Under the Bauhinia Tree: lessons from South East Asia on ICH and the intersection between people, place and practice

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Abstract

The UNESCO 2003 Convention for the Safeguarding of Intangible Cultural Heritage was conceived as a harmonizing tool that would work to mitigate the negative impacts of globalisation while also creating opportunities for renewed dialogue amongst communities within and across national borders and to maintain the world’s cultural diversity. Australia, like most of the major western nations, is not a signatory to this Convention, although cultural heritage practitioners within Australia have for some years been incorporating a consideration of intangible values into understandings of heritage places in Australia. Meanwhile, many of our neighbours in the Asia-Pacific have enthusiastically embraced the Convention and embarked on a range of activities from research and documentation of Intangible Cultural Heritage (ICH) through to the enactment of legislation specifically protecting ICH. The adoption in 2015 of the UN Sustainable Development Goals which specifically reference cultural heritage for the first time will potentially provide an added impetus for consideration of cultural heritage in Southeast Asia and the Pacific although the impact of this latest initiative has for the most part yet to filter down into development planning. Given the activity around the safeguarding of ICH and the increased attention to cultural heritage in regional development activities, if we do not ratify the Convention it is possible that Australian will find itself increasingly out of step with its neighbours in the region.

While there are many similarities in the approaches to safeguarding ICH by nations across Asia and the Pacific there are also some interesting differences. In some countries ICH and Tangible Cultural Heritage (TCH) have developed into separate silos and in others they are more entwined. This paper will consider approaches to ICH in the region and consider some of the lessons that we can learn from our neighbours to the north who are engaged in the protection of ICH.

Introduction

Intangible cultural heritage as a field of endeavour does not have the prominence of tangible heritage in Australia. However, researchers and consultants have long considered intangible values of heritage including the meanings, experiences and beliefs that are associated with ‘tangible heritage items and places (e.g. English & Lee 2004; Stefano et al., 2012; Harmon 2004; McLean 2013, McIntyre-Tamwoy 2004; Sullivan 2004). For this reason, intangible values relating to certain heritage places in Australia have been recognised for some time. For example, Kakadu National Park, (Figure 1) which was inscribed on the world heritage list in three stages between 1981-1992, is listed under a number of criteria, including criterion vi: Be directly or tangibly associated with events or with ideas or beliefs of outstanding universal significance
which recognises intangible and associative values of the landscape to Aboriginal people. Through their work with Aboriginal people many practitioners in Australia have developed a nuanced understanding of the depth and range of intangible values in Australia especially as it relates to Indigenous heritage (Hill et al 2011; Greer 2010) however a similar focus has rarely been applied to non-indigenous culture.

Increasingly, protected area managers of large, ostensibly natural, landscapes now understand that many of these also have intangible cultural values and it is common to hear this recognised in literature on protected area management (e.g. Feary in Worboys et al., 2015, p. 97; Pannell 2008; Hill et. al., op cit.). This ‘understanding’ has not come without struggle, debate and robust critique (e.g. Smith 2006; 2007).

Given this understanding it is surprising that there has been little dialogue between the government and the heritage community about the 2003 UNESCO Convention for the Safeguarding of the World’s Intangible Cultural Heritage. If Australian heritage practitioner and researchers have been considering the intangible heritage values of landscapes since the mid-1980s why has there been so little interest in the 2003 Convention? We suggest that this is for three reasons. Firstly, in Australia, as in many western countries there is a disconnect between cultural heritage and the arts. The former is seen to be about monuments, sites and protected areas that are linked to the nation’s history and identity and therefore in the realm of heritage agencies; while ‘culture and the arts’ is viewed as part of a cosmopolitan global tradition. Secondly, ‘traditional’ crafts are seen largely as the province of Indigenous Australians and not really considered in the context of settler Australians. Finally, traditional crafts are seen as somewhat static while the focus in the ‘Arts’ sector in Australia is often on promoting creativity and supporting new forms of performance, and art.

We suggest that it is timely to reconsider Australia’s engagement with the 2003 Convention and in doing so we suggest that we can gain insight into the success of the Convention by looking to our neighbours in the Asia Pacific region to see what lessons we might learn. While Australia and other major western powers including the UK, USA, NZ, and Canada have not ratified the Convention, 170 other countries have. Towards the end of our paper we broaden out again to the Australian context and we look at challenges and opportunities in our local context.

**Understanding the 2003 Convention**

In the Convention, the term ‘intangible cultural heritage’ (ICH) has a specific meaning. It refers to the practices, representations, expressions, knowledge and skills, including the instruments, objects artefacts and cultural spaces associated with them, that communities, groups and individuals recognize as part of their cultural heritage. The Convention describes ICH as manifesting in any of five domains:

- Oral expressions and traditions, including language as a vehicle of the intangible cultural heritage;
- Performing arts;
• Social practices, rituals and festive events;
• Knowledge and practices concerning nature and the universe;
• Traditional craftsmanship.

