



Submission

Indigenous Cultural and Intellectual Property

June 2012

Indigenous Advisory Committee Secretariat

Indigenous Policy and Coordination Section
Indigenous Policy Branch
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Introduction

The Indigenous Advisory Committee (IAC) is a statutory body established under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) as an advisory mechanism for the federal environment minister and department. The IAC provides advice on a wide range of environmental issues, particularly where they intersect with Indigenous people's customary land and sea management practices and contemporary interests and aspirations.

The IAC has been engaged in the intellectual property space through its involvement in the negotiation of the Nagoya Protocol. This submission therefore focuses on Indigenous people's right to protect our knowledge systems through an evolved intellectual property framework. Many of the principles and aspirations associated with the protection of Indigenous knowledge systems are applicable to traditional cultural expression.

The IAC acknowledges the complexity of providing intellectual property protection for Indigenous knowledge systems.

Changing these systems in order to provide a more effective protection mechanism for Indigenous people's knowledge systems is essential for our social, economic and cultural development. This is justified in the IAC's view given the level of exploitation of Indigenous knowledge by others that has already taken place.

Any government policies that seek to promote Indigenous economic development in the absence of an appropriately modified intellectual property regime will not be able to deliver any meaningful outcomes as it will continue to stifle community capacity to innovatively use our respective knowledge systems.

Providing adequate and appropriate protection for Indigenous knowledge systems and traditional cultural expression is one area of reform that is 'unfinished business' which requires urgent attention, but with a long-term outlook.

Existing Arrangements for Protecting Indigenous Knowledge

While there may be sound basis for the existing domestic and international arrangements for intellectual property rights there are obvious anomalies and gaps that enable the legal use of Indigenous knowledge in spite of the issues of morality that arise.

In the absence of an effective protection regime Indigenous knowledge holders have been forced into a situation where they often have to rely on the goodwill of others to ensure that their information will be protected from unauthorised use. While such policy and administrative approaches have evolved to provide a reasonable degree of comfort for Indigenous knowledge holders it falls well short of the legal protection and other mechanisms that are required.

Gaps in Existing Domestic Legal Frameworks

The Australian Government is well-informed about the gaps in the existing domestic legal frameworks. The challenge the government faces therefore is not with the identification of gaps, but with how to address them.

Indigenous Knowledge under existing domestic legal frameworks is at best afforded the right to be treated as "confidential information". But how does the legal concept of confidentiality apply to a body of information that is collectively held, often by different groups of people?

Copyright provides one avenue for the legal protection of Indigenous cultural and intellectual property, however, there are problems with this system including:

- Copyright generally being afforded to those who have made a record of Indigenous knowledge, not to the original knowledge holders unless this is clearly specified in any agreement;
- Indigenous arts and culture are orally-based, which does not meet the requirements of the Copyright Act 1968¹;
- Copyright laws do "not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin" (Justice Robert French as quoted in Janke, 2009); and
- Sunset clauses associated with copyright means that sensitive knowledge and cultural expressions could reside in the public domain against the wishes of the Indigenous custodians.

The disclosure requirements associated with patents also presents a problem for aspects of Indigenous knowledge that is regarded by its holders as being sacred and therefore should not be made available to others or resides in the public domain. Enhanced disclosure requirements should be considered for Indigenous knowledge systems, however, the IAC notes that such a response may have the potential to compromise the existing system of patenting that operates both domestically and internationally.

Recommendation One

That the Australian Government commission a specific study into the operation of the intellectual property laws including the limitations with protecting Indigenous knowledge and opportunities and potential implications for reforming the current system.

¹ Janke, T., Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority, Terri Janke and Company Pty. Ltd., 2009

Article 31 of the *Declaration on the Rights of Indigenous Peoples* states: 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 (UN 2007).

Ethical Guidelines and Frameworks

Given the inadequacies of existing legal frameworks Indigenous peoples in Australia have generally relied on a system of policy and administrative approaches to help manage the protection of their knowledge. While these approaches may not afford Indigenous peoples the same level of protection that is provided through law they do offer the advantage of giving knowledge holders some flexibility and enables the development of more customised community-based protocols.

Indigenous communities and organisations are increasingly adopting a system of self-developed protocols as a mechanism to protect their knowledge; however, they are predominantly used by other bodies such as universities and other research institutions. The AIATSIS arguably provides the best model of ethical standards associated with the access and use of Indigenous knowledge by others. AIATSIS is seen as a leader with the development of the *Guidelines for Ethical Research in Australian Indigenous Studies* both nationally and internationally.

The IAC considers that while there is a risk of duplication the development of a set of a national model of protocols for the access and use of Indigenous knowledge does have merit particularly in the short to medium term. These ethical standards used by AIATSIS and their experience with managing the ethical behaviour of researchers they fund must be used to inform any nationally recognised model of protocols.

