

# Protection of Indigenous Knowledge in the Intellectual Property System

*Consultation Report*

August 2019



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# Introduction

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IP Australia is the Australian Government agency that administers intellectual property (IP) legislation relating to patents, trade marks, designs and plant breeder's rights.

IP Australia is looking at ways to improve Australia's IP system to help promote the cultural integrity and economic potential of Indigenous Knowledge (IK), which includes:

- **Traditional Knowledge (TK)** – know-how, practices, techniques and skills; and
- **Traditional Cultural Expressions (TCEs)** – visual imagery, performance, design, words and names.

This report summarises stakeholders' feedback received in our consultation on IK issues.

IP Australia would like to thank everyone who attended a roundtable, completed our online survey, or provided a written submission. This feedback will help us to prioritise proposals for further policy development work. We expect to consult stakeholders as we refine our policy response to IK issues.

## Background to Consultation

In 2017, IP Australia and the Department of Industry, Innovation and Science commissioned a discussion paper, *Indigenous Knowledge: Issues for protection and management*, from Terri Janke and Company. The discussion paper is available here: <https://www.ipaustralia.gov.au/about-us/news-and-community/news/indigenous-knowledge-issues-protection-and-management>. This discussion paper provided a comprehensive examination of the issues affecting protection and management of IK and identified six key issues.

In September 2018, IP Australia published a consultation paper, further exploring the issues raised in Terri Janke and Company's discussion paper. Part A of our consultation paper provided an overview of those issues and asked stakeholders if there were additional issues that we should consider. Part B of the consultation paper focussed on issues that relate particularly to the responsibilities of IP Australia. The issues canvassed in that part of the consultation were largely drawn from the following three key issues in the discussion paper:

- Issue 2: Misuse of Indigenous languages, words and clan names;
- Issue 4: Misappropriation and misuse of TK; and
- Issue 5: Use of Indigenous genetic resources and associated TK.

We also held seven roundtables in urban, regional and remote locations and hosted an online survey. We received feedback from:

- 112 stakeholders who attended roundtables and interviews;
- 41 responses to our online survey;
- 17 written submissions, which are available on our website at <https://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultations>.

Roundtable attendees included Indigenous and non-Indigenous people from a wide range of sectors and backgrounds such as advocacy groups, government, tourism, arts, business, research, environment, and academia. Respondents to our online survey also identified themselves as being from a range of sectors including arts, research, academia, legal, native title, business and government.

Written submissions were received from

- Angela Gimenez Barrera
- The Arts Law Centre of Australia (Arts Law)
- Australian Digital Alliance and Australia Libraries Copyright Committee (ADA-ALCC)
- Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)
- Australia Library and Information Association (ALIA)
- Australian Museums and Galleries Association (AMaGA)
- Dr Ana Penteadó
- Dr Dimitrios Eliades
- First Nations Media (FNM)
- Indigenous Lawyers' Association of Queensland (ILAQ)
- Kimberley Indigenous Saltwater Science Project (KISSP)
- National and State Libraries Australia (NSLA)
- International Trademark Association (INTA)
- New South Wales Aboriginal Land Council (NSWALC)
- New Zealand Institute of Patent Attorneys (NZIPA)
- Northern Australian Aboriginal Kakadu Plum Alliance (NAAKPA)
- Victorian Small Business Commission (VSBC)

The House of Representatives Standing Committee on Indigenous Affairs' *Report on the impact of inauthentic art and craft in the style of First Nations peoples* was tabled in December 2018. Some of the recommendations made by the Committee overlap with issues we have explored. For example, the Committee recommended that the Australian Government conduct a consultation process on stand-alone legislation to protect Indigenous Cultural and Intellectual Property, which includes all aspects of cultural practices, knowledge and resources. It also recommended that a Certification Trade Mark (CTM) should be developed for Indigenous arts and crafts. The Government's response to the report will further inform our future policy work in this area.

If you have any questions or comments, please contact [MDB-TradePolicy@ipaaustralia.gov.au](mailto:MDB-TradePolicy@ipaaustralia.gov.au); Aideen Fitzgerald (02 6283 2094) or Brendan Bourke (02 6283 2148).