In simple terms, one can think of the ICH protected under the Convention as the knowledge systems associated with cultural practice. So, for example, it is the knowledge and methods of making and playing an instrument, rather than the actual instrument itself that is afforded protection and it is the skill, and tradition of puppetry including both the performance and the crafting of the puppets (Figure 2) rather than the individual puppets themselves that are the object of the safeguarding activity.

The Convention had a long gestation and the history of its development is outside the scope of this paper (but see for instance Vrdoljak, 2005). However, it is worth noting that the pre-cursor to the ICH Convention originally ran parallel to the development of World Intellectual Property Organization (WIPO) in response to the perceived threat of globalisation on cultural diversity of humanity and this has influenced the final form of the Convention. In 1984 a draft treaty was created briefly titled ‘Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions’ however this never came into force. The Convention developed against a backdrop of increased awareness of the relationship between human rights and cultural heritage protection and law. The safeguarding of living cultures has emerged in the past decade as one of the new dimensions of international cultural heritage law. The link with human rights, and in particular with the collective dimension of the right to access, perform and maintain a group’s culture, underlies the success of the ICH Convention and also highlights its failures (Deacon and Smeets 2013). The Convention shifted the focus from the protection of the tangible cultural object to the socio-cultural structures and processes that have generated and developed the ‘intangible’ heritage. States remain the contracting parties to the Convention but it is the artisans, cultural communities, human groups, including minorities, whose cultural traditions are the real object of the safeguarding under international law.

Enthusiastic proponents of the Convention say that it redresses the separation of ‘heritage’ and ‘people’ that critics claim has come to characterise the 1974 World Heritage Convention. They stress that ‘the value of ICH derives from the relationship and interaction between ICH and people rather than from ICH themselves’ (Suga 2009, p. 107 cited in Zhiqin 2015, p.330); and ‘compared to material culture, ICH is the kind of cultural heritage that has to be an integrated part of human kind’ (Fukuda 2010, p.5 cited in Zhiqin, p. 330). However, as we will discuss, although the intention of the Convention was to empower grass root safeguarding activities the realization of this has not always been easy and has yielded mixed results.

**Cultural Heritage Law in Australia**

Historically in Australia, land and resource related issues have been within the exclusive jurisdiction of the individual States. Federal powers under the constitution did not extend to laws relating to land or waters, unless they were Commonwealth land and waters. With the development of co-operative Federalism over the last few decades we have seen a shift to
some uniform Federal based regimes, such as water management, and national and world heritage sites although the day to day management of such cultural heritage is generally still within the purview of the individual States.

Every State and Territory in Australia has different legislation for the protection of cultural heritage and typically there is a separation between legislation to protect Aboriginal and Torres Strait Islander cultural heritage and that of settler Australians (often referred to as historic heritage) and there are considerable differences between the various pieces of legislation. For example, in Western Australia the Minister for Aboriginal Affairs has the right to determine what can be done to Aboriginal cultural heritage, and can allow for the destruction of any Aboriginal cultural heritage, regardless of its significance. In Queensland, for the lawful destruction of significant cultural heritage, agreement must be reached with the Aboriginal people who determine the significance of their heritage.

There are two pieces of federal legislation which are relevant, the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cwth) (ATSIHP Act), and the Environment Protection and Biodiversity Conservation Act 1999 (Cwth) (EPBC Act). The former is meant to protect particularly sacred sites and objects as a ‘last resort’ if protection under State or Territory law was inadequate. It could be said to recognise intangible values but of physical places and objects. The EPBC Act provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places which are defined in the EPBC Act as matters of national environmental significance. It only applies to proposed work over commonwealth land or land of national significance, such as national and world heritage listed areas. It is silent on the issue of the protection of cultural practices, although it could be argued that the management processes outlined for listed places can accommodate these if properly conducted.

While various State Acts have recognised Aboriginal spiritual significance e.g. Aboriginal Place provisions, in 2016 Victoria became the first State in Australia to explicitly provide protection to Aboriginal ICH with the express protection of cultural knowledge, artistic traditions and other ICH under the amendments to Aboriginal Heritage Act, 2006 (Vic). Aboriginal ICH is defined in that Act (s79B) to include ‘performing arts, stories, rituals, festivals, social practices, craft visual arts, and environmental and ecological knowledge’. The Minister for Aboriginal Affairs acknowledged that ‘the influence of Aboriginal culture has not been properly acknowledged in the past’ and now Aboriginal people ‘will be able to shape the nature of cultural heritage and how their cultural heritage is used’ (Hutchins 2016).

Apart from this recent addition to the protection of Aboriginal ICH in Victoria, in the rest of Australia most ICH except for spiritual values of physical places, remains outside of the parameters of direct legal protection. There are some other legal protections that can apply to ICH in Australia, including Intellectual Property Law mechanisms such as copyright and patenting. These legal mechanisms have proved inadequate to provide protection to indigenous expressions of cultural heritage (for example see Bulun Bulun v R & T Textiles [1998] ALR 157; Hardie 1998). Intellectual property laws have been identified as falling short for Aboriginal cultural objects as such laws usually focus on individual authors and do not acknowledge community ownership, and they are often subject to time limitations (for example, copyright expires). The intellectual property laws themselves are designed to give protection to the ‘original’ creation and this does not apply to ICH that has been transferred for generations (see Janke 1998).

