

INDIGENOUS VOICE INQUIRY 2021

**THE ULURU STATEMENT FROM THE HEART
AND INDIGENOUS INTELLECTUAL PROPERTY**



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The Uluru Statement from the Heart

The *Uluru Statement for the Heart* recognizes the importance of culture and heritage to Australia's First Nations:

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

The proposals in respect to an Indigenous voice, truth-telling, and a treaty would perhaps be helpful in the development of Indigenous rights and Indigenous intellectual property. This submission discusses the ways in which the recognition of an Indigenous voice would assist policy-making and practice respect of Indigenous rights and Indigenous intellectual property.

In his book, *Finding the Heart of the Nation*, Thomas Mayor has explained that the establishment of an Indigenous Voice will improve policy-making in Australia:

The establishment of a First Nations Voice enshrined in the Constitution is the priority reform – indeed it is now an urgent reform – because, unlike other racial or ethnic groups, law and policies are being made by governments specifically about us, without us, and too often to our detriment. A Voice is the first reform because it will start to address this political disempowerment, setting us on the path for the future reforms of Treaty and Truth.¹

¹ Thomas Mayor, *Finding the Heart of the Nation: The Journey of the Uluru Statement Towards Voice, Treaty and Truth*, Melbourne: Hardie Grant Travel, 2019, 2.

There should be an Indigenous Voice to Parliament – not merely an Indigenous voice to Government. Once the model for an Indigenous voice has been settled, there should be a referendum. Enabling legislation for the Indigenous Voice should be passed after a referendum has been held in the next term of Parliament. The membership model for the National Voice must provide for a diverse and inclusive representation of Aboriginal and Torres Strait Islander peoples. The establishment of an Indigenous Voice should be followed by a Treaty and a truth-telling process. The combination of a voice, treaty, and truth would be ideal – rather than merely the recognition of those concepts in isolation.

Thomas Mayor has explained the need for an Indigenous Voice.² He reflects:

The Voice is the key step forward. Truth-telling alone does not produce solutions. We do. And the truth is justification for the solutions we seek and deserve. To use the truth to get meaningful, lasting treaties, and to affect the legislation and policies that have so fatally failed us, we must have a Collective Voice to the Federal Parliament in Canberra. Our Elders have called for a Voice for generations. We direly need representatives that we choose, who are accountable to us – not the parliament, a corporate sponsor or the media. The time has come for this proposal. We must not take “no” for an answer. The line has been drawn in the red sand at Uluru.³

There remain many outstanding issues of public policy in respect of Indigenous rights and Indigenous intellectual property. It is worth outlining a number of areas, worthy of further law reform and development. First, this submission notes that an Indigenous Voice would help give force to the *UN Declaration on the Rights of Indigenous Peoples* 2007. Second, the

² Thomas Mayor, *Finding the Heart of the Nation: The Journey of the Uluru Statement Towards Voice, Treaty and Truth*, Melbourne: Hardie Grant Travel, 2019, 4.

³ Ibid.

contribution observes that an Indigenous voice would improve policy-making in respect of copyright law, policy, and practice. Third, this submission suggests that an Indigenous Voice would help refine the right of resale for visual artists – including Indigenous artists. Fourth, this policy paper contends that an Indigenous Voice will help protect Indigenous consumers.

Fifth, this submission contends that an Indigenous Voice will ensure that trade mark law and policy have a greater sensitivity to Indigenous iconography. Sixth, this paper argues that an Indigenous Voice will boost tobacco control amongst Indigenous communities through supporting Indigenous-led healthcare. Seventh, this submission observes that a First Nations Voice would help inform designs law.

Eighth, this paper contends that an Indigenous Voice would enrich our understanding of confidential information and trade secrets. Ninth, this submission observes that an Indigenous Voice will improve our patent system – particularly in respect of informed consent and benefit-sharing. Tenth, this paper notes that an Indigenous Voice is particularly important in respect of a public health pandemic – such as the coronavirus.

Eleventh, this paper comments that plant breeders' rights could be better understood through an Indigenous voice. Twelfth, this paper suggests that a First Nations Voice is required to improve environmental protection and biodiversity protection in Australia. Thirteenth, this submission comments that an Indigenous Voice would help safeguard the protection of cultural heritage. Fourteenth, this paper argues that native law and policy needs to better embody First Nations voices. Fifteenth, this paper maintains that Indigenous communities need to have a stronger voice in respect of climate policy in Australia. Finally, the submission notes that a

Treaty and a process of truth-telling could further provide protection of Indigenous rights – specifically Indigenous intellectual property.

1. International Law

The *UN Declaration on the Rights of Indigenous Peoples 2007* provides a template for the protection of the protection of Indigenous rights – including the Indigenous intellectual property. There has been international recognition of Indigenous intellectual property as part of the *United Nations Declaration on the Rights of Indigenous Peoples 2007*.⁴ Article 31 (1) of *UNDRIP* provides:

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.⁵

⁴ *United Nations Declaration on the Rights of Indigenous Peoples 2007*, 61st sess, UN Doc A/61/L.67, adopted by the General Assembly Resolution 61/295 on 13 September 2007. See Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples*, London and New York: Routledge, 2016; and

⁵ *United Nations Declaration on the Rights of Indigenous Peoples 2007*, 61st sess, UN Doc A/61/L.67, adopted by General Assembly Resolution 61/295 on 13 September 2007.

Article 31 (2) provides: ‘In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.’⁶ The *Uluru Statement from the Heart* seeks to provide a realization of a number of the principles of the *UN Declaration on the Rights of Indigenous Peoples* 2007.

