



Managing Indigenous
Knowledge: Report 2

Indigenous Protocols and Processes of Consent relevant to Trade Marks

Discussion Paper



Terri Janke and Company
LAWYERS AND CONSULTANTS

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WARNING

The document contains names of deceased Aboriginal and Torres Strait Islander people. It also contains some language that might be considered offensive.

Important legal notice

The laws and policies cited in this book are current as at 30 June 2020. They are generally discussed for the purposes of providing this report. No person should rely on the contents of this report for a specific legal matter but should obtain professional legal advice from a qualified legal practitioner.



Executive Summary

This Report is the second of three reports prepared by Terri Janke and Company at the request of IP Australia as part of their Indigenous Knowledge Project through which they have been exploring initiatives to recognise Indigenous Knowledge (IK) and the rights of Indigenous people to their cultural material through the IP system.

This Report examines the Indigenous protocols and processes of consent relevant to trade marks. It begins by framing the discussion of Indigenous peoples consent to the use of their IK. It provides an overview of the Guiding Principles of consultation and consent. From this overview two themes emerge:

1. The internationally recognised principle of self-determination as a right of Indigenous peoples, requiring that any consultation and consent process be Aboriginal or Torres Strait Islander led¹; and
2. The internationally recognised standard of free, prior, informed consent².

In unpacking the practicalities of achieving free, prior, informed consent, the report looks at the criteria and challenges to achieving this standard. This includes identifying when and why consent is necessary, identifying who is the appropriate consent authority and what to do when it's not clear who the consent authority is.

With the key issues for consent protocols framed, the Report continues to look at specific consent models that could be relevant to trade mark applicants considering including Aboriginal or Torres Strait Islander language words, phrases or artistic content in their mark. The models looked at are:

- Language based consent models (language centres)
- Land based consent models
- Protocols developed in collaboration between Traditional Owners and government
- Indigenous Arts Organisations consent models.

As each consent model is examined, with case study examples, key themes will emerge. For example, variability of time frames, the possibility that an applicant may need to go through several consent models in order to identify the most appropriate consent authority and the importance of documentation as evidence of consent.

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007) Art 3.

² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007) Art 11(2), 19, 28.

Abbreviations

ACCC	Australian Competition & Consumer Commission
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRC	Australian Law Reform Commission
CBD	United Nations Convention on Biological Resources
CSIRO	Commonwealth Scientific and Industrial Research Organisation
Cth	Commonwealth
FPIC	Free prior informed consent
ICIP	Indigenous Cultural and Intellectual Property
IK	Indigenous Knowledge
IP	Intellectual Property
NIACA	National Indigenous Arts Cultural Authority
NIAAA	National Indigenous Arts Advocacy Association (no longer operating)
TCE	Traditional Cultural Expression
TK	Traditional Knowledge
TO	Traditional Owners
WIPO	World Intellectual Property Organization

Terms

Aboriginal and Torres Strait Islander person is an Australian person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander person and is accepted as such by the community in which he or she lives.

First Nations peoples is increasingly used as a term that recognises all Indigenous persons.

Indigenous peoples is a general term for Australian persons of Aboriginal and/or Torres Strait Islander descent, and the clans or language groups and communities they belong to.

Indigenous Cultural and Intellectual Property or 'ICIP' is widely used in Australia following the report *Our Culture: Our Future*. ICIP includes intangible and tangible aspects of cultural heritage from cultural property and cultural sites to languages, human remains and documentation of Indigenous peoples. ICIP is generally communally owned and its scope is constantly evolving as current and emerging generations contribute to and nurture it.

Indigenous Customary Law or **Indigenous Law** in Australia is the body of rules, values and traditions which are accepted by the members of an Indigenous community as establishing standards or procedures to be upheld in that community. Indigenous customary law is observed and practised by many Indigenous Australians, and varies from community to community.

Indigenous Knowledge or 'IK' is broad in scope and covers all forms of cultural knowledge including Traditional Cultural Expression and Traditional Knowledge. Like ICIP it is communally owned, inextricably linked to place, and is constantly evolving.

Public domain generally refers to work that does not have any legal restriction upon its use by the public

Secret sacred refers to information that, under customary laws, is made available only to the initiated; or information that can only be seen by men or women or particular people within the culture.

Traditional Cultural Expressions are defined in WIPO's Draft Articles for *The Protection of Traditional Cultural Expressions* as 'comprising the various dynamic forms which are created, expressed, or manifested in traditional cultures and are integral to the collective cultural and social identities of the Indigenous local communities'.³

³ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, World Intellectual Property Organisation, *The Protection of Traditional Cultural Expressions: Draft Articles* 37th session, WIPO Doc WIPO/GRTKF/IC/37/5 (27-31 August 2018).

Traditional Knowledge is defined in WIPO's Draft Articles for *The Protection of Traditional Knowledge* as 'knowledge that is created, maintained, and developed by Indigenous peoples, [and] local communities...and that is linked with, or is an integral part of, the...social identity and/or cultural heritage of Indigenous peoples [or] local communities; that is transmitted between or from generation to generation...which subsists in codified, oral or other forms; and which may be dynamic and evolving, and may take the form of know-how, skills, innovations, practices, teachings or learnings'.⁴

Traditional Owners refers to the traditional custodians of that particular region.

⁴ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, World Intellectual Property Organisation, *The Protection of Traditional Knowledge: Draft Articles* 38th session, WIPO Doc WIP/GRTKF/IC/38/4 (10-14 December 2018).

1. Introduction

1.1 The Report

IP Australia are looking at ways the IP system can better support Aboriginal and Torres Strait Islander people to protect and benefit from their Indigenous Knowledge. With this goal in mind, a current focus for the organisation is their Indigenous Knowledge Project through which they have been exploring a range of initiatives. The initiatives were developed following a public consultation process in 2018 and based on the discussion paper *Indigenous Knowledge: Issues for Protection and Management*.

Consultation to date has highlighted the importance of consent for the protection and management of Indigenous Knowledge. IP Australia has limited experience with Aboriginal and Torres Strait Islander processes for consent and requires a more detailed understanding of how processes for seeking and obtaining consent from Aboriginal and Torres Strait Islander groups works, and how these processes could be incorporated into the trade mark application and examination process.

IP Australia has engaged Terri Janke and Company to prepare this Report on Indigenous Protocols and Consent Processes. In particular, this Report will include:

- research and consultation with Indigenous language centres about consent and approval processes and how it applies to trade marks; and
- research into other models for seeking consent. For example, in use by art centres, museums or research institutions.

1.2 How to read this Report

This Report will begin with an examination of the key considerations relevant to consent processes and protocols for culturally appropriate use of IK , particularly in relation to the registration of word and composite trade marks.

The Report will then examine the key consent models, including

- Language based consent models
- Land based consent models
- Government working with Traditional Owners
- Indigenous Arts organisations.

Each part will look at the role of each of these models in consent processes. In particular this section will look at the length of time anticipated in consultations, any difficulties in identifying the correct decision-making authority and managing challenges when no clear decision maker exists.

With a better understanding of the role of these models IP Australia will be in a position to analyse the issue of including a requirement for consent in the trade marks system. Each part will be accompanied by several case studies or examples of each of the consent models.

2. Indigenous people and consent of IK

2.1 Why is it so important to obtain consent?

IK is communally owned by its source community and its use and communication is regulated by cultural protocols. These protocols are concerned with maintaining the integrity of IK, safeguarding it in this generation, so that it may be passed safely to the next. In general, when Aboriginal or Torres Strait Islander people incorporate IK from their community in their own artistic practice, they do this in ways consistent with their cultural protocols.

Misuse of IK, including use without seeking permission, or where permission is withheld, risks cultural harm to the individual, their family and their community, and could negatively impact the integrity of that IK, which in turn could result in cultural harm to future generations.

Unfortunately, there are many examples of cultural harm wrought by misuse of IK. For example, the case of *Bulun Bulun v R&T Textiles* in which a textiles manufacturer copied sacred imagery used by Ganabingu man, Mr John Bulun Bulun in his bark painting. Mr Bulun Bulun's use of the imagery was consistent with his cultural responsibilities, however, the manufacturer's unauthorised use of the imagery was both a breach of copyright and customary law. In his judgement, Von Doussa J recognised Mr Bulun Bulun's ongoing cultural responsibilities with regard to use of the imagery, and recognised that those duties formed grounds for a fiduciary relationship between Mr Bulun Bulun and his clan. Mr Bulun Bulun's case is discussed further below.

