



***The NSW Aboriginal Land Council's submission  
on the  
Protection of Indigenous Knowledge in the  
Intellectual Property System***

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## **Introduction**

The NSW Aboriginal Land Council (**NSWALC**) welcomes the opportunity to provide feedback to IP Australia. NSWALC provides these comments in our capacity as the peak body representing Aboriginal peoples in NSW and as the largest Aboriginal member based organisation in Australia.

NSWALC is committed to pursuing cultural, social and economic independence for Aboriginal peoples. As a self-funded statutory corporation established under the *Aboriginal Land Rights Act 1983 (ALRA)*, NSWALC has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples and communities across the state.

NSWALC also provides support to a network of 120 Local Aboriginal Land Councils (**LALCs**), with a combined membership of over 25,000 Aboriginal people. LALCs are autonomous, elected bodies representing the interests of their members as well as the wider Aboriginal community in each of their respective regions. The core business of each LALC is to protect Aboriginal culture and heritage, acquire and manage lands for cultural and economic purposes, and as compensation for dispossession.

NSWALC's recommendations seek to advance the human rights of Aboriginal peoples, protect and create opportunities and/or processes for Aboriginal peoples to be active participants in the intergenerational protection and management of Indigenous Knowledges.

Accordingly, NSWALC draws IP Australia's attention to **Article 11** and **Article 31** of the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)** which respectively state:

*"1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*

*2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs"*

and

*"1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

*2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights".*

NSWALC highlights these Articles as they reference two themes that underpin this submission; Aboriginal community control and a human rights based approach to the protection and preservation of Indigenous Knowledges.

**Question One: 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?**

NSWALC recommends IP Australia consider the incorporation of data sovereignty principles in future work regarding Indigenous Knowledges. Indigenous data sovereignty is an emerging academic discipline and global movement led by Indigenous peoples that seeks to recognise the connection between Indigenous development agendas and data as a resource<sup>1</sup>. Data sovereignty includes the following definitions:

- ‘Indigenous Data’ refers to information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually;
- ‘Indigenous Data Sovereignty’ refers to the right of Indigenous people to exercise ownership over Indigenous Data. Ownership of data can be expressed through the creation, collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous Data; and
- ‘Indigenous Data Governance’ refers to the right of Indigenous peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity.<sup>2</sup>

NSWALC recommends that the principles of data sovereignty guide and inform the future work of IP Australia regarding Indigenous Knowledges. The global Indigenous data sovereignty movement is a demonstration of self-determination and as such, incorporation of these principles and approach is aligned with a human rights based approach to Indigenous Knowledges.

**Question Two: What do you consider to be the greatest challenges for Indigenous people in ensuring that Traditional Knowledge is not misappropriated or misused?**

NSWALC considers the lack of a comprehensive legal framework (and accompanying policy framework) tailored and designed to protect Aboriginal people’s Traditional Knowledges is a significant challenge when dealing with the misappropriation or misuse of Traditional Knowledges.

Responsibilities spread across various laws and government agencies, across various jurisdictions, combined with ad hoc policy responses are prime examples of an ineffectual legal framework.<sup>3</sup> When dealing with Indigenous Knowledges, NSWALC strongly agrees with by Ms. Terri Janke and the Arts Law Centre of Australia regarding the need for a coordinated national approach and Sui generis protection<sup>4</sup>.

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1 Walter, M. Lovett R., Bodkin Andrews, G. & Lee, V. (2018) *Indigenous Data Sovereignty Briefing Paper 1*. Miam nayri Wingara Data Sovereignty Group and the Australian Indigenous Governance Institute

2 Miam Nayri Wingara. (n.d.). KEY PRINCIPLES. [online] Available at: <https://www.miamnayriwingara.org/key-principles/> [Accessed 31 Jan. 2019].

3 Janke, T. (1999) *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Final Report) Michael Frankel and Company

4 Janke, T., & Sentina, M. (2018). Indigenous Knowledge: Issues for Protection and Management; Arts Law Centre of Australia (2012), Indigenous Knowledge Consultation, Available:

[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_arts\\_law\\_centre\\_of\\_australia.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_arts_law_centre_of_australia.pdf)

As the government agency responsible for the “administration of Australia’s intellectual property (IP) rights system, specifically trademarks, patents, designs and plant breeder’s rights” and the accompanying vision of “...a world leading IP system that builds prosperity for Australia”, IP Australia is uniquely placed to become a world leader regarding the protection of Indigenous Knowledges and the promotion of the rights and interests of Aboriginal peoples regarding Indigenous Knowledges. It goes without saying both are intrinsically interconnected; Aboriginal peoples cannot be separated from our knowledges.