**How is ICH safeguarded?**

The Convention does not affect the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources. While it does not expressly provide that parties must introduce legislation to protect ICH, there are certain criteria in the Convention that State Parties agree to undertake which are consistent with the creation of national laws to protect ICH and consequently to be
consistent with the terms of the Convention (for example see Articles 11a and b). The State Party is also required (Article 12) to draw up inventories of intangible cultural heritage and update these inventories, while Article 13 of the Convention lays out a range of other measures for safeguarding to be implemented.

The Convention emphasizes education and awareness-raising. The preamble refers to the ‘need to build greater awareness, especially among the younger generations, of the importance of the intangible cultural heritage and of its safeguarding’. One of the four purposes of the Convention is to raise awareness of the importance, and ensure appreciation of, the intangible cultural heritage (UNESCO 2003 Convention Article 14). The most obvious activities associated with the convention are around the establishment of the three lists: the Representative list of the ICH of humanity; the list of ICH in need of urgent safeguarding and the list of programmes, projects and activities for the safeguarding of the intangible cultural heritage (envisioned as sharing and acknowledgement of best practice initiatives).

At the national level, there is a lot of attention on inventorying and as is the case with the World Heritage Convention this translates into competition to have elements listed. Once listed however there is an obligation on the State Party to ‘safeguard’ the ICH and therein lies one of the great challenges of the Convention. It is one thing to recognise and acknowledge the diverse practices and knowledge systems but how does one safeguard them?

### Inventorying and documenting as a safeguard action

There is evidence to support the claim that the act of inventorying and documenting ICH is an action that contributes to safeguarding i.e. it raises awareness, documents the processes and practices and it often reawakens community interest and pride in culture. However inventorying and documentation alone cannot safeguard ICH and it arguably contributes to the appropriation of ICH by the State or third parties if protocols are not put in place. There is little guidance on what form ‘documentation’ takes, the quality and detail of the data collected, where the data is stored and who controls it.

### Research as a Safeguarding action

Research can contribute to the safeguarding in a number of ways. It should form a part of documentation of ICH as understanding the evolution of an element of ICH is often important for a number of reasons. Firstly, it contributes to our understanding of the innovations and adaptations that have occurred over time and which have produced the ICH. It allows us to explore the knowledge system and understand the traditional processes and protocols that should be involved in future decision-making in relation to the ICH it may reveal transnational connections with related ICH maintained by other ethnic groups and it can reveal the interconnected factors that might be essential to its rejuvenation or long-term sustainability. Unfortunately, we note an aversion to research by some practitioners under the Convention who claim that detailed investigation and documentation leads to the veneration of an ‘authentic’ historic form of ICH.

### Legislation as Safeguarding Action

As noted elsewhere in this paper the creation of specific ICH legislation is not prescribed under the Convention. However, many countries have chosen to go down this path. In some cases, State Parties have considered this necessary to ensure that the nation’s lists are given the status of statutory lists to the establishment and maintenance of which adequate budgets can be allocated e.g. *Act Promoting and Safeguarding the Intangible Cultural Heritage, 2016 Thailand*. Immediately prior to the enactment of this legislation we were privileged to speak to Thailand’s heritage and legal government officials involved in the drafting of the legislation. Primary reasons for the new legislation were to provide legal status to the national inventory and to recognise and resource the required activities needed to implement the Convention.
Non legislative mechanisms for Safeguarding

Many countries in the Asia-Pacific already have in place a number of initiatives that serve to promote and encourage at least some ICH. These include awards for practitioners of certain crafts and the arts; incentives to undertake apprenticeships and training in forms of ICH such as puppeteering and traditional musicianship and dance and public veneration of elder master-craftsmen and women as living treasures (e.g. Hieu 2007, see also Figure 3 which depicts a exhibition of master craftsmen in Taiwan). UNESCO has established the Living Human Treasures program to recognise the expertise of senior craftspeople and to encourage the transmission of their skills. Living human treasures are persons who possess to a high degree the knowledge and skills required for performing or re-creating specific elements of the intangible cultural heritage (UNESCO nd). In Myanmar, there are also tertiary level studies that can be undertaken in key tradition crafts and art forms such as puppetry, song and dance (See Figure 2).

Protecting places and resources

The ICH is the processes and practices, and environmental knowledge around traditional industries. However, in some cases there is a clear correlation between the protection of ICH and the protection of places or spaces that facilitate its continuation. One example is the case of Xoan singing (Figure 4). Xoan singing in Vietnam is an example of the success that comes in part from recognising the interconnectedness of the ICH element and the physical and social context in which it is performed. It was listed under the ICH in need of urgent safeguarding in 2011 and due to the success of the safeguarding measures implemented it has now been earmarked for removal from the urgent list.