Registration of word or composite marks that incorporate IK (e.g. language words or symbols) should be subject to consultation and consent by the relevant community, particularly where the applicant is not a member of that community and does not share ownership of that Knowledge. There is great cultural diversity across Aboriginal and Torres Strait Islander communities, and each community will have its own specific cultural protocols for managing Knowledge.

Consent protocols are relevant to every person wishing to use communally owned knowledge. This includes non-Indigenous traders, Aboriginal or Torres Strait Islander people without a close connection to the source community and Aboriginal and Torres Strait Islander people even if they have a connection to the source community. Consent protocols are about looking after culture, so people should also think about the impact of the commercial use of the word or design, as well as any individual's right to use a design.

In fact, there are six key considerations relevant to an understanding of the importance of consent:

1. language and design comes from land;
2. people are connected to language and design by birthright and are required to follow customary laws in the use of IK;
3. communal ownership of IK means communal obligations under customary law;
4. when IK is used in an offensive context, it compromises the integrity of that IK and causes cultural harm;

5. even when the proposed use is not directly offensive, use of IK without consent compromises cultural revitalisation processes. For example, loss of culture means many Indigenous peoples are still in a state of reclaiming words. This language revitalisation process takes a lot of time and resources. Language centres work hard to revitalise their languages. Use of language words without permission and out of context can dilute or generise the meaning of the word; and
6. respect for consultation and consent processes preserves the integrity of cultural knowledge and helps culture continue.

2.2 When should the consultation process start?

It is also relevant to consider when the consultation process should be commenced. Should it be done before the applicant submits a trade mark application? Or should it be in response to the examiner's first report?

The appropriate answer could vary according to the context. For example, while the requirement of *prior* consent generally means that consultation should be commenced at the earliest possible stage of any process, community consultation can be quite a process for the community as well as the applicant. It may not always be appropriate to ask the community to contribute to a consultation process before any application is made. For example, a Head Start application may indicate that a mark would be ineligible without certain changes. When the mark is revised in response to the Head Start report, should community be re-consulted? What are the risks of consultation fatigue?

Another issue may be that in order to protect their brand, the applicant may want to preserve a certain amount of confidentiality around the word or design, before it is registered with IP Australia. Broad consultation about the mark before an application is lodged with IP Australia would negate this confidentiality.

2.3 Returning to the source community

As words and designs belong to place, under customary laws, the relevant Aboriginal and Torres Strait Islander people to provide consent will depend on:

- *where* the knowledge or cultural expression originated;
- the proposed use; and
- the relationships of the applicant to the source community.

It is best practice to return to the source community and work with existing networks and governance structures when seeking consent for an Aboriginal language word or phrase. It ensures that the process is in the hands of the community, helps to make sure all the relevant decision makers and stakeholders are consulted and lays the infrastructure for free, prior and informed consent.

2.4 IK and IP Australia

Trade mark examiners may often be asked to assess for suitability the registration of Indigenous symbols, art, word or phrases. This might be a stylised logo that is created by an Indigenous design team or an Indigenous artist, or it could be a logo designed by a non-Indigenous graphic design team.

Below, are just a few examples of word or figurative marks currently on the trade mark register that incorporate Indigenous knowledge, language or imagery.



Figure 1: Figurative mark, TM613320, registered to Broome Musicians Aboriginal Corporation, entered onto register 26 October 1994 (renewal date on 8 October 2020)



Figure 2: Figurative mark TM1465958, registered to Voyages Indigenous Tourism Australia Pty Ltd, entered onto register 26 July 2012 (renewal date on 19 December 2021)



Figure 3: Figurative mark TM1550163, registered to National Aboriginal Cultural Institute Inc, entered onto register 3 October 2013 (renewal date on 5 April 2023)

Trade Mark applicants may incorporate IK in their mark for a number of reasons. They may be an Aboriginal or Torres Strait Islander business and want to showcase that fact because they are proud of their heritage, and because it may demonstrate a point of difference in a competitive marketplace. In fact, commercial opportunities for use of IK in art and bush foods have been expanding in recent years. For this reason, trade mark examiners may encounter marks that incorporate IK in an attempt to capitalise on the commercial value of IK and cultural practice in these industries. However, it is important that this capitalisation does not amount to exploitation and consultation and consent models are a significant control against the unethical appropriation of IK.

It is important to consider two things when determining whether a word or composite mark that incorporates Indigenous Knowledge should be registered as a trade mark. First, its suitability for its purpose. Marks should not be registered in relation to culturally inappropriate goods or services, or in culturally inappropriate contexts.

Assuming that the word or composite mark is not, in itself offensive, and its proposed use is not culturally inappropriate, the second consideration is whether the community has consented to the use of the word or image at all.

The second part to consider about consent processes is the link to the community and the consent to use the symbols, art or material at all. Some examples here might be the use of art styles belonging to certain places, or the use of logos designed by Indigenous people. This might be new designs or pre-existing designs.

The next section will examine the guiding principles relevant whenever anyone is working with IK. They are principles that are relevant to IP Australia's conduct when driving the Indigenous Knowledge protection initiatives, and they are relevant to applicants when they are applying for consent to use a word or mark in their trade mark.

The following section will look at the internationally recognised right of Indigenous peoples to self-determination. This provides relevant background for the necessity of Indigenous-led consent models.

Finally, there is an examination of the challenges to free, prior, informed consent in this context. We will also deal with the challenges of identifying the most appropriate consent authority. In tandem with this, we will examine the question of how to know when consultation has been sufficiently broad to achieve genuine consent from all relevant Indigenous stakeholders.

2.5 Self determination and Indigenous led consultation

The principle of self-determination is recognised in Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which states

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹²

Indigenous led organisations are already in existence that have the authority to facilitate Aboriginal and Torres Strait Islander led cultural protocols and consent processes. These organisations include peak national bodies as well as state and regional organisations.

These organisations operate in a range of subject areas, and include:

- Aboriginal and Torres Strait Islander language centres
- Land councils, prescribed bodies corporate and native title entities

¹⁰ *ibid*, Art 12.

¹¹ *ibid*, Art 13(1).

¹² *ibid*, Art 3.

- Indigenous land and sea management agencies
- Indigenous wellbeing support groups
- Indigenous professional representative organisations
- Indigenous women’s organisations
- Indigenous youth and elder organisations
- Indigenous legal service providers
- Indigenous corporations
- Indigenous research centres
- Indigenous art/cultural/heritage organisations
- Indigenous business and support organisations

In the context of trade mark applications, there are four key consent models relevant to the consent to use words, phrases and logos containing Indigenous Knowledge.

These consent models are included in this Report:

Language based consent models: Particularly relevant where the applicant wishes to register an Aboriginal language word. However, language centres are keeping places of immense amounts of cultural knowledge and work very closely with their communities. This means they are often best placed to know who an applicant should speak to about getting consent.

Land based organisations: Some land based organisations have set up processes and procedures for when researchers wish to enter onto country and/or use the communities’ knowledge or resources. With these community-led consent networks already in place, they are often well placed to act as liaison between applicant and community.

Government working with Traditional Owners: As with land based organisations, communities may work with Commonwealth or State government agencies, to develop access and research protocols providing consent mechanisms through which communities can consider the use of traditional knowledge in trade marks.

Indigenous Arts Organisations: Indigenous arts organisations are particularly well placed to assist trade mark applicants with community consultation on the use of logos. Some arts organisations tend to have a broader sphere of operation, for example, the Indigenous Art Code operates nationally. Sometimes this can present problems, as the predominately national networks can mean fewer regional and local connections. Nevertheless, Art Centres often play important community liaison roles, for example, in the Canning Stock Route Project. The Canning Stock Route Project was initiated by creative consultancy organisation, FORM to tell the Indigenous history of the Canning Stock Route through paintings, cultural artefacts, film, new media and photography.¹³ FORM worked directly with art centres.¹⁴

2.6 Free, Prior, Informed Consent

A consent process that has followed the principles of respectful consultation, through Indigenous-led organisations is already well on its way to achieving free, prior, informed consent. However, there remains more to be examined about the features and challenges of free, prior, informed consent before consent models can be examined more closely.

