

Managing Indigenous cultural and intellectual property in Indigenous business

Terri Janke

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Terri Janke and Company

Our vision is to empower Indigenous people
by providing legal solutions to complex matters
in a practice that is sensitive to cultural protocol



Yumbulul and the \$10 note



- ‘Australian’s copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.’ – Justice French (1991)

Intellectual property

IP is 'the property of your mind or intellect.'

- An invention
- Trade mark
- Original design
- Practical application of a good idea

Intellectual property laws

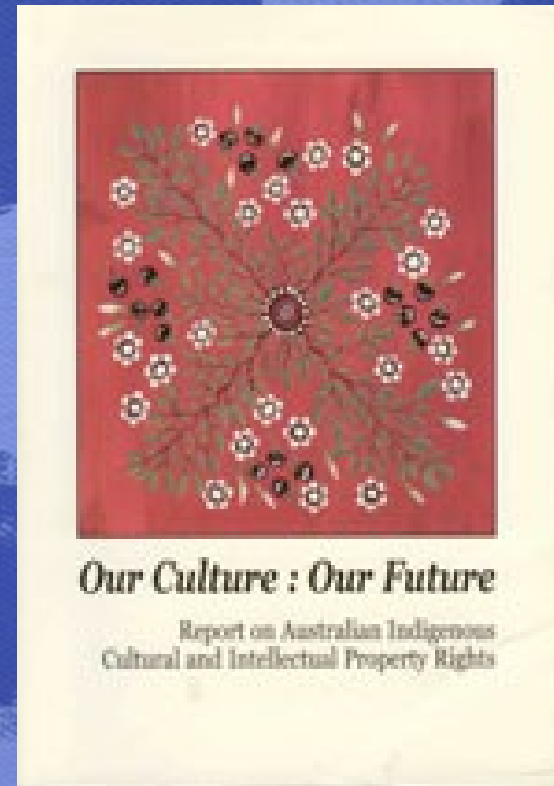
- Copyright, patents, plant breeders rights, trade marks, registered designs
- Products of the mind – expressions protected not the form
- Rights are limited
- Economic rights primarily
- Focus on individual ownership

Indigenous customary laws

- Knowledge and cultural expression both tangible and intangible are interconnected
- Oral and performance based, passed on from generation to generation
- Rights last forever
- Cultural rights
- Communal ownership

Our Culture Our Future (1999)

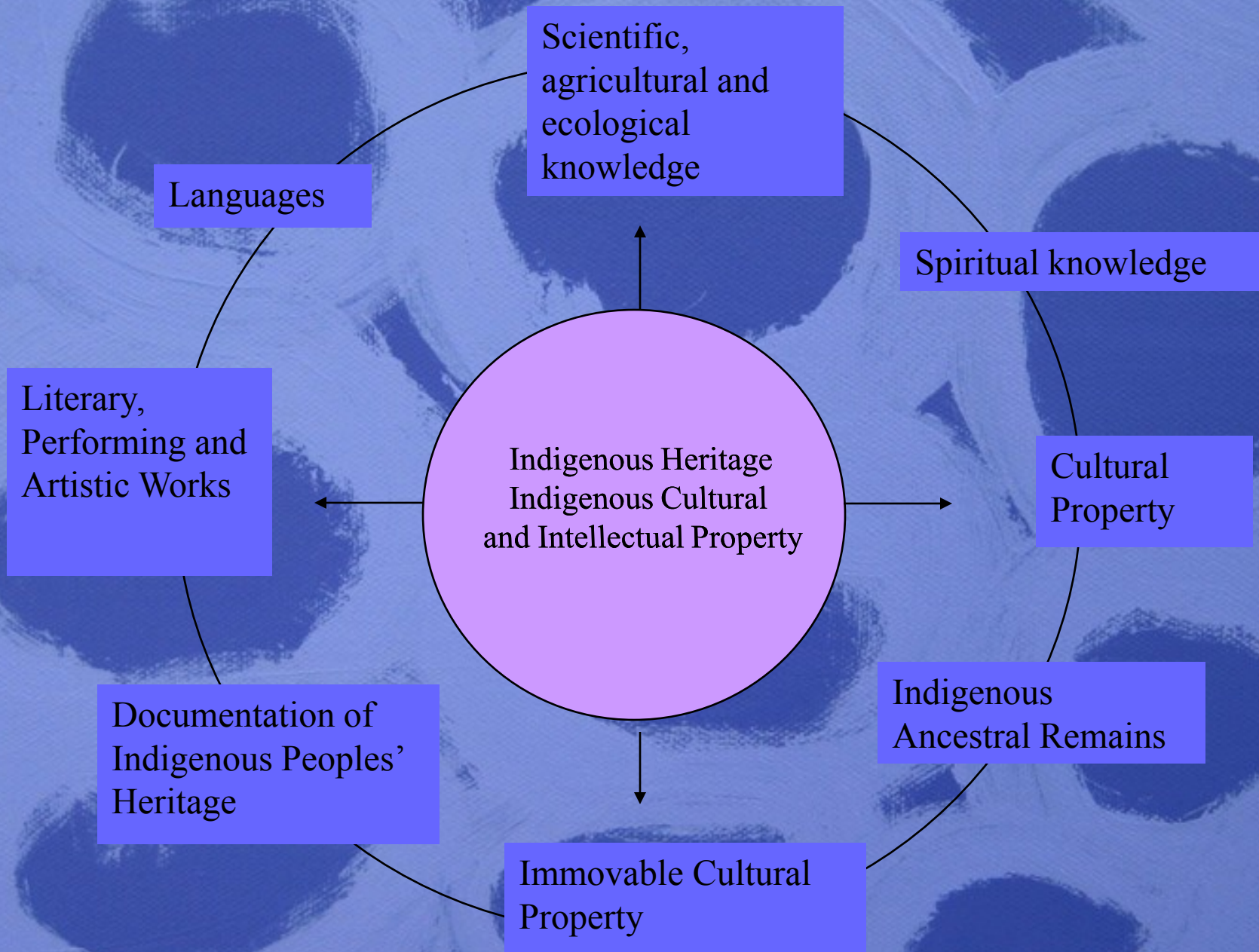
- 1996 – 1999 – commissioned project
- Report on Indigenous cultural and intellectual property rights.