In the intervening period, the State Party working at provincial and commune level, dramatically increased the number of practitioners from 300 to 1000. They re-established the performance spaces, including restoring nineteen historic sites and swelled the failing guilds, so that artisans qualified to teach increased from 7 to 62). There were several factors aside from the commitment of the local communities and the province that contributed to this success. The song was suitable for children which it was possible to focus on teaching children which served to rapidly swell practitioner numbers. The tradition belongs to one province therefore minimising complexities of elements that cross different jurisdictional boundaries such as differing commitment to or capacity to resourcing, provincial variations and issues of ownership and control. There was an early recognition that the tradition had been impacted by the loss of traditional ‘spaces’ for performance due to modern development and this meant that government intervention to address this was possible. Based on the assessment of the likelihood of success the government committed around $AUD 10 million to the safeguarding project.
Challenges for the equitable implementation of the Convention

There has been ample commentary on the problems encountered in the implementation of the Convention and some of these have been iteratively dealt with through revisions from time to time of the Operational Directives and we expand on some of these in the following section. The issues we have selected for discussion are some of the enduring issues and arguably might equally apply to the Australian context if the Convention were to be ratified by the Australian Government. They are:

- Conflicts of interest between State Party interests and the community or “bottom up” approach advocated in the Operational Directives;
- Commercialisation and potential loss of authenticity;
- Trans-border ICH plus challenges with cultural diaspora, and
- Free Prior and Informed Consent (FPIC).

ICH, the ‘bottom up approaches’ and the State--conflicts of interest

The protection of tangible heritage in international law was made in favour of the State which, as in any international Convention, enters into treaties as the guardian of the heritage interests of the people. The protection of ICH challenges the role of the State because it deals with living cultures. Communities and their heritage are inextricably linked, therefore by extension communities themselves are entitled to protection under the ICH Convention.

While there is a lot of emphasis on the use of bottom-up approaches in the implementation of the Convention, the reality is that the Convention of course is an agreement with State Parties rather than the communities or individuals who own ICH. This means that it is up to the State which ICH they will inventory and put up for listing under the Convention and it is the State that asserts that it has the necessary rights to take safeguarding actions. According to the Operational Directives of the Convention, State Parties should consult not only communities, groups, and individuals who are bearers of ICH, but also ICH experts and research institutes.

The recognition of diverse ethnicities and cultural groups as being the source most of the ICH in need of safeguarding creates something of a paradox in many instances (Logan 2009; Seeger 2009; Bortolotto 2006; Lixinski 2015). Ethnicity is often factor in many internal conflicts within state borders, and frequently State power is assumed by the dominant ethnic group. As a result it can be argued that the selection of ICH is rarely free of political bias and in such cases there are concerns about whether the State Party can ethically claim to represent the owners of minority owned ICH. Indeed, how can the international community /UNESCO be confident that the Convention is not being used as a political tool and that the authorisation processes are reasonable and authentic and satisfy the conditions of FPIC?

The State and Ethnic diversity

This is a challenge for many nations in SE Asia and elsewhere. For example: Myanmar is one of the most ethnically diverse countries in the world. It is geographically located between Bangladesh, India, Tibet, China, Laos and Thailand. Today ethnic groups make up about a third of the 60 million people in Myanmar. Several of these ethnic groups are found on both sides of the land frontiers surrounding Burma: notably, the Chin (Mizo) and Naga are also present in India; the Kachin, Wa and Shan in China; the Karen, Mon and Shan in Thailand; and the Rakhine and ‘Rohingya’ Muslims in Bangladesh. The smaller hill communities of the Lahu, Akha and Lisu are even divided across four modern-day borders, being split between Burma, China, Laos and Thailand (Department of Population, Ministry of LIP 2016).

The former Myanmar government was engaged in active conflict with some of the ethnic groups and refused to recognise others such as the Rohingya. In such circumstances is Myanmar likely to or indeed capable of safeguarding Rohingya ICH? This is an extreme example but parallels exist in many countries including other parts of Asia, Africa and South America (Zhiqin, C 2015).
It is for this reason that recent versions of the Operational Directives have emphasised the role that ICH and the Convention could play in reconciliation and the restoration of peace (UNESCO 2016 clause 196 & 197) and have urged respect for the ICH of ‘indigenous communities, immigrants and refugees, people of different ages and genders, persons with disabilities and members of vulnerable group’ (UNESCO op. cit., p. 197). Under the Convention State parties are encouraged to create consultative bodies to bring together communities and experts to help in the identification of ICH, the drawing of inventories, and the preparation of nominations. However, it is the State Party that initiatives these and in some cases where the State’s hierarchical structure has many levels the process is an unwieldy one.

**Free Prior and Informed Consent—whose ICH?**

A key issue under the Convention is the community consent. The Convention stops short of requiring ‘consent’ and rather uses the terms ‘participation’ and ‘involvement’. However, since the Convention was established the criteria as been tightened to specify FPIC (UNESCO 2016). One example that highlights some of the issues around FPIC is the Uyghur Meshrep which was inscribed on the UNESCO’s List of Intangible Cultural Heritage in Need of Urgent Safeguarding on 17 November 2010. That the meshrep is endangered is not disputed however the threats to its survival are contested and the appropriateness of the safeguarding measures proposed by the State have been questioned.

