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(Re)defining Indigenous Intangible Cultural Heritage

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Contents

Executive summary	4
Rethinking Indigenous knowledge	4
Intangible cultural heritage recognition internationally	7
Cultural heritage and its consequences in Australia	10
Heritage registers and registration	11
Native title claims and evidence	14
Environmental legislation and management	15
Intellectual property parallels and finding the owner	16
Protection vs cultural practice	17
Communities and living archives	18
Conclusions	20
Reference list	21

Executive summary

As a national Institute, AIATSIS works at the intersection of Indigenous and non-Indigenous knowledges, playing an important role in the mediation of those knowledges and supporting their expression and protection via our research and collections work.

In March 2016 the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* was amended to include new functions for AIATSIS including the development, preservation and provision of access to an archive, the use of the AIATSIS collection to strengthen Indigenous cultures and heritage and the provision of advice on the status of Indigenous culture and heritage. A critical aspect of these new functions is the articulation of Indigenous knowledge, its scope and content as well as existing mechanisms for recognition and protection.

This paper maps out the multiple ways in which Indigenous knowledge has been defined and understood and how it is generated and recorded in Australia, and reviews the implications of these definitions. The paper makes suggestions for pathways forward for recognising, protecting and renewing Indigenous knowledge.

The paper identifies that:

- There is no set definition for Indigenous knowledge although it has been reflected in international instruments as a form of intangible cultural heritage, in intellectual property law as Indigenous Cultural and Intellectual Property (ICIP) and in native title as a system of laws and customs. Accordingly, there are multiple regimes of recognition in place that have multiple definitions of Indigenous knowledge (or heritage).
- Heritage has been traditionally defined based on physical place and relics without a substantial definition for intangible elements of heritage and the interlinkages between physical places of significance and knowledge generation and protection.
- Indigenous knowledge is better understood as existing on a continuum with multiple aspects of physical and intangible significance.
- Rights based mechanisms for protection are mainly limited to places and do not provide any further mechanisms for practice and renewal.
- Indigenous peoples are best placed to make determinations of significance and importance and, accordingly, should be supported with funding and through governance arrangements in order to do so.
- The most effective way to protect cultural heritage and knowledge is to practice it.

Rethinking Indigenous knowledge

Speaking for country means looking after country, 'You're part of it. And you have a right for that country.'²

This statement formed a part of the evidence provided by Paul Patrick Sampi to support the native title claim of the Bardi and Jawi people over the Dampier Peninsula in Western Australia in 2005. For the Bardi Jawi people, and other Indigenous peoples throughout Australia, cultural knowledge, legitimacy and strength are interconnected and linked to place or country. Often when asked about the key priorities for Indigenous communities, organisations, families and individuals the response is universal – to get back out on country, support wellbeing, teach younger generations and strengthen cultural connections.³

2 Paul Patrick Sampi cited in *Sampi v State of Western Australia* [2005] FCA 777 [343].

3 T Tran et al., 'Advice to the Expert Indigenous Working Group on the COAG Investigation into Indigenous Land Administration and Use on improving Indigenous land administration frameworks and processes', AIATSIS, 12 June 2015.

Relationships to country are not only expressed in physical terms but through the ability to continue to practice important social and cultural traditions – ranging from the ability to practice law to having culturally appropriate medical services. Accordingly, the need to recognise the critical links between wellbeing and access to country are well documented and are often expressed in the need to protect cultural heritage.⁴

Indigenous intangible cultural heritage – or knowledge – is the starting point for engagement with country. However, when attempting to understand what constitutes Indigenous knowledge, the application of non-indigenous frameworks to this process confuses and distorts its definition and protection. Indigenous knowledge comes in multiple forms, and is linked to philosophical and legal traditions, language and education, stories, song and ceremonies. How these definitions apply within a national context has not been broadly understood or interrogated, nor has there been a model for the practical assertion of Aboriginal and Torres Strait Islander knowledges, let alone systematic mechanisms to restore lost connections to country.

Indigenous conceptions of knowledge tend to overlap with intangible cultural heritage (ICH) or Indigenous Cultural and Intellectual Property (ICIP), native title, heritage and environmental legislation (discussed further below) – all of which enable some form of recognition and protection.⁵ However, the ways in which Indigenous knowledge has been asserted within law and policy has not always been consistent, timely nor culturally appropriate. This struggle to reach an agreed definition is characteristic of the challenges of translating Indigenous relationships to land (and evidence of this relationship) into ‘something’ that is recognisable and capable of protection. As Deacon et al. aptly noted more than 10 years ago:

We do not yet have a strong historical understanding of how intangible cultural forms change over time and why they sometimes disappear or show such resilience over time.⁶

Their observation is still relevant now in understanding why heritage is so difficult to define. In assuming that we understand what heritage is and designing recognition regimes based on these assumptions, we have inadvertently narrowed the ‘what’ of heritage that can be protected. Further, there are no established measures for accounting for or capturing all the elements of Indigenous heritage.⁷

As a national research institute, AIATSIS is well placed to interrogate what Indigenous knowledge ‘looks’ like and how it can be asserted in a practical way. Additionally, in March 2016, the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* was amended to introduce new functions under section 5:

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- 4 See for example JK Weir, C Stacey & K Youngetob, ‘The benefits associated with caring for country’, literature review, AIATSIS, prepared for the Department of Sustainability, Environment, Water, Population and Communities, June 2011; Berenice Carrington & Pamela Young, *Aboriginal heritage and wellbeing*, Department of Environment, Climate Change and Water (NSW), 2011. Indigenous health not only refers to physical wellbeing but also social, cultural and emotional wellbeing: National Aboriginal Health Strategy Working Party, *A national Aboriginal health strategy*, National Aboriginal Health Strategy Working Party, Canberra, 1989. The fatal consequences of loss of connection to country has been discussed in the context of payment of compensation: *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (‘*Timber Creek*’).
- 5 Indigenous knowledge (IK) is used throughout this paper in order to remain inclusive of the elements of ICIP or IICH that are not recognised elsewhere.
- 6 H Deacon et al., *The subtle power of intangible heritage: legal and financial instruments for safeguarding intangible heritage*, Social Cohesion and Integration Research Programme, Human Sciences Research Council, South Africa, 2004, pp. 10, 27.
- 7 The State of the Environment Report establishes 22 indicators for assessing Indigenous heritage and landscapes yet there is very little data available to provide accurate information on all these indicators: E Schnierer, S Ellsmore & S Schnierer, ‘State of Indigenous cultural heritage 2011’, report prepared for the Australian Government Department of Sustainability, Environment, Water, Population and Communities on behalf of the State of the Environment 2011 Committee DSEWPac, webpage, viewed 14 November 2017 <<https://soe.environment.gov.au/sites/g/files/net806/f/soe2011-supplementary-heritage-state-indigenous-cultural-heritage.pdf?v=1488157317>>.

- a) to develop, preserve and provide access to a national collection of Aboriginal and Torres Strait Islander culture and heritage;
- b) to use that national collection to strengthen and promote knowledge and understanding of Aboriginal and Torres Strait Islander culture and heritage;
- c) to provide leadership in the fields of:
 - (i) Aboriginal and Torres Strait Islander research; and
 - (ii) ethics and protocols for research, and other activities relating to collections, related to Aboriginal and Torres Strait Islander peoples; and
 - (ii) use (including use for research) of that national collection and other collections containing Aboriginal and Torres Strait Islander culture and heritage;
- d) to lead and promote collaborations and partnerships among the academic, research, non-government, business and government sectors and Aboriginal and Torres Strait Islander peoples in support of the other functions of the Institute;
- d) to provide advice to the Commonwealth on the situation and status of Aboriginal and Torres Strait Islander culture and heritage.

These functions involve the development, preservation and provision of access to an archive, the use of the AIATSIS collection to strengthen Indigenous culture and heritage and the provision of advice on the status of Indigenous culture and heritage. A critical aspect of these new functions is the articulation of Indigenous knowledge, its scope, quality and existing mechanisms for recognition and protection.