Nation states – including Australia – could do more to implement the articles relating to the protection of Indigenous rights and Indigenous intellectual property. Canada has put forward special legislation – *Bill C-15: The United Nations Declaration on the Rights of Indigenous Peoples Act* to help give force to the *United Nations Declaration on the Rights of Indigenous Peoples* 2007. According to the Government of Canada, ‘The purpose of this Bill is to affirm the Declaration as a universal, international, human rights instrument with application in Canadian law and provide a framework for the Government of Canada’s implementation of the Declaration.’⁷ The Government of Canada notes: ‘Once passed by Parliament, this legislation would require the Government of Canada, in consultation and cooperation with Indigenous peoples, to: take all measures necessary to ensure the laws of Canada are consistent with the Declaration prepare and implement an action plan to achieve the Declaration’s objectives; and table an annual report on progress to align the laws of Canada and on the action plan.’⁸ Australia could do much more to implement the *United Nations Declaration on the Rights of Indigenous Peoples* 2007. The recognition of an Indigenous Voice to Parliament would be an important

⁶ *United Nations Declaration on the Rights of Indigenous Peoples* 2007, 61st sess, UN Doc A/61/L.67, adopted by General Assembly Resolution 61/295 on 13 September 2007.

⁷ Government of Canada, ‘Backgrounder: Bill C-15 – United Nations Declaration on the Rights of Indigenous Peoples Act’, <https://www.justice.gc.ca/eng/declaration/about-afpropos.html>

⁸ Ibid.

step in fulfilling the ambition of the *United Nations Declaration on the Rights of Indigenous Peoples* 2007.

Moreover, at an international level, there is a need to progress stalled discussions on an international agreement on Indigenous intellectual property in WIPO. The WTO could play a more significant role in the protection of Indigenous Intellectual Property. Moreover, the language on the protection of Traditional Knowledge under the *Convention on Biological Diversity* 1992 needs to be translated into effective action. The regional agreement - the *Trans-Pacific Partnership* 2015 – has some text on how nation states have the discretion to take action in respect of the protection of Indigenous intellectual property.⁹

2. Copyright Law

There is a long history of legal, political, and ethical debate in respect of the topic of Indigenous intellectual property in Australia – much of which has focused on copyright law.¹⁰

The Hawke and Keating Governments made an initial effort to explore the topic of Indigenous intellectual property. In the 1990s, the Attorney-General's Department released the *Stopping*

⁹ Matthew Rimmer, 'The Trans-Pacific Partnership and Sustainable Development: Access to Genetic Resources, Informed Consent, and Benefit-Sharing', in Charles Lawson and Kamallesh Adhikari (ed.), *Developments in Access and Benefit Sharing of Genetic Resources – New Approaches and Opportunities*, Abingdon (Oxon) and New York: Routledge, 2018, 151-184.

¹⁰ Matthew Rimmer, 'Mapping Indigenous Intellectual Property', in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 1-44.

the Rip-Offs Discussion Paper.¹¹ Terri Janke was commissioned to produce the landmark report, *Our Culture, Our Future* in 1999 – but many of its key recommendations have gone unheeded.¹²

There have been a number of conflicts over the use of Indigenous intellectual property by the Reserve Bank of Australia as national symbols for currency.¹³ There has also been skirmishes over the appropriation and counter-appropriation of Indigenous art.¹⁴ It is true that von Doussa J of the Federal Court of Australia has shown judicial innovation in a number of cases – most notably, the “Carpets” case,¹⁵ and the “Bulun Bulun” decision.¹⁶

Building upon the ‘Bulun Bulun’ decision, Australian copyright law should recognise communal ownership of Indigenous cultural works.¹⁷

¹¹ Attorney General’s Department, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples: Issues Paper*, Canberra: Attorney-General’s Department, 1994.

¹² Terri Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Sydney: Michael Frankel and Company, 1999.

¹³ Stephen Gray, ‘Government Man, Government Painting? David Malangi and the 1966 One-Dollar Note’ in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 133-154. *Yumbulul v. Reserve Bank of Australia* (1991) 21 IPR 481.

¹⁴ Matthew Rimmer, ‘Four Stories About Copyright Law And Appropriation Art’ (1998) 3 (4) *Media And Arts Law Review* 180-193

¹⁵ *Milpururru v. Indofurn Pty Ltd* (1994) 30 IPR 209.

¹⁶ *Bulun Bulun and Milpururru v. R & T Textiles Pty Ltd* (1998) 41 IPR 513.

¹⁷ *Bulun Bulun and Milpururru v. R & T Textiles Pty Ltd* (1998) 41 IPR 513.

During the debate over the introduction of moral rights in 2000, there was discussion about the need for better protection of Indigenous cultural works, and recognition of communal ownership.¹⁸ A draft version of a bill to recognize communal ownership of moral rights was published by Attorney-General Ruddock, but never acted upon.¹⁹ Further reforms of moral rights should consider dealing with such matters.

As a result of implementing international WIPO agreements, Australia provides some protection of performers' rights under copyright law. There is a need to review whether Australia's regime provides adequate and sufficient protection of Indigenous performers.

There was a long-running over the copyright ownership of the artistic works of Albert Namatjira – which was finally resolved after mediation, negotiation, and settlement.²⁰

¹⁸ Matthew Rimmer, 'Bangarra Dance Theatre: Copyright Law And Indigenous Culture' (2000) 9 (2) *Griffith Law Review* 274-302.

¹⁹ Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27 (3) *University of New South Wales Law Journal* 585-605.

