



To IP Australia

Response to IP Australia's consultation paper: Protection of Indigenous Knowledge in the Intellectual Property System

Below is the Indigenous Lawyers' Association of Queensland (**ILAQ**) response to IP Australia's consultation to identify policy options that relate to the IP responsibilities of IP Australia and help to promote the cultural integrity and economic potential of Indigenous Knowledge.

Part A: Indigenous knowledge issues in Australia

Consultation question

- 1. Are there any other issues associated with the protection and management of Indigenous Knowledge not addressed above that you would like IP Australia to consider?***

The issues identified in the consultation paper are comprehensive and cover many of the ongoing problems that Indigenous people face with the protection and management of their Traditional Knowledge. IP Australia may consider the extent to which its own role could assist Indigenous people in protecting Traditional Knowledge. For example, are there existing IP Australia frameworks or known mechanisms that would assist Indigenous people in addressing some of the identified issues? Is IP Australia aware of Indigenous groups or businesses that have overcome the issues identified in the consultation paper using the IP Australia system? If so, that information may assist others to do the same.

Part B: Proposed initiatives for the protection and management of Indigenous Knowledge

Consultation questions

2. What do you consider to be the greatest challenges for Indigenous people in ensuring that Traditional Knowledge is not misappropriated or misused?

From a legal perspective, one of the challenges for Indigenous people in ensuring that Traditional Knowledge is not misappropriated or misused, include the inability of Indigenous people to:

- obtain legal recognition of rights existing in and in connection with their Traditional Knowledge; and
- enforce such rights when Traditional Knowledge is misappropriated or misused by third parties.

It is clear that existing intellectual property frameworks were not designed, nor have the capacity, to recognise the rights possessed by Indigenous people in relation to Traditional Knowledge. This position has been well documented over many years in Australia.¹ Deficiencies in patent law in the context of Traditional Knowledge have also been identified in the consultation paper. Because existing laws take a fragmented approach and do not comprehensively protect Indigenous peoples' Traditional Knowledge, it has the practical effect of preventing Indigenous people from engaging with, managing and obtaining economic benefit from the use of their Traditional Knowledge. It also makes it difficult for Indigenous people to take action against third parties for unauthorised use of their Traditional Knowledge.

3. What are your views on the proposals considered above for the protection of Traditional Knowledge?

As a combined package, the proposals in the consultation paper may go some way to protecting Traditional Knowledge.

¹ <http://www.terrijanke.com.au/our-culture-our-future>

Proposal 1 suggests use of certification trade marks to identify products that use Traditional Knowledge. It is suggested that careful consideration be given to the accessibility of the existing trade mark's system and the practicalities of Indigenous people being able to effectively engage with and obtain trade mark protection – including the establishment of standards for the certification trade mark and time and costs associated with the application process.

Proposal 3 calls for the development and use of standard research and commercialisation agreements which vest intellectual property rights in Traditional Knowledge with the relevant Indigenous group. While the vesting of intellectual property rights with Indigenous groups sets a good contractual position, ideally legal recognition and protection of Traditional Knowledge would be guaranteed and arise in specific standalone legislation.

The disclosure of sources under proposal 6 may assist in identifying where Traditional Knowledge is being used. The priority of identifying, attributing and properly compensating owners of Traditional Knowledge in the patent process could be built into the required steps so the issues of time and costs raised by applicants becomes a usual part of the process, rather than perceived as an obstacle to registration (as identified in the consultation paper).

4. Are there other ways in which collaboration between Indigenous communities and researchers could be encouraged and supported in order to create economic opportunities?

From a legal perspective, comprehensive protections for Indigenous peoples' Traditional Knowledge, coupled with protocols for management and treatment of Traditional Knowledge may encourage further collaboration to create economic opportunities. This may be achieved through specific standalone legislation that interacts with existing laws.

5. Are there other options that IP Australia should consider to protect Traditional Knowledge?

The review of the *Biodiscovery Act 2004* (Qld) (**Act**) is considering processes for how Traditional Knowledge is accessed and used in research. Proposed amendments to the Act

align with the Convention on Biological Diversity and the Nagoya Protocol (which Australia signed in 2012), and will be the strongest reform in this area nationally. An option may be for IP Australia to consider the proposed amendments and if implemented, how they may be administered by IP Australia. Ideally, a consistent approach would be given to such amendments and standards for dealing with Traditional Knowledge.