The meshrep is a traditional Uyghur cultural event, which the nominating file claims ‘constitutes the most important cultural carrier of Uygur traditions’ (UNESCO 2010). It includes performance of traditional arts, including music, dance, drama, folk arts, acrobatics, storytelling, food and games. In assessing the status and risks to the survival of the meshrep, the committee was informed that the ‘Frequency of occurrence and the number of participants are progressively diminishing, while the number of transmitters who understand the traditional rules and rich content of the event has sharply decreased from hundreds to tens.’ (ibid)

The meshrep provides a good example of the problems of the inscription of ICH under the Convention. It is the State that inscribes the items, yet the ICH belongs to a community of people who are not part of the dominant State culture. Some observers noted the irony of nomination, given that the Chinese authorities had banned them throughout East Turkestan (WUC 2010).

The WUC notes that around 1996 meshrep had been revived in the city of Gulja, East Turkestan as a means of combating drug abuse amongst young Uyghurs. The meshreps were organised to revive cultural and Islamic traditions and to encourage a sense of moral values and the application of rules against drinking and drug use. The cultural revival was popular and was spreading to other areas of East Turkestan and it was claimed that they were having a positive impact on drug use. The WUC claims that the Chinese authorities were wary of practices that brought the Uyghurs together and were hostile towards the meshrep movement. This resulted in the Chinese detaining some of the meshrep participants including one of the founders. In reaction a peaceful protest was started by Uyghers in Gulja in 1997 and the next day on February 5, 1997 the Chinese government brutally crushed the protest. The event has been described in a news report as ‘one of the most unforgettable days of commemoration for the Uyghur people’ (Irwin 2017). The Chinese Government then banned the meshrep.

![Figure 5: Singers during Uyghur Meshrep. Photo: aygulmipo <https://www.flickr.com/photos/travelingmipo/> reproduced under cc-by-sa-2.0 licence.](image-url)
in East Turkestan, as they have replaced the Uyghur language in the region being taught in schools with mandarin and destroyed much of the old city in Karhgar.

The World Uyghur Congress in a press release caution that the aim of the nomination was politically to show that they care about the protection of ethnic culture, while in reality they are trying to assimilate the Uyghur people into the Han culture. The concerns of the WUC are to some extent reflected in the dissenting report of one of the assessors of the nomination, which raised concerns that as to the viability of any grassroots preservation efforts aimed at meshrep. It seems likely that this initiative will contribute to the promotion and preservation of folklorised representations of meshrep traditions, while grassroots practice remains subject to the threats detailed above (Harris in UNESCO 2010b: 28).

While Harris agreed that the drive for modernity in Xinjiang is certainly impacting on meshrep practices, she also considered that there were other factors seriously impacting the sustainability of this element including: the State mandated compulsory shift to Chinese language as a medium of teaching in schools; the forcible removal of Uyghur communities in order to make room for new development, and government restrictions on a range of community-based religious activities and on large public gatherings (Harris in UNESCO 2010b, pp. 23-24).

### Control of ICH—appropriation by the State

Related to FPIC is the issue of what happens to the control of ICH once the State led mechanisms associated with the implementation of the Convention take over. Zhiqin, 2015 uses the example of two rituals Revere for Yu the Great and the Emperor Shun Temple festival to illustrate how grassroots cultural groups may be disenfranchised by the safeguarding process and the folk beliefs are transformed in to objects of the State. It is clear that there is potential for the misuse of the Convention by the State which can use heritage listing to alienate one minority group and promote another. For example, Lixinski (2015 p. 387) suggests that the listing of the Buddhist Chanting of Ladakh by India is an example of the Convention being wielded as an ‘instrument of domination or even geographical control’. There is potential for ICH to be used as tool to promote national agendas and identities at the expense of local community values and identities.

### Commercialisation and Authenticity

Another way that the State can appropriate ICH is via commodification of ICH in the course of tourism development. This is not to say that tourism is in itself negative as indeed the potential for owners of ICH may be an important factor in its long-term sustainability. However, in recent field work we found that many people had concerns about a loss of authenticity of ICH due to commercialisation. Authenticity is not a requirement of the ICH Convention and this was deliberate, partly because frequently the ICH earmarked to be safeguarded is the produce of cultural practices by indigenous communities, rather than individual artists. This may include information and techniques and other material that has been handed down from generation to generation. Many of these practices that comprise the ICH will have been modified and adapted for regional variations and over different generations.

The underlying premise of the Convention is that ICH is dynamic and the approach to its safeguarding must involve a shift from ‘an archival documentation paradigm based on philologically determined authenticity, to one that stresses the importance of reproduction and transmission of practices for elaboration and adaptation by future generations. In this perspective, culture is not identified with tangible expressions but with the human activity that underpins and allows their production’ (Bortolotto 2006, p. 27).