## Next steps

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The consultation process has revealed a clear need for greater awareness and understanding about issues relating to the misuse and misappropriation of IK. IP Australia is currently reviewing *Nanga Mai Arung/Dream Shield*, our IP guide for Indigenous businesses. We will incorporate the feedback received on Proposal 12 (see page 17) into this review and start developing additional communications material to increase awareness and understanding across the community.

Other proposals require further analysis and consultation with stakeholders and other parts of government. IP Australia is developing a work plan to progress these proposals. As noted above, the Government's response to the House of Representatives inquiry into inauthentic art and crafts will inform the future development of these proposals.

# Thematic Summary of Roundtables

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IP Australia held a series of roundtable sessions throughout November 2018 with stakeholders in Brisbane, Cairns, Sydney, Alice Springs, Darwin, Broome and Perth. We also took the opportunity to meet with individual stakeholders who could not attend the roundtables while in these locations and we had a number of other discussions with individual stakeholders via teleconference.

All of these discussions were informative and extremely helpful in improving our understanding of the issues associated with the protection and management of IK. We received a large amount of feedback and information from stakeholders during the discussions which highlighted the diversity of views and attitudes towards the use and sharing of IK. Indigenous stakeholders recognised and welcomed the economic benefits in pursuing commercial opportunities involving IK. But they cautioned that there were circumstances where any commercial application would be deeply offensive and noted that any engagement involving IK should be culturally appropriate.

Four themes emerged which reflect the main things that we understand Indigenous people are seeking in relation to their knowledge. These themes will guide our analysis of the proposed initiatives and they provide a flexible and adaptable way to approach the protection and management of IK. For example, initiatives that embody these themes would assist Indigenous people whether they want to use their IK for commercial opportunities, share their knowledge with researchers or keep their IK secret.

## **Control**

Indigenous people want to be able to control who uses IK and how it is used. Traditional customs and cultural protocols have provided this control for thousands of years with a clear understanding of who can tell a story, paint an image or perform a song. These customs and protocols also give certain people responsibility for looking after specific cultural elements and deciding who that responsibility is passed onto. Knowledge might be shared with another person, but that does not necessarily give them the right to share it with others.

Indigenous stakeholders are often frustrated that this type of ownership and custodianship is not reflected in Western culture. IK is usually treated in the same way as any other form of knowledge or information—if it is shared with another person it can then be used in any way unless there is a legal right to prevent further use or sharing, such as copyright, patents or non-disclosure agreements.

## **Protection**

Indigenous people are seeking measures that can be used to stop unauthorised use of IK and impose sanctions against misappropriation. Some levels of protection are provided in specific circumstances under the Australian Consumer Law and IP laws, and actions under these laws have sometimes been successful in addressing inappropriate use, but not all forms of misuse or misappropriation are prevented under current laws.

## **Recognition**

Indigenous people want to be recognised as the owners of their IK. A lack of understanding and awareness that IK exists, what it encompasses and who owns it was repeatedly highlighted in our discussions with stakeholders.

## **Respect**

Indigenous people want their ownership of IK and the cultural protocols associated with it to be respected. There is a lack of understanding and awareness about the nature of their ownership of IK and the types of actions that cause offence or misappropriate culture. In addition, the lack of legal mechanisms available for Indigenous people to enforce their IK rights undermines calls for respect.

# Indigenous Knowledge issues in Australia

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Part A of our consultation paper outlined the six key issues identified in the discussion paper by Terri Janke & Company. IP Australia wanted to hear stakeholder views on these issues as well as learn about other issues and experiences relating to the management and protection of IK. The consultations largely confirmed the six key issues identified by the discussion paper as the main concerns relating to IK. Stakeholders provided a lot of information, insight and experience which can inform IP Australia's policy response, and these views are summarised below.