There is no perfect definition – the terms of recognition have always been determined by non-indigenous institutions – however there can be a better process for recognition and protection. Indigenous communities ‘often out of exacerbation and exhaustion...will use the very legal systems they wish to alter or subvert in order to gain some type of control over materials that are no longer in their possession’.⁸ While this might not always be the case, there is a real risk that the paucity of frameworks and processes in place for the recognition of Indigenous knowledge could compromise community control over and expression of cultural heritage.

From an Indigenous perspective, the priorities, arguments and concerns have remained consistent over time. Indigenous knowledge provides the fundamental basis of connection to places and protecting, teaching and transmitting knowledge is in turn fundamental to maintaining cultural authority. Accordingly, definitions of Indigenous knowledge have sought to be purposely inclusive and intentionally broad.⁹

Indigenous knowledges are interconnected – there is little distinction between intangible and tangible heritage. In providing evidence for the Banjima native title claim, Slim Parker states:

if you have language you can practise your Law. Language and Law go together. You cannot have Law without language. To know the language you have to be able to speak with each other, know the names of plants, animals and important places. ...if you have fluent language and practise your own Law as in milgu and Wardirba and sing your songs associated with your country, ngurra, you will know the boundary of your ngurra.¹⁰

The instances in which assertions of culture can occur remain largely contingent on opportunities etched in conflict or those created by policy makers. For example, Slim Parker’s evidence led to the

8 J Anderson & K Christen, “‘Chuck a copyright on it’: dilemmas of digital return and the possibilities for traditional knowledge licenses and labels’, *Museum Anthropology Review*, vol. 7, no. 1–2, 2013, p. 105.

9 For example, Janke & Frankel identify multiple elements that constitute intangible cultural heritage including knowledge (such as scientific, agricultural, technical and ecological knowledge, spiritual and religious knowledge, knowledge of kinship and other forms of governance), expressions of culture (ceremony, dance etc. as well as languages) and documentation of this knowledge: Terri Janke & Michael Frankel, ‘Our culture: our future’, prepared for AIATSIS, 1998.

10 *Banjima People v State of Western Australia (No 2)* [2013] FCA 868, [453].

eventual recognition of the native title right to ‘protect significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means, any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice.’¹¹ While these are the legal rights flowing from his evidence, the list provided in the judgment does not reflect his words. Localised conflicts resolved through specific evidence provided in court proceedings for example, under heritage, native title or land rights legislation, are reliant on non-indigenous understandings of legitimacy and proof. Moreover, protecting a physical place or piece of knowledge requires more than a legal right.

In this paper, we do not seek to define what Indigenous knowledges should be – this is not relevant to understanding current regimes of protection. Instead, we argue that Indigenous individuals, families, communities and nations should be empowered to assert and practice their culture in a manner that makes the most sense to them. This paper maps out the multiple ways in which Indigenous knowledge is defined and understood and how it is generated and recorded in Australia, reviews the implications of these definitions and suggests pathways forward for the ongoing recognition, protection and renewal of Indigenous knowledge. The ultimate purpose of recognition and protection should be to support robust knowledge structures that underpin Indigenous cultures.

Intangible cultural heritage recognition internationally

The recognition of cultural forms of property and property in cultural expressions grew largely from the post war destruction of significant artefacts and monuments, which were largely place-based and centred on landmarks, monuments and objects. Unsurprisingly, cultural heritage has been described as a ‘Western’ construct with its place- and object-based origins informing the majority of many internationally based movements.¹² Critiques of the initially narrow focus of global heritage protection have highlighted a strong bias towards physicality or, in other words, tangible heritage.¹³

These concepts have evolved to recognise intangible expressions and, more recently, the unique and specific forms of Indigenous knowledge.¹⁴ Anderson and Geismar refer to the genealogies of thinking that have produced these concepts that are just as much social conceptions and reflections of values and beliefs as they are codified words and concepts.¹⁵ They discuss the idea of multiple allied concepts – heritage and cultural property; communal property and cultural property for example – which may be better expressed as conflated concepts.¹⁶

11 *Banjima People v State of Western Australia (No 2)* [2013] FCA 868, [655]. See also *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) where the court recognises the following rights and interests:

maintain, conserve and/or protect from injury, desecration damage, destruction or alteration and prevent the misuse of ceremonies, artworks, song cycles, narratives, beliefs or practices which have social, cultural, religious, spiritual, ceremonial, ritual or cosmological importance or significant to the common law holders associated with the area, by preventing by all reasonable means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice.

12 See also F Lenzerini, ‘Intangible cultural heritage: the living culture of peoples’, *The European Journal of International Law*, vol. 22, no. 1, 2011, pp. 101–120; G Lloyd, ‘The safeguarding of intangible cultural heritage: law and policy: a case study of Angkor’, PhD thesis, Univeristy of Sydney, 2009; Deacon et al., *The subtle power of intangible heritage*, 2004; J Anderson & H Geismar, ‘Introduction’ in J Anderson & H Geismar (eds), *The Routledge Companion to Cultural Property*, Routledge, London, 2017, 8.

13 This bias exacerbates what has been described as a dichotomy between ‘primitive’ and ‘civilised’: Deacon et al, ‘The subtle power of intangible heritage’ 2004. The idea of cultural landscapes has been recognised in the context of African heritage: UNESCO, *Synthetic report of the Expert Meeting on African Cultural Landscapes*, 23rd sess, UN Doc WHC-99/CONF.204/INF.4, 25 May 1999.

14 For a comprehensive review of the development of these principles by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and World Intellectual Property Organisation (WIPO) see: Deacon et al., *The subtle power of intangible heritage*, 2004.

15 Anderson & Geismar, ‘Introduction’, 2017, p. 4.

16 Anderson & Geismar, ‘Introduction’, 2017, p. 17.

Indigenous knowledges are reflected in the concept of ‘Cultural Property’, an ever-evolving category – ‘a way of describing culture, a form of sovereignty, a unit of power, a measure of value, a political instrument, ...refer[ing] to a wide range of different things, both material and immaterial’.¹⁷ Anderson and Geismar conceive of Indigenous knowledges as operating somewhere between public and private property and reflected as a form of collective rights and interests.¹⁸ This entire spectrum of rights and interests has not always been traditionally recognised, only small parts of it. Accordingly, existing regimes are poorly equipped to support Indigenous control, creation and ownership of information. Within the international context, *The Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge Relevant for the Conservation and Sustainable Use of Biological Diversity* seek to draw together diverse attempts to recognise Indigenous knowledge.¹⁹ These principles, developed in the context of the implementation of Article 8(j) of the Convention on Biological Diversity, draw together concepts that could potentially apply more broadly to support the recognition of Indigenous knowledge.

Unfortunately, there is little connection between international concepts and how Indigenous knowledge is expressed in practice. Nor is there understanding of the complexity of Indigenous experiences and aspirations for the expression of knowledge.²⁰ One of the major barriers is confusion over the meaning of Indigenous knowledge; other barriers are the practical measures for ensuring not only the continued regeneration of Indigenous knowledge but also the creation of a productive context where, for example, Indigenous languages are able to be taught throughout Australian schools. The exact and precise role of the government within this process is made clear by Gavin Andrews:

The government has a role in heritage, because it’s collectively owned by the whole of society; it’s ‘the heritage of the people’. Heritage starts today and goes all the way back. The government doesn’t have a management role in culture. That belongs to the individual. If government wants a role in culture, it’s about only offering support for cultural expression....²¹

There is no one set definition for cultural heritage, let alone for intangible cultural heritage or Indigenous intangible cultural heritage.²² This lack of clarity is invariably perceived to be a problem. As Lloyd notes, ‘the conceptualization of intangible heritage has the rather unflattering reputation of being an afterthought within the scope of cultural heritage preservation’.²³ Fancioni adds to this confusion, noting that the ‘increasing complexity in the ways of thinking about cultural property has been accompanied by an increased complexity of the law’.²⁴

There is more than just one way of viewing cultural property: it reflects national identity, objects and artefacts, expressions of human creativity and the need for protection from destruction.²⁵ The most relevant element of cultural heritage with respect to Indigenous knowledge is the protection of ‘the spiritual, religious and cultural specificity of minorities and groups’.²⁶ From this perspective policy and legal mechanisms offering ‘protection’ provide only one aspect of support for cultural expression. Forms of intangible cultural heritage that are readily identifiable have had longstanding recognition – for example language, music, dance, or costume.