²⁰ Matthew Rimmer, 'Albert Namatjira: Copyright Estates and Traditional Knowledge' (2003) 24 (6) *Incite* 6; Stephanie Convery, 'From Alice Springs to Buckingham Palace: The Fight for Albert Namatjira's Legacy', *The Guardian*, 5 August 2017, <https://www.theguardian.com/film/2017/aug/05/from-alice-springs-to-buckingham-palace-the-fight-for-albert-namatjiras-legacy>; Isabel Dayman, 'Albert Namatjira's Family Regains Copyright of His Artwork After Dick Smith Intervenes', ABC News, 15 October 2017, <http://www.abc.net.au/news/2017-10-14/albert-namatjira-copyright-returned-to-family/9050550>; and Arnold Bloch Leibler, 'Arnold Bloch Leibler negotiates historic settlement for descendants of Albert Namatjira', Press Release, 27 August 2018, <https://www.abl.com.au/insights-and-news/namatjira-compensation/>

In 2020, there was significant debate over the copyright ownership and licensing of the Aboriginal flag – but there did not seem to be resolution of that conflict over the icon.²¹

Terri Janke has called for the establishment of an Indigenous Cultural Authority in order to provide a co-ordinate institutional response to the protection, enforcement, and exploitation of Indigenous intellectual property. Such a regime would provide institutional support for the array of codes and protocols for the protection of Indigenous intellectual property in Australia. Such an authority might also play a role in the management of national Indigenous icons.

An Indigenous voice would be helpful in improving copyright law, policy, and practice in Australia.

3. The Right of Resale for Visual Artists

The Rudd Government introduced the right to resale scheme for visual artists – which would incidentally benefit Indigenous artists. There has been ongoing research as to the operation and the impact of this regime in Australia.²² The Rudd Government also discussed the need for

²¹ Matthew Rimmer, *Free the Flag: Copyright Law and Indigenous Intellectual Property*, Canberra: Senate Select Committee on the Aboriginal Flag, Australian Parliament, 2020, <https://www.aph.gov.au/DocumentStore.ashx?id=a57de21c-1c7e-4312-b09d-88a294585de3&subId=691856>
Bepress Selected Works: https://works.bepress.com/matthew_rimmer/362/; and Senate Select Committee on the Aboriginal Flag, *The Aboriginal Flag*, Canberra: Parliament House, 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Aboriginal_Flag/AboriginalFlag/Report

²² Robert Dearn and Matthew Rimmer, 'The Australian Resale Royalty Right for Visual Artists: Indigenous Art and Social Justice', in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 200-230.

additional protection against unfair dealings with Indigenous art. However, instead of taking legislative action, it instead passed a code of conduct in respect of Indigenous art.

There is a need to review the conservative model for the right of resale for visual artists in Australia to determine whether the regime is meeting its aims and objectives. In particular, it should be evaluated whether the scheme has provided adequate benefits for Indigenous artists and their families. There could be further scope to strengthen the right of resale for visual artists in Australia – particularly in light of the High Court of Australia rulings on constitutional law and intellectual property.

There is also a need to provide for additional protection for Indigenous art to prevent unfair dealings – particularly by intermediaries.

4. Consumer Law

The ACCC has taken action under Australian consumer law in respect of misleading and deceptive conduct and representations made about Indigenous art and craft. In the cases that it has intervened in, the ACCC has been effective. However, there has been concerns whether the regulator has been able to cope with the systematic nature of the problem. The precedent of *Australian Competition and Consumer Commission v. Birubi Art Pty Ltd* [2018] will hopefully act as a deterrence to further production of inauthentic art.²³ Thought should be given to giving the ACCC further resources in order to engage in comprehensive action in respect of

²³ *Australian Competition and Consumer Commission v. Birubi Art Pty Ltd* [2018] FCA 1595 (23 October 2018).

misleading and deceptive conduct relating to Indigenous art and craft. There have been a number of proposals put forward to strengthen Australian consumer law.

The ACCC has also taken action over misleading and deceptive conduct towards Indigenous communities in respect of telecommunications services. The ACCC brought action against Telstra over its unfair sales to Indigenous consumers in the Northern Territory.²⁴ Rod Sims said: ‘This case exposes extremely serious conduct which exploited social, language, literacy and cultural vulnerabilities of these Indigenous consumers.’²⁵ Reconciliation Australia revoked Telstra’s ‘elevated’ status, as a result of its conduct in this matter.²⁶ The Consumer Action Law Centre said it had helped Indigenous clients in Victoria who had faced serious issues with telecommunications providers.²⁷

An Indigenous Voice would help empower Indigenous Australians, and protect them from unfair and unconscionable conduct.

5. Trade Mark Law

²⁴ ACCC, ‘Telstra in court over unconscionable sales to Indigenous consumers’, 26 November 2020, <https://www.accc.gov.au/media-release/telstra-in-court-over-unconscionable-sales-to-indigenous-consumers>

²⁵ Ibid.

²⁶ Lorena Allam, ‘Telstra stripped of reconciliation status over ‘unfair’ sales to Aboriginal people’, *The Guardian*, 30 March 2021, https://www.theguardian.com/business/2021/mar/30/telstra-stripped-of-reconciliation-status-over-unfair-sales-to-aboriginal-people?CMP=share_btn_tw

²⁷ Stephanie Corsetti, ‘Telstra agrees to pay \$50 million fine for exploiting Indigenous consumers’, *NITV News*, 1 April 2021, <https://www.sbs.com.au/nitv/article/2021/04/01/telstra-agrees-pay-50-million-fine-exploiting-indigenous-consumers>

Australia's authenticity marks scheme – introduced for the Sydney 2000 Olympics - was a failure.²⁸ Nonetheless, trade mark law can play a useful role particularly in respect of protecting Indigenous businesses and entrepreneurs.