Another option to consider would be a specific and permanent team of Aboriginal and Torres Strait Islander people with the relevant skills employed by IP Australia to assist in the development of appropriate standards in relation to IP Australia's management of Traditional Knowledge. This may guide IP Australia's policy around the development and protection of Traditional Knowledge.

The report on inauthentic or fake Aboriginal art released in December 2018 by the House of Representatives Standing Committee on Indigenous Affairs put forward a recommendation for specific legislation, in the form of recommendation 8:

The committee recommends that the Australian Government begins a consultation process to develop stand alone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions.

IP Australia may wish to consider how it could support and explore this recommendation further.

6. What do you consider to be the greatest challenges for Indigenous people in ensuring that Traditional Cultural Expressions are protected from inappropriate commercial use?

From a legal perspective, one of the challenges for Indigenous people in ensuring that Traditional Cultural Expressions are protected from inappropriate commercial use, include the inability of Indigenous people to:

- obtain legal recognition of Traditional Cultural Expression; and
- enforce such rights when breached by third parties.

It is clear that existing intellectual property frameworks were not designed, nor have the capacity, to recognise the rights possessed by Indigenous people in relation to Traditional Cultural Expressions. This position has been well documented over many years in Australia.² Because existing laws take a fragmented approach and do not comprehensively protect Indigenous peoples' Traditional Cultural Expressions, it has the practical effect of preventing Indigenous people from engaging with, managing and obtaining economic benefit from the use of their Traditional Cultural Expressions. It also makes it difficult for Indigenous people to take action against third parties for unauthorised use of their Traditional Cultural Expression.

7. What are your views on the proposals considered above for the protection of Traditional Cultural Expressions in the trade marks and designs systems?

As a combined package, the proposals for the expansion of the 'scandalous' rejection in relation to cultural sensitivities, inclusion of a database for traditional cultural expressions and requirement for consent may assist Indigenous people to obtain control over cultural words or images. Confidentiality and disclosure issues around the publication of sensitive material through a public database must also be carefully managed. In that regard, Indigenous people, particularly those who look to engage with the intellectual property rights system would need to be included on how to implement best practice for the management of the database.

8. Are you aware of any existing databases or collections of Traditional Cultural Expressions that could be used or built upon to implement the database option (Proposal 9) outlined above?

Amendments to the Victorian Cultural Heritage Act in 2016 introduced a mechanism for traditional owner groups to register their intangible cultural heritage rights. The purported effect of registering rights puts third parties on notice that such rights exist, includes a mechanism for parties to enter into agreements for use of such intangible rights, and creates an offence if third parties use intangible rights in an unauthorised way. While the Victorian

² <http://www.terrijanke.com.au/our-culture-our-future>

register is not specifically trade mark based (and is focused more on the management of cultural heritage), the model itself may offer guidance on the operation of a traditional cultural expressions database.

9. Are there any other options that you think IP Australia should consider to address the issue of inappropriate use of Traditional Cultural Expressions in trade marks and designs?

An option to consider would be a specific and permanent team of Aboriginal and Torres Strait Islander people with the relevant skills employed by IP Australia to assist in the development of appropriate standards in relation to IP Australia's management of Traditional Cultural Expressions. This may guide IP Australia's policy around the development and protection of Traditional Cultural Expressions.

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IP Australia may wish to consider how it could support and explore this recommendation further.

10. What role do you think an Indigenous Advisory Panel (or similar body) could play in advising or assisting IP Australia on the protection of Indigenous Knowledge?

In addition to the team of employees referred to in responses 5 and 9, an advisory panel could provide support to IP Australia on the protection of Indigenous Knowledge. The advisory panel could work alongside the specialised team and broader IP Australia staff to educate and provide guidance from different areas of the Indigenous community.

11. Are there any specific issues you would want IP Australia to consider, were it to set up an Indigenous Advisory Panel (or similar body)?

If IP Australia were to set up an Indigenous Advisory Panel, it may wish to gauge other existing panels in the same or similar area to consider what is best practice. It would also be important to consider the breadth of representation on the Advisory Panel to ensure there is appropriate representation from Aboriginal and Torres Strait Islander people and industries, including legal professionals, business owners, artists and community and cultural leaders.

12. Are there any issues you think should particularly be included in any education and awareness campaign?

Any education and awareness campaign needs to be ongoing and driven by the needs of those who IP Australia is wanting to engage with. Education of the IP Australia system for Indigenous businesses and community groups may assist in spreading awareness of how the intellectual property rights' system may assist such groups.

13. Do you have any suggestions for how an education and awareness campaign should be conducted and whether any particular community or industry sectors should be targeted?

Please see response to question 12 above.