Indigenous cultural heritage in Australia and in the right to keep it: a view from Europe

*by Prue Vines and Carla Bassu**

Abstract: *Il patrimonio culturale indigeno in Australia e il diritto di mantenerlo: un punto di vista europeo* – In Australia the recent failed referendum of 2023 on the Voice to Parliament was a failed attempt to get recognition in the Commonwealth Constitution for Indigenous people in Australia. This recognition was seen as needed in the Constitution because of the threats to people, language, and culture which have existed in Australia since colonisation in 1788. What Australia seems to lack, when considering its track record of protecting cultural heritage, is a concerted political will to see the need for protecting cultural heritage, and for carrying out the actions which will protect it.

Keywords: Constitution; Cultural heritage; Federalism; Regionalism; National identity; Pluralism

1. Introduction

Cultural heritage is important to all of us, but for some people it is at risk. Indigenous peoples[1] in Australia are at major risk of loss of cultural heritage and Indigenous knowledge of all kinds. The cultural heritage of some other people may also be at risk and in some cases strategies for protection already exist.

In Australia the recent failed referendum of 2023 on the Voice to Parliament was a failed attempt to get recognition in the Commonwealth Constitution for Indigenous people in Australia. This recognition was seen as needed in the Constitution[2] because of the threats to people, language, and culture which have existed in Australia since colonisation in 1788.

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* Paragraph 1 and 4 are attributed to both authors; paragraphs 2 (2.1; 2.3; 2.4; 2.5) are attributed to Prue Vines, paragraphs 2.2. and 3 are attributed to Carla Bassu.

[1] In Australia, the Indigenous peoples include Aboriginal peoples (mainland Australia) and Torres Strait Islanders. Different groups prefer terminology of 'Indigenous', 'Aboriginal', 'Torres Strait Islander' and/or 'First Nations'. Some object to one of the terms on various grounds, for example, some object to 'First Nations' because it is redolent of North America rather than Australia. In this chapter we may use all these, depending on whether they seem appropriate at the time. The term 'Aborigines' is no longer acceptable.

[2] T. Mayo, K. O'Brien, C. Wilcox, *The Voice to Parliament Handbook*, Melbourne, 2023; M. Davis, *Voice of Reason*, Quarterly Essay 90, 19 June 2023; S. Morris, D. Freeman, *Statements from the Soul: the moral case for the Uluru Statement from the Heart*, Victoria, 2023.

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2.The Struggle to Protect Indigenous Cultural Heritage in Australia

2.1 The diversity of Indigenous peoples in Australia

Australia's Indigenous people are more diverse than is often appreciated. There are some 300 nations, with distinct languages, laws and views of family. The evidence is of a continuous cultural tradition which is 40-60,000 years old.[3] This cultural tradition was an oral one with multiple complex systems of law and culture which are only now beginning to be understood by the non-Indigenous population.

When Captain Cook was sent to map the coast of Eastern Australia he was told to do so with the consent of the natives:[4]

You are also with the consent of the natives to take possession of convenient situations in the country, in the name of the King of Great Britain, or, if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.

In fact, Cook did not seek consent of the natives and the pattern of arbitrary treatment of the original inhabitants of the country was set. When the British 'settled' Australia in 1788 they made some overtures to the Indigenous people, but wherever there was conflict the British way and British interests prevailed. Contrary to what has often been said, this was not a peaceful settlement. Massacres of Aboriginal people took place.[5] Wars were fought.[6] The level of dispossession and destruction of culture was devastating. The loss of the connection to the land which operated as the link to law and all culture was devastating in itself.

The doctrine of terra nullius was used to ensure that English common law became the law of the land and that the fiction of settlement by the British could be maintained. This doctrine was not overturned until 1992 when the High Court of Australia overturned it in deciding that Aboriginal native title could stand against the feudal land law which the British had brought with them.[7] This seemed like a major victory, but in fact it only gave title to land in very limited circumstances, which were later reduced by legislation. [8] The sequelae of this dispossession has resulted in peoples who are often poorer than the majority population, and whose life expectancy is much lower. The gap is narrowing very slowly, but at present two-thirds of

[3] C. Klein, *DNA Study finds Aboriginal Australians world's Oldest Civilisation*, at https://www.history.com/news/dna-study-finds-aboriginalaustralians-worlds-oldest-civilization#. The estimate is 40-60,000 years of continuous culture. At https://www.theguardian.com/australianews/2020/may/26/rio-tinto-blasts-46000-year-old-aboriginal-site.

[4] Admiralty Instructions to Captain James Cook 1770: P. Vines, *Law and Justice in Australia*, 4th ed., Melbourne, 2022, 161.

[5] At https://c21ch.newcastle.edu.au/colonialmassacres (a massacre in this map is defined as the killing of more than 6 undefended people); J. Lydon and L. Ryan, *Remembering the Myall Creek Massacre*, Sydney, 2018.

[6] J. Connor, *Australian Frontier Wars, 1788-1838*, Sydney, 2002.

[7] *Mabo v Qld (No 2)* (1992) 175 CLR, 1.

[8] Native Title Act 1993 (Ch.).

Indigenous people in Australia die before the age of 65 compared with 19% of the non-Indigenous population.[9] Indigenous Australians are imprisoned at a rate between 20 and 30 times non-Indigenous people.[10] However, a middle class, mostly of professionals, is developing[11] and Aboriginal and Torres Strait cultures are alive and well, albeit struggling at times. A great deal of the struggle turns on protecting Indigenous traditional knowledge or cultural heritage.