Recommendation Two

That the federal government investigate existing examples of overarching model rules that operate internationally and domestically and advise on whether such approaches might be appropriate for supporting community based initiatives to protect Indigenous cultural and intellectual property.

Recommendation Three

That the Australian Government develop protocols for consistency of use, in particular where sensitive knowledge and cultural expressions is released into the public domain when the copyright sunset clause expires. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has developed guidelines for researchers that addressed cultural and intellectual property rights and copyright issues.

Indigenous Knowledge and Government Policy and Programs

Government, particularly at the federal level, funds a number of programs that involves gaining access to various forms of Indigenous knowledge. The IAC is concerned that through the funding of various environment programs government agencies may get undue access to Indigenous knowledge through the contractual arrangements associated with funding agreements.

Such arrangements can enable the delivery of mutually beneficial outcomes; however there are risks, in the absence of at least a clear statement of principles for Indigenous peoples rights associated with our knowledge systems. The nature of government funding and contractual arrangements leaves Indigenous peoples with minimal scope to amend any funding contracts that might be considered to impair their rights to protect their knowledge systems.

It should also be noted that government policies and programs often fail to recognise the contribution that Indigenous knowledge can make to personal and collective human development. The current *Indigenous Economic Development Strategy* provides a very pertinent case in point. The failure of government programs like the Indigenous Economic Development Strategy to appropriately consider the potential use of Indigenous knowledge systems is clearly linked to the silos approach in which government approaches its Indigenous affairs policies.

Recommendation Four

That the Commonwealth review its Indigenous Economic Development Strategy and related policies to promote the opportunities for Aboriginal and Torres Strait Islander peoples to consider the use of their knowledge for commercial purposes.

Critical Challenges

If the intellectual property system in Australia is incapable of providing an adequate protection mechanism for Indigenous knowledge then the adoption of sui generis legislation must be considered as an alternative option. It is, however, difficult to see how the existing intellectual property system and judicial interpretation in Australia can evolve to adequately and appropriately protect Indigenous knowledge without compromising the very principles that governs intellectual property throughout the world.

Reconciling Competing Principles and Aspirations

The need for transparency in dealing with intellectual property rights is a core principle that gives rise for a need to design and implement certain disclosure requirements.

The requirements for disclosure, particularly through the patent system presents one of the most significant risks for the protection of Indigenous knowledge because customary laws regarding the sacredness and secrecy of Indigenous knowledge do not appropriately interface with the existing principles for intellectual property protection. Indigenous peoples are

therefore rightfully concerned that making their knowledge available for patent procedures can trigger misappropriation by third parties.

While there are aspects of Indigenous knowledge that may have economic value communities have to consider the potential opportunity cost for their cultural rights when seeking to use their knowledge for an economic benefit. There is only potential for Indigenous knowledge to have economic value, but there are always inherent cultural values that must be protected in all circumstances.

The Diversity of Circumstances for Indigenous Knowledge Systems

The lack of uniformity in which Indigenous knowledge is held creates a number of challenges for Indigenous peoples and for the development of appropriate protection mechanisms. As indicated previously attempting to address all of these circumstances through a suite of protection mechanisms does give rise to potential unintended consequences.

Indigenous knowledge can be held by all members of a particular group, but it is generally held through custodianship by one or more people of that group. The transmission of knowledge is often governed by customary laws, but what should happen for example where the same knowledge is held by more than one group who have different laws regarding its transmission.

This is one example where putting mechanisms in place to protect Indigenous knowledge may actually impair the customary laws associated with that knowledge. Conversely, any reforms will also need to contemplate how to deal with situations where Indigenous knowledge may be held by a very small number of people, however, the customary law related to that knowledge is not observed within the community.

This gives rise to a fundamental principle that needs to be clarified. Should an individual person or family have the right to commercially benefit from the exploitation of their knowledge to the exclusion of other members of their community?

Such circumstances highlight the point that redesigning a body of international and domestic laws is not the panacea. In fact, it can be argued that it should not be considered in the absence of a rigorous long-term project that raises awareness about the options available to improve the protection of Indigenous knowledge.

Legal mechanisms at the international and domestic level must therefore be developed in tandem with capacity building measures within the Indigenous community. This should help to ensure that the gaps that cannot be reasonably addressed through legal means can be managed through community level protocols and systems.

Capacity Issues

Given that it is unlikely that any legal reforms adopted at the international and domestic level will provide sufficient protection for Indigenous cultural and intellectual property a range of

other supportive measures will also need to be considered. One critical measure that must be among those open for consideration is the need to build capacity and awareness among all citizens, but particularly key stakeholders such as Aboriginal and Torres Strait Islander peoples and research institutions.