The Morrison Coalition Government is promising to respond to the inquiry into inauthentic Indigenous art. Minister Ken Wyatt has vowed to stamp out fake art.²⁹ He reflected: 'It really is staggering, given tourists come here wanting authentic Indigenous artwork and they assume that the artwork they are buying is genuine, when in fact they are buying a fake.'³⁰ Ken Wyatt observed: 'We'd never buy a fake Pro Hart, because we'd be outraged.'³¹ The Minister was concerned about the production of fake Indigenous art in Australia and overseas: 'Fake art is being done everywhere.'³² He lamented: 'We've even had it done here in Australia by people who are quite happy to sit down in a sweatshop environment and recreate Aboriginal artworks.'³³

For its part, the leading government intellectual property agency IP Australia has emphasized that protection of Indigenous intellectual property is a priority in its 2020–2021 Corporate

²⁸ Matthew Rimmer, 'Australian icons: Authenticity marks and identity politics' (2004) 3 *Indigenous Law Journal* 139-179.

²⁹ Anna Henderson and Sarah Collard, 'Commonwealth vows to stamp out fake Aboriginal art made in 'sweatshops'', *ABC News*, 2 September 2020, <https://www.abc.net.au/news/2020-09-02/federal-government-moves-to-protect-indigenous-art-from-fakes/12621362>

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

Plan.³⁴ IP Australia hopes to ‘improve Australia’s IP system to promote the cultural integrity and economic potential of Indigenous Knowledge.’³⁵ There is a need for IP Australia to play an active role in policing the trade marks register for any deceptive marks relating to Indigenous culture.

The Morrison Government and IP Australia are considering the option of a certification trade mark scheme anew – in light of the inquiry into fake art. There has been an academic discussion about how geographical indications may be employed to protect Indigenous linkages between place and culture.

An Indigenous voice would help ensure that Australia’s trade mark regime had better respect for Indigenous iconography.

6. Tobacco Control and Plain Packaging of Tobacco Products

The Australian Government has been a world leader in tobacco control. The Gillard Labor Federal Government passed plain packaging of tobacco products – which incidentally has been of benefit in addressing tobacco consumption in Indigenous communities.³⁶ Australia’s

³⁴ IP Australia, *Corporate Plan 2020-2021*, <https://www.ipaustralia.gov.au/corporate-plan-2020-21>

³⁵ Ibid.

³⁶ Matthew Rimmer, 'The High Court of Australia and the Marlboro Man: The Battle Over The Plain Packaging of Tobacco Products', in Tania Voon, Andrew Mitchell, and Jonathan Liberman (Ed.) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues*, London and New York: Routledge, 2014, 337-360; Matthew Rimmer (ed.), *The Plain Packaging of Tobacco Products*, Special edition of *QUT Law Review* (Vol. 17 (2)), Brisbane: QUT, 2017, <https://lr.law.qut.edu.au/issue/view/55>; Matthew Rimmer, ‘The Global Tobacco Epidemic, the Plain Packaging of Tobacco Products, and the World Trade Organization’ (2017) 17 (2) *QUT Law*

pioneering plain packaging of tobacco products has been successfully defended in the High Court of Australia; an investment tribunal; and the World Trade Organization. It was hoped by the policy-makers that plain packaging of tobacco products would not only address the tobacco epidemic in the general community – but it would also dampen the levels of smoking in Indigenous communities.³⁷

There has been new research into tobacco smoking and mortality among Aboriginal and Torres Strait Islander adults in Australia.³⁸ This new research found:

Around half of all contemporary deaths of Aboriginal and Torres Strait Islander adults aged ≥ 45 years are caused by smoking, according to this study. Over the past decade, this amounts to >10 000 preventable premature deaths. Never-smokers were around twice as likely to survive to age 75, and had over an extra decade of life expectancy, compared with current-smokers. These findings highlight the magnitude of smoking-related harms, and the urgent need to prevent smoking initiation and to support Aboriginal and Torres Strait Islander smokers to quit.³⁹

Review 131-160; and Matthew Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, the Plain Packaging of Tobacco Products and the Trans-Pacific Partnership', (2017) 7 (1) *Victoria University Law and Justice Journal* 76-93.

³⁷ Raglan Maddox, Sarah Durkin and Ray Lovett, 'Plain packaging implementation: perceptions of risk and prestige of cigarette brands among Aboriginal and Torres Strait Islander people' (2016) 40 (3) *Australian and New Zealand Journal of Public Health* 221-225.

³⁸ Katherine A Thurber, Emily Banks, Grace Joshy, Kay Soga, Alexandra Marmor, Glen Benton, Sarah L White, Sandra Eades, Raglan Maddox, Tom Calma, and Raymond Lovett, 'Tobacco smoking and mortality among Aboriginal and Torres Strait Islander adults in Australia', (2021) *International Journal of Epidemiology* <https://academic.oup.com/ije/advance-article/doi/10.1093/ije/dyaa274/6118443?login=true>

³⁹ Ibid.

ANU associate professor Raymond Lovett has observed that high rates of smoking stemmed from colonial practices of paying Aboriginal and Torres Strait Islander workers in rations, which included tobacco.⁴⁰ He commented that there was a need to promote Indigenous-specific health responses: ‘I have seen it ... where people are using those colonial process as an intervention to say: this is colonial resistance, this is a part of colonisation and we don’t want this in our community.’⁴¹

There is accordingly a need to find more funding to boost culturally appropriate smoking cessation services.⁴² Deadly Choices is a good example of an Indigenous-led public health program.⁴³ The organization notes: ‘We aim to empower Aboriginal and Torres Strait Islander peoples to make healthy choices for themselves and their families – to stop smoking, to eat good food and exercise daily.’⁴⁴ The community group observes: ‘Deadly Choices also encourages our people to access their local Community Controlled Health Service and complete an annual ‘Health Check’.’⁴⁵

⁴⁰ Calla Wahlquist, ‘Smoking causes half of Indigenous Australian deaths over 45, study shows’, *The Guardian*, 25 January 2021, <https://www.theguardian.com/australia-news/2021/jan/25/smoking-causes-half-of-indigenous-australian-deaths-over-45-study-shows>

⁴¹ Ibid.

