

**TAKING BETTER CARE OF CULTURE:
AN EVALUATION OF INTANGIBLE HERITAGE PROTECTION
UNDER THE *ABORIGINAL HERITAGE ACT 2006* (VIC)**

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1 Introduction

Creating the best conditions for a thriving community requires more than the provision of healthcare, education and economic opportunity. The protection and affirmation of the community's cultural heritage is also vital. Cultural heritage involves expressions of the way of living developed by a community and passed down through generations.¹ It does not end at archaeological artefacts or heritage places. Such things are all but meaningless without the intangible traditions and living expressions that accompany them. Included in this 'intangible cultural heritage' (ICH) are performing arts, language, and the knowledge and skills used to produce traditional crafts.² ICH is essential to maintaining cultural identity and diversity.³ Its importance and the importance of its protection are internationally recognised.⁴

In 2016, the *Aboriginal Heritage Amendment Act 2016* (Vic) ('*AH Amendment Act*') introduced into the *Aboriginal Heritage Act 2006* (Vic) ('*AHA*') a regime for the protection of Aboriginal intangible heritage (AIH).⁵ This regime remains the only of its kind in Australia. When first introduced, it received praise as 'revolutionary';⁶ a 'milestone in Australia's recognition of Indigenous intangible heritage.'⁷ But it was not long before flaws became evident and criticisms were voiced.⁸ The most significant criticisms have come from the *Taking Care of Culture* ('*TCOC*') discussion paper,⁹ released by the Victorian Aboriginal Heritage Council

¹ Elsevier, *International Encyclopedia of Human Geography (Second Edition)* (online at 8 March 2022) Heritage and Economy, 369.

² UNESCO, 'What is Intangible Cultural Heritage?' *Intangible Cultural Heritage* (Web Page) <<https://ich.unesco.org/en/what-is-intangible-heritage-00003>>.

³ Ibid.

⁴ *Convention for the Safeguarding of the Intangible Cultural Heritage*, signed 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006) ('*ICH Convention*').

⁵ *Aboriginal Heritage Act 2006* (Vic) pt 5A ('*AHA*').

⁶ Victoria, *Parliamentary Debates*, Upper House, 11 February 2016, 212, 218 (Jaala Pulford, Minister for Agriculture).

⁷ Ashleigh Blechyndan, Belinda Burbidge, Michael O'Kane and Philip Roberts, 'Victoria leads the way in Australian Aboriginal intangible heritage protection' (December 2016) *Native Title Newsletter* 19.

⁸ E.g. *ibid*; Matthew Storey, 'Tangible Progress in the Protection of Intangible Cultural Heritage in Victoria?' (2017) 20 *Australian Indigenous Law Review* 108.

⁹ Victorian Aboriginal Heritage Council, 'About the Victorian Aboriginal Heritage Council', *Victorian Aboriginal Heritage Council* (Web Page, 30 March 2021) <<https://www.aboriginalheritagecouncil.vic.gov.au/about-victorian-aboriginal-heritage-council>>.

(VAHC), a body constituted solely of Traditional Owners.¹⁰ This discussion paper and the consultation it sought aimed to inform the yet to be released *State of Victoria's Aboriginal Cultural Heritage Report 2016-2021* ('VACHR').¹¹

Through the VACHR, the VAHC intends to not only critically analyse Victoria's Aboriginal cultural heritage laws, but also reflect upon what the future of cultural heritage protection in Victoria should be.¹² This essay evaluates the current legal protections of AIH under the AHA. It does so through comparison with both the *Convention for the Safeguarding of the Intangible Cultural Heritage*¹³ ('ICH Convention'), an international benchmark for ICH protection, and the Mexican legal regime implementing this convention, which is internationally recognised as strong and effective.¹⁴ Mexico has been chosen as its cultural diversity, history as a former colony, federal constitution and the recency of a significant part of its ICH regime (introduced 2017)¹⁵ mean the jurisdiction shares key similarities with Victoria. Another recent VAHC publication, *Taking Control of Our Heritage: Recommendations for reform of the Aboriginal Heritage Act 2006*¹⁶ ('TCOH') contains two proposals for reform of the AHA that pertain to AIH protection. These proposed changes are evaluated along with the current law.