2.6.1 Why is consent necessary?

Article 31 of the Declaration states:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions...They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.¹⁵

The standard for free, prior, informed consent can be read into this right – in order for Indigenous peoples to maintain, control and protect their cultural heritage and knowledge, there needs to be appropriate consent models for the use of that knowledge.

The Declaration was adopted by Australia in 2009, but is not legally enforceable. Nevertheless, it is an important standard setting document and it does find expression in some state and territory human rights legislation.

Consent is necessary for non-Indigenous people, Aboriginal or Torres Strait Islander peoples who don't have links to the source communities and Aboriginal and Torres Strait Islander peoples who are from the source community. For non-Indigenous people use of Indigenous Knowledge without consent is cultural misappropriation at the very least. But it is also more than that. It means the non-Indigenous applicant is gaining commercial benefit from the knowledge and expression of Aboriginal and Torres Strait Islander people without sharing in this benefit, and possibly limiting Indigenous peoples' ability to commercialise their own knowledge.

As discussed previously in relation to the six key considerations relevant to the importance of consent, language and design comes from place and reflects people's relationship to place. Use of an Aboriginal or Torres Strait Islander language word or design in a trade mark, implies that the business is linked to the source community. Where IK is incorporated into a trade mark and the owners *do not* have a link to the source community risks include not just misleading consumers, but also cultural harm, undermining of the cultural revitalisation process and compromise of the intergenerational integrity of the IK as the use may dilute or distort the meaning of the cultural knowledge.

¹³ 'About', *Ngurra Kuju Walyja Canning Stock Route Project* (Web Page, 2011-2013) <
<https://www.canningstockrouteproject.com/about/>>

¹⁴ Arts centres were: Birriliburu Artists, Tjukurba Gallery; Kayili Artists; Mangkaja Arts Resource Agency; Martumili Artists; Ngurra Artists; Papunya Tula Artists; Paruku Indigenous Protected Area; Red Rock Gallery; Warlayirti Artists; Yulparija Artists; and Short Street Gallery.

¹⁵ See above note 3, Art 31.

This damage goes beyond the general competition of the marketplace, that is considered acceptable under Western legal and commercial norms. Aboriginal and Torres Strait Islander peoples have cultural responsibilities to their knowledge. These responsibilities include ensuring that the use of Indigenous Knowledge is respectful and follows the cultural protocols specific to that clan or group. These rules are necessary to maintain the integrity of the Knowledge for the benefit of future generations. Use by an applicant unconnected with the source community breaks the ties between the IK and community. Even if the trade mark applicant does not intentionally misuse the IK; the damage can occur when the Indigenous Knowledge is used in a way inconsistent with the cultural needs of that Knowledge. In the context of the Indigenous Art Market, a flood of fake art on the market threatens the integrity of the IK because it threatens the continuity of the transmission of intergenerational knowledge. As art is used to record and transmit Indigenous Knowledge, a proliferation of fake art disrupts that transmission, potentially irreparably.

Use of knowledge without consent can also be enormously culturally offensive. At present, without an established consent procedure requiring trade mark applicants to demonstrate community consent for use of Indigenous Knowledge in trade marks, IP Australia lacks visibility on whether the IK is being used without consent. However, if there was an established procedure requiring the applicant to submit evidence of consultation and consent, the ethical and cultural issues with registration would become obvious to IP Australia. This means that without requiring applicants to submit evidence of consultation and consent, IP Australia may allow the registration of a trade mark that causes cultural, social or financial harm to an Aboriginal or Torres Strait Islander group.

The importance of maintaining the connection between IK and place means that it would be appropriate for Aboriginal and Torres Strait Islander people to consult with community before registering a trade mark. There are cultural protocols for the use of communally owned Indigenous Knowledge and the applicant should follow these protocols. This includes circumstances where the applicant is a member of the source community, and especially if they are from another Aboriginal or Torres Strait Islander community.

Given that there are many factors that contribute to the importance of consultation and consent, there are equally a number of ways in which a mark may be unsuitable for registration with IP Australia. For example, to follow the six key considerations relating to consent, there are six ways a mark may be unsuitable for registration.

²¹ 'The Wandjina case demonstrates the lack of protection for Indigenous culture', *Arts Law* (Web Page, 30 September 2010) < <https://www.artslaw.com.au/article/the-wandjina-case-demonstrates-the-lack-of-protection-for-indigenous-cultur/>>.

1. language and design used in the mark may be unconnected with the land on which the business operates;
2. the business may have no connection to the people, clan or community who are the owners of that IK;
3. use may not follow cultural protocols;
4. the proposed use may be offensive;
5. even if the proposed use is not directly offensive, it may be incompatible with the underlying meaning of the language or design so that the use disrupts or dilutes the meaning; and
6. the use may compromise the integrity of cultural knowledge transmitted in the language or design.

2.6.2 Individual consent

Depending on the source of the Indigenous Knowledge, and the proposed use, it may be sufficient to obtain consent from an individual. For example, perhaps a non-Indigenous business has commissioned an Aboriginal graphic designer to design a new logo for their business. In those circumstances it might be sufficient that the business obtains from the graphic designer an undertaking that he has not included any communally owned knowledge in the logo, or if he has, he has done so with cultural authority, and has provided the business with the relevant protocols for use.

In other circumstances, individual consent may not be enough and wider community consultation and consent may be required. This will be particularly the case where the knowledge is communally owned. Use of language words or phrases, for example, is very likely to require broader community consent.

Further consultation would also be essential where the original author of a work is unknown, or not much is known about the provenance (this includes Orphan Works – works where the owner cannot be identified or located). When not much is known about the provenance of the work, consultation must be much broader in order to try and retrace the provenance of the IK and to ensure all relevant stakeholders are consulted.

In addition, consultation is still necessary even when works are considered to be in the public domain. The gaps in copyright law's protection of Indigenous Knowledge are frequently identified as failure to recognise communal ownership, and time limitations. This means that there are many works not covered (or no longer covered) by copyright law, that continue to have cultural significance as Indigenous Knowledge. Given this, then any material in the public domain, should be considered to potentially contain communally owned knowledge and the relevant community should be consulted.

2.6.3 Consent must come from community

It is generally the case that existing consent and governance systems are in place to help determine *who* to speak to, and act as a liaison between applicant and community in the consent process. For example, an applicant wishing to register a Wirangu word, should speak to the Far West Languages Centre as they provide support and assistance to the languages of the Far West Coast region of South Australia. Far West Languages Centre will know who to speak to about the use of the word but ultimately it will (and should be) the community's decision about whether to consent to the use of the word in the proposed context. This distinction is not always clear as these consent bodies act as representatives of the community, and consent and licence paperwork may be between the consent body and the applicant. However, the point to be made is that consent is ultimately a community decision. When an applicant contacts a consent body, they are starting a conversation. In most cases the consent body will need to conduct further community consultations, be it through their ethics boards or speaking to Traditional Owners and Elders. This process will take time and cannot be rushed.

2.6.4 Scope of consent

Staying within the scope of consent is just as vital as having consent in the first place. In this context scope of consent means, ensuring that the actual *use* of the word or mark stays within the consent parameters set by the community or individual..

2.6.5 Consent without provenance

As already discussed, the basic principle of the consent process is to return to the source community to ask permission. This can be very difficult where lack of information or provenance means that it is not clear where a word or image comes from, or where the people most concerned have passed away.

²² Searched on the 'Global Brand Database', *World Intellectual Property Organisation* (Online Database) <<https://www.wipo.int/reference/en/branddb/>>.

²³ 'Prime Minister Voreqe Bainimarama: Appeal to stop Air Pacific trademarking 15 distinct masi motifs' *change.org* (Web Page, n.d.) <<https://www.change.org/p/prime-minister-voreqe-bainimarama-appeal-to-stop-air-pacific-trademarking-15-distinct-masi-motifs>>.

In these circumstances, where the appropriate consent community or person is unclear, applicants could approach state and regional bodies that have done research in the relevant area. These bodies might have more information or have a better idea of who would be the most appropriate person to consult. Larger national bodies, universities, or arts organisations may also be of assistance although again, they would probably need to redirect the applicant to the appropriate regional or local body.