⁴² David Thomas and Tom Calma, ‘Tackling Indigenous smoking: a good news story in Australian tobacco control’, (2020) 30 (3) *Public Health Research and Practice* <https://www.phrp.com.au/issues/september-2020-volume-30-issue-3/tackling-indigenous-smoking-a-good-news-story-in-australian-tobacco-control/>

⁴³ Deadly Choices, <https://deadlychoices.com.au/>

⁴⁴ Ibid.

⁴⁵ Ibid.

An Indigenous voice will help promote an Indigenous led public health response to tobacco control.

7. Designs Law

The work of Professor Maree Sainsbury has highlighted that there have been instances of misleading design registrations relating to Indigenous culture.⁴⁶ IP Australia needs to take action in respect of the designs register in such matters. There is an ongoing law reform process in respect of designs law. IP Australia has opportunity to consider ways and means of how Australia's design system could better support Indigenous communities. An Indigenous voice is needed to provide better guidance as to the reform of Australian designs law.

8. Confidential Information and Trade Secrets

Confidential information and trade secrets have been employed successfully in the past by Indigenous communities in Australia in disputes over Indigenous intellectual property.⁴⁷ There

⁴⁶ Maree Sainsbury, 'Indigenous Cultural Expression and Registered Designs' in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 233-249.

⁴⁷ Sarah Holcombe, 'Confidential Information and Anthropology: The Politics of the Digital Economy' in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 417-436.

is also increasing scope for the use of privacy law to protect private spheres in relation to Indigenous intellectual property.⁴⁸

In one of its inquiries into privacy, the Australian Law Reform Commission recommended that ‘The Office of the Privacy Commissioner should encourage and assist agencies and organisations to develop and publish protocols, in consultation with Indigenous groups and representatives, to address the particular privacy needs of Indigenous groups.’⁴⁹ The Australian Law Reform Commission has also recommended the creation of a statutory cause of action in respect of serious invasions of privacy. That could be useful for Indigenous communities.

9. Patent Law

There is a long history of Indigenous innovation in Australia. In the early days after Federation, David Unaipon filed patent applications in respect of his inventions.⁵⁰ The Australian patent system has expanded and evolved over the years. The recent High Court of Australia decision

⁴⁸ Bruce Baer Arnold, ‘Dignity, Trust and Identity: Private Spheres and Indigenous intellectual property’, in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 455-476.

⁴⁹ Australian Law Reform Commission, ‘Privacy Protocols for Indigenous Groups’ in *Australian Privacy Law and Practice*, ALRC Report 108, 12 August 2008, <https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/7-privacy-beyond-the-individual/privacy-protocols-for-indigenous-groups/>

⁵⁰ Matthew Rimmer, ‘The Legacy of David Unaipon’, in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, xxi-xxvii.

in *Myriad* is an important precedent in respect of patentable subject matter in Australia.⁵¹ There is a need for IP Australia to take into account Indigenous knowledge as prior art when making determinations in respect of patent threshold standards – such as novelty, inventive step, and utility. There has been considerable policy discussion about the relationship between patent law, disclosure, informed consent and benefit-sharing in relation to Indigenous genetic resources.⁵² There does needed to be a stronger Indigenous Voice in respect of policy-making in respect of patent law, practice, and policy.

10. Access to Essential Medicines

The coronavirus public health crisis has also raised larger questions about Indigenous rights, and Indigenous intellectual property (particularly in terms of access to essential medicines). As Caroline Kell has noted, an Aboriginal led-approach was critical to a successful approach to coronavirus safety.⁵³ An Indigenous voice would also be helpful in addressing matters around public health and access to essential medicines.

⁵¹ *D'Arcy v Myriad Genetics Inc* [2015] HCA 35 (7 October 2015). Matthew Rimmer, 'An Exorbitant Monopoly: The High Court of Australia, Myriad Genetics, and Gene Patents' in Duncan Matthews, Herbert Zech (Eds.) *Research Handbook on Intellectual Property and the Life Sciences*. Edward Elgar, Cheltenham (UK) and Northampton (Mass.), June 2017, 56-103.

⁵² Matthew Rimmer, 'The Genographic Project: Traditional Knowledge and Population Genetics' (2007) 11 (2) *Australian Indigenous Law Review* 33-55.

⁵³ Caroline Kell, 'An Aboriginal-led approach saved communities from Covid. Now it's time to tackle mental health', *The Guardian*, 12 November 2020, <https://www.theguardian.com/commentisfree/2020/nov/12/an-aboriginal-led-approach-saved-communities-from-covid-now-its-time-to-tackle-mental-health>

11. Plant Breeders' Rights

Much like in the patent regime, IP Australia needs to take into account Indigenous knowledge in respect of determinations of distinctiveness, uniformity, and stability, when assessing plant breeders' rights applications.⁵⁴ An Indigenous Voice would

12. Access to Genetic Resources

Australia has a fragmented federal and state and territory system of regimes in respect of access to genetic resources.⁵⁵ There is a lack of consistency and harmony between the systems – particularly in respect of the treatment of Traditional Knowledge and Indigenous intellectual property.⁵⁶ There is a need to ensure that benefits are passed onto Indigenous communities through the biodiscovery regimes – across the Federal Government, States, and Territories.

