

VICTORIA LEADS THE WAY

IN AUSTRALIAN ABORIGINAL INTANGIBLE HERITAGE PROTECTION

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NEW ABORIGINAL HERITAGE LAWS CAME INTO force in Victoria on the 1 August 2016. The *Aboriginal Heritage Amendment Act 2016 (Vic)* establishes changes to the *Aboriginal Heritage Act 2006 (Vic)* (the Act). The amendments to the Act mark the first protection of Indigenous intangible heritage in Australia.

A milestone in Australia's recognition of Indigenous intangible heritage, the amendments to the Act form part of a broader shift toward the protection of intangible cultural heritage (ICH) occurring globally. Following the United Nations Educational, Scientific and Cultural Organisation Convention for the Safeguarding of Intangible Heritage in 2003 (UNESCO Convention), many countries have implemented programs, funding and support to protect ICH. Whilst heralded as an opportunity to foster great cultural diversity, inclusion and economic benefits for the communities involved, ICH protection incites discussion concerning its implementation.¹ The new ICH protection in Victoria provokes discussion for the benefits it could bring to Aboriginal communities in Victoria but also raises questions about the detail of its application.

Widening definitions

UNESCO defines ICH as encompassing the various 'practices, representations, expressions, knowledge, [and] skills' that communities, groups and individuals recognise as part of their cultural heritage, laws and political traditions.² This may include oral traditions and expressions including language, performing arts, social practices, rituals and festive events as well as knowledge and practices about nature, the universe and traditional craftsmanship.

The introduction of ICH legislation in Victoria is significant because it challenges historical understandings of Indigenous heritage in Australia. In the 1960s and 70s the protection of Indigenous heritage was considered a process of 'conserving relics.'³ This language reflected the once dominant nineteenth century perception of Aboriginal people as a 'dying race' and favoured the collection of tangible heritage in Victoria as an archaeological pursuit. The term 'relic' denied the continuing connection Aboriginal people had with their heritage, tradition and culture, as the use of the past tense seemed to consign Aboriginal cultural practice to the past. The introduction of ICH into Victorian legislation is important because in addition to reflecting a change in attitude toward Aboriginal ICH, it signifies a shift in how the Victorian government will view and protect ICH.