**Question Three: What are your views on the proposals considered above for the protection of Traditional Knowledge?**

NSWALC recommends that the proposals put forth by IP Australia be viewed as a starting point with the long-term goal of comprehensive, fully enforceable legal rights for the protection and management of Indigenous Knowledges. NSWALC also recommends any legislative frameworks (and subsequent implementation) must be co-designed with Aboriginal peoples.

Regarding each of the proposals:

Proposal 1: Support the use of IP rights to promote Indigenous products

NSWALC supports the proposal to establish collective or certification trademarks and commends IP Australia’s proposed approach regarding both national and regional certification trademarks as a regionalised approach is likely to be more reflective of cultural and political differences across regional areas.

Proposal 2: Standardise research protocols and guidelines

NSWALC supports the harmonising of existing industry standard protocols (along with the incorporation of international protocol frameworks). Whilst consistency across protocols is important, ensuring the enforceability of any future revised protocols should also be given equal priority.

Proposal 3: Develop and promote standard research and commercialisation agreements to vest Traditional Knowledge rights with traditional owners

NSWALC supports the development and promotion of standard research and commercialisation agreements to vest Traditional Knowledge rights with Aboriginal peoples. Free, prior and informed consent should also be a requirement within standard research and commercialisation agreements.

Proposal 4: Include Free, Prior and Informed Consent (FPIC) as a requirement for Australian Government-funded research programs

NSWALC supports the proposal to include free, prior and informed consent as a requirement for Australian Government funded research programs. NSWALC commends IP Australia for recognising the foundation principle of Free, Prior and Informed Consent (FPIC) (an international principle protected by human rights standards).

Proposal 5: Develop a national database of Traditional Knowledge and genetic resources

NSWALC does not fully support the proposal for a national database of Traditional Knowledge and genetic resources. NSWALC cautions against the creation of a database of Indigenous Knowledge unless the principles of data sovereignty, and free, prior and informed consent, can be fully incorporated across all aspects of the database administration and implementation. The excerpt

below, whilst referring to Native American initiatives, highlights the political context and practicalities of Indigenous data sovereignty:

“Indigenous data sovereignty is a right; it is also a state to be achieved through data governance. Every tribal nation is positioned along a spectrum from data dependency—the state of depending on other entities to provide data about the tribe and about its people, communities, and resources—to data sovereignty.



By implementing mechanisms of data governance, tribes are working toward data sovereignty. In this process, they will develop and use mechanisms such as research review boards, data sharing agreements, and data repositories. They also will revisit, reuse, and revise these mechanisms continuously to better achieve their goal. As technological advances or changes in tribal government activities create new data, the process will continue to evolve<sup>5</sup>.

#### Proposal 6: Disclosure of source requirement for genetic resources in patent applications

NSWALC supports the proposal for disclosure of source requirements for genetic resources in patent applications. Unfortunately, due to the risks involved with Traditional Knowledge databases, NSWALC does not fully support the use of Traditional Knowledge databases as a means of defensive protection.

#### Proposal 7: Provide training and legal support to Indigenous communities

NSWALC encourages IP Australia to undertake training and legal support to Aboriginal communities as this will facilitate informed decision making. NSWALC recommends that IP Australia implement any training and legal support with a human rights based approach. NSWALC provides the following information to assist IP Australia:

“A human rights based approach seeks to realise human rights in practice. It frames poverty or disadvantage as an injustice, and is concerned with the interaction between a rights-holder and a duty-bearer. It transforms consumers/clients/constituents from a person deserving of charity (charity approach) or who has an unmet need (needs approach), to a person who holds or should be helped (empowered) to hold a right (rights-holder). Understood this way, the provision of services; the creation of policy; and the shaping of priorities are informed by the objective of duty-bearers fulfilling the rights of rights-holders.<sup>6</sup>”

Regarding the provision of legal support, NSWALC recommends IP Australia explore the creation of a legal fighting fund for the protection and management of Indigenous intellectual and cultural

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5 Rainie, S. C, Rodriguez-Lonebear, D. and Martinez. A. (2017). *Policy Brief (Version 2): Data Governance for Native Nation Rebuilding*. Tucson: Native Nations Institute.