The Federal access to genetic resources scheme does make reference to native title rights; but only provides limited remedies for non-compliance with the regime. The Queensland access to genetic resources regime has been recently revised to provide stronger protection of traditional knowledge.⁵⁷

⁵⁴ Matthew Rimmer, 'Blame It On Rio: Biodiscovery, Native Title, And Traditional Knowledge' (2003) 7 *The Southern Cross University Law Review* 1-49.

⁵⁵ Department of Agriculture, Water, and the Environment, Australia's Biological Resources, Australian Government, 2021 <https://www.environment.gov.au/topics/science-and-research/australias-biological-resources>

⁵⁶ Matthew Rimmer, 'Blame It On Rio: Biodiscovery, Native Title, And Traditional Knowledge' (2003) 7 *The Southern Cross University Law Review* 1-49.

⁵⁷ David Jefferson, Daniel Robinson, David Claudie, Jocelyn Bosse, and Margaret Raven, 'Australia's plants and animals have long been used without Indigenous consent. Now Queensland has taken a stand', *The*

There have been some successful schemes, with Indigenous rangers protecting biodiversity in Australia.⁵⁸

The interim Samuel Review has recommended that there is a need to improve the protection of traditional knowledge and Indigenous intellectual property in the context of environmental laws for the protection of biodiversity and conservation.⁵⁹ Chapter 2 focuses upon Indigenous culture and heritage. In his press statement, Graeme Samuel emphasised that ‘the *EPBC Act* had failed to fulfil its objectives as they relate to Indigenous Australians.’⁶⁰ He commented: ‘Sustained engagement with Indigenous Australians is needed to properly co-design reforms that are important to them.’⁶¹ Samuel observed: ‘Much more needs to be done to respectfully incorporate valuable Traditional Knowledge of Country in how the environment is managed.’⁶²

Conversation, 16 September 2020, <https://theconversation.com/australias-plants-and-animals-have-long-been-used-without-indigenous-consent-now-queensland-has-taken-a-stand-144813>

⁵⁸ Matthew Rimmer, 'The World Indigenous Network: Rio+20, Intellectual Property, Sustainable Development, and the Future We Want', in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 106-130.

⁵⁹ Graeme Samuel, *The Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, Canberra: Australian Government, June 2020, <https://epbcactreview.environment.gov.au/resources/interim-report>

⁶⁰ Graeme Samuel, ‘Release of the Interim Report for the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*’, Press Release, 20 July 2020, <https://epbcactreview.environment.gov.au/news/media-statement-professor-graeme-samuel-ac-releases-interim-report>

⁶¹ Ibid.

⁶² Ibid.

He concluded: 'Indigenous Australians seek, and are entitled to expect, greater protection of their heritage'.⁶³

The final report of Graeme Samuel retained these key recommendations about the need for further law reform in respect of Indigenous knowledge and biodiversity.⁶⁴ The report concluded that the *EPBC Act* has failed to fulfil its objectives as they relate to the role of Indigenous Australians. A recommended National Environmental Standard for Indigenous engagement and participation in decision-making should be adopted. The report found that the suite of national-level laws that protect Indigenous cultural heritage are unsatisfactory and out of step with community expectations. Graeme Samuel concluded that such laws needed comprehensive review and reform.

The presence of an Indigenous voice would improve the discussion over access to genetic resources.

13. Cultural Heritage

In respect of cultural heritage, there has been some good progress in respect of the repatriation of Indigenous ancestral remains.⁶⁵

⁶³ Ibid.

⁶⁴ Graeme Samuel, *Final Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, Canberra: Australian Government, October 2020, <https://epbcactreview.environment.gov.au/resources/final-report>

⁶⁵ Matthew Rimmer, 'Travelling Bones: The Repatriation of Indigenous Remains', in Susanne Berthier-Foglar, Sheila Collingwood-Whittick and Sandrine Tolazzi (Eds.) *Biomapping Indigenous Peoples: Towards an*

There has been issues in terms of the protection of Indigenous cultural heritage in Australia.

In 2016, Victoria passed the *Aboriginal Heritage Amendment Act 2016* (Vic) to provide protection for tangible and intangible cultural heritage. Under the new provisions in the act, a group of traditional owners or native title holders can apply to have a piece of intangible heritage included on the Aboriginal heritage register.

Aboriginal Intangible Heritage means any knowledge of/or expression of Aboriginal tradition, including: oral and expressions (including language, songs and stories); performing arts (vocal and instrumental music, dance and performance); social practices, rituals and festive events; knowledge and practices concerning nature and the universe (including environmental and ecological knowledge) and/or visual arts and craftsmanship (skills and knowledge involved in their production). The legislation then makes it an offence to knowingly use any registered Aboriginal intangible heritage for commercial purposes without consent from the ownership group, with penalties of up to \$280,000 for an individual or \$1.5m for a corporation. It will be worthwhile monitoring this regime in operation. If this system is effective, it could be a useful model to emulate by other Australian Governments.