17 Anderson & Geismar, ‘Introduction’, 2017, p. 1.

18 Anderson & Geismar, ‘Introduction’, 2017, pp. 11–13.

19 *The Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge Relevant for the Conservation and Sustainable Use of Biological Diversity*, ad hoc open-ended inter-sessional working group on article 8(j) and related provisions of the Convention on Biological Diversity, UN Doc CBD/WG8J/10/2, pp. 13–16 December 2017.

20 J Clifford, *Returns*, Harvard University Press, Cambridge, MA, 2013.

21 Carrington & Young, *Aboriginal Heritage and Wellbeing*, 2011.

22 For example, the 1998 Stockholm Intergovernmental Conference on Cultural Policies for Development recognised the need to develop policies to safeguard intangible heritage: Stockholm, *Intergovernmental conference on cultural policies for development*, UN Doc CLT-98/Conf.210/CLD.19, 30 March–2 April 1998.

23 Lloyd, ‘The safeguarding of intangible cultural heritage’, 2009.

24 F Fancioni, ‘The human dimension of international cultural heritage law: an introduction’, *The European Journal of International Law*, vol. 22, no. 1, p. 10, 2011.

25 Fancioni, ‘The human dimension’, 2011; Anderson & Geismar, *The Routledge Companion*, 2017.

26 Fancioni, ‘The human dimension’, 2011.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has developed a definition of intangible cultural heritage that incorporates knowledge production and transmission,²⁷ flowing from the 2003 *Convention on the Safeguarding of the Intangible Cultural Heritage* (CSICH) and the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.²⁸

The CSICH created an important counter narrative to physical heritage by introducing a ‘cultural rights dimension’.²⁹ The inclusion of intangible cultural heritage also reflects the recognition of Indigenous knowledge with deference to local decision-making power.³⁰ Similarly, the 1992 UN *Convention on Biological Diversity* identifies the need to establish local systems for classifying, acquiring and sharing knowledge; addressing the needs of communities and their members; ensuring free, prior and informed consent and establishing agreed terms for such processes; supporting full participation and partnerships; sharing benefits as well as the protection of rights to confidentiality; and rights to review and/or own research publications.³¹

The CSICH also prioritises community engagement in its safeguarding of intangible cultural heritage. Kurin asserts that the significance of the CSICH is that it ‘shifts both the measures and onus of safeguarding work to the cultural community itself.’³² This has extended to a proposal by the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage that custodians of intangible cultural heritage benefit from the ‘moral or material interests resulting from such heritage’ thus bringing the principle of benefit sharing into the intangible cultural heritage paradigm.³³

The World Intellectual Property Organisation (WIPO) has also carried out substantial work in the development of ICH. In its work WIPO refers not to intangible cultural heritage but rather to traditional knowledge and traditional cultural expressions. WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has developed draft provisions for the protection

27 UNESCO defines intangible cultural heritage (ICH) as traditional, contemporary and living at the same time, inclusive in the sense that it contributes to social cohesion, identity and a sense of community, is representative and embedded within communities and is recognised by them: United Nations Educational, Scientific and Cultural Organisation (UNESCO), ‘What is intangible cultural heritage?’, website, viewed 15 May 2018, <<https://ich.unesco.org/en/what-is-intangible-heritage-00003>>.

28 Article 2(1) of the CSICH defines intangible cultural heritage as:

the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

29 J Blake, ‘UNESCO’s 2003 Convention on Intangible Cultural Heritage: the implications of community involvement in “safeguarding”’, in L Smith & N Akagawa (eds), *Intangible heritage*, Routledge, New York, NY, 2009, p. 46.

30 Blake notes that ‘the inclusion of the idea of ICH within the broader rubric of cultural heritage provides opportunities to democratise the process by which we give value to heritage, giving a larger role to local people’: Blake, ‘UNESCO’s 2003 Convention’, 2009, p. 46.

31 Article 8(j). These principles have been further developed in the Indigenous context via the AIATSIS ‘Guidelines for ethical research in Australian Indigenous studies’ (GERAIS) in relation to research which up until this point has been applied to the research functions of AIATSIS exclusively. However, many of the processes advanced under GERAIS are in the form of private treaty or contract, which is based on a voluntary ethical negotiation process rather than a broader framework that can ascribe a value to the practice. This establishes the need for new tools and methodologies that empower local based approaches.

32 R Kurin, ‘Safeguarding intangible cultural heritage: key factors in implementing the 2003 Convention’, *International Journal of Intangible Heritage*, vol. 2, 2007, pp. 10–20.

33 L Jing, ‘Exploring the narrative of heritage through the eyes of the law’, *Kajian Malaysia: Journal of Malaysian Studies*, vol. 35, 2017, pp. 185–207.

of traditional knowledge and traditional cultural expressions. The draft provisions contemplate secret/sacred knowledge as requiring unique protections, and suggest the creation of an authority to administer rights as well as a system of protections utilising a database of registered traditional knowledge. Evident in WIPO's draft provisions is a focus on the prevention of misuse and exploitation of traditional knowledge and traditional cultural expressions. WIPO has also attempted to develop a documentation toolkit to aid in protecting Indigenous knowledges.³⁴ A better understanding of heritage is that it exists in a 'continuum of portability', with the intangible taking precedence over the tangible.³⁵

There is significant movement in the development of principles, guidelines and tools based on recognition of Indigenous cultural diversity and locally defined needs. The language and approach of instruments such as the *Rutzolijirisaxik Voluntary Guidelines* attempt to capture the open-ended and community defined nature of knowledge protection and ownership with a specific focus on repatriation. In assessing the Australian context, the legal rules that support heritage recognition provide 'a key indicator of the response by government to threats and pressures to heritage'.³⁶ Accordingly, while international statements offer guidance and can direct state practice to focus on intangible heritage, recognition and protection remains defined by state based legal and policy institutions.³⁷

Cultural heritage and its consequences in Australia

State government institutions, legislation, policies and processes have a defining role in the ways in which Indigenous knowledge can be recognised and protected. This influence involves not only the definition of heritage but the standards of proof or legitimacy to be applied, the administrative decision making processes and supporting structures of authority and more importantly the generation of new knowledge and recordings.

34 See: World Intellectual Property Organisation (WIPO), 'Documenting traditional knowledge – a toolkit', WIPO, Geneva, 2017.

35 Article 2(1) of the CSICH defines intangible cultural heritage as:

the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

Blake notes that the 'inclusion of the idea of ICH within the broader rubric of cultural heritage provides opportunities to democratise the process by which we give value to heritage, giving a larger role to local people': Blake, 'UNESCO's 2003 Convention', 2009, p. 46. Jing, 'Exploring the narrative of heritage', 2017;

Article 8(j).

36 Schnierer, Ellsmore & Schnierer, 'State of Indigenous cultural heritage 2011', p. 20.

37 Marrie notes:

While the definition of the 'intangible cultural heritage' given in the Convention is very broad, the text of what is considered worthy of safeguarding will ultimately be those items, components of this heritage entered into the inventories established and maintained by the state. For example, a critically endangered Indigenous language might be excluded while the threatened knowledge and techniques of how to make a unique basket of one of the last traditional weavers and speakers of that language may be digitally recorded in detail for posterity and entered on the list for safeguarding.

H Marrie, 'The UNESCO convention for the safeguarding of the intangible cultural heritage and the protection and maintenance of the intangible cultural heritage of indigenous peoples', in L Smith & N Akagawa (eds), *Intangible Heritage*, Routledge, New York, 2008, p. 177.