Developing understandings

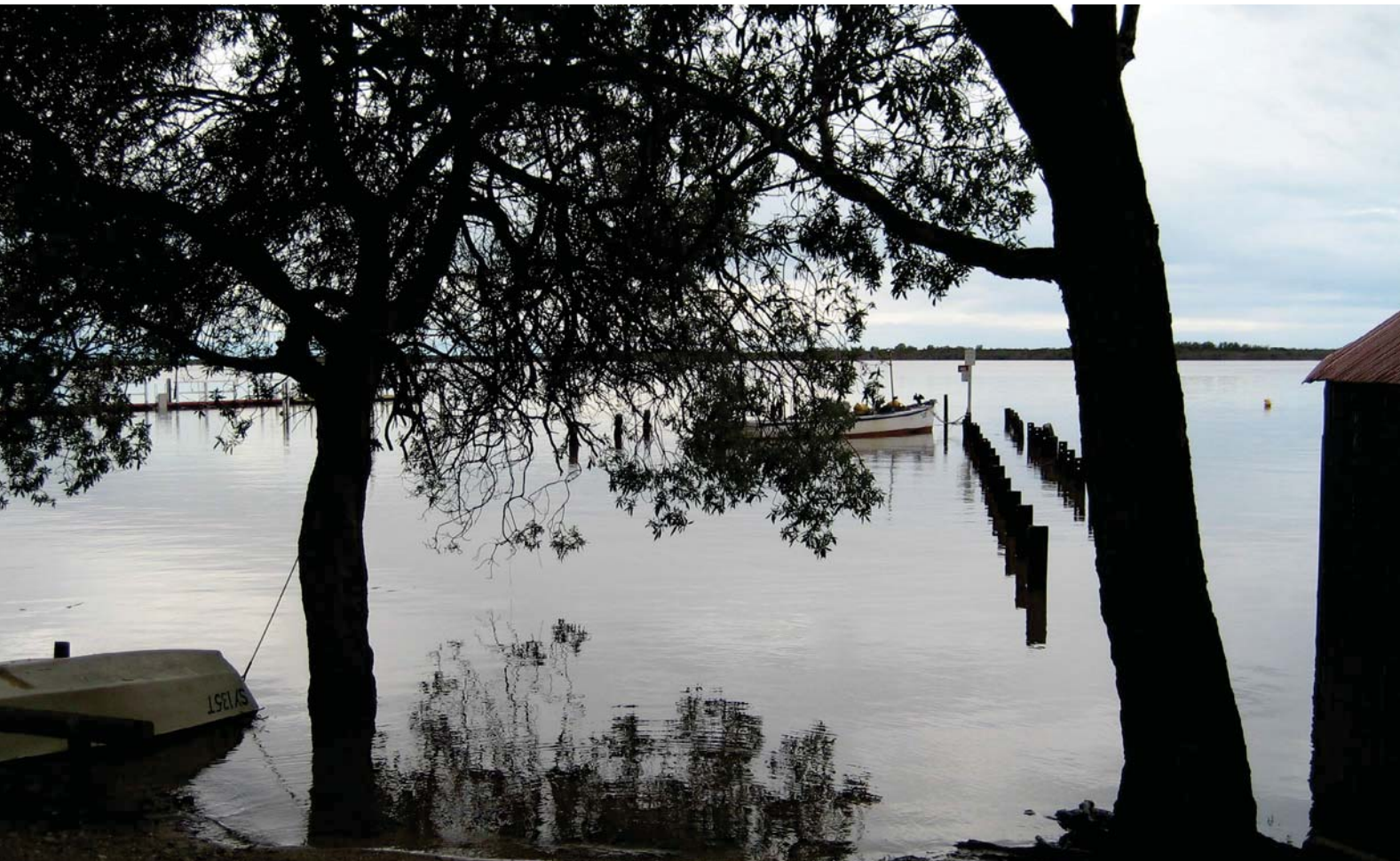
Australian archaeologist and anthropologist Heather Builtth describes ICH in Victoria as the 'spirit of the country', extending the definition of the intangible beyond languages or songs to other cultural knowledge, such as familial oral histories.⁴ Mick Harding, a Taungurung person and chairman of the Victorian Aboriginal Heritage Council, reported to *the Guardian* that ICH is, 'the space between what is tangible. It is the stories that mothers share with their children, that elders share with groups, the special skills, the cultural stories, the dreamings.'⁵

ICH is inseparable from tangible heritage. The tangible and intangible 'interact and mutually construct one another', such that an understanding of the intangible imbues deeper understandings to tangible objects and places.⁶ Appreciation of ICH permits

the development of a more nuanced depiction of culture and heritage that recognises connection between places, practices and peoples.

For Aboriginal people in Victoria, for instance, scarred trees are an important form of heritage where both the tangible presence of the trees and the intangible knowledge of their use are central. Aboriginal scarred trees are trees scarred by the deliberate removal of bark or wood to make canoes, tools, shelters or for spiritual purposes. For traditional owners carved trees are 'history books' that hold a position of great significance for many Aboriginal people in Victoria.⁷

The knowledge about how to use the trees (the intangible) provides a deeper understanding of the tree itself (the tangible). Hence, when considered in conjunction with tangible forms of heritage, ICH 'gives a richer and more complete meaning to heritage as a whole.'⁸



Gunaikurnai story site, Gippsland, Vic.
Credit: Belinda Burbidge.

Legislative changes

Although Australia did not ratify the UNESCO Convention, Victoria (Australia) is the second jurisdiction in a Commonwealth country to legislate to protect ICH, following the province of Quebec in Canada.

In Victoria, under the new provisions, ICH is focused on Aboriginal heritage. Traditional owners via a Registered Aboriginal Party (RAP), registered native title holders or a traditional owner group entity can apply to record ICH on the Aboriginal heritage register (*Aboriginal Heritage Act 2006* (Vic), ss 79c, 79d). The legislation also provides for the registration of agreements between traditional owners and other stakeholders. These agreements will enable traditional owners to negotiate and make decisions about the management, protection, development and commercial use of their ICH by others (*Aboriginal Heritage Act 2006* (Vic), ss 79c, 79d).