Ultimately, extreme caution should be exercised in any proposed use of IK where provenance is unclear. Without proper consent and community support, it may be inappropriate to use or register such a mark.

2.6.6 What if the IK belongs to multiple Aboriginal and Torres Strait Islander Groups?

Situations may arise where IK belongs to multiple Aboriginal and Torres Strait Islander Groups. In these circumstances, the sphere of consultation and consent should be broader to take in all relevant communities.

2.6.7 Finding who has authority

Finding the correct authority to consult can be a challenge. The previous section highlighted the challenges of finding the correct authority when provenance is unknown, or where the people that would generally be the most appropriate people to speak to, have passed away. There is, however, an additional concern: in some circumstances, the consent authority may be a single person (or a few people). In these circumstances, how does the applicant confirm that this person is really the correct consent authority? Put another way, when Knowledge is communally owned who decides who is the correct consent authority?

There is not really an easy solution to this question. In the circumstances it may be appropriate to broaden the scope of consultation, and to speak to other people from the area, to better understand their concerns in relation to the use of the word or mark for the proposed purpose.

2.6.8 Determining Aboriginality

A key question that may arise in considering a person's entitlement to use a word or design may be the person's identity and connection to it as this will provide context for their connection to IK and place.

Identifying an appropriate consent authority can raise the question of determining when someone is Aboriginal or Torres Strait Islander. In general, a person is recognised as being Aboriginal or Torres Strait Islander when they identify as Aboriginal or Torres Strait Islander and are accepted as such by the community in which he or she lives.

This can be complex and should really consider Indigenous cultural governance perspectives. It is not really appropriate for IP Australia to engage in decisions of whether an applicant is Aboriginal or Torres Strait Islander. It is also not necessary in the circumstances. Trade mark applications for marks which include IK should come with evidence of consultation and consent from the source community. Provided that the consultation and consent processes have been conducted appropriately, and the source community has

consented to the use of the mark in the proposed context, it is not really necessary for IP Australia to engage in questions about whether the applicant is Aboriginal or Torres Strait Islander.

The diversity of Indigenous identity must be taken into account. Only the source communities of the Traditional Knowledge have cultural authority to consent to use of a language word or image in a trade mark. For example, it's not appropriate for a Noongar person to consent to the use of a Wiradjuri word in a trade mark.

2.6.9 Commercial misappropriation

Aboriginal and Torres Strait Islander art is an expression of belonging and connection to country. It is produced both to express culture, and to make a living. However, the popularity of Indigenous Art has meant that Indigenous art techniques and images have been misappropriated, for example, imitation art on tea towels or drink bottles.

This kind of misappropriation is sometimes caught by the Australian Consumer Law under the prohibitions on misleading or deceptive conduct or false or misleading representations about goods and services.²⁴ The Australian Consumer Law does not provide a complete solution to these kinds of misappropriations, as it is still possible to use a language word or mark without claiming that it is an authentic Indigenous product or that the use is with the knowledge and consent of the source community.

This unethical conduct can extend beyond art, for example, into Native Bush Foods. A recent ABC News article noted the growth of the Australian bush food industry but also estimated that Indigenous representation in the bush foods supply chain was less than 1 per cent.²⁵ In fact, the cause of this severe under-representation is multifactorial, and the subject of much further research about developing inclusive governance frameworks for bush food commercialisation.²⁶

However, the point to be made here, in the context of trade mark registration, is that trade mark examiners may well encounter marks that incorporate Indigenous Knowledge in an attempt to capitalise on the commercial value of Indigenous Knowledge and cultural practice in these industries. Evidence of proper consultation and consent is an additional control against the unethical appropriation, or dislocation from place, of Indigenous Knowledge into trade marks that may mislead the consumer into believing that the good or service was produced by or with the consent of the source community.

²⁴ *Competition and Consumer Act 2010* (Cth), Schedule 2 – The Australian Consumer Law, ss18 & 29.

²⁵ Ruby Mitchell and Joshua Becker, 'Bush food industry booms, but only 1 per cent is produced by Indigenous people' *ABC Rural* (Online News, 19 Jan 2019) <<https://www.abc.net.au/news/rural/2019-01-19/low-indigenous-representation-in-bush-food-industry/10701986>>.

²⁶ See for example: Emma Woodward, Diane Jarvis, Kirsten Maclean 'The Traditional Owner-led Bush Products Sector' (An Overview – Scoping Study and Literature Review, CSIRO, 8 April 2019); Kylie Lingard 'An inclusive governance framework for bush food commercialisation' (Policy Briefing, Ninti One Ltd, 2015).

3. Language based consent models

Language centres are holders of enormous amounts of cultural knowledge and have close bonds with their communities. They are in an advantageous position, being community controlled and with connections to language and cultural experts. These organisations can assist with consent processes for language use.

Many language centres have started running consultation services for use of language words and/or phrases. This means that people and businesses who wish to use a language word (e.g. in a business name, or in branding for a service or product) may engage the language centre to assist them to consult with the relevant community. If the community consents to the use of the word, the language centre may also assist the business to enter into an agreement with the relevant cultural authority for the terms of usage.

In some cases, language centres may also be able to assist with consultation and clearance for figurative marks as well as words and phrases. In addition to their community connections, language centres often have huge archives which could assist in the search of provenance. They may hold a lot of historical records which could help the applicant trace the original owners of artworks.

Many language centres are starting to formalise this process, and below are several case studies of language centres' approach to language requests. The case studies include an explanation of the process that centres use for consent, any projected timelines where these exist, and consultation fees.

3.1 Kurna Warra Karrpanthi (KWK) approvals process

Language consents for Kurna people of the Adelaide Plains were initially managed through Kurna Warra Pintyandi (KWP), the language centre for the Kurna language. However, KWP now has a separate, independent organisation named Kurna Warra Karrpanthi (KWK) designated with the responsibility of processing language requests.

The steps for consultation and consent through KWK are as follows:

Step 1: Initial application

Applicants are asked to read the KWK information sheet.²⁷ The information sheet provides some background information on the Kurna language and naming protocols. Applicants must seek approval from Kurna Elders, use the word or phrase with respect and as a means to promote reconciliation.

Reciprocity is also expected. As the Kurna Elders have shared their language with the applicant, it is expected that the applicant reciprocate in some way, to contribute to the language's strength and development.

²⁷ 'Information Sheet' *Kurna Language Requests* (Web Page, 2020)
<<https://www.adelaide.edu.au/kwp/requests/>>.

Applicants must then complete a template questionnaire.²⁸ There are two versions of the questionnaire, one for individuals and one for organisations. The questionnaire covers the basics of what is being requested and by who. However, it also includes more probing questions designed to give decision-makers a better understanding of the request so that they can make a decision on whether the use is culturally appropriate.

Questions include:

- *What is the purpose of the request?*
- *To your understanding, what do these words mean?*
- *Is this location [of the use] within Kurna Country?*
- *Will the name/phrase/translation/information be used on the internet?*
- *For how long will the Kurna name/phrase/translation/information be used?*
- *Is there to be an official launch or dedication?*

There is also a schedule of fees. The fees reflect the complexity and purpose of the request.

As at June 2020, a simple request to use a Kurna word is \$500 for corporate applicants, \$200 for government entities and \$100 for educational institutions and individuals. Where the consultations are more complex, KWK charges out at \$150 per hour.

On-going use of names involves an annual fee and the licence to use the word is granted for a period of 10 years, after which the use will need to be re-negotiated.

Step 2 Review by committee

All language use requests – names, translations and information – are discussed at monthly KWK meetings, attended by Kurna Elders and teachers as well as linguists and other researchers.²⁹

Applicants will be advised of the outcome once a decision is made, although a timeline for consultation could vary depending on the complexity of the request. If the application is granted, it is on the understanding that the applicant may use the word/phrase on a non-exclusive basis and only for the purpose requested.

3.2 Victorian Aboriginal Corporation for Languages (VACL)

The VACL website contains an online form that applicants can fill out and submit when making a language inquiry.³⁰

²⁸ 'Kurna Language Requests' *Kurna Warra Pintyanthi* (Web Page, 2020), Requests Questionnaire <<https://www.adelaide.edu.au/kwp/requests/>>.

²⁹ Ibid.

³⁰ 'Language Query' *Victorian Aboriginal Corporation for Languages* (Web Page, 2020) <<https://www.vaclang.org.au/Languages/language-query.html>>.