Cominelli and Greffe 2012 argue that ICH in its very nature keeps evolving and what we see today as ICH representation is the result of generations of design and re-design, that it is consequently difficult to identify an original manifestation, as adaptation have taken place in response to challenges and responding changes in the technical contribution. In this respect ICH can also carry knowledge and its current representations may incorporate experiences that
have resulted in the modern representation. By allocating authenticity to a product or process or knowledge system means that a one version is given recognition and superiority over other similar products. In this respect, they argue, ICH can also carry knowledge and its current representations may incorporate experiences that have resulted in the modern representation.

This means that any form of protection cannot easily be attributed to a single artist or even a single place. We found this to be a common situation in areas of South East Asia, where different regions and even different countries are seeking to protect ICH that is intrinsically the same product but has various reproductions that account for modifications over decades (McIntyre-Tamwoy & O’Rourke 2016). One example of this is the Space of Gong. The Gong culture was recognised as part of northern Vietnamese ICH in 2008. The Space of Gong Culture is described as ‘the cultural space of the gongs in the central highlands of Vietnam covers several provinces and seventeen Austro-Asian Austronesian ethno-linguistic communities’ (UNESCO 2008). However neighbouring countries told us that they too would have liked to nominate the Gong.

Most commentators (see Cominelli and Greffe 2012; Yin 2004; Lixinski 2015) acknowledge that ICH should allow for adaptation and modification, unlike TCH which can be traced to a specific historical time period, ICH may have always been involved in generational transmission of the cultural heritage. The heritage is continuing and change can be seen as one of the characteristics of ICH, to allocate authenticity to a particular item of ICH may result in “freezing in time” the ICH and removing its cultural vibrancy. Despite the deliberate avoidance in the Convention and Operational Directives of the use of the word ‘authenticity’ we found in our research we found that authenticity is often raised as a concern in relation to ICH that is listed under the Convention and that this concern usually relates to the commercialisation of the element once it is listed, or the listing of a commercialised version of the element. There is no doubt that one of the incentives for governments to embrace the Convention is the potential to develop cultural tourism based economies. Many listed elements are marketed explicitly as tourism products once listed.

Linked to these concerns over authenticity is the issue of over-commercialisation. In Cambodia, we were told that commercialisation and the lack of State guidelines governing commercial exploitation of ICH, for example of traditional dancing at Angkor Wat, has led to a degradation of this important traditional form. As the tourist numbers have increased the level of training by master practitioners for the dancers of the Royal Ballet (inscribed in 2003) has decreased and Cambodian informant’s expressed concern that the dancing was often without merit, whereas the ‘true’ traditional dancing took decades to master.

In relation to the cultural space of gong in Vietnam it is claimed that this also has become very commercialised with communities performing tourist performances that are not related to the ‘original’ ICH, but rather have become so commercialised that the practices are considered by neighbours to be inappropriate. For example, by using the gongs more often, including in settings such as religious practices where traditionally this would have been considered disrespectful (McIntyre-Tamwoy and O’Rourke 2016). Salemink (2016) points to the rise in commercial value of the instruments themselves as an indirect consequence of the attention drawn to Gong culture by the listing of this element. Tourists and collectors have exploited the economic situation of the local people by buying the instruments which have sometimes been handed down in families over generations. In this case at least one might argue that inscribing and element of ICH can exacerbate the threats to its sustainable practice, at least in ways that are traditionally authentic and culturally appropriate.

It is interesting to look at the example of Vietnam as it was one of the earliest southeast Asian nations to embrace the Convention. As early as 1994 (nine years before the Convention), UNESCO held two expert meetings related to ICH of ethnic communities in Hue (Salemink 2001) and since the Convention came into force on 20 April 2006, eleven ICH elements have been inscribed from Vietnam. However, critiques of this listing activity in Vietnam point to the ‘theatricalisation’ of cultural practices that has ensued. Certainly, during our recent field work this claim was also made in relation to the Xoan singing and local media coverage provided some evidence of this.
While the Convention and the Operational Directives place emphasis on local agency and control, it is rare that local people retain exclusive control of the element once it is listed. This is invariably bemoaned as a negative outcome, however is this always a bad thing or are critics falling into the trap of academic elitism? In some cases, at least, it appears that the traditional practices in question were in danger of disappearing and not because the traditional custodians of these practices had lost interest but because they lacked the capacity to sustain the practice in the face of the forces of modernity and globalisation. The ethical question is not so much is it right to resource the safeguarding of a disappearing cultural practice, nor that it is almost inevitable that any intervention may lead to changes in the practice, but rather, how much control do the owners of the cultural practice retain in this process? Given that plans for safeguarding of ICH are ultimately the responsibility of the State Party under the terms of the Convention and that it is also incumbent on the State Party to report regularly on safeguarding activities it is easy to imagine that even with the best of intentions timelines and processes for decision-making according to traditional/local community mechanisms and those required by the State may diverge.