The Indigenous community requires the building of capacity to prevent the unauthorised access and use of their cultural and intellectual property. Capacity is also required to ensure that customary laws can be enhanced so that they can be used more proactively within a contemporary context while retaining the cultural authority that underpins the use and transmission of cultural and intellectual property.

One of the critical issues related to the utilisation of Indigenous knowledge is the sharing of benefits that might be derived from such use. Without appropriate capacity building measures there is potential for conflict to arise. Adopting appropriate capacity building measures can help to ensure that community agreements related to benefit sharing can be proactively developed consistent with the principles arising out of the customary law associated with the relevant cultural and intellectual property.

Capacity building and awareness raising is also required for those who may seek to access and utilise Indigenous cultural and intellectual property. Such measures may include raising awareness about any cultural sensitivity associated with accessing Indigenous knowledge as well as the processes that are involved.

While there are costs associated with capacity building when done appropriately this will prove over the long-term to be cost effective given that it will help to streamline processes and help to mitigate the unauthorised use of Indigenous cultural and intellectual property.

Recommendation Five

That government supports and funds the inclusion of negotiation skills training through Indigenous leadership programs to build the capacity of knowledge holders to negotiate with others regarding the access and use of their knowledge. The training should also include the principles of free, prior and informed consent.

Infrastructure and Support Requirements

Irrespective of the legal and capacity building measures that might be adopted for any Indigenous reform of the intellectual property system there are also administrative measures that will need to be employed to ensure their effective implementation. The establishment of ‘national Indigenous cultural authority’ is one suggestion that has been put forward.

The IAC endorses the idea of establishing such an authority provided it is sufficiently resourced to manage a broad range of functions. Such an authority could possibly be incorporated with the national competent authority and focal point that would need to be established through the domestic implementation of the standards arising out of the *Nagoya Protocol*.

How such an authority might be structured and operate is a matter requiring extensive consideration and consultation with Aboriginal and Torres Strait Islander peoples. Some of the functions that such an authority might have responsibility for includes:

- Supporting the development of policy, protocols *and agreement templates*;
- *Providing a registration and certification mechanism to help ensure that Indigenous cultural and intellectual property has been appropriately acquired and is being used in line with any agreements that have been made with the Indigenous owners;*
- *Assisting with the resolution of dispute through mediation where conflict over Indigenous cultural and intellectual property rights arises within Indigenous communities and between Indigenous peoples and other stakeholders;*
- Undertake public awareness and capacity building;
- Accredite training procedures and consultants to undertake appropriate skills training for communities; and
- Advance Indigenous Australians rights to our cultural and intellectual property both *nationally and internationally* (Janke, 2009).

International Cooperation and Recent Developments

The substantive challenge with building international cooperation around Indigenous people's right to protect our cultural and intellectual property have been well identified and includes among other things the diversity of Indigenous knowledge systems themselves. In addition the diversity in values and legal systems associated with the protection of intellectual property generally throughout the world creates fundamental challenges in building international cooperation.

In order to build effective international cooperation there is a clear need for different national legal systems to interact appropriately². This is, however, nothing new to international law. Previous and recent experiences with integrating the protection of Indigenous peoples rights without unduly inhibiting the rights of others provides useful guidance for the development of international and domestic cooperative mechanisms.

The leadership shown by Australia in the negotiation of recent pieces of international law is required again if an effective and appropriate international cooperative framework is to be developed and adopted. The best examples of Australian leadership arise when our experience with operating domestic mechanisms can be used to inform international standard-setting.

² Australia's submission on the gap analysis on the protection of traditional knowledge. Accessed from the World Intellectual Property Organisation website at <http://www.wipo.int/tk/en/igc/gap-analyses.html> on 31 May 2012.

An International Instrument

The IAC endorses the development of an international instrument for the protection of Indigenous people's cultural and intellectual property and supports the current work of the World Intellectual Property Organisation's Inter-Governmental Committee (WIPO IGC). We are, however, concerned about the amount the lack of progress in developing an international instrument through the WIPO IGC.

A critical question in developing an international instrument arises as to whether it should be legally-binding or operate as an international voluntary code. A legally-binding instrument will hold more authority, but it will be much harder to obtain the international consensus required for its ratification and implementation.

The IAC considers that a legally-binding instrument is ultimately required, however, a set of voluntary guidelines need to be established as a matter of urgency to inform the negotiation of a legally-binding multilateral treaty. The development of the Bonn Guidelines as an interim measure leading to the development of the Nagoya Protocol provides a very recent example as to how this can be done.