VACL's Language Query webpage puts the visitor on notice of 3 important principles when they are considering using an Aboriginal Language word³¹:

1. Seek Permission and follow Protocol

When naming a place, facility or program, correct protocol says that the word should belong to the local language on which the place/facility/program is situated. Permission must then be sought from the Traditional Owners of that place. VACL advises applicants to speak directly to the Traditional Owners of the place, if they are known to the applicant. If the applicant is unsure of who the Traditional Owners of the place are, they may seek advice from VACL.

2. Translating English concepts into Indigenous languages is complex

For many reasons, it may not be possible or appropriate to do a literal translation of a word or phrase from English to the local Aboriginal language. Therefore, applicants should be flexible, and respond to alternative suggestions for words or phrases from Traditional Owners.

3. It takes time to show respect

There is much to discuss when Traditional Owners consider allowing public use of their language. This means that the consent process can vary in the length of time it takes, and can sometimes take quite a bit of time, possibly several months. VACL notes that rushing this process is as disrespectful as not seeking permission in the first place.

The VACL website includes several current and past projects that are examples of creatives working closely with VACL, or using VACL resources, to respectfully work with IK originating from Victoria³²:

- Gunditjmara/Gunai man Corey Theatre sings in traditional language. His use of language in his music is guided by the principles he learnt by attending VACL workshops;
- The Djirri Djirri Dance Group dances contemporary interpretations of Wurundjeri culture. The group is led by VACL language worker Mandy Nicholson; and
- 2015 film *Wawi*, directed by Michael Portway was spoken in Dja Dja Wurrung language with English subtitles. VACL language worker, Harley Dunolly-Lee worked as a language consultant on the film, with Emeritus Professor Barry Black.

3.3 Far West Languages Centre – Protocols and Processes

The Far West Languages Centre (FWLC) is based in Ceduna and as a program of the Ceduna Aboriginal Corporation, provides assistance to Aboriginal languages of the Far West Coast region of South Australia including Gugada/Kokatha, Mirning and Wirangu as well as local Southern Desert languages in the region.³³

³¹ Ibid.

³² 'Language Revival and Creativity' *Victorian Aboriginal Corporation for Languages* (Webpage, 2020) <<https://vaclang.org.au/projects/creative-collaborations/language-revival-creativity.html>>.

³³ 'About us' *Far West Languages Centre* (Web Page, 2020) <<https://www.fwlc.org.au/about>>.

The FWLC does not have an online language request form, but it does have contact details and an online inquiry form for those wishing to discuss the languages of the Far West Coast area.

However, on their website the FWLC does make available the protocols they use to consult language knowledge holders when creating language resources.³⁴ These protocols give insight into the consent process – leaving ample time for discussion with knowledge holders on more than one occasion and ensuring that the knowledge holders understand and agree to every aspect of the project before asking them to enter into any legal agreement.

The three-step process uses the protections afforded by the Copyright Act, but extends the consultation and consent process so that customary law and cultural protocols are also followed and legally protected as far as possible under the copyright act and contract law.

The three-step process of engaging language experts can be summarised as follows:

1. **The Invitation** in which the Language Centre identifies the language work needed, and starts the conversation with the knowledge holder, by giving them background information about the project.
2. **The Explanation of the Language Centre's Protocols.** If the language expert accepts the initial invitation, FWLC then provides the project protocols to the expert so that they can be reviewed and discussed in more detail. They will discuss how cultural knowledge will be used, answering the questions and concerns of the language expert.
3. Finally, the **Legal Terms of Sharing** are put in place. The legal rights to use the language expert's information are agreed and confirmed in the language expert's participation form.

³⁴ 'Ethical Protocols & Processes' *Far West Languages Centre* (Web Page, 2013) <<https://www.fwlc.org.au/protocols-processes>>.

³⁵ 'Use of palawa kani Aboriginal Language' *Tasmanian Aboriginal Centre* (Web Page, 2005, reviewed and updated 2016) <<http://tacinc.com.au/wp-content/uploads/2016/05/Use-of-palawa-kani-Aboriginal-Language-1.pdf>>.

4. Land based organisation consent models

There is scope for Indigenous native title holders and prescribed bodies corporate to play a role in the consultation and consent for use of Indigenous Knowledge. However, not all Indigenous groups have native title. For example, in Victoria, the *Traditional Owner Settlement Act 2010* (VIC) allows for an out-of-court settlement of native title, with traditional owners, if the traditional owners agree to withdraw their native title claim.³⁶ As a result, a range of land-based organisation may be appropriate consent authorities.

Many of these land based organisations have developed research protocols in relation to research requests, or requests to access resources located on that group's land.

Where a trade mark applicant is applying to use Indigenous Knowledge belonging to that particular region, it may be appropriate to approach the local land council or land-based Aboriginal Corporation for assistance and guidance in seeking consent.

4.1 KLC ICIP Protocol

The Kimberley Land Council (KLC), formed in 1978, is an Aboriginal Corporation and political land rights organisation. They are the peak Indigenous body in the region, assisting Aboriginal people to secure native title recognition, conduct conservation and land management activities and develop cultural business enterprises.³⁷

They have several relevant IP and ICIP policies for the management of Intellectual Property and Traditional Knowledge. Policy application is summarised in the graphic below.

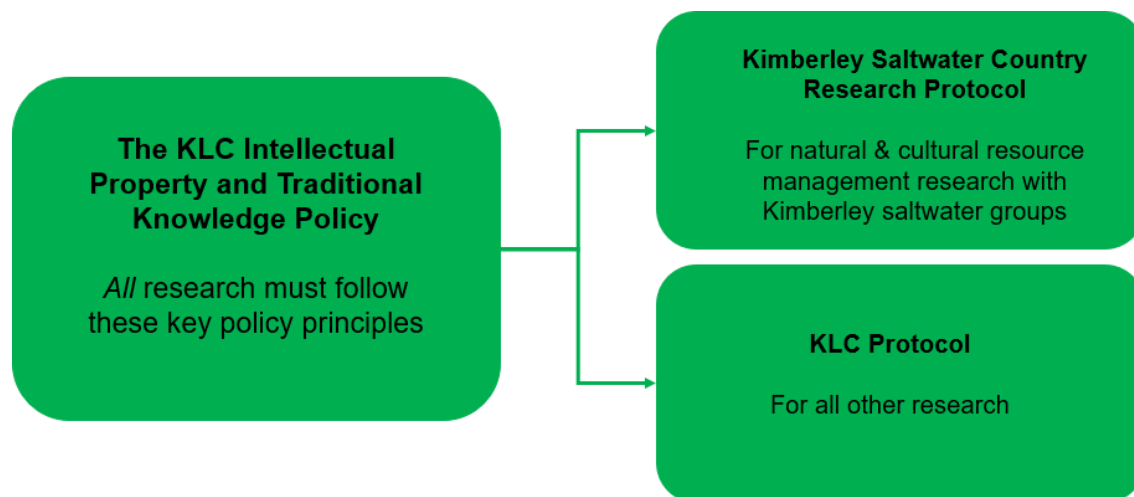


Diagram 1: Application of KLC policies

³⁶ *Traditional Owner Settlement Act 2010* (VIC), s4.

³⁷ 'About Us' *Kimberley Land Council* (Web Page, 2020) <<https://www.klc.org.au/about-the-klc>>.

In summary, all research done in the Kimberley must be reviewed by the KLC Research Ethics and Access Committee. Requests to research must be submitted to the Ethics Committee at least 12 weeks prior to the proposed commencement.³⁸

Approved researchers are expected to sign research agreements agreeing to the Intellectual Property and Traditional Knowledge Policy.³⁹ Again the Policy is overseen by KLC, through the Ethics Committee.⁴⁰

5. Government working with Traditional Owners

There are some examples of governments working with Traditional Owners to develop research and resource access protocols that comply with cultural protocols and legislative requirements. Again, these protocols will be relevant when the trade mark applicant is referring to Knowledge or cultural material that belongs to that place.

For example, in the context of the case study below, any kind of mark that refers to or represents Uluru must be at the consent of the Anangu people. Uluru in particular is incredibly culturally sensitive. Not only is it culturally significant to the Anangu, but it has also historically been exploited for commercial use by non-Indigenous Australia with scant regard to cultural or environmental safety.