Heritage registers and registration

Heritage legislation in Australia is predominantly focused on physical objects ('relics') and places ('sites') identified and placed on a database or register.³⁸ This identification is initiated on a reactive basis with Indigenous heritage registration largely driven by development pressure.³⁹ Policy statements such as those from the then Department of Sustainability, Environment, Water, Population and Communities (DSEWPaC) aspire to broaden cultural heritage to encompass 'both natural and cultural heritage (both tangible and intangible), whether formally listed or not, and both Indigenous and non-Indigenous heritage.'⁴⁰ However, despite policy recognition of the artificial ways in which heritage is separated between the intangible and tangible, this recognition has resulted in very little direct legislative change and if anything, a regression in heritage protection has occurred.⁴¹ There are other persistent issues – including questions of ownership, the need for categorisation and the resulting disaggregation of Indigenous knowledge, and the privileging of non-Indigenous experts.

In both the Northern Territory and Tasmania, Aboriginal heritage legislation applies only to sites. The Tasmanian legislation also requires that sites are located where a specified relic or object is found. Western Australia's protections extend only to sites and objects. South Australian and Queensland legislation protects objects, sites, and remains. This distinction exists beyond heritage legislation to conservation and development legislation. For example, the *National Parks and Wildlife Act 1974* (NSW) protects only Aboriginal places.⁴² This issue is also prevalent in the *West Australian Aboriginal Heritage Act 1972* (WA) where the 2014 amendments seem to decrease the level of protection to Aboriginal tangible and intangible cultural heritage.⁴³

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- 38 P McGrath & E Lee, 'The fate of Indigenous place-based heritage in the era of native title', in P. McGrath (ed.), *The right to protect sites: Indigenous heritage management in the era of native title*, AIATSIS, Canberra. 2016, pp. 1–25. Website, viewed 17 May 2018 <http://aiatsis.gov.au/sites/default/files/products/book/the_right_to_protect_sites_indigenous_heritage_management_in_the_era_of_native_title.pdf>.
- 39 See, for example, Commonwealth legislation: *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Protection of Movable Cultural Heritage Act 1986* (Cth); *New South Wales: National Parks and Wildlife Act 1974* (NSW), *Heritage Act 1977* (NSW), *Environmental Planning and Assessment Act 1979* (NSW); *Queensland: Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld); ACT: *Heritage Act 2004*; Victoria: *Aboriginal Heritage Act 2006* (Vic.); *Tasmania: Aboriginal Relics Act 1975*; South Australia: *Aboriginal Heritage Act 1988* (SA); Western Australia: *Aboriginal Heritage Act 1972*; and *Northern Territory: Heritage Conservation Act 1991* and *Aboriginal Sacred Sites Act 2006*. For a review of early Indigenous heritage management in Australia see: Schnierer, Ellsmore & Schnierer, 'State of Indigenous cultural heritage 2011'. There are at least 11 heritage registers in Australia which list sites and locations of objects of significance to Aboriginal and Torres Strait Islander peoples. The South Australian and Queensland registers are specific to Aboriginal and Torres Strait Islander culture and are not publicly accessible. The Northern Territory does not list Aboriginal sites or objects on its register as these have automatic protection under the Heritage Act. Of the remaining state, territory and national registers, 13,658 of 151,235 (or 9%) of listings are of significance to Aboriginal or Torres Strait Islander peoples. Approximately 13,000 of these are listed on the Tasmanian Aboriginal Heritage Register.
- 40 R Mackay 'Australia ICOMOS – State of the environment 2011 workshop – summary note', report prepared for the Australian Government Department of Sustainability, Environment, Water, Population and Communities on behalf of the State of the Environment 2011 Committee DSEWPaC, webpage, viewed 14 November 2017 <<https://www.environment.gov.au/system/files/pages/ba3942af-f815-43d9-a0f3-dd26c19d83cd/files/soe2011-supplementary-heritage-icomos-workshop-notes.pdf>>; R Mackay, 'DSEWPaC Indigenous Advisory Committee State of the environment 2011 workshop – summary notes', report prepared for the Australian Government Department of Sustainability, Environment, Water, Population and Communities on behalf of the State of the Environment 2011 Committee DSEWPaC, 2011, webpage, viewed 14 November 2017 <<https://www.environment.gov.au/system/files/pages/ba3942af-f815-43d9-a0f3-dd26c19d83cd/files>>.
- 41 The 2011 State of the Environment report noted that legislative changes over time have weakened the protection of Indigenous heritage: Mackay 'Australia ICOMOS; 2011.
- 42 *National Parks and Wildlife Act 1974* (NSW) ss 84, p. 86.
- 43 Ambelin Kwaymullina, Blaze Kwaymullina, & Lauren Butterly, 'Opportunity lost: changes to Aboriginal heritage law in Western Australia', *Indigenous Law Bulletin*, vol. 8, no. 16, pp. 24–27, Jan/Feb 2015.

The *Aboriginal Languages Act 2017 (NSW)* is one piece of legislation which demonstrates an increasing recognition of intangible cultural heritage. However, it does not recognise the relationship between the tangible and intangible, and in particular the importance of connections to country in the practice of language. To its credit, the legislation is aimed at increasing the practice of languages as its means of protection.

The disaggregation of tangible and intangible extends beyond heritage specific legislation to land and water legislation and policy where certain Indigenous knowledge is isolated for the purpose of the legislation and can further result in the neglect of intangible cultural heritage. For example, the *Water Act 2007 (Cth)* provides consideration of Indigenous uses of the Murray Darling Basin; however, the knowledge gathered for this purpose is disconnected from the cultural importance of place. When 'development' occurs and has the potential to impact upon heritage, the considerations are largely related to the physical area rather than the intangible consequences such as a loss of access to the site, or disruption to songlines.⁴⁴ 'Development' can also occur without consultation. For example the *West Australian Aboriginal Heritage Act 1972 (WA)* provides that in the process of allowing the destruction of or damage to an Aboriginal site or object, there is no statutory requirement to consult Traditional Owners and no appeal mechanism for Traditional Owners, thus leaving no place for the consideration of intangible cultural heritage.⁴⁵

All of these pieces of legislation are largely focused on avoiding disturbance of tangible heritage; they seek to avoid damaging heritage sites or places rather than providing for positive actions to promote the practice of intangible cultural heritage. As a consequence, the documentation of heritage is based on constellations of development (or development threats to heritage) rather than systematic recording or the transmission of knowledge. Ensuring the maintenance of the stories, songlines or practices needs to be prioritised as these provide for the significance of tangible heritage.

An increase in the recognition of the holistic nature of intangible cultural heritage is evident in recent changes to some pieces of state Aboriginal heritage legislation. The New South Wales government is in the process of reviewing its cultural heritage management legislation.⁴⁶ Its proposed changes include a definition of cultural heritage that contains tangible and intangible elements. In Victoria, changes were made in 2016 to expand protection beyond Aboriginal places, objects and ancestral remains to include Aboriginal intangible heritage encompassing any knowledge or expression of Aboriginal tradition or an intellectual creation or innovation. This includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge.⁴⁷

A number of state based heritage laws include broad aims to recognise control and ownership of heritage but very few contain specific provisions that enable ownership.⁴⁸ For example, the Queensland legislation sets out as a principle that Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage. However, the legislation then goes on to create

44 Department of Environment and Heritage Protection (Qld), 'Developing heritage places: using the development criteria' 2013, webpage, viewed 17 November 2017 <<https://www.qld.gov.au/environment/assets/documents/land/heritage/gl-heritage-development.pdf>>; Office of Environment and Heritage (NSW), 'Development and heritage' 2017, website, viewed 17 November 2017, <<http://www.environment.nsw.gov.au/Heritage/development/index.htm>>.

45 *West Australian Aboriginal Heritage Act 1972 (WA)*.

46 Office of Environment and Heritage (NSW), 'Aboriginal cultural heritage reforms' 2018, Office of Environment and Heritage (NSW), website, viewed 31 May 2018, <<http://www.environment.nsw.gov.au/achreform/>>; 'A proposed new legal framework: Aboriginal cultural heritage in NSW', 2017, Office of Environment and Heritage (NSW), website, viewed 31 May 2018, <<http://www.environment.nsw.gov.au/research-and-publications/publications-search/a-proposed-new-legal-framework-aboriginal-cultural-heritage-in-nsw>>; Office of the Environment and Heritage (NSW), 'Aboriginal Cultural Heritage Bill 2018' 2018, Office of Environment and Heritage (NSW), website, viewed 31 May 2018 <<http://www.environment.nsw.gov.au/research-and-publications/publications-search/draft-aboriginal-cultural-heritage-bill-2018>>.