2.2 "The 'Indigenous Affair' in the Evolution of the Australian Constitution

The "Aboriginal affair" represents, by definition, the unresolved issue in the political agenda of contemporary Australian governments. Subjected to harsh persecution that led to violent cultural uprooting operations, the surviving Aborigines have never truly assimilated into the white communities that gradually settled in the territory. This is, at least in part, attributable to a precise choice made by the institutions that, at the time of the consolidation of colonial government, adopted a welfare approach, creating reserves where housing for Aborigines was concentrated and providing allowances that, though meager, allowed for survival in cases (widespread) of unemployment. In 1959, the Federal Council for the Defense of Aborigines was established, an institution that grew and consolidated during the 1960s. Within this framework, the process of political mobilization of Aboriginal communities began and developed, advocating for equal treatment in relation to their fellow citizens of European descent, particularly concerning civil and wage rights. The issue that gained the most traction over time, emerging as one of the most significant constitutional problems of modern Australia, was that of territorial rights of Indigenous populations, which became the flag of the Aboriginal activist movement. "Land Rights Now" was the slogan frequently chanted at demonstrations that became increasingly common, attracting attention and support from the trade union leadership and religious institutions, managing to awaken the consciousness of a society that had remained indifferent to Aboriginal claims until then. In particular, the Australian natives demanded exclusive ownership of territories with particular symbolic, religious, and historical significance, which represented a fundamental part of their cultural identity.

As has already been emphasized, Aboriginal civilization is distinguished by the intensity of the connection to the land where this ancient people has lived for centuries, to the point that places—such as the great sacred monolith of Uluru—found in the so-called outback, and the animals that inhabit them are considered sacred and become objects of worship. It is noteworthy that only in 1967 was a referendum held, which, with overwhelming support (a remarkable ninety percent of voters in favour

[9] The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples Australian Institute of Health and Welfare, 2015.
[10] Australian Bureau of Statistics (2012) 4517OD O001: Prisoners in Australia (figures released on Dec. 6, 2012).
[11] M. Langton, *Boyer Lectures: The Quiet Revolution: Indigenous People and the Resources Boom*, Sydney, 2012.

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of recognizing citizenship rights for natives), granted Aborigines Australian citizenship. It is simply paradoxical that, until that time, the Indigenous population had been denied full recognition of their rights in the lands they had inhabited since time immemorial. In 1972, the government of Australia was taken over by the Labor Party, which—for the first time in Australian history—introduced a political program that addressed the situation of the Indigenous minority. In response to the claims made by the descendants of the first Australians, the Department of Aboriginal Affairs was established, and a legislative commission was simultaneously set up to address issues of interest to Indigenous minorities. In 1976, the Aboriginal Land Rights Act (ALR) was adopted, a law that regulated Aboriginal land rights. However, this was only a seemingly successful outcome for activists regarding the Aboriginal issue, as the legislation had legal validity only for a limited territorial area. In fact, the provision is still in effect but only in the Northern Territory. Despite the approval of the ALR being considered a compromised victory, it is important to acknowledge that the Labor government made a significant effort to promote the civil rights of the Indigenous minority, which indeed saw improvements in its social position and living conditions during the 1970s and 1980s. Throughout the 1980s, there were proposals for legislation aimed at recognizing full and inalienable rights for Aborigines over the lands of ancient Indigenous reserves, national parks, and Crown land. As part of the reconciliation plan initiated by the Canberra government, a significant symbolic act was accomplished in October 1985, the result of a long and arduous negotiation process. The sacred mountain of Uluru, then better known by its Western name of Ayers Rock, was officially handed over to the Mutijulu Aboriginal tribe, with the only condition being that public access to the monolith and the surrounding tourist attractions be ensured. However, it is true that this gesture—though significant—proved to be a drop in the ocean and did not mark the beginning of a dialogue aimed at recognizing Indigenous rights, as one might have hoped. The commendable initiatives proposed by the government to facilitate the return of Aboriginal lands to their rightful owners did not succeed and fell into oblivion for a long period. The reasons for the failure of projects favourable to Indigenous communities were primarily attributed to the pressures exerted by state governments and large mining corporations, interested in keeping open areas for action on lands rich in natural resources that were yet to be exploited. Meanwhile, the National Aboriginal Legal Service (NALS) was established, an organization that provided free legal assistance. Under the leadership of Paul Coe, it joined the World Council of Indigenous Peoples (WCIP) and launched an important campaign to inform and raise awareness about the issues faced by Aboriginal Australians on an international level. Thanks to the promotional efforts of NALS, reports of discrimination and marginalization of Aborigines in Australia spread worldwide. The growing international attention on the Aboriginal issue was also due to the significant media impact at the end of the 1980s from the publication of data regarding the high number of deaths recorded among Aboriginal prisoners in the country. In light of this data, as previously mentioned, in 1988, the United Nations promoted an inquiry that resulted in the dissemination of a report stating that Australia had violated fundamental principles of international humanitarian law, demonstrating a

long-standing pattern of behaviour that was severely damaging and discriminatory toward Aborigines. Nevertheless, when the bicentennial celebration of the discovery of Australia took place on January 26, 1988, then-Prime Minister Bob Hawke did not make any reference to the Indigenous Australian people in his speech to the nation. In response to the blatant disregard shown by the institutions, Aboriginal people organized counter-demonstrations in the country's major cities, calling for the establishment of an agreement that would definitively establish a framework for relations between "white" Australians and Indigenous minorities based on principles of substantive equality. In 1990, the groups belonging to the Land Councils, established to discuss issues of interest for Aboriginal communities at the territorial level, underwent a significant reorganization following the passage of the Aboriginal and Torres Strait Islander Commission Act (ATSIC Act). This act led to the creation of a government body, the Aboriginal and Torres Strait Islander Commission, known as ATSIC, which aimed to achieve active involvement of Indigenous populations in decision-making processes relevant to their communities.

