

# Submission to the Productivity Commission Inquiry into Aboriginal and Torres Strait Islander Visual Arts and Crafts

12 January 2022



# Introduction

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IP Australia is pleased to make this submission to the Productivity Commission's inquiry into Aboriginal and Torres Strait Islander Visual Arts and Crafts, in response to the Issues Paper released on 21 September 2021. IP Australia is currently undertaking work on the protection of Indigenous Knowledge (IK) under the intellectual property (IP) system. Our [IK Work Plan 2020-21](#) outlines initiatives we are exploring to support protection of IK in the IP system. We have conducted research and public consultation on issues associated with how IK is protected and managed. We are pleased to share some of the insights we have gained with the Productivity Commission.

## IP Australia

IP Australia is the Australian Government agency responsible for administering Australia's patents, trade marks, designs and plant breeder's rights (PBR) systems, within the Industry, Science, Energy and Resources portfolio. As well as granting exclusive IP rights under the statutes it administers, IP Australia also advises the Australian Government on IP policy, provides IP information and education services to business and the broader community, and regulates the IP attorney profession.

IP Australia's vision is to create a world leading IP system that builds prosperity, ensuring that Australians benefit from great ideas. As part of this we aim to improve Australia's IP system to support the cultural integrity and economic potential of IK.

## Indigenous Knowledge in the IP system

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IP Australia's objective for our work relating to IK is firstly, to investigate how the IP system can help better support Aboriginal and Torres Strait Islander people who want to build a business based on their IK; and secondly, to look at how misappropriation happens and how it could be prevented through the IP system.

IP Australia uses 'Indigenous Knowledge' to refer to a wide range of cultural knowledge, including, for example, techniques, know-how, practices and scientific, medicinal and environmental knowledge, as well as cultural expressions including language, art, dance stories, songs, and crafts. It encompasses Aboriginal and Torres Strait Islander visual arts and crafts but is broader. The issue of IK protection touches on matters of cultural heritage and identity, the arts, competition and consumer protection, IP rights and economic development.

In 2021 IP Australia consulted on a range of potential changes to support IK within the registrable IP rights system we administer. Our 2021 [IK Consultation Paper](#) outlines the issues in the IP system that have been raised by Aboriginal and Torres Strait Islander people.

### Investigating limits and changes to the IP system

In the Inquiry issues paper, the Productivity Commission asked about the limits of existing IP protections. The system of registrable IP rights is designed to commercially protect certain knowledge

by granting exclusive rights to owners to create, sell or license it. However, these IP rights do not protect all types of knowledge and are generally not well suited to protecting IK. For example, IP rights are often individually owned, time limited and only protect new innovations, which often does not support the protection of knowledge held in perpetuity and passed down over time. Gaining IP protections also involves making the knowledge publicly available, meaning the public can access or use the information once the IP protection period ends.

The cultural protocols and processes for IK form a different knowledge-management system to that supported by the western IP system. The result is that there are inherent limitations in how the western IP system can protect IK. However, IP Australia is investigating changes that could help, for example, by avoiding the misappropriation of IK within registered IP rights. These changes may include:

1. Establishing an Indigenous Advisory Panel – providing a formalised Aboriginal and Torres Strait Islander voice within IP Australia.
2. Measures for trade mark or designs using Indigenous Knowledge – changes to processes to ensure IK custodians benefit from, or have consented to, the use of their IK as the basis for rights.
3. New requirements to declare the source of Indigenous Knowledge used in new innovations – to make it easier to determine if IK has been used in a patent or plant breeder's right and encourage conversations about access and benefit sharing.
4. Labelling to promote authentic products – exploring interest in labelling schemes that distinguish authentic Aboriginal or Torres Strait Islander goods.

IP Australia has been exploring these options through a series of consultations and is keen to ensure any changes made will not inadvertently cause harm to culture and protocols for IK. New processes for the IP system are being carefully considered to ensure they also support Aboriginal and Torres Strait Islander control and use of IK. IP Australia does not want to create barriers or red tape that would ultimately stand in the way of how people wish to use their IK.

### **Exploration of Authenticity Labelling**

The Terms of Reference (3.1) for the Productivity Commission Inquiry include consideration of labelling or other certification as a response to problems in the market for Aboriginal and Torres Strait Islander visual arts and crafts. It is clear that the sale of inauthentic products can be highly offensive and take economic opportunities away from Aboriginal and Torres Strait Islander people. As part of the Australian Government's Response to Recommendation 6 of the House of *Representatives Inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander products and merchandise for sale across Australia*, IP Australia has been investigating stakeholder interest in labelling schemes for authentic Aboriginal and Torres Strait Islander products. Labelling schemes can use existing IP protections such as certification trade marks or geographical indications to provide additional protection and enforceability for authentic products.

Previously there have been issues raised with labelling schemes and these would need to be addressed in setting up any new scheme. The need to accommodate regionality and different styles and protocols behind what may be authentic was raised as part of the House of Representatives Inquiry. This issue highlights that a national level scheme may not be a good fit due to the potential difficulty

in providing for regional differences. The costs of raising consumer awareness about the meaning of an authenticity label, and to manage and enforce the use of a label, is also a key matter that would need to be addressed in a successful scheme. Another concern raised by stakeholders is the impact on producers who are unable to, or choose not to, engage in a labelling scheme, and whether they may be seen as inauthentic.

Overall, labelling schemes can assist consumers to differentiate between authentic products and avoid inauthentic ones. However, even a successful labelling scheme cannot alone prevent the creation or sale of inauthentic products which remains a key concern for Aboriginal and Torres Strait Islander peoples.

Over 2020-21, IP Australia was involved in a successful pilot with the Indigenous Land and Sea Council and the Northern Australia Aboriginal Kakadu Plum Alliance to track the provenance of goods based on IP Australia's Smart Trade Mark technology. Smart Trade Mark allows consumers to verify a trade-marked product through a blockchain authenticated supply chain. The pilot has shown the potential for producers in exploring technology supported labelling to prove the authenticity of their goods to retailers and consumers. This may be an area for further exploration in supporting people to identify and choose authentic products in the market.

#### **Stand-alone legislation for IK Protection**

A further question raised in the Issues paper related to whether there was a need for stand-alone legislation to improve available protections for Indigenous Knowledge. In line with the Government's Response to Recommendation 8 of the House of Representatives Inquiry, a study is underway to assess the scope and feasibility of stand-alone legislation to protect IK. A cross departmental working group is considering if stand-alone legislation could help Aboriginal and Torres Strait Islander peoples protect and commercialise their IK. The aim is to identify possible models for stand-alone legislation and assess the potential benefits and costs of different models.

## **Conclusion**

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IP Australia is committed to looking at ways the IP system we administer can better support Aboriginal and Torres Strait Islander people to benefit from and protect their IK. Following from our 2021 consultations on IK, in 2022 IP Australia will use the consultation feedback to develop possible options for reform to support IK protection. IP Australia intends to further consult with Aboriginal and Torres Strait Islander peoples to help craft and refine these options. IP Australia will also continue work on the scoping study into stand-alone legislation in collaboration with other Australian government departments.