47 *Aboriginal Heritage Amendment Act 2016 (Vic)* s 59.

48 Schnierer, Ellsmore & Schnierer, 'State of Indigenous cultural heritage 2011'.

a presumption that the State owns Aboriginal cultural heritage except in the case of human remains, secret or sacred objects, or other ownership confirmed under the Act.⁴⁹ The Victorian legislation similarly provides that, in principle, all registered Aboriginal intangible heritage should be owned by a relevant Aboriginal party but provides detail about the operation of such ownership only in relation to ancestral remains and secret or sacred objects.⁵⁰ In the Northern Territory, decision-making power rests with an authority which is not bound by the custodians' input.⁵¹ Other states such as Western Australia do not include any kind of recognition of ownership whatsoever.

A common form of recognition of heritage is listing in, for example, Australia's National Heritage List, which purports to recognise places of outstanding heritage significance including Indigenous places. However, this kind of recognition requires that significant intangible heritage be associated with a particular place in order to gain recognition.⁵² The notion of identification has also been strongly linked to authentication from 'experts' creating an intellectual and economic market for non-indigenous heritage practitioners.⁵³ Under the *West Australian Aboriginal Heritage Act 1972* (WA) the assessment of significance is based on anthropological and archaeological discourse, potentially valuing non-indigenous experts over the living knowledges of Aboriginal people.⁵⁴

49 *Aboriginal Cultural Heritage Act 2003* (Qld) s 20.

50 *Aboriginal Heritage Act 2006* (Vic) s 12.

51 *Heritage Act 2011* (NT) s 75.

52 Australian Heritage Council, 'Guidelines for the assessment of place for the National Heritage List', webpage, viewed 17 November 2017, <<http://www.environment.gov.au/system/files/resources/8b50f335-42e8-4599-b5e0-ac643f75475f/files/nhl-guidelines.pdf>>.

53 The Indigenous Advisory Committee (IAC) highlights the multiple challenges created by 'heritage' with respect to listing, identification and the separation of nature from culture; the Indigenous Advisory Committee is a statutory committee established in 2000 under section 505A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth); Lenzerini stresses that ICH is by its very nature 'dynamic' and that while the CSISH has 'created a model for safeguarding' ICH, as cultural heritage is 'inventoried, classified, declared as official treasure, kept under surveillance' it loses much of its quality that made it significant in the first instance: Lenzerini, 'Intangible cultural heritage', 2011. Also, as McGrath recognises, 'the business of Indigenous heritage management is very much a non-Indigenous enterprise' with little input from Indigenous actors: McGrath & Lee, 'The fate of Indigenous place-based heritage', 2016. See Mackay, 'Australia ICOMOS – State of the environment 2011', for a contrasting perspective.

54 McGrath & Lee, 'The fate of Indigenous place-based heritage', 2016. There are also high rates of authorised destruction: Schnierer, Ellsmore & Schnierer, note for example that, in 2007, of a total of 79 compliance notifications only 1 has been successfully prosecuted. Further, there are 'inconsistent views on Indigenous heritage issues between state agencies and communities or peak bodies' with an overall perception of 'no action': Schnierer, Ellsmore & Schnierer, 'State of Indigenous cultural heritage 2011. This view was also reiterated by the International Council on Monuments and Sites (ICOMOS): Mackay, 'Australia ICOMOS', 2011. For example, in New South Wales the NSW Aboriginal Land Council has provided a summary of findings and recommendations from previous reforms, noting that very little action has occurred: New South Wales Aboriginal Land Council, 'Our sites, our rights: returning control of Aboriginal sites to Aboriginal communities – a summary of key recommendations of past Aboriginal heritage reviews in NSW', report prepared by Policy and Research Unit of NSW Aboriginal Land Council December, 2010, website, viewed 14 November 2017 <<http://www.alc.org.au/media/61784/110215%20our%20sites%20our%20rights%20final.pdf>>. There has been some positive movement in limited circumstances and on a small scale, which has not been applied consistently. In evidence provided by Sharon Hodgetts, she notes that '[t]he cultural landscape includes Aboriginal sites, however it also includes the area between sites consisting of the natural and spiritual landscape. The area between sites and moving from one site to another through the landscape is a journey of connection and learning. This is part of the intangible aspect of our spiritual cultural belief system religion there is no conceptual division between nature and culture': *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor; Australian Walkabout Wildlife Park Pty Limited (ACN 115 219 791) as Trustee for the Gerald and Catherine Barnard Family Trust v Minister for Planning and Infrastructure & Anor* [2015] NSWLEC 1465 [207]. The Australian Committee of the International Council on Monuments and Sites (Australia ICOMOS) has also identified the interconnections between tangible and intangible heritage: Mackay, 'Australia ICOMOS', 2011.

There has been some movement toward the recognition of traditional conceptions of Indigenous heritage – particularly greater community consultation, inclusion and recognition – as heritage bodies are increasingly aligned with native title and land rights governance structures.⁵⁵ For example, the proposed New South Wales changes seek to affirm Aboriginal people’s authority over their own heritage by establishing the Aboriginal Cultural Heritage Authority (which incorporates local Aboriginal land councils and native title bodies) and holds decision-making authority over the conservation and management of Aboriginal cultural heritage.⁵⁶ In Victoria, heritage legislation establishes an Aboriginal Heritage Council that consists of 11 Traditional Owners who are appointed by the Minister for Aboriginal Affairs. The council assesses applications provided by Registered Aboriginal Parties (RAPs) who are responsible for local cultural heritage decision making.⁵⁷ The Queensland model mandates localised agreement-making with proponents for certain types of developments – a process which facilitates Aboriginal identification and assessment of heritage. This voluntary process also includes the development of a cultural heritage management plan.⁵⁸

Ownership of and control over heritage is expressed as an aim of law and policy but there is little provision to enable this, nor is there support for the ongoing practice of intangible cultural heritage. The protections offered are largely isolated within heritage and other forms of rights-based legislation seek to ensure heritage remains preserved as it currently stands – as dots on a map – rather than seeking to facilitate protection through the active practice of culture.⁵⁹

Native title claims and evidence

There is a different situation under native title legislation and case law. The relationships that Aboriginal and Torres Strait Islander peoples have with country provide the evidentiary basis and legal proof for the recognition of native title and land rights – an imperfect attempt to recognise that in ‘Aboriginal and Torres Strait Islander societies, song and ceremony serve as title deeds to land’.⁶⁰ Native title utilises stories of significance in order to recognise traditional rights and interests that are protected within a property law framework. Similarly, land rights is a grant of a tenure based on ‘proof’ of significance or traditional affiliation with a place.

While there is ‘greater legal and public recognition of the intangible qualities of the relationship between people and place – and the fact that intangible cultural practice gives rise to tangible heritage – there remains a fundamental distinction between the place-based rights of native title and the state’s management of Indigenous place-based heritage.’⁶¹

55 For example, in Queensland and Victoria there has been greater inclusion of Indigenous governance structures in decision making, moving away from ministerial responsibility with an Indigenous advisory body.

56 Office of Environment and Heritage (NSW), ‘Aboriginal cultural heritage reforms’, 2018, NSW Environment and Heritage, website, viewed 31 May 2018, <<http://www.environment.nsw.gov.au/achreform/>>; Office of the Environment and Heritage (NSW), ‘Aboriginal Cultural Heritage Bill 2018’ 2018.

57 Victoria amended the *Aboriginal Heritage Amendment Act 2006* in 2016 to provide for the ‘protection of Aboriginal cultural heritage and Aboriginal intangible heritage’: *Aboriginal Heritage Act 2006* (VIC), section 1(a). Where there is no RAP decision making reverts to the Department of Planning and Community Development or the Aboriginal Heritage Council.

58 *Queensland Heritage Act 1992* (Qld) s 81.