5.1 Uluru-Kata Tjuta National Park

The Traditional Owners of the Uluru-Kata Tjuta National Park are the Anangu. Anangu own the land, and lease it to the Director of National Parks. While filmmakers, photographers and painters are welcome to the Park, they are required to abide by the *Uluru-Kata Tjuta National Park Guidelines for commercial image capture, use and commercial sound recording*.

The Guidelines themselves were developed with the Traditional Owners and representatives from the tourism, film and photographic industries.

³⁸ 'Research Facilitation' *Kimberley Land Council* (Web Page, 2020)
<<https://www.klc.org.au/research-facilitation>>.

³⁹ Kimberley Land Council Aboriginal Corporation & KLC Research, Ethics and Access Committee *Intellectual Property and Traditional Knowledge Policy* (2011), clause 23.2
<<https://static1.squarespace.com/static/59fecece017db2ab70aa1874/t/5ab0a8600e2e72e816fe4288/1521526883405/klc-intellectual-property-and-traditional-knowledge-policy%281%29.pdf>>

⁴⁰ Ibid, clause 23.1.

Permits are processed by the Uluru-Kata Tjuta National Park in consultation with the Traditional Owners and are required from any visitor wishing to use the Park for any commercial purpose.⁴¹ In fact, the only circumstances in which a permit is not required in order to take a photograph, film or video of the Park is when the visitor is an amateur making the recordings for personal interest only, or is a news or current affairs professional covering the news of the day.⁴² The permit system ensures compliance with both the cultural protocols of the Anangu and the requirements of the *Environment Protection and Biodiversity Conservation Act 1999* and *Regulations 2000*.

In terms of time frames for permits, visitors should expect an application for photography to take 14 days. An application to film will take at least 28 days for consideration. However, where the applications are more complex, requiring Anangu cultural information and participation, the process may take up to 56 days or even longer.⁴³ Fees are also payable - \$25 per day for filming, and \$20 per day for still photography, artwork and sound recording.⁴⁴ The permit equates to a consent to do the activity applied for i.e. take photographs or film.

5.1.1 How does this relate to trade mark applications?

In the context of trade mark applications, the process is likely to take a different course as the nature of the requested used is quite different. The permit system relates to an obligation to seek permission to enter into the Park. It does not relate to use of IK from that place. For example, the Guidelines do not relate to use of Pitjantjatjara or Yankunytjatjara language.

Nevertheless, it is relevant to consider the permit system here as it puts IP Australia (and trade mark applicants) on notice of the relevant governance authorities in the Uluru-Kata Tjuta National Park. It also provides a general (though not exact) guide to the consultation process. That is, the National Park authority is likely to be the most useful first point of contact for use of IK originating from that area. The National Park will then work in consultation with the Traditional Owners to consider any application to use IK in a trade mark. It is likely that fees will apply, and the process could take some time, perhaps even several months.

⁴¹ Director of National Parks *Uluru-Kata Tjuta National Park Guidelines for commercial image capture, use and commercial sound recording* (2009)

<<https://www.environment.gov.au/system/files/resources/b9061590-0291-498b-b8d0-909613c810b2/files/imageguidelines.pdf>> r1.3.

⁴² Ibid, r1.5-1.6.

⁴³ Ibid, r5.1.

⁴⁴ Ibid, r5.5.

6. Indigenous Arts organisation consent models

There are a variety of Indigenous Arts organisations operating at local, regional and national levels. At the national level, the Indigenous Arts Code operates to preserve and promote ethical trading in Indigenous Art. It partners with dealer members, Indigenous artist members and code supporters connecting a vast network of arts workers nationally.

Museums and art galleries (often themselves supporters of the Indigenous Art Code) also actively build relationships with the source communities whose works are represented in their collections. They are also locations where the non-Indigenous Australian community engages with artistic manifestations of Aboriginal and Torres Strait Islander cultures, and are therefore potential places where trade mark applicants could get the idea to use language words or images in their trade mark.

For example, in *John Bulun Bulun & Anor v R&T Textiles Pty Ltd [1998] FCA 1082*, a textiles manufacturer reproduced an artwork by Mr Bulun Bulun on fabric without his consent. At the time, Mr Bulun Bulun's artwork was in the Northern Territory Museum of Arts and Sciences' collection. It had been reproduced with Mr Bulun Bulun's consent in the book *Arts of the Dreaming – Australia's Living Heritage*.⁴⁵ It was this reproduction that the textile manufacturer copied.

Of course, this was not a trade marks case, but it is an illustration of an important point: museums and galleries operate on the principle of providing access to their collections by the public. While many museums and galleries work hard to ensure that their management and display of Aboriginal and Torres Strait Islander works complies with cultural protocols, the flip side of facilitating broad access to collections is that less scrupulous people, or people less aware of the importance of cultural protocols, may draw on the ideas and techniques of (or even directly copy) the displayed material. This means it is possible that some of the marks that come across the trade mark examiner's desk may be drawn from museum and gallery collections.

National art organisations have the potential to build national networks of Aboriginal and Torres Strait Islander consent authorities. Although as the example of the label of authenticity will demonstrate, these national networks must be balanced with regional and local connections so that the local Aboriginal and Torres Strait Islander communities can take the lead in the management of their own cultural material. Overmuch focus on national networks without foregrounding the voices of regional and local communities is a failure to recognise the diversity of Indigenous identity.

At the local and regional level art centres have strong community ties and work closely with the artists, supporting their art practice, promoting their work and advocating for their rights.

Given that designs and styles belong to place, local and regional governance systems will be particularly relevant to consultation processes. National governance systems will be relevant in that they may provide networks to connect applicants with relevant local decision makers.

⁴⁵ *John Bulun Bulun & Anor v R&T Textiles Pty Ltd [1998] FCA 1082*, Von Doussa J.

The rest of this section takes a closer look at these consent models and several examples. It's worth noting that they often interlink closely with each other. Returning to the Bulun Bulun example, Mr Bulun Bulun had painted his artwork, with the permission of the senior members of the Ganalbingu people and sold it to Maningrida Arts and Crafts Centre. The Northern Territory Museum of Arts and Sciences bought the artwork from the Arts Centre.

So, in a hypothetical example, if the textile manufacturer applied to trade mark a logo using the artwork in good faith and wanted to get consent, provenance tracing could have started with the Museum. The Museum might have suggested they speak directly to Mr Bulun Bulun, or redirected inquiries to the Art Centre, who could have acted as a liaison between Mr Bulun Bulun and the applicant. Mr Bulun Bulun could then have sought consent from Ganalbingu elders. So in this example, provenance tracing may have gone through several consent models, before the applicant was in touch with the correct authority to provide consent.

6.1 The role of Art Centres

Art Centres are regionally and locally based and work closely with artists from their particular region. They play a significant role in promoting and protecting the rights of their artists. They also play a role in demonstrating the authenticity of artwork that has been produced ethically. They hold provenance information, and they can act as liaisons for businesses wanting to commission artwork from their member artists.

To further strengthen their operations, Aboriginal Arts and Crafts Centres can join larger regional networks. Desart, for example is an Association of Central Australian Aboriginal Arts and Crafts Centres. It has 34 member organisations including Ninuku Arts, Papunya Tjupi Arts and the Tjanpi Desert Weavers, and represents 8,000 artists. They are governed by a 10 member Aboriginal executive committee elected from the membership regions.⁴⁶ It is also a member of the Indigenous Art Code.

6.2 Indigenous Art Code

The Indigenous Art Code is a code to promote the fair and ethical trade in works of art by Indigenous artists. The code is voluntary, but once registered, dealer members are obligated to act fairly, honestly and professionally at all times when dealing with an artist.⁴⁷ They must respect the cultural practices and rights of the artists⁴⁸ and they must contract fairly with artists, including ensuring that a clear explanation of any agreement has been provided⁴⁹, providing a cooling off period⁵⁰ and include clear payment clauses.⁵¹

⁴⁶ 'Who we are' *Desart* (Web Page, 2020) <<https://desart.com.au/who-we-are/>>.

⁴⁷ Indigenous Art Code Limited, *Indigenous Art: A code to promote fair and ethical trade in works of art by Indigenous artists* Code (2010), 2.1, <<https://indigenousartcode.org/wp-content/uploads/2017/03/Indigenous-Art-Code.pdf>>.