- There is a general lack of awareness and understanding about IP and IK. For example, many non-Indigenous people are not aware of the cultural protocols surrounding the ownership and use of IK or the offence caused by misappropriation.
- Indigenous and non-Indigenous people, both as producers and consumers, need to better understand the economic value of IK and authentic products. Otherwise the 'cost' of authentication is seen as a barrier and not a selling point.
- A gap exists between Western commercial norms, Western legal norms and Indigenous cultural practices relating to knowledge. This is apparent in the area of IP law, which focuses on individual ownership and does not reflect the emphasis of ongoing custodianship that is fundamental within Indigenous culture. IK, including TK, is often captured or embodied in cultural expressions such as art, song and dance. Attempts to protect IK based on Western concepts and laws break this link between knowledge and expression and increases the risk of misuse.
- Where IK is to be used or shared outside normal cultural practice, the appropriate Indigenous laws and protocols relating to knowledge need to be embedded or reflected in agreements, processes and contracts. This could include processes for resolving disagreements about how knowledge should be used and shared, either between contracting parties, or within the community.
- It is important that consent to use IK is sought before any research or bioprospecting occurs and that consultation is undertaken in a culturally appropriate way.
- If someone other than the relevant community seeks to use IK they should be transparent about this fact. There should be mechanisms for Indigenous people to ensure the appropriate usage of their IK by third parties.
- Indigenous people often have limited access to legal advice or resources when engaging with researchers, potential collaborators or commercialising partners. This puts Indigenous communities at a negotiating disadvantage. Some communities have signed agreements in which the IP implications were not fully understood at the time.
- Access and Benefit Sharing (ABS) is important to ensure Indigenous people share in the benefits gained from their knowledge. In making ABS arrangements, non-monetary options relating to managing, maintaining and controlling knowledge should also be considered by the contracting parties.
- Recognition and acknowledgement are important wherever IK is used. However, sometimes difficulties arise in identifying correct ownership or custodianship of cultural material or IK.
- Protecting IK is very difficult once it has been published, particularly online. IK should not be published without the consent of the relevant community and appropriate controls for managing that knowledge should be put in place to prevent inappropriate publication or misappropriation.
- Policies and actions which attempt to use a 'one-size-fits-all' approach can be problematic. Local and regional differences need to be reflected and community-driven solutions are often the most effective.

- There is a perceived lack of advocacy bodies on IK issues outside of the Arts sector. Awareness about inauthentic arts and crafts has grown but other IK issues and concerns about misappropriation, for example in relation to bioprospecting, are less well understood by Indigenous and non-Indigenous people.
- Enforcement of rights in IK is difficult and often too costly for Indigenous people to pursue. It is too onerous for Indigenous people to challenge those who misuse or misappropriate knowledge.

# Traditional Knowledge and Genetic Resources

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TK refers to the know-how, practices, skills and techniques that Indigenous people have developed, nurtured and passed on through generations. It can be found in a wide variety of contexts, including agricultural, scientific, technical, ecological and medicinal knowledge. TK can, but does not always, relate to the properties and uses of a 'genetic resource', which can be any biological material, including plants, fungi and animals.

TK includes knowledge about how to use genetic resources for a range of purposes from culinary uses, to traditional healing methods, to the use of materials, dyes, paints, gums and glues. This knowledge is closely linked to the land and integral to the culture of Indigenous people. It is often not written down but passed on as part of oral traditions. Some TK is to be kept secret, while other TK has been shared and used by Indigenous people as a basis for new economic opportunities.

Our consultation paper explored seven proposals that could address different aspects of how IK can better be protected within the IP system, including the issues of Free, Prior and Informed Consent (FPIC), ABS and how research should be conducted.



## Summary of feedback

### Was the proposal supported and why?

### Was there opposition? What concerns, consequences or related ideas were raised?

#### Proposal 1: Support Indigenous use of IP rights.

Some stakeholders considered that the use of IP rights had the potential to be a driver for Indigenous employment and business opportunities.

Several written submissions (including ILAQ, NZIPA, and NSWALC) and attendees at various roundtables were supportive of using a CTM scheme to help consumers identify authentic Indigenous products in the market. AIATSIS sees product differentiation associated with cultural practice as an untapped economic resource for Indigenous peoples.

Some roundtable attendees noted that such a scheme would need suitable and representative governance and information for consumers so the significance of a new CTM for Indigenous products was understood in the market. A scheme that allowed for regional sub-branding was preferred by some stakeholders.