59 Munjeri reaches the same conclusion in their analysis of the application of the *National Museums and Monuments of Zimbabwe Act 25/11* as described by Munyardadzi Manyanga involving the contravention of the legislation. Munjeri notes:

There is some serious disconnection in the interpretation of the purpose, meaning and the application of intangible cultural heritage. All parties may be reading the same script, but their interpretation is much influenced by the interests of the *actors*, and the issues at stake’,

D Munjeri, ‘Following the length and breadth of the roots: some dimensions of intangible heritage’, in L Smith & N Akagawa (eds), *Intangible heritage*, Routledge, New York, 2008.

60 G Koch, *We have the song, so we have the land: song and ceremony as proof of ownership in Aboriginal and Torres Strait Islander land claims*, AIATSIS research discussion paper, no. 33, AIATSIS Research Publications, Canberra, 2013, p. 37.

61 McGrath & Lee, ‘The fate of Indigenous place-based heritage’, 2016, p. 2.

Under the *Native Title Act 1993* (Cth) rights and interests are recognised based on section 223. The recognition of Indigenous knowledge within the native title context is incidental. As stated by Justice French (as his Honour was then) the principles of *Mabo* ‘embody the rules of what is said to constitute legal “recognition” of Indigenous relationships to land defined by traditional law and custom’ but ‘[t]hey do not operate directly upon those relationships or the traditional laws and customs from which they are derived’.⁶² The connecting element that Justice French does not mention is that the Indigenous knowledge reflected in song, ceremony and other means is evidence of those relationships to land, and forms the basis of native title recognition. In *State of Western Australia v Ward*,⁶³ Justices Beaumont, von Doussa and North recognised that there are both secular and spiritual aspects to connection to country with obligations to care for country, such as burning, having both a practical element – the burning itself – and an intangible element – knowledge of what and when to burn. Both these elements are recognised as part of native title.⁶⁴ Similarly, physical sites such as permanent underground water springs are significant not only for their practical value in an arid desert region but also in enforcing relationships to country – enabling lived practices of caring for culturally and ecologically significant sites.⁶⁵ This was a key issue in the recent decision of *Forrest on behalf of the Ngunnarrara People v State of Western Australia*⁶⁶ where Peter Murray explains:

That country has been our *Ngunnarrara*, our home *and* country since the time of the Dreaming. I know that from the stories my old people who were told by their old people. As a young person I walked across our *Ngunnarrara* country with the old people. They showed me special places. They showed and told me things like where the *jilas* (water places) are right through the country. Places like *Parkal Springs*, *Jindngu Springs*, *Balguna* and *Muningambin*. There are many other places I now look after these places and visit them often. Through the Ranger work I do it makes it easier for me to take the younger boys out and teach them about these places.

As a *Ngunnarrara* Ranger I make sure that these places are not destroyed by the invasion of feral animals. This helps keep these places strong, helps keep the stories strong, and this keeps our culture strong. I have a responsibility both as a *Ngunnarrara* Ranger and a traditional owner to protect and care for these places that are special to us. That is why our old people tell us about these places, the paintings, the songs and the stories. They tell us so we know what to protect and how to protect it.

Peter’s evidence demonstrates the interconnected nature of physical places, cultural practice and identity that cannot always be disaggregated into discrete forms of legal protection. His story is one of many from the native title determinations that have been made since the passing of the NTA – supported by affidavits, film recordings and connection reports that contain iterations of Indigenous knowledge.

Environmental legislation and management

Outside of the realm of heritage- or land-based legislation, Indigenous knowledges are also recognised and recorded as a form of ecological knowledge (or Traditional Ecological Knowledge) linked to knowledge

62 Robert French, ‘The role of the High Court in the recognition of native title’, *Western Australian Law Review*, vol 30, no 2, p. 145, 2002. Justice French later became Chief Justice of the HCA in 2008.

63 [2000] FCA 191, [866].

64 *State of Western Australia v Ward* [2000] FCA 191, [866], where they note:

the secular and spiritual aspects of the aboriginal connection with the land are twin elements of the rights to the land. Thus, the obligation to care for country has a secular aspect – burning the land – and a spiritual aspect – acquiring knowledge of ritual. The protection of ritual knowledge is required by traditional law. Traditional law treats both elements as incidents of native title. There is no reason why the common law recognition of native title should attach to one incident and not the other. Because common law recognition is accorded to the entitlement to land as defined by traditional laws and customs the contrary conclusion should follow.

65 For an example of these interconnections on Karajarri country see: Sarah Yu, *Ngapa Kunangkul (Living Water): report on the Aboriginal cultural values of groundwater in the La Grange Sub-Basin*, The Water and Rivers Commission of Western Australia, Perth, 1999.

66 [2018] FCA 289.

of plants, animals and seasons. However, this characterisation is disconnected from the cultural practices that enable the active renewal of this knowledge. Other contemporary forms of knowledge are evidenced via ranger programs, which – while providing access to country – also serve the national and international conservation objectives of the Australian government.⁶⁷

Land management regimes that tend to protect nature alongside Indigenous knowledge include the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), various National Park legislation and land development legislation. Within this context, Indigenous knowledge is framed by environmental aims and culture becomes secondary to any biodiversity values associated with a place. This environmentally embedded definition of cultural heritage ignores the fact that ‘natural’ heritage can be protected through land management alone while cultural heritage requires the maintenance of both cultural practice and physical places.

This artificial view of cultural heritage also drives land management practices. For example, ranger work plans can be overly influenced by the priorities of funders, which may not match key priorities identified by traditional owners who are seeking to restore country.⁶⁸ Or rangers may have limited opportunities to record knowledge or stories and revisit areas of country about which there is little information. As a result there may be significant information about key sites, plants and animals without the documentation or transmission of information to better manage the specific and holistic elements of country.

Intellectual property parallels and finding the owner

Intellectual property law provides one of the most powerful analogies for the protection of Indigenous knowledge as a ‘mechanism for identifying specific kinds of knowledges, creating a value for this knowledge and establishing conditions for how it can be assessed, used and shared’.⁶⁹ However, a major pre-condition for protection is certainty – in something that can be owned, quantified and identified with a major underlying assumption that heritage is owned or ‘ownable’.⁷⁰ The challenges of identifying and categorising ownership as a dynamic and context-based definition, as opposed to a once-off nomination process, create further complexities in the application of ‘recognition’ processes.

Heritage is iterative and constantly recreated in the present (from the past), whereas intellectual property law fundamentally seeks to protect commercial rights and interests rather than ‘promoting the maintenance and longevity of particular forms of cultural or intellectual expression or endeavour’.⁷¹ This, in addition to the ‘gaps’ in the intellectual property law system and the bias toward tangible property, results in intellectual property law offering limited ‘protection’ to Indigenous knowledge. Temporal elements of ownership, for example, in the tangible record or recordings made by non-Indigenous people also needs to be reconsidered in the context of defining ownership over multiple points of time.

The ‘gaps’ within this existing framework with respect to Indigenous intellectual property and heritage illustrate how Indigenous knowledge or cultural heritage does not meet the expectations of regulators in a manner that can ensure ‘protection’.⁷² Equally, definitions of cultural heritage and knowledge with the additional layer of ‘intangibility’ do not meet Indigenous expectations and demands to have their knowledge recognised as valuable and ultimately protected. The issue of authenticity places Indigenous knowledges within a framework as ‘unique’ without any pathway for managing, maintaining

67 T Tran & R Kennett, ‘Reclaiming Indigenous knowledge in land and sea management’ in N Stoianoff (ed.), *Indigenous knowledge forum – comparative systems for recognising and protecting Indigenous knowledge and culture*, Lexis Nexis, Chatswood, NSW, 2016.

68 T Tran & L Langford, *Negotiating the shared management of Matuwa and Kurarra Kurarra*, AIATSIS, Canberra, 2015.

69 Anderson & Christen, “‘Chuck a copyright on it’”, 2013, p. 71; Anderson & Geismar, *The Routledge companion*, 2017.

70 The work of WIPO highlights some of the limitations of intellectual property law in recognising and protecting ICH: Martin Skrydstrup, *Towards intellectual property guidelines and best practices for recording and digitizing intangible cultural heritage: a survey of codes, conduct and challenges in North America*, World Intellectual Property Organisation, Geneva, 2006; Anderson & Geismar, *The Routledge companion*, 2017, pp. 14–15.