As no comprehensive comparison of the AIH provisions with any equivalent law in overseas jurisdictions has yet been published, this research supplements the findings of the VAHC's publications and contributes towards informed advocacy for AHA reform. In addition to

¹⁰ Victorian Aboriginal Heritage Council, *Taking Care of Culture* (Discussion Paper, January 2021) 44 ('TCOC').

¹¹ Ibid 6.

¹² TCOC (n 10) 52.

¹³ ICH Convention (n 4).

¹⁴ Pier Luigi Petrillo (ed), *The Legal Protection of the Intangible Cultural Heritage: A Comparative Perspective* (Springer, 2019) 241.

¹⁵ Francisco Morales and Edaly Moreno, 'The Legal Framework for Safeguarding the Intangible Cultural Heritage in Mexico' in Pier Luigi Petrillo (ed), *The Legal Protection of the Intangible Cultural Heritage: A Comparative Perspective* (Springer, 2019) 37, 47.

¹⁶ Victorian Aboriginal Heritage Council, *Taking Control of Our Heritage: Recommendations for reform of the Aboriginal Heritage Act 2006* (Final Report, October 2021) ('TCOH').

recommending the implementation of the reforms recommended in *TCOH*, the essay concludes that the intellectual property (IP) regime characteristics of the AIH provisions should be repealed, and AIH registration enhanced through certain additions.

2 Current shortfalls of the *AHA* in protecting AIH

The shortfalls identified by the VAHC in its *TCOC* and *TCOH* publications fall into two categories: those concerning the definition of AIH, and those concerning the registration of AIH.

2.1 Definition of AIH

The *AHA* defines AIH as:

‘...any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.’¹⁷

This also includes ‘any intellectual creation or innovation based on or derived from anything referred to in [the above].’¹⁸

The VAHC takes issue with the separation of intangible heritage from tangible heritage (referred to in the *AHA* as ‘Aboriginal cultural heritage’) under the *AHA*.¹⁹ It argues the approach to AIH protection in Victoria needs to shift from the ‘tangible/ intangible’ dichotomous thinking entrenched in the current *AHA*, to one that takes a ‘holistic view of people, Culture and Country.’²⁰ This is because the traditional knowledge systems from which AIH derives are inextricably linked to Country, and thus, tangible heritage.²¹ The VAHC

¹⁷ *AHA* (n 5) s 79B(1).

¹⁸ *Ibid* s 79B(2).

¹⁹ *TCOC* (n 10) 13.

²⁰ *Ibid* 16.

²¹ *Ibid* 42.

argues that the lack of appropriate expression of this relationship in the *AHA* impedes proper understanding and protection of AIH by the wider community.²²

TCOH includes a recommendation to legislate an obligation for both state and local governments to consult with Registered Aboriginal Parties (RAPs) on matters of AIH as well as those of tangible Aboriginal cultural heritage.²³ This would expand the current legislative framework to encourage increased government engagement with RAPs on cultural heritage matters.²⁴ It may go some way towards achieving both holistic heritage protection and greater participation of Traditional Owners in heritage protection. That people not representative or inclusive of Traditional Owners are currently speaking for Aboriginal cultural heritage was flagged as an issue of significant concern in the VAHC's 2019-2020 Annual Report on RAPs.²⁵

The other issue with the definition of AIH identified by the VAHC is that it excludes anything widely known to the public. The VAHC questions the logic behind this exclusion, contending that AIH does not lose its cultural worth through no longer being secret.²⁶ This exclusion constitutes a limitation to the registrability of AIH which is allegedly misguided and leads to ineffective protection.²⁷

2.2 Registration of AIH upon the Victorian Aboriginal Heritage Register (VAHR)

The VAHC notes that the registration system for AIH is ineffective. Only one registration of AIH has been made since the system's introduction in 2016.²⁸ Concerns expressed by Traditional Owners include:

²² Ibid 44.

²³ *TCOH* (n 16) 15.

²⁴ Ibid.

²⁵ Victorian Aboriginal Heritage Council, *Annual Report on Registered Aboriginal Parties 1 July 2019 – 30 June 2020* (Report, July 2020) 14.