Discussion generally focussed on CTMs but other IP rights such as using Geographical Indications or Plant Breeder's Rights were discussed by some stakeholders (for example, see written submissions from Arts Law, Angela Gimenez Barrera, INTA, Dr Pentead). While these rights present a potential way to provide some protection, some stakeholders felt the costs could be prohibitive. Some stakeholders noted that Plant Breeder's Rights may have limited effectiveness in protecting TK about plants given they only protect new plant varieties. Several online survey respondents noted that they felt native plants needed different treatment, including that native plants should not be patentable.

While some stakeholders were supportive of a CTM scheme, they did raise important issues and concerns that would need to be addressed for a new CTM to work:

- Onerous authenticity requirements for people to prove their heritage must be avoided.
- The cost of managing, promoting and enforcing the CTM should not fall to Indigenous businesses and communities as they may not be resourced to meet these costs.
- A suitable body to administer the CTM needs to be identified. For example, it could be held by a peak body who would have representational governance and dispute mechanisms in place in case of disagreements.
- Indigenous people would need to be provided with support/tools in order to engage with a CTM system.
- Enforcement procedures for a CTM scheme should 'have teeth' that is, they need to be effective in stopping people doing the wrong thing.

Other stakeholders, including Arts Law, did not support the use of CTMs for a range of reasons.

- There was concern that such a system would place the burden on Indigenous people rather than those seeking to use the IK.
- The cost, complexity and time required to obtain use, market and enforce a CTM.
- Some stakeholders thought that trade marks generally did not work to protect or promote Indigenous products because many stores stock only inauthentic products.

Discussion of using a CTM often referenced the previous scheme for Indigenous art under the National Indigenous Arts Advocacy Association and the need for a different approach.

Multiple stakeholders voiced the concern that trade mark protection was not generally suited to the complexity and diversity of IK.

**Was the proposal supported and why?**

**Was there opposition? What concerns, consequences or related ideas were raised?**

**Proposal 2. Standardise research protocols and guidelines**

Multiple written submissions (ALIA, AMaGA, Arts Law, INTA, NSWALC, FNM, AIATSIS) were supportive of standardised research protocols being developed and some organisations are in the process of developing or reviewing protocols themselves. It was noted by some stakeholders that research protocols can ensure FPIC, proper engagement with communities, and acknowledgement.

At roundtables, there was some support, noting that national protocols could provide consistent processes that are acceptable to the community. Not all institutions or communities have protocols at the moment. AIATSIS said it would be desirable to avoid over-specialisation of guidelines or use of multiple protocols on a similar issue.

INTA and NSLA suggested that international best practice protocols could form a basis for a sample framework and structure for further consultation.

86% of online survey respondents supported this proposal.

Stakeholders shared concerns at multiple roundtables about researchers coming onto country with no respect for existing protocols and without getting appropriate consents.

Although standardisation could have benefits, stakeholders noted that any national protocol would have to be adaptable to local contexts and community rules. It should be ensured that agreements allow Indigenous people to be active in the management of research activities and not only passive participants.

It did not appear that any stakeholders were opposed to standardisation of research protocols, but several (Arts Law, NSWLAC) noted concerns about the efficacy of these tools without enforcement mechanisms to back them up. Some other stakeholder suggestions included a system of registering or accrediting researchers to work with IK, or using ethics committee models as a way to approach research using IK.