ATSIC was a democratically elected entity composed of representatives from the main Aboriginal minorities in Australia, although it is important to note that the activities of the body were under constant supervision by the national government. The project, while commendable, ultimately proved to be a failure. The commission became embroiled in an unpleasant and controversial legal case involving its chairperson, Geoff Clark, who was accused of corruption and other serious offenses (including group sexual assault) committed during the 1970s and 1980s. The body was dismissed and officially ceased its functions on March 24, 2005. Following the dismantling of ATSIC, the management of policies concerning Aboriginal communities and the coordination of activities carried out by local Indigenous minority organizations were transferred to the Department of Immigration and Multicultural and Indigenous Affairs. The organizational structure and distribution of responsibilities among the ministries were then reformed, and the Department of Immigration and Multicultural and Indigenous Affairs became the Department of Immigration and Citizenship. Starting from January 27, 2006, the functions previously assigned to the dedicated ministry were transferred to the Office of Indigenous Policy Coordination, which was established within the Department of Families, Housing, Community Services and Indigenous Affairs. The first real success achieved by activists in the fight for Aboriginal rights was represented by the landmark ruling issued by the High Court of Australia in the case of Mabo vs. Queensland, which clearly and unequivocally recognized the land rights of Indigenous populations. Specifically, the Court affirmed that Aboriginal people and Torres Strait Islanders had the prerogative to seek recognition of a native title, provided they could demonstrate the existence of a "sustained and continuous" connection to the land in question. This ruling essentially overturned the concept of terra nullius, which had underpinned Aboriginal territorial claims until then, and established a full land ownership right that recognized Aboriginal people and Torres Strait Islanders as the "original" owners of the continent. The significant balancing effort carried out by the judges in the Mabo decision is evident in their intention not to contest or challenge

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the legally acquired property rights of non-Aboriginal citizens. The ruling had a groundbreaking impact on Australian society, exerting significant influence on the dynamics of relations between white Australians and Indigenous minorities.

2.3 The meaning of Indigenous Cultural Heritage or traditional knowledge, custom and law?

All these words have separate meanings in English, but in some contexts, we put them together to indicate a broader concept. Knowledge, traditions, customs and law are a grab bag of terms which may be used to indicate the broadest sense of law, custom and knowledge of a particular group, whoever they are. In the Australian context, the move from regarding Indigenous knowledge, traditions, custom and law as a 'quaint' matter of interest of interest only to anthropologists has shifted as it has been recognised that Indigenous knowledge of plants, herbs, animals may give rise to possible commercial interests or intellectual property, that customary law is no mere 'custom' but actually is a legal system which must be taken seriously within the Australian polity,[12] and that Aboriginal or Islander traditions have value in the same way as traditions such as the rule of law have substance.

The definition given by UNDRIP[13] is particularly useful in helping to show what is meant by knowledge, tradition, cultural heritage and other matters concerning Indigenous culture:

'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.

1. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.'

Paragraph 2 requires nation states to protect these rights. This must be done by the provision of adequate municipal law. So far this is not adequately done.

2.4 How can we protect these Indigenous Rights?

Protecting Indigenous Cultural and Intellectual Property (ICIP) rights includes recognition of separate rights to control who can adapt and use this ICIP. The rights which should be considered include the right of attribution, the right of integrity, and the right to benefit-sharing.

[12] Australian Law Reform Commission, *Report on Recognition of Australian Customary Law*, 1986; WA Law Reform Commission, *Final Report*, 1994.
[13] UN Declaration of the Rights of Indigenous Peoples, 2007, Art. 31.

One of the major figures in developing protection of Indigenous knowledge in Australia is Terri Janke,[14] a Torres Strait Islander/Aboriginal woman lawyer who has blazed a trail of protection of Indigenous knowledge, languages, art and so on. She defines Indigenous Culture as including artistic works, literature, performance, languages, knowledge, cultural property including objects held in museums, human remain, immoveable cultural property such as sites and places, documentation of Indigenous people and culture.'[15] ICIP covers all these things and more. Terri Janke has proposed 'True Tracks' as a system to manage these issues. The ten principles are:[16]

1. **Respect**

Indigenous peoples have the right to protect, maintain, own, control and benefit from their cultural heritage.

2. Self-determination

Indigenous peoples have the right to self-determination and should be empowered in decision-making processes within projects that affect their cultural heritage.

3. Consent and consultation

Free, prior and informed consent for use of ICIP should be sought from Indigenous people. This involves ongoing consultation and informing custodians about the implications of consent.

4. Interpretation

Indigenous peoples have the right to be the primary interpreters of their cultural heritage.

5. Integrity

Maintaining the integrity of cultural heritage information and knowledge is important to Indigenous people.

6. **Secrecy and Privacy**

Indigenous people have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.

7. **Attributio**n

It is respectful to acknowledge Indigenous people as custodians of Indigenous cultural knowledge by giving them attribution.

8. **Benefit sharing**

Indigenous people have the right to share in the benefits from the use of their culture, especially if it is being commercially applied. The economic benefits from use of their cultural heritage should also flow back to the source communities.

9. Maintaining Indigenous Cultures

In maintaining Indigenous cultures, it is important to consider how a proposed use might affect future use by others who are entitled to inherit the cultural heritage. Indigenous cultural practices such as dealing with

[14] T. Janke, *True Tracks: Respecting Indigenous Knowledge and Culture*, Sydney, 2021; T. Janke, *Our Culture, Our Future*, Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1998.
[15] Ibid., 1998, 9.
[16] T. Janke, *True Tracks: Respecting Indigenous Knowledge and Culture*, quot.,15-16.

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deceased people and sensitive information should be recognised as important and be respected.