The 2020 controversy over Rio Tinto's destruction of cultural heritage in Western Australia has led to calls for the reform of Federal, State, and Territory laws, impinging upon Indigenous

Understanding of the Issues, Amsterdam/New York, NY: Rodopi, 2012, 369-390; and AIATSIS, *Return of Cultural Heritage Report 2018-2020*, Canberra: AIATSIS, 2020, <https://aiatsis.gov.au/research/research-themes/culture-and-heritage/return-cultural-heritage>

cultural heritage and Indigenous intellectual property.⁶⁶ There has been fears that even significant law reform may not be enough to protect cultural heritage.⁶⁷ There has been calls for cultural heritage protection laws to acknowledge the complexities of Aboriginal law.⁶⁸

14. Native Title

The native title regime does not extend to intellectual property rights at present.⁶⁹ The majority of the High Court of Australia refused to recognise the linkage between native title rights and traditional knowledge in the case of *Ward v Western Australia*.⁷⁰

In its 2015 inquiry into the native title regime, the Australian Law Reform Commission reconsidered the relationship between intellectual property and native title:

The decision in *Ward* HCA, and its approach to cultural knowledge, predates key international developments, including UNDRIP. Contemporary understanding of connection to country is being

⁶⁶ Lorena Allam, Ben Butler, and Calla Wahlquist, 'Rio Tinto: Why the Sacking of Three Executives Isn't Enough for Mining Investors', *The Guardian*, 12 September 2020, <https://www.theguardian.com/business/2020/sep/12/indigenous-leaders-say-rio-tinto-dumping-executives-must-be-beginning-of-genuine-transformation>

⁶⁷ Keira Jenkins, 'Law Reforms May Not Be Enough to "Protect What's Left" of Cultural Heritage', *NITV News*, 18 August 2020, <https://www.sbs.com.au/nitv/article/2020/08/18/law-reforms-may-not-be-enough-protect-whats-left-cultural-heritage>

⁶⁸ Sarah Collard, 'Calls for cultural heritage protection laws to acknowledge complexities of Aboriginal lore', *NITV News*, 2 March 2021, <https://www.sbs.com.au/nitv/article/2021/03/02/calls-cultural-heritage-protection-laws-acknowledge-complexities-aboriginal-lore>

⁶⁹ *Western Australia v. Ward* [2002] HCA 28; 213 CLR 1.

⁷⁰ *Western Australia v. Ward* [2002] HCA 28; 213 CLR 1.

shaped by a growing body of academic and anthropological literature which is not reflected in the current state of the law.⁷¹

Terri Janke has pointed to a ‘paradox’ where cultural material is used in native title claims as evidence of continuing connection, but where cultural knowledge is not recognised as a native title right.

In summary, the ALRC has raised the potential for a native title right to protect cultural knowledge and for cultural knowledge to be considered in relation to rights to be exercised for any purpose, including commercial purposes. The ALRC does not have a concluded view on whether this would be a desirable development, but has identified the need for an in-depth inquiry that can assess the legal and policy issues.

Native title law continues to evolve. In the 2016 Timber Creek case, the High Court of Australia has recognized that the loss of native title rights could include compensation for the loss of cultural attachment to the land.⁷²

15. Climate Change

⁷¹ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth) [2015] ALRC 126, 262-270.

⁷² Avani Dias and Jessicah Mendes, ‘Timber Creek Aboriginal custodians win historic \$3.3 million payout for native title rights loss’, *ABC News*, 24 August 2016, <https://www.abc.net.au/news/2016-08-24/timber-creek-custodians-payout-for-native-titles-rights-loss/7779532>

There are increasing challenges faced by Indigenous communities in respect of biodiversity and climate change.⁷³

Australia's Indigenous communities have been particularly vulnerable to the impacts of climate change. A group called the Torres Strait 8 – consisting of 8 Indigenous Torres Strait Islanders - has brought a case to the United Nations Human Rights Committee, accusing the Australian Government of violating human rights by not adequately engaging in climate mitigation or climate adaptation.⁷⁴ The action has been supported by the region's land and sea council Gur A Baradharaw Kod (GBK) and represented by lawyers with leading environmental law non-profit ClientEarth. One of the complainants, Kabay Tamu, said:

We're currently seeing the effects of climate change on our islands daily, with rising seas, tidal surges, coastal erosion and inundation of our communities. We are seeing this effect on our land and on the social and emotional wellbeing of our communities who practice culture and traditions.⁷⁵

⁷³ Matthew Rimmer, 'Intellectual Property, Indigenous Knowledge, and Climate Change', in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 382-414; and Matthew Rimmer, 'The Alliance of Small Island States: Intellectual Property, Cultural Heritage, and Climate Change', in Christoph Antons and William Logan (ed.) *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Abingdon (Oxon) and New York: Routledge, 2018, 102-132.

⁷⁴ ClientEarth, 'Climate threatened Torres Strait Islanders bring human rights claim against Australia', Press Release, 12 May 2019, <https://www.clientearth.org/latest/press-office/press/climate-threatened-torres-strait-islanders-bring-human-rights-claim-against-australia/>

⁷⁵ Ibid.

UN Special Rapporteur on Human Rights and the Environment, Professor David Boyd, and his predecessor, Professor John Knox, have filed a joint amicus brief for the Torres Strait Islanders with the Human Rights Committee.⁷⁶

An Indigenous Voice would help ensure that Australia's Indigenous communities are properly represented and heard in debates over climate action.

16. Voice, Treaty, Truth

Professor Megan Davis has stressed that the *Uluru Statement from the Heart* embraces the trinity of a Voice, a Treaty, and a process of truth-telling.⁷⁷ She has emphasized that such concepts should be inter-linked – and not separated or disassociated.

