TANGIBLE PROGRESS IN THE PROTECTION OF INTANGIBLE CULTURAL HERITAGE IN VICTORIA?

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I INTRODUCTION

Some level of legislative protection of Indigenous cultural heritage is a feature of all Australian jurisdictions at a state (or territory) and Commonwealth level.[1] The Victorian *Aboriginal Heritage Act 2006* ('*AHA*') is often regarded as an example of one of the most effective of such regimes due both to its integration with the processes under the *Native Title Act 1993* (Cth) and its recognition of the appropriately central role of traditional Aboriginal owners in managing *their* heritage.[2]

The scope of the Victorian Aboriginal heritage regime was significantly expanded in 2016 with the passage of the *Aboriginal Heritage Amendment Act 2016* (Vic) ('*AHAA*'). The new legislation commenced on 1 August 2016.[3] Amongst other things, the *AHAA* inserts a new part 5A into the *AHA*. Part 5A provides for a regime for the management of Aboriginal *Intangible* Heritage ('AIH'). This development would appear to give at least partial recognition in Victoria of the provisions of the *Convention for the Safeguarding of the Intangible Cultural Heritage*.[4] Victoria is the first jurisdiction in this country to establish such a regime.

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1 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Northern Territory Aboriginal Sacred Sites Act 1989* (NT); *Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Cultural Heritage Act 2003* (Qld); *Aboriginal Heritage Act 1972* (SA); *Aboriginal Relics Act 1975* (Tas); *Aboriginal Heritage Act 2006* (Vic); *Aboriginal Heritage Act 1972* (WA). In NSW and the ACT the *National Parks and Wildlife Act 1974* (NSW) and the *Heritage Act 2004* (ACT) contain provisions that deal specifically with Aboriginal cultural heritage management.

2 See G Atkinson and M Storey, 'The Aboriginal Heritage Act 2006: A Glass Half Full?' in P McGrath (ed) *The Right to Protect Sites; Indigenous Heritage Management in the Era of Native Title*, (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2016); S Ellsmore, *Protecting the Past, Guarding the Future: Models to Reform Aboriginal Cultural Heritage Management in NSW*, (2012) and E Schnierer, *Caring for Culture: Perspectives on the Effectiveness of Aboriginal Cultural Heritage Legislation in Victoria, Queensland and South Australia* (New South Wales Aboriginal Land Council, 2010) <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>.

3 *AHAA* s 2.

4 Opened for signature 17 October 2003 (entered into force 20 April 2006).

The struggle for the preservation of AIH by Victoria's Traditional Owners is as long as the occupation of their country by non-Aboriginal people. Despite the efforts of the colonial authorities to eliminate the Victorian Aboriginal cultural heritage, in particular intangible heritage,[5] Victoria's Traditional Owners have succeeded in maintaining their intangible cultural heritage. As such, the inclusion of the AIH provisions in part 5A was positively received by Traditional Owner organisations. The inclusion of the AIH provisions was at the instigation of the current Victorian (Labor) Government. An earlier exposure draft of the Bill to amend the *AHA* circulated by the previous (Coalition) Government in 2014 did not include provisions relating to AIH.[6] When the 2016 Amendment Bill was circulated for comment Victorian Traditional Owners were supportive of the proposal (while noting some of the technical concerns expressed in this article).[7] Since the commencement of the AIH provisions, various Traditional Owner groups have been working to utilise the new regime. However, at the time of writing no registration of AIH under the part 5A provisions had occurred.

The purpose of this article is threefold. First, to describe the provisions of the new AIH regime and to reflect upon its likely practical applications; second, the discussion will examine the place of intangible cultural heritage protection in a range of international instruments. Finally, the discussion will consider issues associated with the interaction of the Victorian AIH management regime with Commonwealth intellectual property regime such as the *Copyright Act 1968* (Cth) and *Design Act 2003* (Cth). This consideration is undertaken particularly in the context of jurisprudence regarding property in traditional Indigenous designs exemplified by cases such as *Milpurrurru v Indofurn* (1994) 54 FCR 240 and *BB v R&T Textiles* (1998) 86 FCR 244. The article concludes that, while the new Victorian regime is to be applauded, there are likely to be many practical difficulties that beset its operation.

II THE NEW PART 5A

The new part 5A of the *AHA* is contained in only 12 sections (ss 79A–79L). Section 79A exempts from the operation of the part anything done by an Aboriginal person in accordance with Aboriginal tradition.

The newly inserted section 79B *AHA* gives the following definition of Aboriginal intangible heritage:

> (1) For the purposes of this Act, Aboriginal intangible heritage means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.

5 See, eg, *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [117].

6 The exposure draft is available at: https://www.dpc.vic.gov.au/images/documents/Aboriginal_Affairs/Aboriginal_Heritage_Amendment_Bill_Exposure_Draft.pdf

7 This support was reflected in private communication and correspondence between Traditional Owner organisations and Government at the time to which the author was a party.