**Proposal 3. Standard agreements to vest TK with Traditional Owners.**

Was the proposal supported and why?	Was there opposition? What concerns, consequences or related ideas were raised?
<p>Seven written submissions (ILAQ, NSWALC, KISSP, Arts Law, NAAKPA, AMaGA, AIATSIS) supported the development of template contract agreements as a tool to re-balance the bargaining power and ensure researchers and businesses obtained FPIC from Indigenous communities. These stakeholders felt that standardised agreements could encourage greater collaboration and promote ABS arrangements.</p> <p>At roundtables there was some support for this idea. Standardised agreements could provide for greater checks and balances or security for protecting knowledge. Standard processes also mean people have a better idea of what to expect each time a new agreement is sought, which can increase certainty and efficiency.</p> <p>75% of online survey respondents supported this proposal.</p>	<p>In considering the standards that should be included in agreements, some stakeholders suggested that:</p> <ul style="list-style-type: none"> <li>• the content of the agreement should ensure that Traditional Owners are involved in the active management of the research activity;</li> <li>• Agreements should lock in transparency for researchers dealing with Traditional Owners.</li> <li>• Agreements include terms on data management, access to materials and processes to seek permissions from the appropriate people.</li> </ul> <p>Some organisations have already developed template agreements for their industries which could be used as a basis for further work or more general standard agreements.</p> <p>Three written submissions (INTA, Dr Eliades and NZIPA) highlighted the need to ensure that requirements do not deter researchers from engaging in research projects.</p>
<p><b>Proposal 4. Free, prior and informed consent (FPIC) in Australian Government funded programs</b></p>	
<p>This was supported by five written submissions (NSWALC, INTA, NZIPA, Arts Law, AIATSIS). It was suggested that applying for grants is already a detailed process, so adding an extra requirement is unlikely to significantly increase the burden on applicants.</p> <p>AIATSIS notes a framework already exists in their <i>Guidelines for Ethical Research in Australian Indigenous Studies</i> (GERAIS). GERAIS is currently under review, however new guidelines are expected in July 2019.</p> <p>There was strong support at roundtables for inclusion of an FPIC requirement and the need for additional consideration of how to encourage private organisations to obtain FPIC.</p> <p>65% of survey respondents supported this proposal.</p>	<p>Some stakeholders noted that applicants would need detailed guidance so they can obtain FPIC to meet the requirements for government funding. Researchers would need support to know who to contact, what to ask, and the timeframes which could be expected to obtain consent.</p> <p>There were concerns that, even if there has been some consent, knowledge should not be used in new ways without permission and that it should remain the property of the community who is supplying the knowledge. Where a researcher does the wrong thing, there should still be consequences.</p> <p>Setting a standard for government projects could be useful in setting the new ‘normal’ for ensuring FPIC before any research occurs in both the public and private research sectors. In the context of this conversation, and for other proposals, some stakeholders indicated the ratification of the Nagoya Protocol would help.</p>
<p><b>Proposal 5. National database of TK and genetic resources</b></p>	

**Was the proposal supported and why?**

There was a mix of support and opposition to this proposal. While some stakeholders saw benefits in patent examiners having access to information that prevented patents being inappropriately granted, there were strong concerns around issues relating to data sovereignty.

Some stakeholders at roundtables noted that the use of databases could introduce a level of certainty into the IP system and be used to provide evidence for custodianship. Set up appropriately, it was considered by some that a database could allow a community to own, manage or control the data itself. Some also mentioned that there were existing databases that could be used. A few stakeholders further suggested that a database should be held by government or by IP Australia.

Some stakeholders suggested that Land Councils and/or Prescribed Bodies Corporate could also have a role in establishing the provenance of genetic resources.

72% of online survey respondents supported establishing a database of TK and GR to be used when considering patent applications.

**Was there opposition? What concerns, consequences or related ideas were raised?**

Some stakeholders raised that mechanisms would be required to ensure data sovereignty, appropriate access controls (particularly for secret and sacred knowledge) and FPIC principles were incorporated into any database.

INTA noted that including IK in a database should be voluntary rather than mandatory to ensure only appropriate information is shared. Others also noted that a database would not be useful for protecting secret or sacred knowledge that should not be included in a publicly available database (AIATSIS, Arts Law, AMaGA).

Arts Law pointed out that inclusion of IK on a database should not be a requirement or prerequisite for its protection. It would be unrealistic and unreasonable to expect Indigenous people to register all their IK.

If a database is created, some stakeholders noted that the way data is classified should reflect Indigenous understandings and not follow western science classifications. The NSLA noted it has developed a system like this.

Stakeholders at roundtables raised questions regarding what would be included in the database, who would have responsibility for it and whether it should be publicly available or not. Strong engagement with Indigenous groups on what they want recorded in any database was recommended by multiple stakeholders.

A significant concern was that a database might make information more vulnerable to misuse or misappropriation. A database would need to be set up to ensure Indigenous people retained control of IK. A private, rather than public, database is an option to address this.