The *Treaty of Waitangi* in New Zealand has certainly provided a framework to consider Indigenous rights. Moreover, the Waitangi Tribunal has offered a forum to consider a wide range of legal issues associated with the relationship between the Crown and Maori communities. The Waitangi Tribunal handed down a landmark decision, which provided

⁷⁶ Marian Faa, 'Torres Strait Islander complaint against climate change inaction wins backing of UN legal experts', *Pacific Beat*, ABC News, 11 December 2020, <https://www.abc.net.au/news/2020-12-11/torres-strait-islander-complaint-against-climate-change-inaction/12972926>

⁷⁷ Universities and the Uluru Statement - 23 March 2021
https://us02web.zoom.us/webinar/register/WN_w44AROPBSreD1igL1rIKcw?t=1616375719331

recognition of Indigenous rights in respect of the environment, access to genetic resources, and intellectual property.⁷⁸

In his recent book on the *Uluru Statement from the Heart* 2017, Henry Reynolds highlights the importance of truth-telling.⁷⁹ He notes: 'Truth-telling is the ultimate gesture of respect'.⁸⁰ Reynolds elaborates that truth-telling also 'indicates a willingness to listen, to learn and to concede that the stories should be heard of those who have been victims of great wrongs'.⁸¹

Conclusion

This submission has highlighted how a First Nations Voice to the Australian Parliament would improve decision-making in respect of Indigenous rights – particularly in the diverse field of Indigenous intellectual property (which spans copyright law, trademark law, designs law, patent law, trade secrets, and various other sui generis forms of intellectual property).

⁷⁸ Wai 262 Claim, <https://waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/> and Fleur Adcock, 'Diluted Control: A Critical Analysis of the Wai 262 Report on Maori Traditional Knowledge and Culture' in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 497-516.

⁷⁹ Henry Reynolds, *Truth-telling - History, Sovereignty and the Uluru Statement*, Sydney: NewSouth Publishing, 2021.

⁸⁰ Ibid.

⁸¹ Ibid.

Professor Bronwyn Fredericks from the University of Queensland has reflected upon the significance of the *Uluru Statement from the Heart* 2017.⁸² She reflects:

The Statement calls for a “First Nations Voice” to be enshrined in the constitution to secure Indigenous peoples’ involvement in political decisions. This would require parliament to legislate a representative body to constitutionally guarantee an Indigenous Voice. Constitutional protection is vital, for as the song reminds us, not only promises but voices can and historically have disappeared just like writing in the sand.⁸³

Fredericks laments that ‘there has been much talk, misinformation, and fear mongering about how such a Voice would operate.’ She observes that there has often been misrepresentation of the concept of an Indigenous Voice to Parliament: ‘Public, political, and media discourses have played a role in hijacking conversations equating an Indigenous Voice to Parliament to the establishment of a new “third chamber”, with executive and legislative powers’.⁸⁴ Fredericks maintains that the proposed Voice never sought voting or veto powers, but rather seeks to operate as an advisory body whose representatives would inform and contribute to discussions as means to develop effective and culturally appropriate policy.’⁸⁵ She envisaged: ‘The Voice would sit alongside Parliament but be free of any political allegiances.’⁸⁶ Fredericks concluded:

⁸² Bronwyn Fredericks, ‘An Indigenous Voice: The Time for Action is now’, *West Ender*, 23 March 2021, <https://westender.com.au/an-indigenous-voice-the-time-for-action-is-now/>

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

‘The *Uluru Statement from the Heart* and a constitutionally enshrined Indigenous voice to Parliament is a gift. A gift we owe to all our ancestors, and to our descendants.’⁸⁷

Professor Megan Davis from the University of New South Wales has stressed: ‘It’s time to take a Voice to Parliament to the Australian people, to start the work to hold a referendum.’⁸⁸ She notes: ‘Now is the time to walk together and address the unfinished business of this nation.’⁸⁹ Davis suggests that the *Uluru Statement from the Heart* is ‘strategic roadmap to peace.’⁹⁰ She observes that ‘The public wants to move towards a better Australia – a place where the voices of Aboriginal and Torres Strait Islander people are heard and are central to Australian life.’⁹¹ Davis concludes: ‘Australians want a First Nations Voice to Parliament, protected by the constitution.’⁹²

⁸⁷ Ibid.

⁸⁸ Adam Phelan, ‘It’s time to walk together towards a referendum’: Indigenous Law Centre’, UNSW, Press Room, 2 March 2021, <https://newsroom.unsw.edu.au/news/business-law/its-time-walk-together-towards-referendum-indigenous-law-centre>

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

Biography

Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Business and Law, at the Queensland University of Technology (QUT). He has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, Indigenous Intellectual Property, and intellectual property and trade. He is undertaking research on intellectual property and 3D printing; the regulation of robotics and artificial intelligence; and intellectual property and public health (particularly looking at the coronavirus COVID-19). His work is archived at [QUT ePrints](#), [SSRN Abstracts](#), [Bepress Selected Works](#), and [Open Science Framework](#).

Rimmer is a chief investigator of the NHMRC Centre of Research Excellence on Achieving the Tobacco Endgame (CREATE) (2020-2025). He is a member of the QUT Centre for the Digital Economy – which is part of the QUT Centre for Future Enterprise; the QUT Digital Media Research Centre (QUT DMRC), the QUT Centre for Behavioural Economics, Society, and Technology (QUT BEST); the QUT Centre for Justice; the QUT Australian Centre for Health Law Research (QUT ACHLR); and the QUT Centre for Clean Energy Technologies and Processes (which is based in the Institute for Future Environments). Rimmer was previously the leader of the QUT Intellectual Property and Innovation Law Research Program from 2015-2020 (QUT IPIL).

Rimmer has also a research interest in Indigenous intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics. Rimmer

is the editor of the collection, [*Indigenous Intellectual Property: A Handbook of Contemporary Research*](#) (Edward Elgar, 2015). He has focused upon the adoption and the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* 2007.