> (2) Aboriginal intangible heritage also includes any intellectual creation or innovation based on or derived from anything referred to in subsection (1).

Section 79C provides that only a Registered Aboriginal Party ('RAP') under the *AHA*, a registered native title holder under the *Native Title Act 1993* (Cth), or a Traditional Owner Group Entity under the *Traditional Owner Settlement Act 2010* (Vic)[8] can apply to the Secretary to have details of AIH recorded on the Victorian Aboriginal Heritage Register under the *AHA*. In determining whether to register AIH pursuant to an application, the Secretary may request additional information and consult with the applicant and any Aboriginal person or body they consider relevant.

Section 79D then provides for the registration of agreements between a RAP and any person regarding, inter alia, 'the management, protection … conservation … research … publication … development or commercial use of Aboriginal intangible heritage' and 'the compensation to be paid for the research, development and commercial use of Aboriginal intangible heritage'. Pursuant to section 79E an Aboriginal intangible heritage agreement must be in the prescribed form and identify:

- the parties;
- the term; and
- a description of the intangible heritage to which it relates.

A copy of the agreement must be provided to the Secretary for recording in the Register,[9] however there is no suggestion that this is other than an administrative function of the Secretary. The parties to the agreement would appear to be at complete liberty to determine its content. In the event the RAP is deregistered or ceases to be a body corporate, the agreement is terminated.[10]

Section 79G creates an offence of knowingly or recklessly using registered AIH for commercial purposes without the agreement of the registered owner unless authorised by an agreement. The maximum penalty (for a corporation) is 10 000 penalty units.[11] An offence is also created under section 79H if a party to a registered agreement knowingly, recklessly or negligently breaches the conditions of an agreement.[12] An AIH agreement begins and ends on the date (or on the occurrence of a specified event) as specified in the agreement.[13]

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8 In this discussion the abbreviation 'RAP' will be used to collectively refer to Registered Aboriginal Parties under the *AHA*, registered native title holders and Traditional Owner Entities. Under the *AHA* the latter two classes of organisations are automatically appointed as RAPs.

9 *AHA* s 79F.

10 *AHA* s 79I(1).

11 Currently $155.46 per unit, so $1 554 600. This penalty applies to a corporation *knowingly* using registered intangible heritage for commercial purposes. The penalty for an individual recklessly using registered intangible heritage reduces to 1200 units. Note the provision of s 79G(3) appears to inadvertently prevent the operation of the section in any circumstances where the registered heritage in question is the subject of a registered agreement. Presumably it was intended to only apply to the party to the agreement.

12 With a maximum penalty (corporation, knowingly) of 3000 penalty units – $466 380 – reducing to 60 units (individual, negligently) – $9327.60.

13 *AHA* ss 79J, 79K.

A Analysis of Part 5A

From this brief description of the legislative provisions two particular questions arise. First, what is the subject matter that it is contemplated the new provisions will apply to? Second, what is the legal nature of the protection afforded to AIH by the new regime and, in particular, the legal nature of a registered AIH agreement under section 79D? Consideration of the second reading speech and Explanatory Memorandum provides some insight in regard to what was intended.

In her second reading speech in support of the Bill, the Minister, the Hon Natalie Hutchins MP, addressed the following comments specifically to the intangible heritage provisions:

> Aboriginal intangible heritage is not protected adequately by current intellectual property laws, patent laws or copyright laws. Stories, songs, dances, language, manufacturing techniques and knowledge about the properties and management of plants and animals are central to traditional owner culture and wellbeing, and deserve proper statutory protection as part of the cultural heritage of Victorian traditional owners.
>
> The bill provides a process for registered Aboriginal parties and other eligible traditional owner organisations to nominate particular intangible heritage for registration. Once registered, anyone wishing to use that intangible heritage for their own purposes will require a formal agreement with the relevant traditional owner organisation.
>
> The revolutionary Aboriginal intangible heritage amendments in the bill will create new opportunities for economically beneficial partnerships between Aboriginal people and industry, promote new Aboriginal industries and advance reconciliation and self-determination. This will significantly increase respect for Aboriginal culture and traditional knowledge and provide opportunities for it to be appropriately shared and celebrated. It will finally place traditional owners in the driving seat and able to control how their traditional knowledge is used by the broader community and industry.[14]

The Minister's suggestion that the new regime is intended to apply to '[s]tories, songs, dances, language, manufacturing techniques and knowledge about the properties and management of plants and animals' is enlarged upon somewhat by the Explanatory Memorandum's discussion of the definition now contained in section 79B, which states that it:

> is intended to encompass Aboriginal knowledge and expression held collectively by Aboriginal people or a particular group of Aboriginal people and passed down across generations, with or without adaptations and evolutions in nature or practice. It is limited to knowledge and expression of Aboriginal tradition, and to such things which are not generic to, or known or practiced widely by, the broader population. It is not limited to the types of knowledge and expression of Aboriginal tradition listed in the clause. Intellectual creation or innovation based on Aboriginal intangible heritage is included in the definition and is intended to be protected.[15]

In summary, then, it would appear that the AIH registration regime is intended to apply to performance art (stories, songs, dance, etc); design (craft and visual arts); and knowledge (of manufacturing techniques and the properties and management of flora and fauna). However such 'knowledge and expression' must arise from Aboriginal tradition and not be 'widely known to the public'. Section

14 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 November 2015, 4312.
15 Explanatory Memorandum, Aboriginal Heritage Amendment Bill 2015 (Vic) cl 59.

79B(2) states also that knowledge or expression derived from traditional knowledge or expression are also included within the protection of the regime. The suggestion in the Explanatory Memorandum that the tradition in question is not constrained by limitations of the kind imposed in native title jurisprudence by decisions such as *Members of the Yorta Yorta Aboriginal Community v Victoria*[16] is supported by the broad (and unchanged) definition of Aboriginal tradition contained in section 4 of the *AHA*.

B Operation of Part 5A

Having thus identified the subject matter of the new regime it is necessary to consider the nature of that regime. A first point to note is that, unlike the tangible cultural heritage regime established under the *AHA* generally, AIH is subject to protection only if nominated by the relevant Aboriginal organisation (and where that nomination is endorsed by the State).

By contrast, the *AHA* in relation to tangible Aboriginal cultural heritage operates by broadly defining Aboriginal cultural heritage[17] and then proscribing interference with cultural heritage unless in accordance with an approved permit or plan. If a RAP exists in relation to the specific cultural heritage that RAP has the statutory authority to veto the permit or plan.[18] However, the RAP has no *property* in the cultural heritage.[19] In fact, section 40(2)(b) specifically precludes a RAP from imposing conditions on the approval of a plan requiring the payment of 'money or money's worth' to the RAP.

The effect of these broad provisions is clear. *Tangible* Aboriginal cultural heritage, its definition and management, are under the control of the State. While traditional Aboriginal owners through their RAP may have a legitimate role as a key 'stakeholder' they do not *own* tangible cultural heritage.

By contrast, the AIH provisions of the new *AHA* part 5A give traditional Aboriginal owners the power to identify (through the registration process) AIH[20] and also facilitate, indeed encourage, economic exploitation of the AIH thus defined.

The distinction in approach to tangible Aboriginal cultural heritage and AIH is quite marked.

In relation to the issue of the legal nature of an AIH *agreement*, it would appear that the agreement takes the form of a 'statutory contract' in the sense that the AIH agreement constitutes a common law contract, the provisions of which are enhanced in a manner beyond the competence of the common law[21] – not dissimilar to an Indigenous Land Use Agreement under the *Native Title Act 1993* (Cth). This

16 (2002) 214 CLR 422.
17 *AHA* s 4.
18 *AHA* ss 27, 28, 36–9, 42–9, 59–61.
19 Sections 12 and 13 do encourage Aboriginal ownership of ancestral remains and secret or sacred ownership. However, s 37(1) prohibits any dealings in these aspects of cultural heritage.
20 Although of course subject to the State's veto through the requirement for the Secretary's agreement to the nomination.
21 As opposed to a contract implied by the terms of a statute as discussed in (for example) *Bailey v NSW Medical Defence Union* (1995) 184 CLR 399.

'blended' character is suggested by the following attributes. While the agreement must be provided to the Secretary for registration, there is no suggestion in the Act that the efficacy of the agreement as a contract is dependent upon registration. Indeed, section 79J(a) provides that the AIH agreement may come into effect upon execution, necessarily therefore prior to registration. Rather, registration operates to effect various statutory penalties for breach of the agreement without displacing any provisions within the agreement itself. Thus, the licensee under an AIH agreement who breaches the conditions of the registered agreement would be liable to the registered owner of the AIH in damages under the agreement and would also be potentially liable for prosecution under section 79H. However, there is no suggestion that an unregistered agreement is not effective as a contract sufficient to support an action in damages (or an injunction) for breach. Given the common law character of the AIH agreement, it appears that the Act contemplates that it is registration of AIH under the Act that gives a RAP sufficient 'property'[22] in the subject matter of the agreement necessary to found the contract. This view is supported by the Minister's second reading speech comments regarding inadequate protection of AIH under existing intellectual property regimes and her suggestion that the provisions will create 'new opportunities for economically beneficial partnerships'. The 'blended' character of the registered AIH agreement is also suggested by the provisions of section 79I (noted above) which provides that the AIH agreement 'is terminated' in the event the RAP is deregistered (as a RAP, rather than as a corporation). Thus, in the event the RAP is deregistered, the agreement loses not just its statutory privileges but also its common law existence.