10. **Recognition and Protection**

Australian policy and law should be used to recognise and protect ICIP [Indigenous Cultural and Intellectual Property] rights. Copyright law, for example, as well as new laws and policies should be used to protect these rights. These issues can be covered in contracts, protocols and policies for better recognition. '

These principles are excellent guides for considering how cultural knowledge has been affected in the years since 1788. In the remainder of the discussion of the situation in Australia we will discuss a number of examples of threats to cultural heritage in various forms one by one – threats to major heritage sites, language, art, traditional knowledge of plants and medicines, and Indigenous customary law.

Protection of major heritage sites

In Australia, Indigenous cultural heritage is supposed to be protected in a range of ways including by the Native title Act 1993 (Cth) under which a native title claim can specify areas of matters of cultural heritage to be protected. There are also various legislative protections of cultural heritage in each jurisdiction such as the Aboriginal Heritage Act 1972 (WA). This legislation purports to protect a range of cultural heritage from Aboriginal sites to cultural objects. Offences under s 17 include excavation, destruction, damaging, concealing or altering an Aboriginal site or an object on an Aboriginal site. This was not enough to prevent the destruction of the Juukan Gorge Cave in May 2020 by blasting by Rio Tinto. This removed evidence of the oldest site of human occupation in Australia and possibly in the world. The Juukan Gorge Caves were said to be 46,000 years old. Apparently, Rio Tinto did nothing illegal. The legislation does not require consultation with Aboriginal people in the management of their heritage, although the WA government passed a new Aboriginal Heritage Act 2021 as part of its effort to improve Aboriginal cultural heritage. This was criticised by Aboriginal people because it still left ultimate power to make decisions in the hands of the Minister. It was repealed five weeks after its commencement and the state returned to the Aboriginal Heritage Act 1972 (WA) (amended) which it was intended to overhaul. This occurred not because of its defects in consultation requirements with Aboriginal people, but because of objections by pastoralists and industry. This returned WA to the situation where there was no ability to transfer authorisations for consents, where there was a narrow definition of cultural heritage, and where there was no express provision for consultation with Aboriginal Groups. It thus did not meet the standards of best practice. Indeed a UN Committee accused Australia of breaching international racial discrimination conventions,[17] noting that every application for mining made since 2010 under the Act had been consented to, including a new application by Rio Tinto.

[17] At https://www.abc.net.au/news/2024-05-27/australian-government-breaches-racial-discrimination-convention/103886464.

There have been some developments aimed at improving the situation, including the Release of *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait islander heritage in Australia.*[18] This sets out principles including that Aboriginal and Torres Strait Islander people are custodians of the heritage which is protected for its 'intrinsic worth, cultural benefits and the well-being of current and future generations of Australians'. This heritage is regarded as' central to Australian national heritage', and is 'managed consistently across jurisdictions according to community ownership in a way that unites, connects and aligns practice', and the heritage is 'recognised for its global significance.'[19] Cultural Heritage Councils exist in most jurisdictions. The irony here is that the original WA legislation was considered one of the best of the cultural heritage legislative protection instruments in Australia. This has to be considered a failure of protection of cultural heritage.

Language

One of the major losses for Indigenous people in Australia was loss of languages. Across Australia there were between 300 - 700 languages and dialects in 1788. Many of these are gone, or almost gone. It is estimated that today only 150 of those languages are spoken today as an everyday language. Of those, approximately 110 are regarded as endangered. A chance discovery of notebooks containing handwritten dictionaries of other Aboriginal languages in 2013 has bolstered the survival chances of some of those languages. [20] The loss of language is highly destructive of any culture. Some rebuilding is occurring. New dictionaries are appearing,[21] more Indigenous children are learning their language, more non-Indigenous Australians are learning some words of their local Indigenous language. The Australian Institute of Aboriginal and Torres Strait Islander Studies has now funded dictionaries for 20 languages.[22]

This all sounds good, but there are still significant concerns from some people. For example, Janke discusses the putting up of some of these languages on Wikimedia without the consent of the people whose language it is. This happened with Tasmanian Aboriginal languages. The Tasmanian Aboriginal centre asked Wikimedia to take down their Tasmanian Aboriginal languages on the grounds that there had not been consent and some of it was wrong. Wikimedia refused.[23] It is now common for

[18] Ministerial Indigenous Heritage Roundtable, Communique, 21 September 2020.
[19] Heritage Chairs of Australia and New Zealand, 2020, 1.
[20] *Longnow.org/ideas/forgotten-dictionaries-of-indigenous-australian-languages-rediscovered/*. These were found in the State Library of NSW. Early missionaries were often the only people to record the languages in their desires to convert people: H.M. Carey, *Missionaries, Dictionaries and Australian Aborigines 1820-1850 AWABA Database*, Newcastle, Australia, at https://downloads.newcastle.edu.au/library/cultural%20collections/awaba/language/linguistics.html.
[21] Eg. Wagiman Online Dictionary, at https://aphasialab.org/wagiman/.
[22] AIATSIS.gov.au/research/current -projects/indigenous-languages-preservation. This includes languages from Sydney such as Eora, and from Northern Territory and across the country including Pitjantjatjara/Yankunytjatjara and Warlpiri. The Warlpiri Dictionary, published in 2023 is one of the largest.
[23] T. Janke, *True Tracks: Respecting Indigenous Knowledge and Culture*, quot.