**Proposal 6. Disclosure of source requirement for patent applications**

<b>Was the proposal supported and why?</b>	<b>Was there opposition? What concerns, consequences or related ideas were raised?</b>
<p>This idea was supported in the written submissions of NZIPA, ILAQ, NAAKPA and NSWALC. There was significant support from stakeholders at roundtables.</p> <p>Some stakeholders (NAAKPA, ILAQ) raised the need to not only have a basic disclosure requirement but a broader process that checks for FPIC and ABS as pre-requisites for granting a patent.</p> <p>A further suggestion was that there should be a clear onus on the applicant to declare whether IK is part of the application, rather than requiring Indigenous people to prove this in the first instance.</p> <p>79% of online respondents supported this proposal.</p>	<p>A concern raised by several stakeholders was that a disclosure requirement alone would not ensure adequate FPIC or ABS. Some stakeholders also suggested that ratification of Nagoya and implementation might further assist with this. In implementing a disclosure requirement, it should be considered if there is further scrutiny into the process of the applicant getting the genetic resource and what TK was used in the process.</p> <p>NZIPA thought that the disclosure requirement could become an impractical burden for researchers in terms of maintaining records of source. Broader initiatives to assist researchers to keep records at the time of conducting research are needed.</p>
<b>Proposal 7. Legal training and support</b>	
<p>Seven written submissions (INTA, VSBC, AMaGA, NSWALC, Dr Eliades, NZIPA, Arts Law, AIATSIS) supported providing legal training and support in areas such as FPIC, negotiation skills and the IP regime.</p> <p>At roundtables, there was interest in the development of agreement templates or standard clauses which could be used. It was noted that this support could help Indigenous people consider the options available for protection and use of TK when approached by researchers, businesses or other parties. The training and support could be tied to other initiatives such as support for a greater range of business investment opportunities to help build capacity.</p> <p>NSWALC suggested that such an initiative should include a funding stream to assist Indigenous people with the cost of legal battles to enforce rights.</p> <p>This proposal was supported by 91% of online survey respondents.</p>	<p>Some stakeholders (Arts Law, INTA) highlighted that legal support and training should be ongoing and should not be provided at a cost which limited access. AIATSIS said it was important for training to be culturally relevant and delivered in a format, manner and language which makes sense to individual communities.</p>

# Commercial use of Indigenous words and images

Words and images are integral parts of Indigenous culture and their use is often regulated by customary laws of kinship and custodianship. Businesses and other organisations are attracted to using Indigenous words and images for a range of reasons, but there are no current legal requirements to consult or seek consent before using these expressions. This means words and images could be misused in culturally inappropriate or offensive ways. In addition, technology allows material to be shared quickly and easily online, so it is more likely that words and images could be shared without proper recognition of the source, and without the proper consents and controls from Indigenous people.

## Summary of feedback

Was the proposal supported and why?	Was there opposition? What concerns, consequences or related ideas were raised?
<b>Proposal 8. Offensiveness ground of refusal for trade mark and design applications</b>	
<p>This proposal was supported by three written submissions (NZIPA, ILAQ, INTA). Some noted that New Zealand had introduced a similar proposal by including offensiveness to Māori people as a ground for rejecting a trade mark in the legislation.</p> <p>There was support from roundtable participants for applications to be assessed for offensiveness to Indigenous people. But some also had concerns that the current standard of ‘scandalous’ or a new standard, may be difficult for examiners to determine and apply.</p> <p>This proposal was supported by 70% of online survey respondents.</p>	<p>Several stakeholders and submissions expressed concern that the ‘scandalous’ or ‘offensive’ standards may not be quite right to protect IK from inappropriate use or misappropriation. In some instances, it might not be ethical for Indigenous words or images to be used at all, and this may not be captured.</p> <p>Determining whether a trade mark or design was offensive would require consultation with a community or a person authorised or nominated to speak on behalf of the community.</p> <p>There was concern from some stakeholders that it would not always be obvious to IP Australia’s examiners that a mark or design might be offensive. Some stakeholders suggested that further Indigenous guidance or oversight would be needed.</p>

**Was the proposal supported and why?**

**Was there opposition? What concerns, consequences or related ideas were raised?**

**Proposal 9. Database of words and images**

Four written submissions (INTA, NSWALC, NZIPA, ILAQ) indicated support for a database of words and images to assist Trade Mark Examiners scrutinise trade mark applications and AIATSIS suggested some existing platforms that could be used.