The foregoing provides a sketch, if somewhat brief, of the general scheme of the AIH regime in Victoria. Particularly in the absence of any comparable regime elsewhere in Australia, it is appropriate to consider the international jurisprudence regarding the protection of intangible heritage as an aid in assessing the robustness of the Victorian regime.

III CONVENTION FOR THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE

A starting point for an analysis of the international jurisprudence regarding intangible cultural heritage ('ICH') must be the *Convention for the Safeguarding of the Intangible Cultural Heritage* ('*CICH*').[23] Of particular assistance in the task of assessing the Victorian regime is a consideration of how the *CICH* defines ICH and how it protects the ICH so defined.

The definition of ICH is contained in art 2.1 which provides, in part, that:

> 'intangible cultural heritage' means 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

22 In the sense discussed in *National Provincial Bank v Ainsworth* [1965] AC 1175 at pp 1247-1248.

23 See above n 4.

> 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.

The definition is contextualised in article 2.2:

> The 'intangible cultural heritage', as defined in paragraph 1 above, is manifested *inter alia* in the following domains:
>
> (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
>
> (b) performing arts;
>
> (c) social practices, rituals and festive events;
>
> (d) knowledge and practices concerning nature and the universe;
>
> (e) traditional craftsmanship.

The 'safeguarding' that States party to the *CICH* are under an obligation to ensure is defined in article 2.3 as including 'the identification, documentation, research, preservation, protection, promotion, enhancement [and] transmission' of ICH through education [24] and revitalisation. Article 11(b) suggests the identification and definition of ICH 'with the participation of communities, groups and relevant non-governmental organizations' as a first step in the safeguarding process.[25] Other measures suggested (in article 13) include: promoting the function of ICH; establishing a 'competent body' responsible for safeguarding ICH; 'fostering scientific, technical and artistic studies' and 'adopting appropriate legal, technical, administrative and financial measures' needed to create institutions for the management and transmission of ICH and ensuring access to it 'while respecting customary practices governing access'. The *CICH* also deals with the safeguarding of ICH at an international level, although these provisions (similar in nature to the domestic obligations) are beyond the scope of the current discussion.

A The Development of the *CICH*

A number of publicists involved in the development of the *CICH* have commented on its final provisions. Richard Kurin[26] is one of these. In relation to the Convention's definition of ICH he comments:

> The term intangible cultural heritage replaced historically familiar terms such as Folklore, traditional culture, oral heritage and popular culture. With the convention there was also an important shift of emphasis. Intangible cultural heritage was, foremost living heritage as itself practised and expressed by members of cultural communities … ICH was not the mere products, objectified remains or documentation of such living cultural forms. It was not the songs recorded on sound tapes or in digital form or their transcriptions. ICH is the actual singing of the songs … This means that ICH cannot retain its designation as such if it is appropriated by others who are not members of that community – whether they be government officials, scholars, artists, businessmen or anyone else.[27]

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24 Art 14 emphasises the role of education in the protection of intangible cultural heritage.

25 Art 12 develops stipulates the requirement to develop an inventory of intangible cultural heritage.

26 Director, (USA) Smithsonian Centre for Folklife and Cultural Heritage.

27 R Kurin, 'Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention' (2007) 2 *International Journal of Intangible Heritage* 10, 12.

Consistent with the approach in the new part 5A of the *AHA*, Kurin goes on to note that the very nature of ICH is that it evolves:

> If a form of ICH is living it will, by definition, change over time. An art form that might have originated from a peasant's utilitarian response to a particular need might have grown, over time, into an elite art practised in a royal court, or have acquired a sacred meaning, only to later become a common skill for making market crafts and trade items, and even later to be transformed into the means of making decorative tourist goods.[28]

A review of the development of international law leading up to the *CICH* provides some insight into the safeguarding measures contained in the Convention. Noriko Aikawa notes that the origins of the *CICH* extend back to work done by the United Nations Educational, Scientific and Cultural Organisation ('UNESCO') in the 1970s.[29] She also notes the significance of article 8(j) of the 1992 *United Nations Convention on Biological Diversity*[30] and its reference 'to the significance of the respect and preservation of traditional knowledge and practices of indigenous and local communities which have relevance for the conservation and sustained use of biodiversity' as well as the later references in the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP')[31] to cultural rights.[32] These matters aside, Aikawa also identifies that a crucial point in the eventual development of the *CICH* came in the early 1980s when the processes of safeguarding of ICH as ultimately manifested in the *CICH* were separated from considerations of Intellectual Property Rights ('IPR').[33]