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Indigenous words to be used to name buildings, streets and libraries but this is not always done with the consent of the owners of the language. In a theme that will become clear as it repeats itself in this chapter, copyright law is inadequate protection because it does not recognise that Indigenous language speakers could have a right to control use of the language. In the same way that 'knowledge' is usually regarded as not able to be owned at common law, language knowledge is not regarded as subject to property law. Copyright in language is not generally available, but Janke notes that policies are beginning to be developed such as WA's Aboriginal and Dual Language Guidelines.[24]

Knowledge and traditions

In Australia a number of areas of Indigenous knowledge have begun to be recognised by non-Indigenous persons. This includes knowledge about eg. firefighting, 'bushtucker', herbs and medicines, but recognition has often been followed by removal of the item and turning it into an item of commerce which has not led to benefit flowing to the original people whose knowledge is being used. It is significant that this is often very old knowledge. Intellectual property requires originality to operate, which often causes problems with protecting Indigenous knowledge which frequently does not involve claiming originality, but rather, claiming a very long process of passing the knowledge on.

There are some examples where intellectual property law has been used for protection. For example, *Bulun Bulun v R & T Textiles* (discussed below) was an early example of using intellectual property law to prevent theft of designs for use in carpets.

Another rare early example of civil law protection was an equity suit in which the Pitjantjatjara Council obtained an injunction to prevent the distribution of a book which they argued would reveal their secrets.[25]

Traditional knowledge of food and traditional medicine in Australia is another significant area of knowledge. It is also becoming commercially significant. Obviously, the Indigenous people have knowledge of many plant species and how they grow and yield in particular seasons and conditions This knowledge is retained in various complex ways which may involve dance, oral traditions, and the passing on of responsibility for particular species. How can this knowledge be protected? The knowledge of Indigenous people has often been ignored by scientists and business people, and, as mentioned above, intellectual property law protections may not fit – for example, patenting of bushfoods or harvesting methods may not be possible because of the 'inventive step' requirement. [26] Issues of biopiracy exist, and most Indigenous people will tell you of the theft of such

[24] T. Janke, *True Tracks: Respecting Indigenous Knowledge and Culture*, quot., 52; Landgate, *Aboriginal and Dual Naming: a guideline for naming Western Australian Geographic Features and Places*, WA Govt, 2020, at https://www.landgate.wa.gov.au/maps-and-imagery/wa-geographic-names/aboriginal-and-dual-naming.

[25] *Foster v Mountford* (1976) 29 FLR 233.

[26] TRIPS Agreement of WTO Art. 27, for example, requires newness, an inventive step and that the item can be applied industrially.

knowledge, often aided by Government. Note that New Zealand has created a system to recognise Maori traditional knowledge. [27]

Janke discusses the smokebush plant story as an example of what sometimes happens. This plant *conospermum* is found in Western Australia. Samples of the plant were stolen from the Aboriginal custodians of the plant, and the WA government licensed the US National Cancer Institute to collect the plants which were found to be useful for treating HIV. The US government filed for a US patent which was granted in 1997 and for an Australian patent. Large sums of money were paid to the WA government for access and search rights. No funds went to the Indigenous people who had looked after the plant for centuries. Other plants exist which have been found to be valuable and where Indigenous people seek to build businesses with them for their communities, and to protect their knowledge, but it is difficult. Intellectual property is often inadequate for the task, and there is no protection available from the constitutional arrangements in Australia.

The Heritage Protection legislation in existence in Australia does some work, but it requires the translation of Indigenous understandings of words and concepts into a legal framework which is distinct and this often therefore creates something different from the understandings of the Indigenous people. Despite these common outcomes, as Behrendt et al say '…the content of Indigenous culture, cultural heritage and practice is precisely whatever the relevant Indigenous people say it is, and the relevant Indigenous people should be recognised as authorities in decisions made about their cultural heritage'.[28]

The content of heritage protection legislation varies, but few pieces of legislation meet the standards of either UNDRIP or Janke's True Tracks. There are quite a few Commonwealth pieces of legislation. These include the Protection of Movable Cultural Heritage Act 1986 (Cth), the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) and the Environmental Protection and Biodiversity Conservation Act 1999 (Cth). [29]

Art

We have already noted that copyright law has not been an effective protector of Indigenous artwork. There are multiple problems: first, if the artwork is traditional and has been copied or followed then the novelty requirement for copyright will not be met and there will be no copyright protection. Ancient work like rock art is too old for copyright to protect it, since 70 years is the current timeframe. Second, Aboriginal art may well be based on stories or secrets which belong to certain people within the community, who by customary law have to give consent for the artist to use them in their art. This can create further issues if the artwork is used by other people who have no customary law rights to it. There are also multiple

[27] T. Janke, *True Tracks: Respecting Indigenous Knowledge and Culture*, quot., 208.
[28] L. Behrendt, C. Cunneen, T. Libesman, N. Watson, *Aboriginal and Torres Strait Islander Legal Relations*, 2nd ed, Melbourne, 2019, 185.
[29] Extracted in L. Behrendt, C. Cunneen, T. Libesman, N. Watson, *Aboriginal and Torres Strait Islander Legal Relations*, quot., 188; The UN Declaration of the Rights of Indigenous People, of which Articles 11,13,25,26,31,32 are relevant.

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examples of artwork being stolen or used with the original artists failing to get the benefit of sometimes large profits.[30]

Some older artists suffered the problem that as they were regarded as wards of the state and any copyright they owned was held for them by the Minister for Welfare or the equivalent state person, who could decide what to do with it.

Abuse of this cultural heritage consisted (and still does consist) often of theft of artwork or design. Many Aboriginal artworks were simply copied and then put onto paper, cloth or other items and sold to tourists. The *Bulun Bulun* case is an example: John Bulun Bulun's artwork had been copied by a T-shirt manufacturer. In this case in 1989[31] the T shirt manufacturer pleaded lack of knowledge of the copyright, withdrew the material from sale and the case was settled, but the companion case involving another Aboriginal artist and some common ownership of the sacred information used in some of the artworks is illuminating about the complexity of these issues.[32] This is not merely a case of Mr Bulun Bulun missing out on royalties: as a person given permission to use the sacred information, he was responsible for its loss. Mr Milirrpurru argued that some paintings had been done by a person without the consent of all the relevant people required under their customary law and that those persons were the equitable owners of the copyright in the artistic work known as 'Magpie Geese and Water Lilies at the Waterhole'.