²⁶ *TCOC* (n 10) 44.

²⁷ Ibid 44.

²⁸ Ibid 13.

- the absence of heritage overlay in the registration, meaning there is no direct protection of places associated with registered AIH.²⁹ This shortfall results from the legislative separation of tangible and intangible heritage;
- the need to provide sensitive cultural knowledge to non-Traditional Owners (i.e. public servants); and
- the lack of tangible outcomes of registration.³⁰

TCOH recommends that the *AHA* be amended to transfer the responsibility of the VAHR from First Peoples-State Relations (FP-SR) (part of the Victorian Department of Premier and Cabinet³¹) to the VAHC.³² This recommendation is aimed at reducing the delays and obstacles encountered by Traditional Owners in trying to protect heritage.³³ The recommendation may address the issues that arise from the VAHR being under the management of public servants. Namely, these are the concern regarding sharing of sensitive knowledge, and the disparity that often arises between what public servants view as appropriate for registration and the views of Traditional Owners and heritage advisors.³⁴

An additional shortfall identified by the VAHC was the lack of cultural mapping, with only around 6% of Victoria having been surveyed for Aboriginal cultural heritage.³⁵ This is a consequence of the ‘reactive, not proactive’ approach to heritage protection perpetuated by the current Act.³⁶

²⁹ Victorian Smart Planning Permit Application Services, ‘What is a Heritage Overlay?’ *The Complete VicSmart Guide* (Web Page) <<https://vicsmartguide.com.au/vicsmart-planning-permit/application-forms-checklists/what-is-a-heritage-overlay>>.

³⁰ *TCOC* (n 10) 44.

³¹ First Peoples-State Relations, ‘About First Peoples - State Relations’ *First Peoples-State Relations* (Web Page, 6 October 2021) <<https://www.firstpeoplesrelations.vic.gov.au/about-first-peoples-state-relations>>.

³² *TCOH* (n 16) 33.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid* 13.

³⁶ *Ibid* 24.

3 Guidance provided by the *ICH Convention*

Though Indigenous issues were deliberately left aside in the negotiations for the *ICH Convention*,³⁷ the instrument still represents a high point of international legal protection of ICH.³⁸ Hence, the Convention serves as an important benchmark for evaluation of *AHA* AIH protection, particularly if the *AHA* is to maintain its purported status as a ‘model internationally’³⁹ for indigenous heritage protection. Of particular assistance is the *ICH Convention*’s definition of ICH and its ICH inventory provisions.

3.1 Definition of ICH

The preamble of the *ICH Convention* considers the ‘deep-seated interdependence between the ICH and the tangible cultural and natural heritage’.⁴⁰ This is an obvious contrast to the intangible/tangible dichotomy presented through the *AHA* and so heavily criticised by the VAHC. The Convention’s definition of ICH includes the ‘cultural spaces’ associated with the ICH elements and recognises that ICH is created in response to a community’s environment and through interaction with surrounding nature.⁴¹ Article 13(d)(i) provides that State Parties shall endeavour to adopt measures fostering the ‘transmission of [ICH] through ... spaces intended for the performance or expression thereof’. Article 14(c) provides that State Parties shall endeavour ‘to ... promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the [ICH].’ Though the *ICH Convention* necessarily deals with ICH as separate from tangible heritage, its expression of the interdependence between the two and the proposals therein for fostering this relationship should inform *AHA* reform aimed at addressing the VAHC’s concerns.

³⁷ Petrillo (n 14) 12.

³⁸ Storey (n 8) 117.

³⁹ Victoria (n 6).

⁴⁰ *ICH Convention* (n 4) preamble.

⁴¹ *Ibid* art 2.1.

The *ICH Convention* defines ICH as:

‘...the practices, representations, expressions, knowledge, skills ... that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups ... and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.’⁴²

It is intended that ‘almost anything that a particular community wishes to protect’ that falls within this definition is protected by the Convention.⁴³ In contrast to the *AHA*, there is no exclusion of ICH that is widely known to the public.