The early relationship between the development of a desire to protect ICH and IPR is explored in greater detail by Sherkin.[34] Sherkin notes that the early development of ICH protection discourse was in the context of the development of tangible cultural heritage protective instruments.[35] Concerns that the developing tangible cultural heritage regimes would not protect ICH led to consideration of an additional protocol to the *Universal Copyright Convention*.[36] However, as Sherkin notes:

> After much deliberation, the Intergovernmental Copyright Committee and the Executive Committee of the Berne Union concluded that although folklore was in need of protection, a solution at the international level was unrealistic. Moreover,

28 Ibid 13. The point regarding the necessary evolution of ICH is also identified in M Bedjaoui 'The Convention for the Safeguarding of the Intangible Cultural Heritage: The Legal Framework and Universally Recognized Principles' (2004) 56(1-2) *Museum International*, 150, 152.

29 N Aikawa, 'An Historical Overview of the Preparation of the UNESCO International Convention on the Safeguarding of the Intangible Cultural Heritage' (2004) 56(1-2) *Museum International* 137, 138.

30 opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

31 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

32 Aikawa above n 29, 139–40. In relation to UNDRIP see for example arts 5, 14, and in particular 11 and 31.

33 Aikawa above n 29, 138.

34 S Sherkin, 'A Historical Study on the Preparation of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore' in P Seitel (ed) *Safeguarding Traditional Cultures: A Global Assessment* (Center for Folklife and Cultural Heritage, 2001) 42.

35 Ibid 44. The point is also made by Bedjaoui, above n 26 at 151.

36 signed 6 September 1952, 943 UNTS 178 (entered into force 16 September 1995).

> they felt that the problem was of a cultural nature and, as such, was beyond the bounds of copyright.[37]

The view that the pressing need was to develop institutions and processes to protect ICH and that IPR protection of ICH was both a discrete and a more problematic issue continued throughout the 1980s. This is evidenced in the content of the UNESCO 1989 *Recommendation on the Safeguarding of Traditional Culture and Folklore*[38] and the apparent reluctance of the World Intellectual Property Organisation ('WIPO') to engage in the area over this time.[39] A joint UNESCO–WIPO forum that did take place in 1997 concluded that existing copyright regimes were inappropriate for the protection of ICR and that a new internal agreement would be necessary for this purpose.[40]

To this end, in 2000 WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('IGC'). However, UNESCO has no association with this body and the development of the 2003 *CICH* took place independently of the IPR considerations taking place in the WIPO Intergovernmental Committee.[41]

The WIPO IGC has the objective of 'reaching agreement on one or more international legal instruments that would ensure the effective protection of genetic resources, traditional knowledge and traditional cultural expressions'.[42] The work is continuing, particularly in relation to the issue of Intellectual Property and Traditional Cultural Expressions. However, it is not apparent that any resolution is imminent.[43] WIPO suggests that the 1996 *WIPO Performances and Phonograms Treaty*[44] affords protection of the rights of performers of expressions of folklore.[45] That treaty does grant economic and moral rights to the performers of recorded (fixed) and live (unfixed) performances.

B Other Notable Features of the *CICH*

Aside from the relationship to IPR matters, the terms of the *CICH* pose a number of issues of significance to Indigenous communities. Foremost among these is the positive feature that the *CICH* contemplates in article 11(b), a structure for community involvement in the process of ICH identification. Blake suggests that this feature, in combination with the fact that the *CICH* is unique in dealing with the 'human context' of heritage, means that that the *CICH*: 'creates a fundamental shift in the pre-existing relationships between state authorities and

37 Sherkin, above n 34, 45.
38 General Conference of UNESCO, meeting in Paris 15 November 1989 at its 25th session.
39 Sherkin, above n 34, 50–1.
40 Aikawa, above n 29, 141.
41 Ibid 141–2.
42 WIPO, 'The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (Background Brief No 2, 2015).
43 *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO/GRTKF/IC/34 (June 2017). <http://www.wipo.int/meetings/en/details.jsp?meeting_id=42302>.
44 signed 20 December 1996, TRT/WPPT/001 (entered into force (20 May 2002) arts 5–10.
45 WIPO, above, n 42.

local communities'.[46] Writing in 2004 shortly after the adoption of the *CICH*, Kuruk echoes Blake's views on community participation,[47] but also notes a number of issues of potential concern to Indigenous communities that are not addressed in the Convention. These include: that the 'competent body' contemplated at article 13(b) is not given any function of power with regard to commercial exploitation of ICH;[48] and that, while there is a duty to consult local communities, the *CICH* still leaves the initiation and final determination of ICH identification in the hands of the State and therefore not under the control of local Indigenous communities.[49]