Indigenous cultural and intellectual property

Indigenous Cultural and intellectual property is Indigenous peoples' rights to their heritage.

“The heritage of Indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or territory.”



Our Culture Our Future

Indigenous Cultural & Intellectual Property Rights

- Prior informed consent
- Cultural integrity: prevent derogatory use, Maintain secrecy and cultural context
- Attribution
- Benefit sharing including from commercial use

Issues for protection of Indigenous cultural and intellectual property

- Material form requirement
- Expression is protected not the underlying idea
- Limited duration for protection in IP laws
- Protects economic rights of Individual authors/creators
- No communal rights for communities

Our Culture Our Future

Indigenous Cultural & Intellectual Property Rights

115 recommendations including:

- New laws (sui generis)
- Amendments to current law
- Protocols
- National Indigenous Cultural Authority

Mapping a strategy for protection

Contract

1. Develop policies and laws
2. Use of available IP tools and other measures
3. Developing capacity to implement, manage and enforce

Intellectual Property

Protocols

Declaration on the rights of Indigenous people

Article 31 states:

- 1. 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.**
- 2. In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.**

Convention on Biological Diversity

- **Article 8(j)**- encourages member states to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities...and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the **equitable sharing of the benefits** arising from the utilization of such knowledge innovations and practices.”

World Intellectual Property Organisation

WIPO Inter-Government Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for:

- Access to genetic resources and benefit sharing;
- the protection of traditional knowledge, innovations and creativity; and
- the protection of expressions of folklore.

Two important draft guidelines:-

1. traditional cultural expression and
2. traditional knowledge.

Pacific Model Law 2002

- Provides traditional cultural rights over traditional knowledge and expression of culture.
- The prior and informed consent of the traditional owners is required to reproduce, publish, perform, display, make available on line and electronically transmit, traditional knowledge or expressions of culture.
- Six Pacific countries are developing laws – Fiji, Palau, Cook Islands, Papua New Guinea, Vanuatu and Kiribati.

Domestic standard setting

- National Indigenous Arts Code of Conduct
- Protocols – Australia Council Protocols, Film, AIATSIS, Desert K CRC, Cultural institutions

Why do we need a National Indigenous Cultural Authority?

1. **EDUCATION:** Educate Indigenous artists, creators and communities on IP and ICIP and awareness raising of value of ICIP generally
2. **CAPACITY BUILDING:** developing IP and knowledge management and negotiation skills
3. **PRIOR INFORMED CONSENT:** to ensure that the use of Indigenous cultural and intellectual property (in terms of tradition-based creativity and innovation) takes place with the prior informed consent of the traditional owners
4. **BENEFIT SHARING:** to ensure the sharing of benefits derived from the use of ICIP with Indigenous people
5. **ADVOCACY:** A collective Indigenous voice to promote ICIP rights – currently there is no independent national body promotes ICIP rights
6. **INVIGORATE CULTURAL PRODUCTION:** to permit tradition-based creativity and innovation.

How can a NICA make a difference?

1. A rights tracking database
2. Agreements templates and standards
3. Protocols
4. Dispute resolution
5. A distinctive trade mark

A distinctive trade mark

- Consumers want products that are produced ethically
- Licensing of trade marks on set terms and conditions
- Enforcement by NICA



Protocols

- To recognise the diversity of cultural groups and communities
- Cater for the different industries and projects
- Interlink with industry such as arts, culture and science and technological industries

Conclusion: it's time to take the lead!

- A National Indigenous Cultural Authority would:
 - promote Indigenous culture
 - facilitate negotiations
 - distribute income to Indigenous stakeholders
 - to develop standards for appropriate use including royalties, cultural integrity and attribution.
- The benefits to Australia:
 - encourage Indigenous artistic and cultural development
 - create jobs
 - share the benefits
 - Maintain and revitalise Indigenous culture.