Article 11(b) of the *ICH Convention* suggests ICH is identified and defined ‘with the participation of communities, groups and relevant non-governmental organizations’. The VAHC’s recent criticisms indicate Traditional Owners do not find the *AHA* definition of AIH adequate. Though the art 11(b) duty to consult appears helpful, it has been flagged as potentially ineffective for indigenous communities.⁴⁴ This is because, despite the duty, the Convention still places the initiation and final determination of ICH identification in the hands of the state.⁴⁵ The VAHC’s recommendation to transfer management of the VAHR to the VAHC would give Traditional Owners greater control over AIH identification and definition. This also aligns with Chapter III of the *ICH Convention Operational Directives*,⁴⁶ the Ethical Principles for Safeguarding ICH,⁴⁷ and Article 15 of the *ICH Convention* which obligates State

⁴² Ibid art 2.1 and 2.2.

⁴³ Isabelle Connolly, ‘Can the World Heritage Convention be adequately implemented in Australia without Australia becoming a party to the Intangible Heritage Convention?’ (2007) 24 *Environmental and Planning Law Journal* 198, 200.

⁴⁴ Paul Kuruk, ‘Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage’ (2004) 1 *Macquarie Journal of International Law* 111, 128.

⁴⁵ Richard Kurin, ‘Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention’ (2007) 2 *International Journal of Intangible Heritage* 10, 12.

⁴⁶ UNESCO, *Basic Texts of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage* (UNESCO, 2020 ed, 2020) 43.

⁴⁷ Ibid 113.

Parties to endeavour to ensure the widest possible participation of the communities that create, maintain and transmit ICH, and to actively involve them in its management.

The *ICH Convention*'s definition of ICH suggests the aim of the Convention is to safeguard knowledge and processes rather than products and records.⁴⁸ The comments of anthropologist Richard Kurin, who assisted in the development of the Convention, support this interpretation: 'ICH was not the mere products, objectified remains or documentation of such living cultural forms... ICH is the actual singing of the songs ...'⁴⁹ Current VAHC Director Dr Matthew Storey has observed that the AIH provisions place greater emphasis on the physical artefact of ICH than the act of production described by Kurin.⁵⁰ A shift in focus toward process and practice in accordance with the Convention may improve the utility of the *AHA* protections.

3.2 ICH inventories

The *ICH Convention* provides for the making of inventories of ICH.⁵¹ State Parties are required to make and regularly update an inventory 'to ensure identification with a view to safeguarding'.⁵² Such an inventory may be seen as the *ICH Convention* equivalent of AIH registration. The Operational Directives include core indicators for inventorying which may assist in the improvement of the AIH registration system.

The first indicator is that the inventory reflects the diversity of ICH and contributes to its safeguarding.⁵³ Given the sole registered element, the registration of AIH in Victoria clearly does not currently perform well against this indicator. Associated assessment criteria include whether:

⁴⁸ Connolly (n 43) 200.

⁴⁹ Kurin (n 45) 12.

⁵⁰ Storey (n 8) 117.

⁵¹ Connolly (n 55) 200; *ICH Convention* (n 3) art 12.

⁵² *ICH Convention* (n 3) art 12.

⁵³ UNESCO (n 46) 124.

- the inventory is updated to reflect the current viability of elements included, and
- access to the inventory is facilitated to strengthen safeguarding whilst respecting customary practices governing access.⁵⁴

Current viability is important as it implies protection measures tailored to the risk of loss of a particular ICH element. These criteria can guide improvement aimed at striking a balance between ensuring registration leads to tangible outcomes and ensuring it is culturally appropriate. The aforementioned VAHC commentary suggests cultural sensitivity of the registration system could be improved through transferral of responsibility for the VAHR into the VAHC's hands.

The second core indicator is that the 'inventorying process is inclusive, respects diversity, and supports safeguarding by communities and groups'.⁵⁵ This is assessed according to whether 'communities, groups and NGOs participate inclusively in inventorying which informs and strengthens their safeguarding efforts'.⁵⁶ Again, transferal of VAHR management to the VAHC would accord with this criterion.

4 Implementation of the *ICH Convention* in Mexico

This part provides an overview of the implementation of the *ICH Convention* in Mexico to illustrate how the guidance outlined in Part 3 may translate into practise. This information will be utilised to formulate key considerations for the improvement of AIH protection (Part 5).