6 State Library of NSW. (2019). Human rights standards in Australia. [online] Available at: <https://legalanswers.sl.nsw.gov.au/hot-topics-85-human-rights/human-rights-standards-australia> [Accessed 31 Jan. 2019].

property rights. Such a fund could provide financial, legal and professional assistance to Aboriginal and/or Torres Strait Islander peoples facing major legal issues that have the potential to set legal precedents in relation to intellectual and cultural property rights in Australia.

**Question Four: Are there other ways in which collaboration between Indigenous communities and researchers could be encouraged and supported in order to create economic opportunities?**

When focussing on economic development opportunities, NSWALC is guided by the following principles:

- **Self-determination:** When Aboriginal people have the authority to make their own decisions about what development approaches to take they are more likely to lead to successful outcomes.
- **Cultural legitimacy:** Aboriginal cultures are a source of strength. Successful economies are built on legitimate, culturally grounded institutions of self-government and management.
- **Knowledge sharing:** Aboriginal people are an asset and as such, Aboriginal people must be supported to realise their full potential. Knowledge sharing and skill development through partnerships and education/training is essential for the achievement of successful economic outcomes.
- **Accountability and transparency:** Any research initiatives should be accompanied by the development of an evaluation framework, which will measure the outcomes of the different economic activities.

NSWALC recognises the importance of economic development, however cautions that commercialisation of Indigenous Knowledges should only be undertaken where the free, prior and informed consent of Aboriginal peoples has been reached (and maintained throughout the project).

**Question Five: Are there other options that IP Australia should consider to protect Traditional Knowledge?**

NSWALC provide the following additional options for IP Australia's consideration:

1. A national Government funded redress scheme for Aboriginal artists, individuals and/or communities who have had their IP rights infringed upon. This proposed scheme would initially be administered by IP Australia with a long-term view to be administered by a National Indigenous Arts and Cultural Authority (NIACA). Such an initiative would serve two primary purposes; firstly, to justly compensate those Aboriginal persons who have been wronged by inadequate legal protections and secondly, to serve as a deterrent to those who would seek to impinge upon the rights and interests of Aboriginal peoples and communities.
2. Support the establishment of a National Indigenous Arts and Cultural Authority (NIACA). The idea of a National Indigenous Arts and Cultural Authority has been persistent over many years. In its most recent iteration (currently open for consultation), the proposed NIACA would promote social, cultural and economic development, including on matters such as the upholding of Traditional Knowledge (TK) and Traditional Cultural expression (TCE) and cultural and intellectual property rights.

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

NSWALC again considers that a lack of legally enforceable rights presents one of the greatest challenges for Aboriginal peoples.

Given IP Australia's unique position, NSWALC encourages IP Australia to build on the previous work undertaken by Aboriginal peoples and advocate for the creation of coherent national framework that protects, promotes and upholds the rights and interest of Aboriginal peoples relating to Indigenous Knowledges. As identified in the report 'Indigenous Knowledges: Issues for protection and management', a lack of legally enforceable rights means 'protection' of Indigenous Knowledge is occurs primarily in the domain of policy settings and agreement making processes.

**Question Seven: What are your views on the proposals considered above for the protection of Traditional Cultural Expressions in the trademarks and designs systems?**

Proposal 8: Measures to prevent registration of offensive trademarks

NSWALC supports the proposed measures to prevent registration of offensive trademarks and designs.

Proposal 9: Database of culturally significant words and images

NSWALC recognises and can appreciate the importance of databases when dealing with intellectual property rights. However, as with the proposed database of Traditional Knowledge, NSWALC conditionally supports the proposal for a database of culturally significant words and images. It would be remiss if NSWALC did not caution against the creation of a database of Indigenous Knowledge unless the principles of data sovereignty, and free prior and informed consent, can be fully incorporated across all aspects of the database administration and implementation.

Proposal 10: Requirement for consent

NSWALC supports IP Australia's proposal to introduce new requirements in the trademarks and designs systems that oblige applicants to advise if consent to use a word or image has been sought and obtained, when considering an application to register that word or image as a trade mark. NSWALC supports this proposal as this approach is aligned with the notion of free, prior and informed consent.

**Question Eight: 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?**

NSWALC strongly urges IP Australia to further explore the risks of Government run databases regarding Aboriginal cultural heritage and Indigenous Knowledges. There are considerable concerns associated with the creation and ongoing maintenance of Indigenous Knowledge databases. Government owned databases (such as the Aboriginal Heritage Information System – AHIMS - in NSW), that raise several concerns for Aboriginal peoples such as issues regarding authority to access and transmit cultural data as well as ownership and management of information and metadata.