71 Marrie, ‘The UNESCO convention’, 2008.

72 Deacon et al., *The subtle power of intangible heritage*, 2004.

or supporting its protection and transmission. For example, the Productivity Commission's recent Inquiry into Australia's Intellectual Property Arrangements did not include Indigenous knowledges within its analytical framework nor its specific draft findings or recommendations.⁷³ Similarly, recognised cultural rights (related to sacred sites and, equally, decision making) are an afterthought in land use planning and housing development.⁷⁴ Aside from this inherent bias towards 'physicality' – and the largely reactive nature of state-based heritage law – there is arguably no reason to separate the protection of intangible or tangible heritage within the multiple regimes of intellectual property, property, native title and heritage legislation.

Stories, songs, ceremonies, language, manufacturing techniques and knowledge about the properties and management of plants and animals, among many other things, are central to Indigenous culture and wellbeing. Above and beyond land-based forms of recognition is how Indigenous knowledge is recorded (filmed, reported or photographed) as a part of the evidence-gathering exercise. Questions of ownership confined to physical objects ignore the current significance and autonomy of Indigenous communities in the present. Constant focus on physical objects, deposited or owned by non-Indigenous people in the past, is ultimately a replay of dispossession.

Protection vs cultural practice

State-based institutions, processes and policies – while different, intersecting and sometimes conflicting – create the platform upon which heritage is decided. This platform (reflected in policy attitudes, funding and legislation) supports the production and authorisation of heritage and knowledge protection. The defining context for cultural heritage recognition has significant implications for the effective practice of culture. For example, funding arrangements can skew priorities as communities adapt to predefined programs, so that access to information to revitalise or practice culture is constrained by rights and permissions decided by non-Indigenous researchers and there is further disconnection between country and people.

Australia's Indigenous Advisory Committee has clearly stated that there is a 'lack of protection provided to "protected" areas' with the 'cumulative effect of slowly losing spiritual values as more and more sites are damaged to the point that their value is no longer there' resulting in the 'incremental loss of Indigenous knowledge'.⁷⁵ Anderson and Christen note that there is also 'very little in the way of progressive, flexible solutions that offer Indigenous peoples alternative engagements with legal systems and their representatives'.⁷⁶ Investment in processes that enable bottom-up control and engagement are a critical element of the positive protection and generation of Indigenous knowledge and heritage. One of the key elements of this protection is the renewal of heritage via cultural practice.⁷⁷ Deacon has argued that 'the most successful incentives and safeguarding strategies will involve the use of intangible heritage forms as springboards for new cultural expression that have relevance and meaning in the modern world'.⁷⁸ Deacon provides that broadcasting is one way of 'safeguarding dialects, marginalised language forms

73 AIATSIS, *AIATSIS submission to the Productivity Commission's Inquiry into Australia's Intellectual Property Arrangements*, no. DR583, AIATSIS, 2016.

74 C Stacey & J Fardin, 'Housing on native title lands: responses to the housing amendments of the native title act', *Land, Rights, Laws: Issues of Native Title*, vol. 4, no. 6, p. 93, 2011. This 'unflattering' reputation as an afterthought has been well recognised by others: Lloyd, 'The safeguarding of intangible cultural heritage', 2009.

75 Mackay, 'DSEWPac Indigenous Advisory Committee', 2011.

76 Anderson & Christen, "'Chuck a copyright on it'", 2013. Similarly, Munjeri notes that 'freeing rather than freezing the conditions under which intangible cultural heritage exists and operates is the best safeguard for intangible cultural heritage. Such conditions are best set by the communities that generate and perpetuate that heritage': D Munjeri, 'Following the length and breadth of the roots', 2008, p. 148.

77 Munjeri notes: 'What makes intangible cultural heritage unique is that it targets the people, groups and communities that enact the intangible cultural heritage', D Munjeri, 'Following the length and breadth of the roots', 2008, p. 141, see also pp. 135, 148.

78 Deacon et al., *The subtle power of intangible heritage*, 2004, p. 3.

and oral traditions while giving them new currency and relevance today'.⁷⁹ The legal profession and policy makers' priorities rarely align with those of traditional owners, thus limiting processes that enable bottom-up control and leading to a lack of policy directed toward increasing cultural practice.

In reflecting on the experiences of Indigenous researchers Kath Schilling and Ray Kelly, Carrington notes that governments have a 'responsibility to engage with the cultural lives and lived heritage of Aboriginal communities with which they work' and notes that 'for them [Schilling and Kelly] the role of government is to create ways to work within a cultural context that benefits communities.'⁸⁰ Similarly, the Indigenous Advisory Committee has noted the 'lack of effective Indigenous engagement regarding projects to record Indigenous knowledge' or ensure its interconnection with concepts of looking after country appropriately.⁸¹ The reproduction of knowledge is as equally important as its protection. Speaking from the New South Wales context: 'One of Ray [Kelly]'s driving concerns was to feed the knowledge gained... back to Aboriginal communities to stimulate a process of cultural revival.'⁸² Protection is only a part of the solution – renewal is the missing element. Without the ability to access, reuse and create new meaning from existing materials, the objects, recordings and other collected materials becomes a static 'snapshot' of intangible heritage as opposed to being a part of a living and thriving element of Indigenous cultures.⁸³

Communities and living archives

Indigenous knowledge has diverse origins, subject matter and forms of transmission.⁸⁴ Cultural archives have a defining role in how they can support cultural practice and revitalisation via existing collections and expertise. The physical and conceptual disaggregation of Indigenous knowledge is problematic as it lends itself to externalising assessments of significance and value – despite the 'deeply subjective' nature of this process.⁸⁵ There is no one external organisation or group of peoples that should be making any value statements on what is significant. Article 31 of the 2007 Declaration on the Rights of Indigenous Peoples states:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.⁸⁶

Central to this definition is the respect afforded to different cultural worldviews and narratives as well as a refocusing on local definitions of significance.⁸⁷ As Mathé aptly notes, the gatekeeping function of archiving institutions locks Indigenous peoples within a deficit model as lacking the capacity to implement the governance of their own archives.⁸⁸

In relation to archiving of Indigenous knowledge, what is truly lacking is the ability of collecting bodies to develop, maintain and form relationships with relevant communities in order to ask these questions

79 Deacon et al., *The subtle power of intangible heritage*, 2004, p. 61.

80 Carrington & Young, *Aboriginal heritage and wellbeing*, 2011, p. 5.

81 Mackay, 'DSEWPaC Indigenous Advisory Committee', 2011, p. 2.

82 Johanna Kijas, *Revival, renewal and return: Ray Kelly and the NSW Sites of Significance Survey*, Department of Environment & Conservation (NSW), 2005, p. 9.

83 Hofmeyr cited in Deacon et al., *The subtle power of intangible heritage*, 2004, p.. [Insert page number.]

84 Tran & Kennet, 'Reclaiming Indigenous knowledge', 2016.

85 Deacon et al., *The subtle power of intangible heritage*, 2004, p. 9.

86 The UNDRIP was finalised in 2007 and formally ratified by Australia in 2009. The dynamic and lived nature of knowledge is also embodied in Article 2 of the CSICH: Lenzerini, 'Intangible cultural heritage', 2011, p. 7.