Penalty clauses

The changes to the Victorian legislation make it an offence to knowingly use any registered Aboriginal ICH for commercial purposes without consent from the traditional owners, with a fine of up to \$280,000 for individuals and \$1.5 million for corporations who do not comply with this section of the Act.

This section also states a person must not 'recklessly use any registered Aboriginal intangible heritage for commercial purposes without the consent of the relevant registered Aboriginal party, registered native title holder or traditional owner group entity' (*Aboriginal Heritage Act 2006* (Vic), s 79g(2)). Fines for this penalty are up to \$187,000 for individuals and just under \$1 million for corporations.

These penalty clauses are important because they offer protection to Aboriginal cultural heritage in areas where the tangible heritage,

such as the site or object, has been destroyed by colonial processes and only the intangible remains.

The penalty clauses are also significant in filling the gaps within intellectual property legislation, in providing new protections for Aboriginal groups against the appropriation of their cultural traditions, practices and knowledge by external groups. Matthew Storey, the current CEO of Native Title Services Victoria explains that the penalty clauses, 'underscore recognition that while AIH [Aboriginal Intangible Heritage] 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.' In contrast to tangible heritage legislation in Victoria, the new ICH provisions 'facilitates, indeed encourages, economic exploitation of ICH' by traditional owner groups.⁹

Commercial and economic development

ICH protection legislation provides individuals and groups the opportunity to combine cultural heritage (including intellectual property rights) protection with commercial development. Such commercial opportunities enable individuals and groups to develop culturally sensitive ways to promote their ICH whilst further providing job opportunities and positive economic development for their communities.

In Quebec, ICH commercial ventures have already begun with the development of economuseums. Economuseums are spaces where visitors can meet and watch artisans at work and then purchase their products.¹⁰ They have become popular tourist destinations and are marketed as an authentic opportunity to learn about different cultures, histories and traditions. As 'heritage that earns a living' economuseums in Quebec have

combined annual revenue of 32 million dollars and attract over 600,000 visitors a year.¹¹

The amendments to the Victorian Act offer the potential for the development of similar commercial projects for Aboriginal groups within Victoria.

Potential issues

Despite the amendments to the Victorian *Aboriginal Heritage Act* seeming overwhelmingly positive for Aboriginal communities, certain details regarding how the legislation will be enforced and the impact this may have upon Aboriginal communities are unclear. In particular, the ICH legislation raises questions about its potential for increasing existing inequality and conflict between Aboriginal groups in Victoria.

Will the legislation cause further disparities between Aboriginal groups?

Whilst some Aboriginal communities have people with the skills and time to go through the process of registering ICH through the Victorian register, others who are equally knowledgeable about country and culture may not be presently in a position to take up this opportunity. In many cases, the divisive nature of the native title process in Victoria has caused long-standing divisions, not only with the broader community, but also within and between family groups that could impact upon their present ability to collectively navigate the management of their ICH. This may mean registered ICH may ultimately be clustered in certain areas and give the false impression that areas without conspicuous ICH management are areas where ICH no longer exists. As registered ICH can bring with it increased visibility and tourism, 'emphasising the heritage of one group at the expense of other groups reinforces the feelings of superiority of the dominant group,