Customary Law

In the *Bulun Bulun* case the counsel for the Minister argued that evidence of customary law was not admissible in Australian courts. The Judge disagreed and said that 'evidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system'[33] He used the existence of native title as evidence of this. So he admitted the evidence about Ganalbingu law and customs. Notice this evidence was not admitted as law but as fact. The evidence of Mr Bulun Bulun included:

'A painting such as this is not separate from my rights in the land. It is part of my bundle of rights in the land and must be produced in accordance with Ganalbingu custom and law. Interference with the painting or another aspect of the Madayin [corpus of ritual knowledge] associated with Djulbinamurr [the site of the waterhole] is tantamount to interference with the land itself as it is an essential part of the legacy of the land, it is like causing harm to the spirit found in the land, and causes us sorrow and hardship….'At the Waterhole is' the number one item of Madayin for Djulibinyamurr…It has all the inside meaning of our ceremony, law and

[30] This has been going on for a long time: C. Golvan, *Aboriginal Art and the Protection of Indigenous Cultural Rights*, in 1 (56) *Aboriginal L. Bull.*, 5 (1992); S. Parkin, *The Theft of Culture and Inauthentic Art and Craft: Australian Consumer law and Indigenous Intellectual Property*, M. Phil Thesis, Queensland University of Technology; see also T. Janke, *Our Culture, Our Futur*e, quot.

[31] C. Golvan, *Aboriginal Art and Copyright: the case for Johnny Bulun Bulun*, in 11(10) *Eur. Intellect. Prop. L. Rev.*, 346-355 (1989); *Bulun Bulun v R & T Textiles* 86 FCR, 1998, 244.

[32] *Bulun Bulun v R&T Textiles* [1998] FCA 1082.

[33] *Bulun Bulun v R&T Textiles* [1998] FCA 1082, at 6/20.

custom encoded in it…Only an intitiate knows that meaning and how to produce the artwork… Production without observance of our law is a breach of that relationship and trust…'

The court could not recognise communal title in an art work, another defect in copyright law for Indigenous artists. Von Doussa J noted that copyright is now entirely a creature of statute[34] and that it states that 'the author of an artistic work is the owner of the copyright' (s 35(2)). After considering and rejecting the possibility of an express trust, von Doussa J held that Mr Bulun Bulun was the copyright holder and he was in a fiduciary relationship with the Ganalbingu people and owed them fiduciary obligations to protect the ritual knowledge which Mr Bulun Bulun had been given permission by them to use. Mr Bulun Bulun owed them a duty not to exploit the artistic work contrary to the customary law requirements. This did not amount to the Ganalbingu people owning copyright, but that they could bri,g an action against Mr Bulun Bulun to enforce the obligation owed to him by the party he had sold the painting to.

The idea that the 'customary law' of Australian Indigenous people is actually law has been slow to be accepted by the common law. For some time customary law was regarded as merely '(quaint) custom', of interest to anthropologists but not more. Very early in the colony the Crown had taken the view that its law applied to all inhabitants of the colony, even where what was involved was a ritual revenge killing under customary law.[35] Recognition of such customary law was problematic because it created uncertainty. The Australian Law Reform Commission investigated recognition of Aboriginal and Torres Strait Islander Customary Law and decided that it should be recognised, subject to human rights, and within the background and general framework of the common law. They suggested that 'specific, particular forms of recognition are to be preferred to general ones'.[36] The Western Australian Law Reform Commission considered the issue next[37] and came to similar conclusions. But no legislative program to do this appeared, and use of customary law was limited and sporadic. Some recognition of Aboriginal customary law in sentencing sometimes occurred, but this was problematic because the Aboriginal customary law involved physical punishment which the common law now eschews.

It is consistent with criminal law sentencing principles to take into account the circumstances of the defendant so an Aboriginal defendant could sometimes have aspects of customary law taken into account along with other aspects of their tradition. Similarly, when assessing damages occasionally the fact that an injury might interfere with the ability to take part in customary law matters might be taken into account for damages.[38] But this is not really accepting Aboriginal law as law; it is merely treating some of these customs as facts which can be taken into account.

[34] Copyright Act, 1968 (Cth).
[35] *R v Jack Congo Murrell* (1836) 1 L. 72.
[36] Australian Law Reform Commission Report No. 31 (1986).
[37] WALRC Project No. 94 Final Report: Recognition of Aboriginal Customary Law (2000-2006).
[38] Eg. *Napaluma v Baker* [1982] AboriginalLawB 28.

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One of the few areas of real recognition of customary law is the ability to use it in intestacy in three jurisdictions: Northern Territory, NSW and Tasmania. Elsewhere either an Indigenous person makes a will which reflects customary law if they wish it, or intestacy law applies and outside Northern Territory, NSW and Tasmania intestacy law does not fit Indigenous people well. The wrong people inherit and the need to protect certain cultural items is ignored.[39]

Intellectual property law has proved insufficient to protect long-held knowledge because of the emphasis on originality and individualism. Terri Janke has made it clear that it is not enough to pass cultural heritage laws in common law or western terms. That creates a situation where the Indigenous concepts and laws which have governed the use of, for example, stories and plants for thousands of years have to be translated into concepts and words which are alien and which do not fit the cultural matrix within which the stories or care of plants or art has come. This appears to be particularly true with intellectual property concepts, and the endpoint appears often to be the loss of the benefit associated with the knowledge. There are many examples of this problem occurring, and little evidence of governmental will to develop this particular form of self-determination. Reform of intellectual property or cultural heritage law along the lines of the True Tracks put forward by Janke is needed if there is to be proper legal protection.