⁴⁸ *Ibid*, 2.3

⁴⁹ *Ibid*, 3.1

⁵⁰ *Ibid*, 3.3

⁵¹ *Ibid*, 3.4

In relation to consent, the Code obligates members to seek informed consent from artists before reproducing artworks, or permitting third parties to reproduce artworks.⁵² There is also a duty of informed consent, in which all members must deal with artists on the basis of informed consent. This includes when members enter into agreements with artists.⁵³

Indigenous artists can become members, as can other people or organisations not directly involved in commercial trade with Indigenous artists, but who support the ethics of the Code, for example, museums and galleries.⁵⁴

A dealer member is allowed to display the company logo of the Indigenous Art Code in connection with their business.⁵⁵ Directors of the Indigenous Art Code Limited have the authority to apply sanctions to Art Code members who fail to follow their obligations, including being suspended or removed as a signatory to the code.⁵⁶

6.3 The Label of Authenticity

The Boomerang Tick was a certification mark registered with IP Australia between 1999 and 2008. The mark was owned and administered by the National Indigenous Arts Advocacy Association (NIAAA). The intention of the Tick was to protect Indigenous peoples' rights, culture and arts practice and to educate consumers about buying authentic Indigenous Arts and Crafts. Any Aboriginal or Torres Strait Islander person who met the criteria for certification could use the Label of Authenticity on their work, signalling to the consumer that the product was authentically made. The certification system was to promote Indigenous arts and crafts and discourage fake art – art made by a non-Indigenous person using Aboriginal or Torres Strait Islander techniques.

The Boomerang Tick is no longer in use. However, the certification rules provide a useful case study on consent processes.⁵⁷

In fact, the certification system had two levels of certification:

1. The Label of Authenticity, and
2. The Collaboration Mark

The Label of Authenticity could only be used in relation to work which was created, authored or produced wholly by an Indigenous person. The Collaboration Mark could be used where the work was authored, created or produced by an Indigenous person in collaboration with a non-Indigenous person.

⁵² Ibid, 2.3(a).

⁵³ Ibid, 3.

⁵⁴ 'Become a member or supporter' *Indigenous Art Code* (Web Page, 2019) <<https://indigenousartcode.org/become-a-member-or-supporter/>>.

⁵⁵ Above note 43, 6

⁵⁶ Ibid, 7.2(a)

⁵⁷ National Indigenous Arts Advocacy Association *NIAAA's Label of Authenticity trade mark Certification Rules* (1998) <https://www.ipaustralia.gov.au/sites/default/files/certification_rules/772566.pdf>.

Under the certification rules, the NIAAA could delegate its powers, including the power to consider applications for certification, to an approved certifier. The certifier had to be a non-profit incorporated Indigenous community arts or cultural organisation, funded by the Aboriginal and Torres Strait Islander Commission (abolished 2004), or similar organisation and have knowledge of the Indigenous communities within the area in which they were entitled to certify applicants. It was the role of the NIAAA (or the approved certifier) to consider the applications for use of the Label of Authenticity or Collaboration Mark.

All applications had to be accompanied by the application fee and some form of evidence that the application has been made by an Indigenous person e.g. an ATSI Confirmation of Aboriginality of Torres Strait Islander Descent. So the NIAAA's (or certifier's) role was to oversee that the work that was created, authored or produced, complied with criteria for use of the mark. It was not directly involved in consultation processes.

If the application was approved, the certified creator could use the mark for 12 months, and then would re-apply for renewal.

The details of the Label of Authenticity were included here as an example of an attempt to use trade mark law to assist in the protection and promotion of authentic Aboriginal and Torres Strait Islander art. The trade mark was owned and run by an Indigenous arts organisation, and use of the mark was subject to an approvals procedure. However, it was this approvals procedure which may have contributed to the difficulty in sustaining the mark. As referred to in section 2.7.8 these proof of Aboriginality requirements were onerous and frequently caused offence. Also, in response to the problem of fake art, it placed the burden and cost (licence fee) on the artists who are actually doing the right thing. Another issue was that it operated too much on the national level without enough local and regional participation. So in a sense, the issue was that the community declined to consent to use the mark. Considered in these terms, this is a useful case study to show the importance of local community consultation.

6.4 The National Indigenous Arts and Cultural Authority

The NIAAA is no longer in operation. However, a proposed National Indigenous Arts and Cultural Authority (NIACA) has been put forward by the First Nations arts and cultural sector.

A discussion paper was circulated in 2018/19 followed by extensive consultation forums held all around Australia and in the Torres Strait. There were at least 30 consultation forums in major cities as well as local and regional areas. Online surveys were also available. The success of a NIACA will be based on its strong local and regional ties. This means that design of the NIACA requires consultation with local and regional areas throughout Australia. Though a national body, the NIACA will be a collaboration of between local and regional Aboriginal and Torres Strait Islander peoples and groups, throughout Australia. A national summit of the First Nations arts and culture sector is scheduled for later in 2020.⁵⁸

⁵⁸ '2020 National Summit' *National Indigenous Arts & Cultural Authority* (Web Page, 2018) <<https://niaca.com.au/2019-summit/>>.

The NIACA would be an effective national representative body connecting Aboriginal and Torres Strait Islander artists and cultural organisations to develop co-ordinated and community driven programs.⁵⁹ It would give First Nations arts and culture a national voice and would provide support and leadership on the protection of cultural knowledge and expression.⁶⁰ It has the potential to play a significant role in consultation processes in the First Nation arts and culture sector.

Once established it could be a significant resource for applicants needing guidance on consent protocols, and could help connect applicants with the relevant local community, regional groups or individuals who need to be consulted.

⁵⁹ 'About NIACA' *National Indigenous Arts & Cultural Authority* (Web Page, 2018)
<<https://niaca.com.au/about-national-indigenous-arts-and-cultural-authority/>>.

⁶⁰ Ibid.

7. Conclusion

IP Australia trade mark examiners are likely to be asked to consider marks that include Aboriginal language words, or figurative representations of Aboriginal art or stories. These language words and designs belong to place. The applicants may be Aboriginal businesses from the source community, Aboriginal businesses from other regions, or non-Indigenous businesses. Whoever the applicant, it is important that the IK in the mark is used with the consent of the appropriate cultural authority. This Report provided information and examples of Indigenous cultural protocols and consent processes, to assist IP Australia in developing mechanisms for working with these existing Aboriginal-led consent models to improve IK protection through the IP system.

The consent mechanisms examined showed that there is an increasing practice of getting formal consent through the appropriate consent authority (e.g. language centres, Traditional Owner groups or Aboriginal arts and crafts centres). These written consents can take the form of agreements or letters from individuals and groups with cultural authority to consent to the IK use.

Obtaining these written consents must follow reasonable consultations with the people and communities from which the IK originated. This process can vary in the length of time it takes. One factor that can impact the length of time is the provenance tracing. These consent bodies can often help with this process – given their extensive networks and archives – but it may be the case that the applicant may have to be referred through several people before they speak directly with the consent authority.

Another factor that can impact time taken to obtain consent is the complexity of the request. What is the IK proposed for use? Is it culturally sensitive? What is the proposed use of the mark? Could its use cause offense, or be culturally inappropriate?

There are also often consultation fees involved in the process to recognise the time and effort contributed by consultants. This consultation fee may be accompanied by a licence fee if the use is consented to. The use of the licence fee model (e.g. KWK) is best practice, as it reflects the use of language as the use of cultural property – the ownership remains with the community, but the community has consented to a time limited licence to use the word for the agreed purpose.

Evidence of a licence fee paid to a consent authority could form part of the trade mark applicant's evidence of consultation and consent. It is up to the consent authority and the applicant to negotiate the term of any licence (and associated fees). However, it would be relevant for IP Australia to put any trade mark applicant on notice (if they are not already) of the usual 10 year trade mark registration renewal. The applicant could then factor that into their negotiations with the consent authority and perhaps negotiate fees for a roughly equivalent time period.

Above all, consultation and consent must not be a 'tick-the-box' exercise. Rather than being merely a transaction, support paperwork should reflect the development of a more balanced, mutually beneficial relationship between business and Aboriginal and Torres Strait Islander

communities. Evidence of a licensing arrangement with the source community could be an indicator of this continuing relationship.