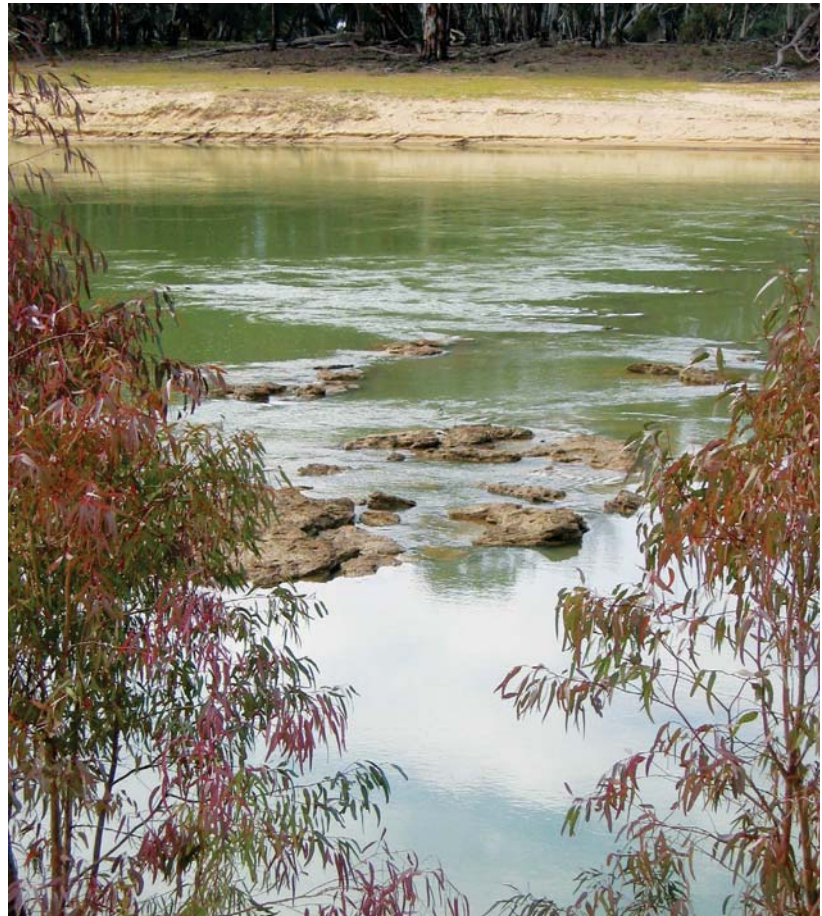
and those of inferiority of the other groups.’¹² This could potentially exacerbate existing disparities between different Aboriginal groups in Victoria by legitimising rights to ICH for some Traditional Owner groups at the expense of their less organisationally capable neighbours.

Accounting for change

Another consideration for ICH protection is how to ‘safeguard and manage a heritage that is mutable and part of ‘living culture’ without fossilising, freezing or trivialising it.’¹³ If a particular practice or custom has changed over time, which form should be recorded within inventories or registers – the original traditional form or that currently practiced? This challenge presents an opportunity for cross-cultural comparison as it is an ongoing issue faced by people throughout the world. For instance, in South Korea’s approach to ICH there are two schools of thought:

1) *Those who proclaim the traditional form of ICH must be the one recorded and maintained.* This is the view held the Cultural Heritage Administration in South Korea which is focused on protecting the most original form of ICH. Across a number of Asian countries, including Korea, the protection of ICH is a response to globalisation and mass urbanisation, which are viewed as threats to a distinct cultural identity and heritage.¹⁴ As ICH protection was introduced partly to strengthen South Korean national identity, the traditional form of ICH is preferred as it is considered the most authentic with the least influence from external global forces.

2) *Those who believe ICH protection should account for change.* This school of thought argues that the lack of recognition and appreciation for the dynamic and fluid nature of ICH will result in a drop of public interest as ICH becomes less accessible and applicable to modern life. In order to prevent this from happening, it is thought the



public performance of ICH should embody changing social conditions, demonstrating how ICH adapts to varying historical, social and economic contexts.¹⁵

This conflict has led to debate in South Korea about how ICH should be protected and recorded to account for change. It has also led to discussion over whether ICH should be modified for the tourist market and, if so, how this can be done whilst also maintaining authenticity.¹⁶ The South Korean experience highlights a significant issue about how ICH protection should account for the adaptation of cultural practices over time. The ability to commodify ICH can provoke tensions between the agency of traditional owner groups to adapt cultural knowledge and practice, and profit from its commodification and, on the other hand, the desire of government bodies for a fixed definition of ‘traditional’ to implement effective legislation.