At the roundtables, stakeholders noted that a database (possibly with restricted access) could help examiners identify trade marks and designs that include a TCE.

The loss of Indigenous languages is a great concern to many stakeholders and they noted that databases could be one part of retaining and protecting language.

INTA noted that a database could provide a resource to allow businesses to clearly identify any issues with words they seek to use.

ILAQ suggested a TCE database could be modelled on the Victorian Cultural Heritage Act and the way it captures intangible heritage.

75% of online survey respondents supported this idea.

NSWALC, ILAQ and INTA said that a database would need to be set up in such a manner to ensure FPIC and allow for Indigenous people to retain data sovereignty.

Stakeholders at the roundtables flagged issues such as ongoing cost and queried who would manage the database. It was also noted that a database might create greater risk of misappropriation, particularly if the content is publicly available.

Stakeholders suggested that Indigenous peak bodies, or a new national body, should have a role in the ownership or management of a database.

**Proposal 10. Requirement for consent in trade marks and designs systems**

**Was the proposal supported and why?**

Seven written submissions (NSWALC, KISSP, INTA, NZIPA, Arts Law, ILAQ, AIATSIS) supported a consent requirement for IP applications, as part of assisting Indigenous people retain control over their IK.

Online respondents were strongly in favour of this proposal, as were roundtable participants.

91% of online survey respondents supported this proposal.

**Was there opposition? What concerns, consequences or related ideas were raised?**

Many stakeholders noted that it can be difficult to determine who to contact in order to seek consent. It was also noted that it takes time to consult and seek consent. Parties who wish to use IK should be prepared to accommodate this.

Even if consent is required, AIATSIS raised the issue that Indigenous peoples need to fully understand what they are giving away and what options are available. AIATSIS also noted that care should be taken to avoid placing a large decision-making burden on Indigenous communities in relation to requests for consent.

Another concern was that consent might allow for future use which is inconsistent with the passing down of responsibility for IK to further generations.

Attendees at roundtables noted that it is an issue if businesses with no Indigenous connection can use words and images to create the impression that they are Indigenous. A requirement for consent could assist in preventing this, but it should not be used as a mechanism to allow such practices to occur.



# Supporting Initiatives

Our consultation paper noted that the successful implementation of the proposals discussed would be enhanced through supporting initiatives such as establishing an Indigenous Advisory Panel to assist IP Australia and increased education and awareness activities.

## Summary of feedback

Was the proposal supported?	Was there opposition? What concerns, consequences or related ideas were raised?
<b>Proposal 11. Establish an Indigenous Advisory Panel</b>	
<p>Ten of the written submissions (AMaGA, ALIA, ADA-ALCC, NSWALC, Dr Eliades, NSLA, INTA, ILAQ, NZIPA, AIATSIS) expressed support for an advisory panel. Those stakeholders stressed the need for an advisory panel to have a clear and defined role. The proposal was generally supported at roundtables and stakeholders agreed it could provide the necessary input from Indigenous communities that IP Australia would need when considering applications which use IK.</p> <p>Stakeholders at roundtables suggested there could be a range of different formats for IP Australia to consider in seeking advice, such as a dedicated IK Unit or an external network of contact points with experience to draw upon.</p> <p>Another suggestion from the roundtables was that a broader advisory group could potentially provide advice to other areas of government (e.g. also to copyright). AIATSIS said such a panel could also provide useful advice on the use of large and often de-identified data sets.</p> <p>82% of online survey respondents supported having an Indigenous Advisory Body to provide advice to IP Australia.</p>	<p>Some concerns were raised that an advisory panel may not have any formal authority in IP processes, and without this it would be ineffective.</p> <p>Arts Law raised another concern that the panel would not be well-placed to make decisions on behalf of every Indigenous community about what is, or is not, culturally appropriate. Other stakeholders suggested having a mix of IP experts and ad hoc local members on the panel to mitigate this issue.</p> <p>It was also suggested that the advisory panel should not be able to override the express views and decision of a community regarding use of their IK.</p> <p>The roundtables also raised the possibility that having an advisory panel would add an additional layer of bureaucracy within the IP system, without increasing engagement in the system from remote or rural communities.</p> <p>Most stakeholders who expressed support noted the importance of the panel being representative across groups, regions, sectors and genders (NSWALC, NSLA, INTA, ILAQ, NZIPA, Dr Eliades). Having a range of skills and backgrounds was also important.</p>