Implications for Australia

Embracing the Convention would have several implications for Australia, including legal, financial and ethical considerations. While there is no obligation to have a specific ICH legislation, many countries have opted to do this to give effect to the three lists and ensure budget allocations. In southeast asia we asked the question ‘why introduce a new law rather than amending existing cultural heritage law?’ We were given a range of answers. In one country where legislation was being introduced we were given the very pragmatic answer that new laws were introduced with a budget allocation to finance their implementation whereas amending the existing cultural heritage legislation would probably have result in having to new responsibilities within existing, already stretched budgets. This differed from the motivation in at least one other country where the push for separate legislation (yet to be developed) had more to do with a power struggle between government departments over which would have control over ICH administration. In Australia, the Victorian State government has amended the Aboriginal Heritage Act 2006 (the Act) to allow for the registration of Aboriginal intangible heritage on the Victorian Aboriginal Heritage Register (VAHR). At the Federal level, a similar amendment to the EPBC Act might be more difficult given both the already cumbersome nature of that Act and its focus on development/activity impacts.

The financial implications are obvious as ratification of the Convention brings with it an obligation to implement it including inventorying activities and maintaining national lists. In Australia’s three-tiered heritage system this would mean budget implications at local, state and federal levels. Given the low priority given to cultural heritage funding across all jurisdictions support for new/increased budget allocations would appear unlikely in the current context. The concern for heritage agencies is that there would be an expectation that the extra tasks should be covered from existing already stretched budgets.

Finally, there remain a number of ethical issues to navigate. Despite the good intentions embedded in the Convention, a number of ethical quandaries need to be carefully addressed against the social and political context of each country that ratifies the Convention. These include issues around equitable representation, control and ownership of information, FPIC and the adoption or adaptation of traditional methods and processes of determining the limits and rate of acceptable change in the element over time. In Australia, we would need to consider ICH in relation to other government policies and initiatives such as climate change, sustainable development, multi-culturalism, and world views on the culture-nature relationships, peace and wellbeing.

Diasporas—where is the community?

Communities are not always easy to define or identify especially in places like Australia where immigration has been so important and where colonial policies resulted in the forced relocations
of Aboriginal people. This has already proven a challenge for Indigenous heritage management under existing legislation in several jurisdictions. The multi-cultural nature of Australian society means that there would likely be a need for a high level of co-operation and diplomacy with other State Parties to recognise and inscribe ICH arising from our non-indigenous, Australian ethnic communities. Some of the migrant communities in Australia arrived en masse at particular point in time (for example after the Second World War and after the war in Vietnam) and while adapting in many ways to their new cultural environment have in some practices, inadvertently served to ‘preserve’ ICH from their ancestral country as a living snapshot of an earlier point in time. How does this ICH of cultural diasporas contribute to the diversity of humanity? One need only look at Figure 6 which depicts the Chinese and Indian diaspora, to understand the complexity of ICH that must exist within and outside national borders.

The Intergovernmental Committee encourages trans-national listings as a way of dealing with ICH shared by several countries, although there is no specific barrier in the Convention to listing elements multiple times across different countries. Trans- national nominations build dialogue within nations, as well as amongst nations, and this contribute to the primary goals of the Convention as described earlier in this paper. However, it would be naive to think that this level of co-operation between State Parties was going to be forthcoming in all cases.

Shared ICH

Cultural practices including crafts are often shared across borders sometimes with little cultural variation. While sometimes this is a result of the immigration of ethnic groups in other cases it is not possible to point to a shared ethnicity. The preferred approach is to encourage multinational listing as in the case of falconry which was inscribed co-operatively in 2016 on behalf of eighteen State Parties including United Arab Emirates, Austria, Belgium, Czechia, France, Germany, Hungary, Italy, Kazakhstan, Republic of Korea, Mongolia, Morocco, Pakistan, Portugal, Qatar, Saudi Arabia, Spain and Syrian Arab Republic. Similar issues would certainly arise in Australia where different Aboriginal and Torres Strait Islander groups might own similar ICH and where in some cases this might also be shared with other neighbouring countries.

Implications for Australia’s Indigenous Heritage

If Australia was to ratify the ICH Convention Indigenous Australians would be able to safeguard their practices and beliefs under the Convention. The ICH Convention could be seen as an
important tool in recognising and protecting Indigenous cultural heritage, particularly as copyright and other forms of protection in Australia often do not apply to Indigenous cultural heritage. Many aspects of ICH are incorporated in Indigenous Australian culture where the relationship between people and land is a sacred one, deriving from a world view in which creative beings placed humans, topographic features, species, language and culture on the earth (Berndt & Berndt 1999). This epoch is colloquially translated variously as the Dreaming, Dreamtime or Beportaim and is recounted and preserved in stories transmitted through the generations which tell of the travels and deeds of the creative beings. Many of the cultural activities that are undertaken as part of this culture including dancing, singing and ceremony, would fall within the definition of ICH under the Convention. Many of these cultural elements are not associated with tangible or built heritage structures, as is the case in Judaeo-Christian-Islamic and other religions where ceremonies and practise are associated with tangible (heritage), purpose built structures. Many Aboriginal cultural activities are under threat as language and traditional knowledge is rapidly lost in an increasingly globalised world. International recognition in the importance of Indigenous rituals under the ICH Convention could lead to positive reinforced community and individual identities, and increased social wellbeing for Indigenous people and could lead to cultural revival in some communities.