The most significant result of *ICH Convention* ratification in Mexico has been the approval of the *General Law on Culture and Cultural Rights*,⁵⁷ a law on cultural, material and intangible heritage. It is aimed at protecting cultural rights and establishing rules for access to and shared

⁵⁴ Ibid 128.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ *General Law on Culture and Cultural Rights* (published in the Official Journal of the Federation on June 19, 2017) (United States of Mexico).

use of heritage.⁵⁸ This constituted a new tool for the protection and enhancement of ICH according to the model provided by the *ICH Convention*.⁵⁹ Additionally, in August 2021 a new *General Law for the Protection of Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities in Mexico*⁶⁰ was passed through the Mexican federal legislature.⁶¹ This law attempts to increase the inclusivity of Mexican ICH laws to the Indigenous and Afro-Mexican minorities of the country.⁶² The recency of this law means its practical operation cannot yet be analysed. This part will only discuss the definition of ICH in the *General Law on Culture and Cultural Rights* and the Mexican ICH inventory.

As in other States parties to the *ICH Convention*, the use of the term ‘ICH’ and its definition generated debate in Mexico.⁶³ ICH protection in the country has hence not been free of criticism.⁶⁴ Nevertheless, it has resulted in commendable ICH protection that Victoria may draw inspiration from. For example, in 2012 the Centre for Indigenous Arts’ contribution to safeguarding the ICH of the Totonac people of Veracruz, Mexico was selected by the Intergovernmental Committee for the Safeguarding of ICH as best reflecting the principles and

⁵⁸ UNESCO (n 46) 239.

⁵⁹ *Ibid* 240.

⁶⁰ *General Law for the Protection of Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities in Mexico* (published in the Official Journal of the Federation on January 17, 2022) (United States of Mexico).

⁶¹ Luis Schmidt, ‘New General Law for the Protection of Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities in Mexico’, *Olivares* (Blog Post, 5 August 2021) <<https://www.olivares.mx/new-general-law-for-the-protection-of-cultural-heritage-of-indigenous-and-afro-mexican-peoples-and-communities-in-mexico-2/>>.

⁶² *Ibid*.

⁶³ Morales and Moreno (n 15) 37.

⁶⁴ Fernando Armstrong-Fumero, ‘From Hacienda Domesticity to the Archaeological Sublime: Sentiment and the Origins of Heritage Management in Yucatan, Mexico’ (2018) 14 *Archaeologies* 115; Mneesha Gellman, ‘The right to learn our (m)other tongues: indigenous languages and neoliberal citizenship in El Salvador and Mexico’ (2018) 40(4) *British Journal of Sociology of Education* 523; Fernando Armstrong-Fumero and Julio Gutierrez, ‘Settlement Patterns, Intangible Memory, and the Institutional Entanglements of Heritage in Modern Yucatán’ in Fernando Armstrong-Fumero and Julio Gutierrez (eds), *Legacies of Space and Intangible Heritage: Archaeology, Ethnohistory, and the Politics of Cultural Continuity in the Americas* (University Press of Colorado, 2017) 15; Maya Ruiz, ‘Reseña de Ley General de Cultura y Derechos Culturales promulgada en México en 2017’ (2018) 12(24) *Cultura y representaciones sociales* 425.

objectives of the *ICH Convention*.⁶⁵ It was hence registered upon the international Register of Best Safeguarding Practices established by the Convention.⁶⁶

4.1 Definition of ICH in Mexican law

Article 3 of the *General Law on Culture and Cultural Rights* defines ICH as:

‘...the past and present intangible and material elements, inherent in the history, art, traditions, practices and knowledge that identify groups, peoples and communities ... that people, individually or collectively, recognize as their own for the value and meaning ... in terms of their identity, formation, integrity and cultural dignity ...’

This definition is broad, considers intangible and tangible heritage interrelatedly and encompasses both past and present elements.