C The *CICH* and the Victorian Part 5A

While Kuruk's observations and the provisions of the *WIPO Performances and Phonograms Treaty* are noted, at this stage the 2003 *CICH* with its emphasis on identification and encouragement of ICH represents the high point of international legal recognition, if not protection, of ICH. The Victorian part 5A would then appear to be consistent with current international jurisprudence, although there was no public acknowledgement (in, for example, the second reading speech, explanatory memorandum or debate on the Bill) that the Victorian part 5A was influenced by the *CICH*. The definition of AIH in section 79B is consistent with that of *CICH* article 2, although perhaps with a greater emphasis on the physical artefact of ICH rather than the act of production that Kurin[50] attempts to describe. Similarly, the process of registration under section 79C would appear to be in concord with *CICH* articles 11 and 13 regarding the role of State parties in conjunction with relevant communities in the identification and management of ICH. Furthermore, the part 5A process of allowing Indigenous led initiation of the registration process addresses Kuruk's concerns in relation to the shortcomings of the *CICH* in this regard. However, as with the *CICH* (as noted by Kuruk), ultimately under part 5A the registration process is under the control of the State and not the local Indigenous community.

The provisions of sections 79D–79F and the offence provisions of sections 79G and 79H go beyond the scope of the *CICH* and into the territory of the IPR exercise being undertaken by the WIPO IGC. However, these provisions are clearly not in conflict with the *CICH* or apparently the yet to be determined international instruments being developed by WIPO. These provisions do, though, go some way to addressing Kuruk's criticisms that article 13(b) 'competent authorities' have insufficient ability to regulate the commercialisation of ICH.

A notable divergence between the *CICH* and the Victorian part 5A is of course that the Victorian legislation applies only to *Indigenous* ICH. There is no such limitation in the *CICH*.

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46 J Blake, 'Seven Years of Implementing UNESCO's 2003 Intangible Heritage Convention –Honeymoon Period or the "Seven-Year Itch"'? (2014)21 *International Journal of Cultural Property*, 291, 299.

47 P Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage' (2004) 1 *Macquarie Journal of International Law* 111, 123.

48 Ibid 127. See also 131.

49 Ibid 128.

50 Above n 27.

This conclusion that the new part 5A is, in the Indigenous context, consistent with, or arguably even more effective than, current international instruments highlights the significance of considering the provisions of the new part 5A within the context of both Commonwealth statute and the common law. The following section of this article attempts this task.

IV AIH AND COMMONWEALTH STATUTE

Commonwealth intellectual property legislation may impact the efficacy of the new Victorian AIH regime. For example, contemplate the situation where a RAP secured registration under the *AHA* of a traditional design and that same design were also the subject of a copyright held by some person other than the RAP under the *Copyright Act 1968* (Cth). In these circumstances a question may arise as to the inconsistency between the rights of the Commonwealth statutory rights holder and the rights of the RAP under the Victorian legislation. Presumably section 109 of the *Constitution* would operate to resolve this inconsistency.

Given this potential, it is appropriate to briefly review the extent to which existing Commonwealth intellectual property legislation can lead to the bestowal of rights on a group or individual in the AIH contemplated by the *AHA*. To the extent Commonwealth legislation does already potentially operate with respect to AIH, the Victorian regime would be invalid 'to the extent of the inconsistency' under section 109.

However, a complete review of the application of all Commonwealth intellectual property legislation is beyond the scope of the current discussion. It will perhaps suffice to illustrate the potential overlap between the AIH provisions of the *AHA* and Commonwealth legislation through consideration of the example of the *Copyright Act 1968* (Cth) ('CA').

Under the *CA* the creators of literary, dramatic, artistic or musical works and the makers of sound recordings, film and audio recordings are granted certain exclusive 'economic' rights, such as the right to publish the work.[51] The copyright arises at the time of the creation of the work.

Further, *CA* part XIA gives domestic effect to the *WIPO Performances and Phonograms Treaty* referred to earlier, such that the *CA* makes unlawful[52] the unauthorised recording or communication to the public of a live performance of a dramatic work, a musical work, a dance, circus act or variety act, an expression of folklore or the reading or recitation of a literary work or an improvised literary work.[53]

Given the potential scope of application of the *CA* to AIH, it provides a good example with which to consider the interaction of a Commonwealth statute and the rights in AIH under part 5A of the *AHA*. The application of the *CA* to 'traditional' Indigenous visual artworks is illustrative.

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51 *Copyright Act 1968* (Cth) s 31.

52 *Copyright Act 1968* (Cth) s 248G.

53 See *Copyright Act 1968* (Cth) s 248A, definition of 'performance'. Thus, copyright in a performance may be held by both the creator of the work performed and the performer.