In summary, applicants can seek advice regarding who to consult and the extent of appropriate consultation from the following:

- Where known, Traditional Owners, cultural or language custodians or particular communities (section 3);
- Aboriginal and Torres Strait Islander organisations and representative bodies such as local, regional or state Aboriginal Land Councils and Prescribed Bodies Corporate (section 4);
- Government and Traditional Owner collaborative bodies (section 5)
- Aboriginal and Torres Strait Islander arts and cultural centres (section 6)
- State and national libraries, archives, museums and art galleries (section 6)

Other possible sources for advice include:

- Local Aboriginal and Torres Strait Islander Advisory Groups;
- The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)

See Appendix 1: Aboriginal Land Council and Prescribed Bodies Corporate, Appendix 2: Key Indigenous Organisations and Peak Bodies, and Appendix 3: The Australian Government's Indigenous Language and Arts Program for a non-exhaustive list of organisations that may assist applicants in identifying relevant Aboriginal and Torres Strait Islander consent authorities.

These resources, and this Report will assist trade mark examiners in providing applicants directions when they come to IP Australia requesting registration of a mark containing IK.

Appendix 1: Aboriginal Land Council and Prescribed Bodies Corporate

Land councils, regional authorities and Traditional Owner groups may often be able to assist in identifying the correct Aboriginal or Torres Strait Islander people or community to contact about use of cultural heritage or ICIP. There are several land councils in Australia, and they are usually state based. Not all areas in Australia have a land council, so it may be necessary to contact regional authorities, prescribed bodies corporate or Traditional Owner groups, some of which are listed below.

NOTE: These lists are provided as a general guide only. These lists are not exhaustive list and are subject to change.

Prescribed Bodies Corporate

For a list of all Prescribed Bodies Corporate (formally Registered Native Title Bodies Corporate) and their contact details see AIATSIS' Native Title Corporations website:

www.nativetitle.org.au

New South Wales

- A list of all the Local Aboriginal Land Councils in NSW and their contact details can be found here: <http://www.alc.org.au/land-councils/lalc-boundaries--contact-details.aspx>

Victoria

- Barengi Gadjin Land Council Aboriginal Corporation www.bglc.com.au
- Dja Dja Wurrung Clans Aboriginal Corporation www.djadjawurrung.com.au
- Eastern Maar Aboriginal Corporation www.easternmarr.com.au
- Federation of Victorian Traditional Owner Corporations www.fvtoc.com.au
- Gunaikurnai Land and Waters Aboriginal Corporation www.gunaikurnai.org
- Gunditj Mirring Traditional Owners Aboriginal Corporation www.gunditjmirring.com
- Martang Pty Ltd djabwurrung@gmail.com
- Taungurung Clans Aboriginal Corporation www.taungurun.com.au
- Wathaurung Aboriginal Corporation trading as Wadawurrung www.wathcorp.com.au
- Wurundjeri Tribe Land and Compensation Cultural Heritage Council www.wurundjeri.com.au
- Yorta Yorta National Aboriginal Corporation www.yynac.com.au

Northern Territory

- Anindilyakwa Land Council (Groote Archipelago) www.anindilyakwa.com.au
- Central Land Council www.clc.org.au
- Northern Land Council www.nlc.org.au
- Tiwi Land Council www.tiwilandcouncil.com

Queensland

- Cape York Land Council www.cylc.org.au
- Northern Peninsula Area Council (Cape communities) www.nparc.qld.gov.au
- North Queensland Land Council www.nglc.com.au
- Torres Strait Regional Authority www.tsra.gov.au
- Torres Strait Island Regional Council www.tsirc.qld.gov.au
- Torres Shire Council www.torres.qld.gov.au

Western Australia

- South West Aboriginal Land and Sea Council <http://www.noongar.org.au/>
- Kimberley Land Council www.klc.org.au
- Ngaanyatjarra Council Aboriginal Corporation (WA) www.ngaanyatjarra.org.au
- Yamatji Marlpa Aboriginal Corporation www.ymac.org.au

South Australia

- Adnyamathanha Traditional Lands Association www.atla.com.au
- Anangu Pitjantjatjara Yankunytjatjara (APY) Land Council www.anangu.com.au
- Far West Coast Aboriginal Corporation www.fwcac.org.au
- Maralinga Tjarutja www.maralingatjarutja.com
- Ngarrindjeri Regional Authority (NRA) www.ngarrindjeri.org.au

Tasmania

- Tasmanian Aboriginal Centre www.tacinc.com.au

Appendix 2: Key Indigenous Organisations and Peak Bodies

There are many Aboriginal and Torres Strait Islander organisations and peak bodies that exist in the different practice areas such as in the creative arts, media, health, education and business. These organisations are often community controlled and Aboriginal and Torres Strait Islander-led structures that have growing capabilities and may be able to assist with identifying the Aboriginal or Torres Strait Islander people or community for a particular project or activity or who can make decisions about use of cultural heritage or ICIP.

This is a non-exhaustive list of organisations which provides a starting point to identify relevant Aboriginal and Torres Strait Islander people and communities. Representation and decision-making bodies vary between the industry areas, regions and communities. Links to organisation websites are provided where found.

NOTE: These lists are provided as a general guide only. These lists are not exhaustive list and are subject to change.

Key Government Indigenous Advisory Groups

- Indigenous Advisory Committee, Department of Agriculture, Water and Environment, Australian Government www.environment.gov.au/epbc/advisory-committees/iac
- Aboriginal Advisory Council of Western Australia www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/aboriginal-advisory-council-of-western-australia
- Northern Australia Indigenous Reference Group, Department of Industry, Science, Energy and Resources, Australian Government www.industry.gov.au/about-us/our-structure/office-of-northern-australia/northern-australia-advisory-groups

Research and Academia

- Peak research bodies:
 - Australian Institute of Aboriginal and Torres Strait Islander Studies <https://aiatsis.gov.au/>
 - Lowitja Institute <https://www.lowitja.org.au/>
- National Indigenous Research and Knowledge Network <http://www.nirakn.edu.au/>
- National Health and Medical Research Council <https://www.nhmrc.gov.au/>
- Australian Centre for Indigenous History <http://history.cass.anu.edu.au/centres/acih>

Languages

- First Languages Australia <http://www.firstlanguages.org.au/> - peak national body

See also Appendix 3: The Australian Government's Indigenous Language and Arts Program

Art and Design

- Regional art centres and associations:
 - Desert (the Association of Central Australian Aboriginal Art and Craft Centres)

- <https://desart.com.au/>
- Ananguku Arts and Culture Aboriginal Corporation
<https://www.anangukuarts.com.au/>
- Association of Northern, Kimberley and Arnhem Aboriginal Artists
<http://ankaaa.org.au/>
- Indigenous Art Centre Alliance <https://iaca.com.au/>
- Saltwater Freshwater Arts Alliance <https://iaca.com.au/>
- Aboriginal Art Centre Hub of Western Australia <http://aachwa.com.au/>
- Indigenous Art Code <https://indigenousartcode.org/> which maintains ethical standards for Indigenous art dealings
- National Aboriginal Design Agency <http://nationalaboriginaldesignagency.com.au/about/>

Educational Cultural Training

- State and Territory Education Consultative Groups:
 - WA Aboriginal Education and Training Council
 - NSW Aboriginal Education Consultative Group <https://www.aecg.nsw.edu.au/>
 - ACT Aboriginal and Torres Strait Islander Education Advisory Group
 - QLD Indigenous Education Consultative Committee
 - SA Aboriginal Education and Training Consultative Body
<http://saaetcb.demo.webez.biz/>
 - VIC Aboriginal Education Association Incorporated <http://www.vaeai.org.au/>
 - NT Indigenous Education Council,
 - Tasmanian Aboriginal Corporation for Education
- SNAIC- National Voice for our Children <https://www.snaicc.org.au/sector-development/training-programs/>

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'About us' *Far West Languages Centre* (Web Page, 2020) <<https://www.fwlc.org.au/about>>

'About Us' *Kimberley Land Council* (Web Page, 2020) <<https://www.klc.org.au/about-the-klc>>

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Competition and Consumer Act 2010 (Cth)

Human Rights Act 2004 (ACT)

Human Rights Act 2019 (QLD)

Traditional Owner Settlement Act 2010 (VIC)

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