4.2 National Inventory of the ICH of Mexico

Mexico’s ICH inventory is managed by the federal government’s Secretariat of Culture and is publicly accessible.⁶⁷ There are currently 319 ICH elements registered on the inventory. In 2019 there were 249,⁶⁸ indicating a steady rate of registration. Each registration comprises of a form typically indicating the name of the element, the cultural ‘domain’ represented by the element (e.g. performing arts, social practices, traditional craftsmanship), the geographical dimension, a description of the communities, groups or individuals involved and a description

⁶⁵ United States of Mexico, *Report on the Implementation of the Convention and on the Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity* (Periodic Report, December 2017) 2.

⁶⁶ Ibid; UNESCO, ‘Xtaxkgakget Makgkaxtlawana: The Centre for Indigenous Arts and its contribution to safeguarding the intangible cultural heritage of the Totonac people of Veracruz, Mexico’ *Intangible Cultural Heritage* (Web Page) <<https://ich.unesco.org/en/BSP/xtaxkgakget-makgkaxtlawana-the-centre-for-indigenous-arts-and-its-contribution-to-safeguarding-the-intangible-cultural-heritage-of-the-tononac-people-of-veracruz-mexico-00666>>.

⁶⁷ Gobierno de México, ‘Inventario del patrimonio cultural inmaterial’, *Sistema de Información Cultural* (Web Page) <<https://sic.cultura.gob.mx/index.php?table=frpintangible>>.

⁶⁸ Morales and Moreno (n 15) 46.

of the element itself.⁶⁹ This description details the history of the element and its development up to the present.⁷⁰ Also often included is the socio-cultural functions of the element, the risk of its loss, safeguarding measures in place and documentary support.⁷¹ An open access online form for providing feedback upon an entry is also available.⁷²

The history of the creation of the inventory also provides suggestions for the adjustment of the VAHR. With a view to fulfilling the inventorying obligations under the *ICH Convention*, in 2006 the Working Group for the Promotion and the Protection of the ICH of Mexico was created.⁷³ To establish the Mexican ICH inventory, the Working Group created a Committee of Specialists. This Committee consisted of 35 specialists from different academic institutions, with experience and knowledge of both the country's diverse ICH and the knowledge and cultural abilities of ICH bearers.⁷⁴ The group's mission was to bring together all expressions and manifestations representing the country's cultural groups.⁷⁵ Thus, its aim was to proactively survey and inventory the ICH of Mexico, including Mexican indigenous ICH.

The Committee designed the ICH registration form, taking aspects from the nomination form for the *UNESCO Representative List of the Intangible Cultural Heritage of Humanity*.⁷⁶ The completed registration forms that constitute registered elements on the inventory are prepared by specialists of that ICH domain, based on direct fieldwork with bearers and practitioners of the manifestation of the ICH element.⁷⁷ Registrations are a result of widescale community effort.⁷⁸ Seminars and workshops are organised by the government to build the skills of

⁶⁹ E.g. see Gobierno de México, 'La maroma o circo campesino en la región mixteca' *Sistema de Información Cultural* (Web Page) <https://sic.cultura.gob.mx/ficha.php?table=frpintangible&table_id=260>.

⁷⁰ Morales and Moreno (n 15) 46.

⁷¹ Gobierno de México (n 67).

⁷² *Ibid*, see '¿Detectaste algún error en este registro?'

⁷³ Morales and Moreno (n 15) 42.

⁷⁴ Morales and Moreno (n 15) 43.

⁷⁵ *Ibid* 44.

⁷⁶ *Ibid* 46.

⁷⁷ *Ibid*.

⁷⁸ *Ibid*.

community cultural agents, that they may guide their respective communities in protecting ICH and draft inventory registration forms.⁷⁹ Four *ICH Convention*-accredited NGOs⁸⁰ function to provide non-state affiliated support of *ICH Convention* implementation, increasing the strength and inclusivity of ICH protection.⁸¹

In order to be registered, the element and its process of registration must comply with international human rights instruments and any applicable Mexican laws.⁸² Mutual respect amongst all involved in the registration, including the free and informed agreement of the people or community who practice the element, is imperative.⁸³ The VAHC's recommendation that state and local governments be obligated to consult with RAPs on matters of AIH echoes these principles.