2.5. Moving towards Self-Determination ?

In 2023, the Australian government put a referendum to the people asking them to approve a change to the constitution. The aim was to allow for a 'Voice' to Parliament which would advise on issues Indigenous people would be concerned about or where laws would impact on Indigenous people disproportionately. This had been requested by a group of Indigenous leaders who had been through a process of consultation with Aboriginal communities around the country over approximately seven years. The Voice was one of the things this group asked for in their 'Uluru Statement'.[40] The other two things were a treaty, and Truthtelling. The Voice was regarded as the first and least problematic step towards some level of self-determination. Despite appearing to be popular with approximately 80% of the population when first mooted, the referendum failed. The failure of the Voice Referendum was a bitter blow for many Indigenous people and their supporters, because it was thought of as an opportunity to have some kind of voice to the government which was actually constitutionally entrenched.

[39] P. Vines, *Australia's (slow) Experiment with Indigenous Customary Law in Intestacy*, 4 in *J. of Commonwealth L.*, 4 (2023), at https://www.journalofcommonwealthlaw.org/article/36623-australia-s-slow-experiment-with-indigenous-customary-law-in-intestacy?auth_token=VPuOYEQFpgwpV1a93IzQ; P. Vines, *The Use of Customary Law in Intestacy in Australian Jurisdictions: access to justice in action?*, 50 *Aust. Bar Rev.*, 1-13 (2021); P. Vines, *The Need for Culturally Appropriate Wills for Indigenous Australians*, in 79 *L. Soc. J.*, 68-69 (2021).

[40] The Uluru statement from the heart was issued from Alice Springs in 2017. See at https://ulurustatement.org/the-statement/view-the-statement/.

So many advisory bodies had been set up and struck down over the years, that they had rarely managed to achieve very much.

The lack of a bill of rights in the Commonwealth of Australia compounds the difficulty of protecting cultural heritage, as in the absence of constitutional protection there is little reason to hope for proper cultural protection for a group which is a very small minority. Although three jurisdictions do have bills of rights (Queensland, ACT and Victoria), at present they offer very little in the way of protection of Indigenous knowledge or cultural heritage. For example, Victoria's Charter of Responsibilities and Rights 2006 includes this right:

S 19 (1)

(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons that background, to enjoy their culture, to declare and practice their religion and to use their language.

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—

(a) to enjoy their identity and culture; and

(b) to maintain and use their language; and

(c) to maintain their kinship ties; and

(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Whether s 19 (2) (d) will help Aboriginal people in Victoria to receive some benefit from the use of their long-established knowledge of plants and herbs which might be used for vaccines or other medicines remains to be seen. It does not appear to promise much.

3. The recognition and protection of indigenous knowledge in Europe

Australia is a special country from many points of view, and the uniqueness of its constitutional system is the result of a blend stemming from colonial influence and the ascendance of similar legal traditions and constitutional cultures. As is well known, and as highlighted in the preceding paragraphs of this work, for a long time the cultural and traditional substrate of the Australian Indigenous populations has not been recognized as an integral part and constituent basis of the federal system. In contrast, most European constitutional systems base their constitutional identity on specific cultural, linguistic, and traditional particularities that are promoted through specific ruling, tools, and policies.

Another determining factor that marks the substantial difference in the approach and regulation of cultural specificities between Australia and European constitutional democracies is the incorporation within supranational and international contexts, where forms and tools for the

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recognition and protection of the multiple expressions of cultural heritage are established and manifested41.

In continental Europe countries public intervention for culture has a dominant role. The public sector defines the institutional setting responsible for designing and implementing policies for culture and cultural heritage.

Subject to that the focus of our work is on Australian Indigenous knowledge a comparative analysis of European realities allows for the identification of certain aspects that can serve as interesting points of comparison. Indigenous populations with original and ancient traditional specificities are also present on the territory of the Old Continent, enjoying broad recognition within the constitutional framework of the relevant legal systems. European indigenous groups comprise the Inuit of Greenland and the Sámi, who reside in the northern regions of Finland, Norway, Sweden, and Russia, along with other communities based within the territory of the Russian Federation42. Both Greenlandic Inuit and the Sámi, as well as other indigenous peoples had to face oppression by State institution, under policies of cultural assimilation which are fortunately a sad memory of the past43.

According to the definition used by the International Work Group for Indigenous Affairs, Russia is home to over 160 indigenous peoples; however, the government grants legal recognition to only forty-seven 'small-numbered' groups. Of these, forty are situated in the North, Siberia, and the Far East, including the Sámi, Veps, Aleuts, and others. The remaining seven groups are the Abazins, Besermens, Vod, Izhorian, Nagaybak, Setos, and Shapsugs. While some of these peoples reside in the European parts of Russia, the majority are found in the Asian regions44.

Relevant European treaties concerning indigenous rights encompass the European Charter for Regional or Minority Languages (ECRML) and the Framework Convention for the Protection of National Minorities (FCNM). The FCNM can be applied to indigenous peoples, even though it acknowledges that indigenous groups and national minorities are essentially regarded as distinct legal categories. Russia has withdrawn from the minority's convention, and its endorsement of the languages charter is seen as suspended; however, the Nordic countries are active participants in both agreements. The constitutions of Finland, Norway, and Sweden provide specific protections for the Sámi people, whereas the Russian constitution recognizes the forty-seven «indigenous small-numbered peoples»45 Additionally, each country has enacted laws addressing linguistic, cultural, and other rights, such as Finland's Sámi Language Act, Norway's Finnmark

[41] See, for example, *European Cultural Convention (ETS no. 018)*, Paris, Dec.19,1954; *Convention on the Value of Cultural Heritage for Society*, Faro Convention (CETS no. 199), Faro, Oct. 27, 2005.