Further, there are also concerns regarding categorisation, as identified in the Australian National University Report on the Current Status of Indigenous Intellectual Property:

“There is concern that databases would run the risk of classifying Indigenous knowledge according to western scientific categories. This would undermine the holistic nature of Indigenous knowledge systems. For example, a scientific database may categorise species from a western scientific

worldview, however the holistic relationships of plants and animals and the value of active knowledge should not be overlooked”.

If IP Australia proceeds with the establishment of a database, NSWALC strongly recommends IP Australia learn from and model Aboriginal owned and run community databases. Whilst NSWALC is not able to identify a specific database that encompasses all aspects of best practice, NSWALC suggests IP Australia begin with those identified in the report “Indigenous Knowledge Databases in Northern Australia”<sup>7</sup> with the intention to mirror aspects of best practice from a variety of databases.

**Question Nine: Are there any other options that you think IP Australia should consider to address the issue of inappropriate use of Traditional Cultural Expressions in trademarks and designs?**

NSWALC is not aware of any additional options to address the issue of inappropriate use of Traditional Cultural Expressions in trademarks and designs.

**Question Ten: 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?**

NSWALC commends IP Australia’s proposal to draw on the expertise of Aboriginal peoples. However, Advisory bodies often have no formal authority and/or decision making power. It is unfortunately common for the advice and expertise of advisory panels to be ignored or treated as optional. NSWALC strongly encourages IP Australia to provide a clear but comprehensive mandate and formal decision making authority to any panel established to respond to issues regarding Indigenous Knowledges.

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

NSWALC highlights the following issues for IP Australia’s consideration:

1. Representation from a range of geographical areas. To accommodate the diversity with and between Aboriginal communities, NSWALC recommends IP Australia consider representation across each state and territory or alternatively, representation from regional, remote and urban locations. Representation from diverse geographical areas will ensure the work of the proposed body is informed by a variety of perspectives and experiences.
2. Equal gender representation is crucial. Aboriginal women have a unique expertise and perspectives to contribute, however are often underrepresented in governance structures<sup>8</sup>. For IP Australia to have a holistic understanding of issues relating to the protection and management of Indigenous Knowledges, equal representation of Aboriginal women is essential.
3. There is a need to strike a balance between academic and/or professional expertise. It is through a wide variety of experiences and expertise that IP Australia will gain multifaceted understanding of issues related to Indigenous Knowledges.

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7 School of Australian Indigenous Knowledge Systems (2004). Audit of Indigenous Knowledge Databases in Northern Australia. [online] Darwin: Australia: Charles Darwin University, pp.6-30. Available at: [https://www.cdu.edu.au/centres/ik/pdf/IEK\\_Audit\\_Report24\\_06\\_04.pdf](https://www.cdu.edu.au/centres/ik/pdf/IEK_Audit_Report24_06_04.pdf) [Accessed 31 Jan. 2019].

8 Reconciliation Australia (2018). WOMEN IN GOVERNANCE. Sydney: Reconciliation Australia. Accessed from: [https://www.reconciliation.org.au/wp-content/uploads/2018/07/iga\\_factsheet\\_3.pdf](https://www.reconciliation.org.au/wp-content/uploads/2018/07/iga_factsheet_3.pdf) [Accessed 31 Jan. 2019].

**Question Twelve: Are there any issues you think should particularly be included in any education and awareness campaign?**

NSWALC is not aware of any additional issues regarding Indigenous Knowledges that should be included in future education and awareness campaigns.

**Question Thirteen: 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?**

NSWALC makes the following two recommendations regarding any future IP related education and awareness campaigns:

1. Bi-lingual/ translated resources: Where communities are multilingual, all IP Australia resources regarding Indigenous Knowledges should be translated into relevant Aboriginal and/or Torres Strait Islander language/s. This approach will allow people to engage with complex information in their first language.
2. Existing community governance structures: NSWALC recommends that IP Australia utilise and leverage Aboriginal peak organisations and their memberships to share resources and promote awareness.

If IP Australia has any further questions or comments regarding the content of this submission, please contact NSWALC's Strategy and Policy Unit on (02) 9689 4444 or [policy@alc.org.au](mailto:policy@alc.org.au).