5 Evaluation of the *AHA* and considerations for Victoria

5.1 Guidance for reform of the AIH definition

The key difference between the definition of AIH in the *AHA* and that of ICH in the *ICH Convention* and Mexican law is that the *AHA* definition explicitly excludes tangible heritage, as well as anything widely known to the public. It is no coincidence that it is these exact features of the *AHA* definition that the VAHC takes issue with. The *AHA* definition distinguishes between AIH and tangible heritage because the AIH provisions were intended to protect AIH in a way similar to how IP rights protect IP.⁸⁴ The intent of the *AH Amendment Act* was to create a new right facilitating Traditional Owner groups recognised by the State to control the

⁷⁹ Ibid 47.

⁸⁰ UNESCO, 'Accredited NGOs located in this country' *Intangible Cultural Heritage* (Web Page) <<https://ich.unesco.org/en/state/mexico-MX?info=accredited-ngos>>.

⁸¹ Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, *Reflection on the role of accredited non-governmental organizations within the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage* (Report, 18 April 2019) 3.

⁸² United States of Mexico (n 65) 10.

⁸³ Ibid.

⁸⁴ Victoria (n 6); Explanatory Memorandum, Aboriginal Heritage Amendment Bill 2015 (Vic) 18; Storey (n 8).

protection and use of their intangible heritage.⁸⁵ Thus, the legislation conceptualises AIH as separate from tangible heritage, in the way that IP is separate from real property.⁸⁶ The exclusion of anything widely known to the public was intended to exclude from classification as AIH things generic to, known or practiced widely by, the broader population.⁸⁷ This again evokes a likeness to IP rights.⁸⁸

Though there are obvious links between IP rights and ICH protection, the *ICH Convention* and thus, the Mexican law treat IP in ICH and ICH safeguarding as discrete issues. This distinction originates from the history of the development of the *ICH Convention*. While it was initially considered that ICH could be protected at an international level through an additional protocol to the *Universal Copyright Convention*,⁸⁹ it was eventually concluded that an international copyright solution was unrealistic.⁹⁰ That the issue was felt to be predominantly of a cultural nature placed it outside the bounds of copyright.⁹¹ The *ICH Convention* was developed as ICH safeguarding was viewed as a discrete and more problematic issue than IP rights.⁹² As indicated in Parts 3 and 4, the *ICH Convention* and Mexican law are therefore focussed upon ICH safeguarding through facilitation of the practicing of ICH as opposed to the creation of exclusive rights for ICH bearers.

The limitations of the *AHA* definition are therefore intrinsically related to the AIH provisions' property regime characteristics. Hence, addressing the VAHC's criticisms of the definition by

⁸⁵ Explanatory Memorandum (n 84) 18.

⁸⁶ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Interim Report No 127, August 2015) 180.

⁸⁷ Explanatory Memorandum (n 84) 18.

⁸⁸ IP Australia, 'IP explained' *Australian Government* (Web Page, 4 February 2021) <<https://www.ipaustralia.gov.au/understanding-ip/getting-started-ip/ip-explained>>.

⁸⁹ Signed 6 September 1952, 943 UNTS 178 (entered into force 10 July 1974).

⁹⁰ Samantha Sherkin, 'A Historical Study on the Preparation of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore' in Peter Seitel (ed), *Safeguarding Traditional Cultures: A Global Assessment* (Center for Folklife and Cultural Heritage, Smithsonian Institution, 2001) 45.

⁹¹ *Ibid.*

⁹² Sherkin (n 90) 50-51; UNESCO, 'Recommendation on the Safeguarding of Traditional Culture and Folklore' (General Conference of UNESCO, 15 November 1989).

removing the exclusions within it necessitate repeal of the offence and registered agreement sections of the AIH provisions, in order to withdraw the property regime characteristics from the *AHA*.⁹³

5.2 Guidance for reform of AIH registration upon the VAHR

The process of registration upon Mexico's ICH inventory appears to be significantly more accessible and proactive than that of AIH upon the VAHR. Where in Mexico, registration can be undertaken by any community, group or individual,⁹⁴ in Victoria only a RAP, registered native title holder or a Traditional Owner group entity may apply to have AIH registered.⁹⁵ This restriction is intended to avoid conflict between individual applicants by limiting the power of registration to those officially recognised as representing Traditional Owners.⁹⁶ It is also meant to reflect that AIH is collectively owned and sustained by a group.⁹⁷ It is contended that this restriction is appropriate for the Victorian context for those reasons, and does not significantly impede registration as the RAP system appears to be well-accepted by the Victorian Aboriginal community.⁹⁸