87 Also recognised in the Convention on Biological Diversity.

88 Barbara Mathé, 'Whose pictures are these? Indigenous community access and control of digital archives', *Girona*, 2014, webpage, viewed 17 November 2018 <<http://www.girona.cat/web/ica2014/ponents/textos/id240.pdf>>.

in the first place. Current linear models of repatriation engender a one-size-fits-all approach whereby Indigenous knowledge is recorded, assessed according to third-party standards, collected, accessed by others and eventually returned to communities. This is a cautious yet homogenising narrative that entrenches perceived deficits in Indigenous governance and decision-making capacity. However, many communities have been achieving the gradual governance and security of their own archives. For example, the Karajarri have worked with AIATSIS to return material including archival material of law and ceremony recorded in the 1960s and 1970s, record new material, and support the development of community protocols for the management of their materials. This has supported Karajarri to lead revitalisation work to reinvigorate cultural practices in neighbouring groups. This work has also contributed to the cultural wellbeing and authority of the Karajarri people to develop a cultural business arm which supports other initiatives including bush medicine production and the establishment of a cultural centre.⁸⁹ Mervyn Mulardy articulated that: ‘for the Karajarri, a 40 year gap between the most senior knowledge holders [like himself] and the youngest boys who should go through law has been closed in one year.’⁹⁰

There still remains an important and critical role for archives to maintain the standard and quality of recordings – making the past accessible in the present and ensuring its protection into the future. However, ‘for what purpose’ and ‘to what ends’ should be determined by the relevant Indigenous communities or peoples affected by that knowledge. Reflecting on a century-old image, Mathé notes:

These images can spark the memories of elders, remind them of stories they heard from their parents and grandparents: stories disappearing with their native language. So there is some urgency to get these images back to where they originated where their descendants can record the stories and save their history in a tribal archive, library or museum.⁹¹

The issues identified by Mathé magnify with respect to the multiple processes through which Indigenous knowledges are recorded and collected. Attempts to reconnect disparate collections create new dilemmas – what were the conditions that led to the collection of the materials and what limitations on access were originally applied, are they still relevant and can they be renegotiated by communities and finally, how can new access rights be managed into the future? Disputes over how knowledge is acquired and owned in the first instance is a further challenge for collecting and research bodies who have sought to return cultural knowledge.

One of the key measures of decolonisation is a clear distinction between ‘practiced culture’ and ‘performative culture’.⁹² Intangible cultural heritage has also been defined as a form of cultural capital that is passed on to future generations, via cultural activity, identity formation and cultural maintenance.⁹³ Overseas jurisdictions have moved away from rights-based approaches that suffer from the need to quantify, categorise and define in order to access protection. Indigenous knowledge is broader than this mechanical process and as significant sites or places become irrevocably changed through human and non-human action, indigenous cultures and traditions will still persist and thrive. As Wiessner notes, ‘traditional human rights concepts had to be adjusted and redefined’ with indigenous demands for recognition challenging individualistic and exclusive conceptions of property, redefining self-determination as not only a political movement but also an opportunity to continue to flourish as a distinctive cultural group.⁹⁴

In British Columbia, the protection of intangible cultural heritage is embedded in the practice of a lived culture and the mechanisms that enable this – including language revitalisation, support for the arts and

89 AIATSIS, *Submission to the Closing the Gap Refresh public discussion paper*, April 2018, webpage, viewed 1 June 2018, <https://closingthegaprefresh.pmc.gov.au/sites/default/files/submissions/aiatsis_ctg_refresh_submission_-_final_publish.pdf>.

90 AIATSIS, *Submission to the Closing the Gap Refresh public discussion paper*, April 2018.

91 Mathé, ‘Whose pictures are these?’, 2014.

92 Michael G. Doxtater, ‘Indigenous knowledge in the decolonial era’, *American Indian Quarterly*, vol. 28, no. 3/4, pp. 618–620, 2004.

93 Deacon et al., *The subtle power of intangible heritage*, 2004.

94 S Wiessner, ‘The cultural rights of indigenous peoples: achievements and continuing challenges’, *The European Journal of International Law*, vol. 22, no. 1, pp. 121–140, 2011.

reinvigoration of cultural practices. Such funding is not directed at definition or protection regimes, such as in the native title sector in Australia, but at culture-based projects. Professor Taiaiake Alfred articulates cultural heritage as a form of knowledge – measured via the strength of restitution within the context of decolonisation. According to Professor Alfred, the true measure of the success of land rights, compensation and self-governance is the extent to which younger generations develop strength and confidence in their indigeneity.⁹⁵ Accordingly, any rights and recognition regime is not an end in and of itself.

Indigenous knowledges, while embedded within relationships to country, subsist beyond them and are strengthened through continuing practice and acknowledgement. One of the ways in which the limitations of rights-based narratives can be addressed is via the creation of a ‘favourable environment for the preservation of the authenticity and integrity of intangible cultural heritage’.⁹⁶ Another critical and obvious element is the ‘adequate participation by the peoples and communities concerned in the management of their own intangible heritage’.⁹⁷ As Indigenous knowledge is characterised by a spectrum of tangible and intangible elements, there is substantial value in identifying the ‘intangible’ aspects of cultural heritage. ‘Intangible’ encourages the recognition of a previously ignored element and enables a shift in power relationships; intangible redefines authenticity and creates new criteria of significance; intangible adds to existing knowledge about heritage, creating an opportunity to learn the stories of significance related to a particular site or constellation of sites; and intangible supports the development of new mechanisms to safeguard or protect Indigenous knowledge.⁹⁸

Conclusions

Indigenous knowledges cannot be broken down into components that are measurable, ownable and owned. This fragmentation is reflected in the multitude of regimes that have been created in order to ‘protect’ Indigenous knowledge and is further exacerbated by strong distinctions between both tangible and intangible heritage, and natural and cultural heritage. Conversations are overly focused on protection as a primary aim, and often in isolation and without understanding of the interlinkages between getting country back and generating a number of social, ecological and economic outcomes. The closest analogy for Indigenous knowledge protection is property law – whether it be physical land (via native title, land rights and heritage legislation) or intellectual property. However, these frameworks create a space where country and culture can be ascribed to an identifiable owner that self-replicates in legal and financial frameworks or alternatively, is treated as being so unique that it is disregarded altogether.⁹⁹

There is a struggle to define what Indigenous knowledge is, yet no one has asked the communities and individuals concerned how they define it or wish to see it protected. The multitude of processes that Indigenous communities invoke in order to protect their access to land by sharing and asserting knowledges has created a new environment where there are substantial recordings, registers, databases, films, images and geospatially located points of songs, stories and ceremonies relating to plant and animal life, landscapes, behaviours, weather and seasons, mission and pastoral life and technological developments. Access to materials documenting Indigenous knowledge, and access to processes to enable renewal, is fundamentally a part of protecting and preserving Indigenous knowledge. One of the key elements for Indigenous communities within this process is the capacity to regulate how heritage can be renewed, with control over community access being a critical part of the process.

95 Taiaiake Alfred, ‘Cultural strength: restoring the place of Indigenous knowledge in practice and policy’, paper presented at the AIATSIS Symposium, Canberra, 11 February 2015. See also Doxtater, ‘Indigenous knowledge in the decolonial era’ 2004.

96 Lenzerini, ‘Intangible cultural heritage, 2011, p. 119.

97 Ibid.

98 For an account of the impact of Indigenous heritage destruction see: Jacky Green & Seán Kerins, ‘Developing the north – a case study from the Gulf Country’, paper presented at the AIATSIS Occasional Seminar, Canberra, 20 February 2015.

99 Stacey & Fardin, ‘Housing on native title lands’, 2011.

The multiple forms and subjects of Indigenous knowledges create a new policy context where AIATSIS can play a key role in mapping the scope and content of knowledges as well as interrogating new regimes and processes for their recognition, protection and use by and for the benefit of Indigenous communities. What is essentially missing from current models of repatriation and definitions of Indigenous knowledge is any community say in what is recorded, returned and essentially deemed as significant. Moreover, the direct alignment of Indigenous knowledge structures and cultural relationships with governance arrangements will have a direct positive impact on how Indigenous knowledges are enacted in the everyday.

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Indigenous knowledges cannot be broken down into components that are measurable, ownable and owned. This fragmentation is reflected in the multitude of regimes that have been created in order to 'protect' Indigenous knowledge and is further exacerbated by strong distinctions between both tangible and intangible heritage. This paper maps out the multiple ways in which Indigenous knowledge has been defined and understood, how it is generated and recorded in Australia and reviews the implications of these definitions. We argue that Indigenous individuals, families, communities and nations should be empowered to assert and practice their culture in a manner that makes the most sense to them.

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