The illustration is provided by the line of cases that includes *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, *Milpurrurru v Indofurn* (1994) 54 FCR 240 and *BB v R&T Textiles* (1998) 86 FCR 244. Much has been written about these cases[54] and it is not the purpose of the current discussion to comprehensively review that literature. However, two key propositions which emerge from those cases can be briefly stated:

- copyright can arise in an individual artist in respect of work produced by them that constitutes an expression of a traditional design, provided that the requirements of skill and originality in the *CA* are satisfied through the incorporation of the artist's own detail and complexity in the rendering of the traditional design; and
- the individual artist may be under fiduciary obligations regarding the communication of the traditional design to the community from which the traditional design originated, dependent upon the circumstances of the imparting of the design. However, this fiduciary obligation does not necessarily give rise to an equitable interest in the copyright on the part of the community.

The question then arises as to how these propositions accord with the registration of AIH under the *AHA*. The definition of AIH under the *AHA* ('any knowledge of or expression of Aboriginal tradition … [including] … oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts')[55] is clearly sufficiently broad so as to comprehend artistic (or literary, dramatic or musical) works or performances within the *CA*.

This situation can be illustrated by use of an example. Consider the scenario of a Victorian Aboriginal artist who produces an artwork which, while incorporating individual complexity and design, is clearly based on a traditional design from the artist's Indigenous nation. The artist would have copyright in the work under the *CA* without the need to register these rights. In this example, the RAP relevant to the artist's Indigenous nation subsequently applies to the Secretary for a representation of the same traditional design[56] to be registered under *AHA* section 79C. The registration application is approved. Subsequently, the artist has their artwork reproduced and sells these broadly to the public without the consent of the RAP.[57] The artwork would appear to constitute AIH pursuant to *AHA* section 79B(1), at least if it were not 'widely known to the public', and certainly pursuant to *AHA* section 79B(2). As such it is hard to see how the sale would not constitute an offence under *AHA* section 79G (being an offence of knowing use for commercial purposes). However, the actions of the artist are consistent with their right to 'reproduce [their] work in a material form' pursuant to *CA* section

54 A useful contemporary review from a quite personal perspective is provided by M Hardie 'What Wandjuk Wanted?' in M Rimmer, *Indigenous Intellectual Property* (Edward Elgar, 2015) 155.

55 *AHA* s 79B.

56 That is the RAP is registering a representation of the traditional design but not one identical the version produced by the individual artist.

57 For the purposes of this example it is assumed that there is no evidence of a commercial trade in artworks pursuant to relevant Aboriginal tradition (so as to avoid any complications from an *AHA* s 79A defence concerning acting in accordance with Aboriginal tradition).

31(1)(b)(i). In this example, then, the Victorian *AHA* is purporting to make an offence of an action that is specifically authorised by the Commonwealth *CA*. In this instance, section 109 of the Commonwealth *Constitution* would operate to resolve the conflict by rendering the *AHA* invalid 'to the extent of the inconsistency'.

The foregoing provides a clear example of the inconsistency issue. The *CA* is granting particular statutory rights (to control use and reproduction of the artwork) to one individual. The *AHA* is granting the same rights (the right to authorise use and reproduction of the registered design without prosecution) to another (the RAP). Thus, this example cannot constitute a situation where the 'the Federal law was intended to be supplementary to or cumulative upon State law'[58] in the nature of the anti-discrimination legislation considered in *University of Wollongong v Metwally* (1984) 158 CLR 447.

The foregoing example would though appear to constitute an instance of direct inconsistency (a 'textual collision').[59] In addition to a direct inconsistency, section 109 jurisprudence also acknowledges that an indirect inconsistency can arise where Commonwealth legislation evinces an intention to 'cover the field' of the subject matter of the legislation.[60] The two forms of inconsistency were described by Dixon J in *Victoria v The Commonwealth*[61] as follows:

> When a state law, if valid, would alter, impair or detract from the operation of the law of the Commonwealth Parliament then to that extent it is invalid. Moreover, if it appears from the terms, the nature of the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so inconsistent.

The second form of section 109 inconsistency may have a broader impact on the operation of the *AHA* AIH provisions. The *CA* would appear to be intended to comprehensively cover the field in respect of the subject matters it deals with (viz the rights of the creators of literary, dramatic, artistic or musical works and the makers of sound recordings, film and audio recordings and performers of dramatic works, musical works, dance, circus or variety act, expression of folklore, or readings or recitations of a literary work or an improvised literary work). The fact that the *CA* part XIA provisions were inserted apparently to give effect to the *WIPO Performances and Phonograms Treaty,* which in turn was developed in part to provide enforceable Intellectual Property Rights to folkloric performers, would seem to emphasise this point. Aside from the comprehensive terms of the *CA* itself, this conclusion would appear to be emphasised by the terms of *CA* section 8 which states that 'copyright does not exist otherwise than by virtue of this Act'.[62] The question of whether the *CA* part XIA provisions were intended to cover the field of some manifestations of ICH is emphasised by the earlier discussion in this