The examples above provide a glimpse into the complexities arising from the implementation of ICH legislation in Victoria. Furthermore, as the South Korean and Canadian examples illustrate, the introduction of ICH protection and recognition has provided Indigenous communities across the world with the opportunity to protect, share and promote their cultural knowledge and practices. Additionally, as also discussed, the commodification of ICH can have economic and social benefits for the communities involved. The changes to the Victorian Aboriginal heritage legislation are an important development in the recognition for ICH in Australia that may potentially be beneficial and empowering for Aboriginal communities in Victoria. How the Victorian situation will unfold and, indeed, how the rest of Australia will respond to the growing demand to protect ICH is yet to be seen.

Above: Aboriginal story of the Murray Cod, Robinvale, Vic.
Credit: Belinda Burbidge

- 1 See, for instance, L Smith & N Akagawa, 'Introduction' in L Smith & N Akagawa (eds), *Intangible Heritage*, London and New York, Routledge, 2009, B Logan, 'Playing the Devil's Advocate: Protecting Intangible Cultural Heritage and the Infringement of Human Rights', *historic environment*, vol. 22, no. 3, 2009, pp. 14-18 and C Sagazio, 'Introduction, Intangible Cultural Heritage: A New Field of Endeavour', *historic environment*, vol. 22, no. 3, 2009, pp. 2-4.
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- 3 R Pepper, 'Not Plants or Animals: the Protection of Indigenous Cultural Heritage in Australia', paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals Hobart, 2014, <http://www.lec.justice.nsw.gov.au/Documents/not_plants_or_animals.pdf>, [accessed 14 October 2016].
- 4 H Buith, 'Intangible Heritage of Indigenous Australians: a Victorian example', *historic environment*, vol. 22, no. 3, 2009, p. 26.
- 5 M Harding cited in C Wahlquist, 'Indigenous stories, songs and dance protected under new Victorian law', *The Guardian*, 19 July 2016, <<https://www.theguardian.com/australia-news/2016/jul/19/indigenous-stories-songs-and-dance-protected-under-new-victorian-law>> [accessed 30 September 2016].
- 6 'Québec Declaration on the Preservation of the Spirit of Place: Adopted at Québec', Canada October 4th 2008, *International Journal of Cultural Property*, vol. 15, no. 4, 2008, p. 395.
- 7 Creative Spirits, 'Aboriginal Scar Trees', <<https://www.creativespirits.info/aboriginalculture/land/aboriginal-scarred-trees>> [accessed 17 October 2016].
- 8 Québec Declaration on the Preservation of the Spirit of Place, p. 395.
- 9 M Storey, 'Tangible Progress in the Protection of Intangible Indigenous Cultural Heritage in Victoria', *The Learning Communities: International Journal of Learning in Social Contexts*, [Special Edition: Empowering and Disempowering First Nations People through Law and Policy], Forthcoming June 2017.
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- 11 Ibid p. 8.
- 12 G Alpin, cited in B Logan, 'Playing the Devil's Advocate: Protecting Intangible Cultural Heritage and the Infringement of Human Rights', *historic environment*, vol. 22, no. 3, 2009, p.17.
- 13 L Smith & N Akagawa, 'Introduction' in L Smith & N Akagawa (eds), *Intangible Heritage*, London and New York, Routledge, 2009, p. 3
- 14 W Logan, *The Disappearing 'Asian' City: Protecting Asia's Urban Heritage in a Globalizing World*, Hong Kong, Oxford University Press, 2002.
- 15 D Yim, 'Living Human Treasures and the Protection of Intangible Cultural Heritage: Experiences and Challenges', *ICOMS News Keynote Speeches*, no. 4, 2004, <http://icom.museum/fileadmin/user_upload/pdf/ICOM_News/2004-4/ENG/p10_2004-4.pdf>, p. 3 [accessed 20 September 2016].
- 16 S Bak, 'Domestic and International Cultural Tourism in the Context of Intangible Heritage' in C Haddad (ed), *Safeguarding Intangible Heritage and Sustainable Cultural Tourism: Opportunities and Challenges*, Bangkok: UNESCO Bangkok, 2008, pp. 27-31.