**Was the proposal supported?**

**Was there opposition? What concerns, consequences or related ideas were raised?**

**Proposal 12. Education and Awareness initiatives**

There was significant support for increased education and awareness initiatives in written submissions, and at roundtables.

Support for education initiatives consistently indicated the importance of increased education and awareness for both Indigenous and non-Indigenous people about IK issues.

Education and awareness initiatives could increase Indigenous peoples' knowledge about how the IP system and contractual arrangements can be used for commercial purposes and to protect IK. It could also improve understanding of their right to insist on certain protections when access to IK is sought by other parties.

Initiatives targeted at non-Indigenous people could include awareness of cultural protocols around IK, what misappropriation of IK is, and how they can engage with IK in a culturally appropriate manner.

95% of online survey respondents supported expanded education and awareness activities on IK.

Based on stakeholder input, all education and awareness activities should be developed with the following considerations in mind:

- Information should be made and tailored for a range of audiences – including Indigenous people, non-Indigenous people, regulators and policy makers.
- A key message to highlight is that obtaining FPIC will take time and this needs to be factored into project timelines.
- To be effective, campaigns should be ongoing, and driven by the needs of Indigenous stakeholders.
- New information and resources can be further circulated by Indigenous peak bodies to help spread awareness.
- The development and provision of any education or training activities should involve Indigenous representation.

There is also a role for government to lead by example in relation to FPIC and ABS when engaging with IK.

# Other issues raised by stakeholders

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The breadth and nature of IK means that discussions with stakeholders brought out a range of other important issues and concerns, which are summarised below. These issues are not captured under any of the proposals discussed above, but IP Australia considers it is important to capture and report this feedback as part of increasing understanding about IK. Some of these issues were included in the recommendations of the House of Representatives inquiry and will be considered by the government in response to that report. Other issues will contribute to our further analysis of the proposals in this consultation process.

The issues stakeholders raised include:

- The potential benefits of an Indigenous Cultural Authority for both Indigenous and non-Indigenous people. An Indigenous Cultural Authority could coordinate Indigenous-led positions on IK issues from outside of government as well as provide a starting point for non-Indigenous people seeking to consult with the appropriate people on use of IK.
- The need for specific legislation relating to IK. Suggestions included specific legislative prohibitions on misappropriation, penalties for misuse, or a 'sui generis' legislative system set up for the protection of IK.
- The need for a central point of contact to assist and guide people looking to properly consult on IK in order to get FPIC for their research or commercialisation project. Stakeholders often noted that it could be difficult to identify who to contact to get consent, and also that they were uncertain about the process to follow to get FPIC.
- Greater support from Government in capacity building resources for Aboriginal communities to build enterprises so they can potentially earn income and live on country based on IK (for example in relation to bushfoods and native plants and animals).
- New technologies could be used to allow for 'traceability' of authentic products and to minimise the incidence of inauthentic goods. For example, technologies such as blockchain could be used to verify supply chains and identify the source of goods.
- The importance of Government expressing a public position against misappropriation in clear and accessible language. Government practices and arrangements (for example, procurement processes) can influence behaviour greatly.
- The Government should explore how the Australian Consumer Law can more effectively prevent misappropriation at point of sale of inauthentic products.
- The importance of ratifying the Nagoya Protocol and implementing obligations under the United Nations Declaration on the Rights of Indigenous Peoples and the Convention on Biological Diversity.
- Support for Indigenous people to attend the WIPO Inter Governmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore and for Government to consult with Indigenous people before and after WIPO IGC meetings.
- Mechanisms should be created by Indigenous organisations or others to allow Indigenous communities to share their experiences with each other, including agreements which have worked well, or those that have not.