[42] R. Grote, *On the Fringes of Europe: Europe's Largely Forgotten Indigenous Peoples*, in 31 *Am. Indian L. Rev.* 425, 428 ff. (2006).

[43] S. Plaut, *Cooperation Is the Story - Best Practices of Transnational Indigenous Activism in the North*, in 16 *Int'l J. Hum. Rts.*, 193,196 ff. (2012).

[44] See *Indigenous Peoples in Russia, International Work Group for Indigenous Affairs*, at https://iwgia.org/en/russia, accessed on February 5, 2025.

[45] See Constitution of Finland, sec. 17 and 121; Constitution of the Kingdom of Norway, sec. 108; Constitution of the Russia Federation, art. 68 (3) and 69: Instrument of the Government (Sweden), art. 17.

Act, and the Federal Law on Guarantees of the Rights of Indigenous Small-Numbered Peoples in the Russian Federation.

The Sámi parliaments in Finland, Norway, and Sweden - which serve as representative and advisory bodies but do not possess legislative authority - have collaborated to create a «Nordic Sámi Convention» aimed at strengthening indigenous rights46. In recent years, various rulings from Nordic supreme courts have affirmed the rights of the Sámi people. The Swedish Supreme Court upheld Sámi reindeer herding rights in its 2011 Nordmaling decision47. In 2020, the Supreme Court of Finland ruled that the Sámi community in Girjas had exclusive rights for hunting and fishing. The following year, in the Fosen case, the Supreme Court of Norway determined that permits for wind farm construction infringed upon the rights of Sámi reindeer herders. In 2022, the Finnish Supreme Court confirmed the dismissal of charges against Sámi individuals for fishing and hunting violations. However, some decisions have not been as favorable; for instance, the 2017 ruling regarding the Jovsset Ánte Sara reindeer cull by the Supreme Court of Norway has drawn criticism from the UN Human Rights Council, as has the Karasjok land rights ruling issued in May 202448. In recent years, the four Nordic countries have made efforts to rectify past injustices in their treatment of indigenous peoples. In 2018, Norway created a Truth and Reconciliation Commission to explore the effects of its historical policies concerning the Sámi, alongside two other national minorities, the Kvens and the Forest Finns; the commission released its final report in 2023. In 2021, the Finnish government established a Truth and Reconciliation Commission focused on the Sámi, followed by the formation of a Swedish Truth Commission the next year to investigate Sweden's treatment of the Sámi people. Additionally, both the Danish and Greenlandic governments commissioned an official report on the history of the Danish-Greenlandic relationship, with researchers being appointed in early 2024. Although Greenland previously set up its own Reconciliation Commission, the Danish government opted out of participating in its process, and the Commission published its final report in 2017. Both official and academic sources, along with NGO reports, have identified deficiencies in the legal protections for European indigenous peoples and questioned the effectiveness of certain existing measures. In recent years, the UN Special Rapporteur on the Rights of Indigenous Peoples, as well as the UN Permanent Forum on Indigenous Issues (UNPFII), has expressed concerns regarding the conditions faced by European indigenous communities. Dorothée Cambou and Øyvind Ravna acknowledge the progress that has been achieved in Sámi rights within the Nordic countries while also emphasizing the continuing risks to Sámi land posed by mining and green energy developments[49].

[46] Z. Savasan, *Land Rights Under Cultural Autonomy: The Case of Sami People*, in 31 *Int'l J. on Minority and Group Rights*, 3, 51 ff. (2023).
[47] A. Sasvari, H. Beach, *The 2011 Swedish Supreme Court Ruling: a turning point for Saami Rights*, in *Nomadic Peoples*, 15, 130 ff. (2011).
[48] See H. Swift, *Rights of Indigenous People in Europe*, in *Institute of Advance Legal Studies*, 6 January 2025, at https://ials.sas.ac.uk/blog/rights-indigenous-peoples-europe-introduction-and-starting-points-research#footnotes.
[49] D. Cambou, Ø. Ravna, *The Significance of Sàmi Rights, Law, Justice and Sustainability for the indigenous Sàmi in the Nordic Countries*, London, 2023.

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4. Conclusion: Weaving it all together

After years of failing to recognize the value of Indigenous cultural heritage as part of the Australian constitutional identity, the federal and state institutions of the country are showing a shift in perspective that translates into greater attention to Indigenous knowledge, which nevertheless deserves to be further recognized and valued.

It is now an undeniable fact that the peculiarities of Indigenous culture, tradition, history and legal status we have to notice how - in any case - the recognition and promotion of specifical national identity is crucial in the building of a strong and cohesive constitutional order. The presence of multiple traditions and even national identities and indigenous communities does not compromise the robustness of the system but, on the contrary, makes the democratic structure stronger. In Europe, a strong sense of regionalism and allegiance to local customs and languages reflects the historical legacy of the diverse States that have coexisted on the peninsula for centuries. Considering the principles individuated by Terri Janke as essential to achieve the goal of Protecting Indigenous Cultural and Intellectual Property (ICIP) rights we can assert that the EU normative framework meets all the strategies identified as functional to the guarantee and enhancement of the territorial specificities of a linguistic, artistic, and cultural nature in the broadest sense of the term. What Australia seems to lack, when considering its track record of protecting cultural heritage, is a concerted political will to see the need for protecting cultural heritage, and for carrying out the actions which will protect it. The lack of constitutional protection is extremely significant in Australia, and the recent failed referendum only underlines this situation. The issue of self-determination and the extent to which a treaty process might interfere with a "one and indivisible" nation continues to be a significant barrier, it seems, to acceptance by the general public of the need to protect cultural heritage as a living thing.

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