To improve the utility of AIH registration, Victoria may instead draw inspiration from the form of registration implemented in Mexico. The prescribed form used to apply for AIH registration is found in Schedule 7 of the *Aboriginal Heritage Regulations 2018* (Vic).⁹⁹ It contains the name of the applicant and details of the AIH, i.e. the category of AIH, associated Aboriginal cultural heritage and documentary evidence.¹⁰⁰ Victoria may consider explicitly including in its prescribed form the Mexican inventory registration form components of geographical

⁹³ See Storey (n 8).

⁹⁴ United States of Mexico (n 65) 9.

⁹⁵ *AHA* (n 4) 79C(1).

⁹⁶ Explanatory Memorandum (n 84) 18.

⁹⁷ *Ibid*.

⁹⁸ *TCOH* (n 16) 11.

⁹⁹ *Aboriginal Heritage Regulations 2018* (Vic) reg 78.

¹⁰⁰ *Ibid* sch 7.

dimension, risk of loss and protection measures in place. This enhancement would align AIH registration more closely with inventorying per the *ICH Convention*, as AIH protection would be facilitated through the registration process itself.¹⁰¹ Adding a geographical dimension suggests associated heritage overlay, and ensures greater attention is drawn to associated tangible heritage. Adding information about current degree of risk of loss and protection measures in place draws attention to the urgency of protection, and whether protection measures need to be implemented or improved. This recording of current safeguarding actions in order to identify gaps in safeguarding would be the purpose of AIH registration in the absence of the property regime characteristics. The current accessibility restrictions upon the VAHR should, however, be maintained for reasons of cultural sensitivity.

Adoption of elements of the proactive approach to registration employed by Mexico would assist in remedying the current lack of cultural mapping in Victoria. Victoria should consider the creation of an equivalent of the Mexican Working Group for the Promotion and the Protection of the ICH. Like the Mexican group, the Victorian group would comprise of AIH specialists (perhaps RAP representatives or members of the VAHC) that would proactively identify and register AIH across Victoria, beginning with elements in urgent need of safeguarding. The Victorian group would work to ensure the VAHR reflects the diversity of AIH in Victoria and would encourage community participation. As suggested by the *ICH Convention*, regular updating of registrations to ensure the evolution of AIH is accounted for should also be facilitated.

Neither the ICH Convention nor the Mexican regime contemplate an inventory managed by any entity other than the state. It is nonetheless argued that the VAHC's recommendation that responsibility for the VAHR be transferred to the VAHC is appropriate. This is because the

¹⁰¹ per *ICH Convention* (n 4) art 12.

VAHR is distinguishable from the Mexican inventory in that it only pertains to AIH and not the ICH of other groups or the general population. Additionally, the VAHC is still a legislative body and thus subject to certain standards of accountability. This should dispel concerns that giving responsibility for the VAHR to the VAHC could lead to ‘a conflict of interest and consequent potential for abuse of power.’¹⁰²

6 Conclusion

Implementation of the recommendations of this essay would constitute a dramatic shift in the focus of the AIH provisions. Nevertheless, they are the logical conclusion of careful evaluation of the AIH provisions through comparison with the *ICH Convention* and Mexican ICH regime. The logistical difficulties of implementing the recommendations within this essay are acknowledged, as are the complex social and political obstacles that have generally deterred Australia from adherence to or ratification of the *ICH Convention*.¹⁰³ It was not within the scope of this essay to indicate how these obstacles are to be overcome, but rather to assess the current law and suggest achievable improvements that would render the law exemplary.

If any bills amending the AIH provisions do come before the Victorian parliament in the near future, is it hoped that during their preparation, due regard is given to the lessons that may be learnt from the *ICH Convention* and its implementation in countries such as Mexico.

¹⁰² *TCOH* (n 16) 40.

¹⁰³ Connolly (n 55) 209.

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