58 *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J).
59 *Miller v Miller* (1978) 141 CLR 269, 275 (Barwick CJ).
60 *Clyde Engineering v Cowburn* (1926) 37 CLR 466; *Viskauskas v Niland* (1983) 153 CLR 280.
61 (1937) 58 CLR 618, 630. Approved by a unanimous Court in *Telstra v Worthing* (1999) 197 CLR 61,76–7.
62 Considered in *JT International SA v Commonwealth* (2012) 250 CLR 1.

article that traced the common origins in international legal deliberations of both the *CICH* and the *WIPO Performances and Phonograms Treaty*.

Thus, while the inconsistency identified in the previous example arose by reason of the direct conflict between the rights of the artist and the RAP, the notion of the *CA* 'covering the field' would appear to suggest that the AIH provisions of the *AHA* may be inconsistent with the *CA* to the extent to which the *AHA* purports to regulate any of the creative endeavours contemplated by the *CA*. Ultimately, a final view of this matter may be determined by a construction of the term 'use' in the offence created under *AHA* section 79G. If correct, this result would severely limit the operation of the new part 5A.

This conclusion noted, the *CA* does not apply to all manifestation of AIH. Some of the areas not addressed are identified by Janke:

> Copyright law protects the *form* of expression of ideas, rather than the ideas themselves. For example, it is not an infringement of copyright to copy a design style, such as the rarkk or cross-hatching style of Indigenous art used largely in Arnhem land regions.[63]

She continues:

> While copyright exists in literary works, there is no copyright in languages unless they are expressed in material form; that is, written down or recorded. Indigenous languages themselves are not protected by copyright, but expressions and compilations of Indigenous languages, such as dictionaries and word lists, are eligible for protection.[64]

These exceptions noted, an attempt under the Victorian *AHA* to protect a 'style' or 'language' may possibly still be inconsistent with rights afforded under the *CA* to a person who had used that style or language in the production of a particular artistic work.

A Legislation Other than the *CA*

The fact that the *CA* does not involve any process of registration of a work may compound the difficulty with inconsistency as there is no opportunity for the Secretary under the *AHA* to have regard to existing rights when making a decision to register AIH under section 79C. Many other pieces of Commonwealth intellectual property law that may be relevant to AIH *do* involve a process of registration. The *Patents Act 1990* (Cth) and the *Designs Act 2003* (Cth) are two examples. However, the process of registration would not of itself appear to rescue the *AHA* AIH provisions from the risk of inconsistency should such Commonwealth legislation be determined to have 'covered the field'. Notwithstanding this possibility it must be accepted that a firm conclusion in respect of the AIH provisions of the *AHA* would require a more comprehensive analysis than is possible in the current discussion.

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63 T Janke, 'Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights' (Report, Australian Institute of Aboriginal and Torres Strait Islander Studies and Aboriginal and Torres Strait Islander Commission, 1998) 60.

64 Ibid.

V CONCLUSION

The new AIH provisions in part 5A of the *AHA* are an innovative and ground-breaking piece of legislation for Australia. Not only does part 5A seek to recognise the importance of AIH but it also seeks to recognise the essential communal foundation of AIH through the process of RAP centrality in the AIH registration process. Further, the penalty and registered agreement provisions underscore recognition that, while AIH may enrich the broader Australian community, it *belongs* to the relevant traditional Aboriginal owners who should have the right to control its use and the opportunity to engage in economic activity springing from its existence. None of these objectives can be criticised.

Further, part 5A through its registration process encourages the systemic definition and identification of AIH which further the objectives of the *CICH*. The very existence of the legislation and the establishment of the bureaucracy to support it also operates to implement the provisions of the *CICH* in respect of promoting the function of the *CICH*. Again, these objectives cannot be criticised.

However, it would appear that the inescapable conclusion is that in attempting to establish a 'property' regime in AIH through the offence and registered agreement provisions in part 5A, the new legislation may have fallen foul of the Commonwealth legislative intellectual property regime. In many respects the AIH provisions of the *AHA* attempt to bridge the dichotomy that has developed in international law between the work of UNESCO and that of WIPO. Unfortunately for the *AHA*, in the domestic context responsibility for the development of intellectual property regimes has inevitably been assumed by the Commonwealth as contemplated by both section 51 (xviii) and (xxix) of the *Constitution*.

The analysis contained in this discussion has suggested there is an inconsistency between the AIH offence and registered agreement provisions of the *AHA* with Commonwealth legislation. If this analysis is correct, the appropriate response is surely to enhance the Commonwealth intellectual property regime to afford the comprehensive recognition and protection of AIH that the Victorian Parliament has laudably attempted.