It is also critical that Australia adopts the same leadership role in the WIPO IGC that was employed in negotiating the Nagoya Protocol. By having a domestic system in place at the time of developing the Nagoya Protocol, Australia was in a position of being able to inform other negotiating parties through direct experience. This approach proved to be invaluable as it resulted in a protocol that is generally consistent with Australia's domestic regime for granting rights of access and use of genetic resources and traditional knowledge where there is an association.

International Standards and Domestic Implementation

While treaties and other constructive arrangements provide a critical basis for international cooperation they provide no guarantee that the standards set will be effectively implemented at the domestic level. This is particularly the case where an international instrument is not legally-binding. Problems also arise when the ambiguity contained within a legally-binding international instrument enables parties to be seen to be doing the right thing while at the same time failing to live up to the spirit and intent of the instrument.

The recent adoption of the Nagoya Protocol provides a pertinent case in point.

It is, however, also important to note that while the language used in the Nagoya Protocol is problematic for Indigenous Australians as it does contain requirements for a number of administrative and policy measures to be implemented. These requirements are consistent with many of the measures called for through an international framework to protect Indigenous people's rights to our cultural and intellectual property.

The requirement to establish a 'national competent authority' as well as measures including certification and checkpoints through the Nagoya Protocol provides for Australia the opportunity to adopt a more holistic approach to safeguarding Indigenous knowledge systems. Rather than establishing separate government entities based on how Indigenous knowledge is utilised the opportunity exists to consider building a single entity to monitor and protect Indigenous groups against any unauthorised access and use of their knowledge.

While the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) may not have the legally-binding status of other instruments it remains an important document that should have a critical role in elaborating as stand-alone instrument. With respect to Indigenous cultural and intellectual property articles 11 and 31 of the UNDRIP are the most pertinent. While article 11 emphasises the need for Indigenous peoples to be able to seek redress where their cultural and/or intellectual property has been accessed and used without appropriate authorisation article 31 promotes the right of Indigenous peoples to maintain, use and develop their cultural heritage; traditional knowledge and traditional cultural expressions associated with cultural and intellectual property.

Under both articles States are required to take certain measures to ensure that Indigenous people's rights to their cultural and intellectual property are protected. However, these requirements also need to be reconciled with article 35 which recognises the right of Indigenous peoples to determine the responsibilities of individuals within their own communities.

In such situations the collective rights of Indigenous peoples not only intersect with the responsibilities of government they also potentially impact on the inherent existing legal rights of Aboriginal individuals to self-determination.

Reconciling various instruments to establish a new set of international and domestic norms does present considerable risk for Aboriginal and Torres Strait Islander peoples. It is therefore critical that Indigenous Australians capacity to engage in the reform processes currently under way at both the international and domestic level.

Recommendation Six

That the federal government dedicate the resources required to ensure the adequate and appropriate engagement of Indigenous Australians in the international discourse related to Indigenous cultural and intellectual property rights.

Conclusion

The IAC welcomes this process and we are happy to have been able to contribute. It is important, however, that the appropriate action to follow up on what has started. As we indicated earlier in this submission reforming the intellectual property system to better accommodate the rights, interests and aspirations of Indigenous peoples is a long-term process. This consultative process is a good start, but it needs to be followed up through the extensive engagement of all stakeholders, particularly Aboriginal and Torres Strait Islander peoples.

We therefore call on the Commonwealth government to establish an inquiry into the adequacy of the existing legal, policy and administrative measures for protecting and promoting Indigenous people's rights to our cultural and intellectual property. Such an inquiry could be undertaken through the Productivity Commission, the Parliament of Australia or an expert panel made up of a majority of Indigenous Australians.

The terms of reference for such an inquiry may consider and advise on:

- The effectiveness of existing legal, policy and administrative measures regulating the access and use of Indigenous cultural and intellectual property and advise on the most suitable options for reform;
- Clarifying the objectives of protection for Indigenous cultural and intellectual property and advising on the development of appropriate and workable definitions for key terms;
- Assessing the contribution that Indigenous cultural and intellectual property has made to the broader Australian society and the social, cultural and economic impact of the misappropriation of Indigenous cultural and intellectual property;
- Appropriate mechanisms for regulating the access and use of Indigenous knowledge that already resides within the 'public domain';
- The value and appropriateness of establishing a national authority as a policy and administrative mechanism to support Indigenous Australia's with the maintenance, use and protection of their cultural and intellectual property; and
- The measures required to build capacity within Aboriginal and Torres Strait Islander communities and organisations to maintain, use and protect their cultural and intellectual property.

While such an inquiry will be invaluable in establishing the most appropriate evidence base to guide the requisite reforms it should also play a critical role in helping to raise awareness about the issues of Indigenous cultural and intellectual property. This awareness is not only important for Aboriginal and Torres Strait Islander peoples it is also vital to build understanding across all sectors of Australian society.