The recognition would also be an important aspect of valorising Indigenous culture. There are examples in Australia where we can see the positive benefits of this in strengthening cultural identity and re-energising generational transfer of traditions and skills for example the Laura Dance Festival and NAIDOC week celebrations (see Figure 7). The UNESCO brand is known to promote international tourism, and the recognition under the Convention would encourage performance and tourism to the area where the ICH is performed. Remote Aboriginal communities may gain increased access to tourist opportunities if their ICH was recognised and protected, and this in turn could lead to future economic opportunities in the surrounding region, with hospitality services and/ or micro businesses related to traditional arts and crafts to support the ICH.

It is likely that the problems that have occurred in Asia with the commodification of ICH would also be problems in Australia. These include the negative impacts associated with commodification of culture; ethical questions around whose culture is protected and who decides how it is protected and the potential for fossilisation of culture- if safeguarding activities were not culturally appropriate.

Legal mechanisms

At the heart of the Convention for the protection of ICH is a paradox, the Convention is primarily concerned with the protection of ‘community’ heritage, including Indigenous heritage. However, the Convention is an agreement between State Parties and UNESCO and therefore it is the State that selects the ICH to be nominated for listing and ultimately it is the State that manages the listing process. Once the State takes possession of, or accepts responsibility or the element of ICH in this way it is the responsibility of the State to provide the mechanisms for safeguarding. However, legal mechanisms are sometimes a heavy-handed solution. In
some circumstances, once legal professionals control the pronouncement and development of customary traditional law, what is called ‘customary law’ by legal officials does not necessarily correspond to actual customs.

There is also an inherent problem of translation, not only of language where these differ between the dominant language of the state party and the community whose ICH is being considered, but also the translation of cultural concepts some of which may not align with dominant word views. ICH associated with an ethnic group may be difficult to translate to people outside the group. It is often embedded in a different language and based on a different cultural paradigm and in some cases the codification and implementation of written regulations to protect what has previously been an orally transmitted vibrant ICH cannot be easily captured by legislators.

Social customs and norms particularly of ethnic groups and fourth world peoples are produced through a variety of processes and mechanisms usually quite diverse from the official legal system. The State may have difficulty articulate these, and the process of translation and codification will almost certainly modify the unwritten rules involved in transmission. For similar reasons, native title in Australia has been fraught with problems for Indigenous people who to have their native title rights recognised must identify their laws and customs, translate them into the dominant cultural legal process and then present them to the Court in a way that non-indigenous judicial system can understand, while at the same time preserving their vitality.

Conclusions

It is now fourteen years since the Convention was established. The decision not to ratify the Convention straight away may have served Australia well. It is now possible to analyse the successes and failures of the Convention as it had been implemented by 170 other State Parties. Given this it is timely to reignite a discussion between the heritage practitioners, government and the public to consider whether we are indeed losing out by not ratifying and whether cultural heritage in Australia is being served by our current position. Already we are seeing incremental changes that address issues around the safeguarding of ICH such as the recent amendments to the Aboriginal Heritage Act in Victoria. It is clear is that despite existing ‘Art’ programs, Aboriginal cultural heritage is still under threat and traditional arts and crafts are being lost at an alarming rate. Concerns have repeatedly been raised by practitioners in the non-Indigenous heritage arena as well that traditional trade skills needed to maintain our tangible heritage buildings and structures are becoming increasingly rare and in some cases, have been lost.

There has been criticism of the Convention pointing out that it can be politically manipulated. While, this may be a legitimate risk and requires robust scrutiny, in a world where the western nations are increasingly dominated by right wing politics and a populist fear of diversity, even without ratifying the Convention, Australia is in danger of subjugating its multicultural diversity in a similar manner. The issue of appropriate empowerment of communities in the safeguarding of their own heritage is an ongoing concern especially given the lack of formal representation of local communities in the official structures around the Convention (see Deacon and Smeets 2013).

However, embracing the 2003 Convention may breathe new life into cultural heritage practice in Australia, providing a focus on people and practice rather than place. The UNESCO brand has been shown to bring economic opportunities and while recognising that this gives rise to challenges around commodification, it may be that safeguarding of ICH will facilitate micro industries in remote areas and amongst disadvantaged cultural groups. It seems clear that if Australia were to become a signatory, Indigenous Australians would become significant beneficiaries as so much of their cultural heritage falls within the ICH domain.

There is no doubt that the safeguarding of ICH in a culturally diverse nation such as Australia will be a challenge, requiring dialogue with State parties and communities at the source of the diasporas represented here. This challenge may yield opportunities by developing new and positive conversations that have the potential to strengthen political and cultural ties.
Maintaining value to communities is essential to maintaining viability of ICH. Intangible heritage does not develop in a cultural and economic background it is practiced and transmitted by communities because it has a function or meaning for them. In a globalised economy it is easy to see that some practices are rendered less relevant by the impact of external forces and may be lost before we fully comprehend the consequences for the long term well-being of communities.

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