

Supplementary submission to the Productivity Commission Inquiry into Aboriginal and Torres Strait Islander Visual Arts and Crafts

September 2022



Introduction

IP Australia is pleased to make a further submission to the Productivity Commission's (Commission) inquiry into Aboriginal and Torres Strait Islander Visual Arts and Crafts, in response to the draft report released on 19 July 2022.

IP Australia is the Australian Government agency responsible for administering Australia's patents, trade marks, designs and plant breeder's rights systems, within the Industry, Science and Resources portfolio. As well as granting exclusive intellectual property (IP) rights under the laws it administers, IP Australia 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. We aim to improve Australia's IP system to support the cultural integrity and economic potential of Indigenous Knowledge (IK) for Australia's First Nations peoples, as part of our vision of creating a world-leading IP system building prosperity for Australia.

IP Australia uses 'Indigenous Knowledge' to refer to a wide range of traditional knowledge (TK), including, for example, techniques, know-how, practices, and scientific, medicinal, and environmental knowledge, as well as traditional cultural expressions (TCE), including language, art, dance, stories, songs, and crafts. IK encompasses Aboriginal and Torres Strait Islander visual arts and crafts but is broader.

Cultural rights legislation

Aboriginal and Torres Strait Islander stakeholders have told IP Australia that, for First Nations peoples, culture cannot be divided into different sectors, such as physical assets, knowledge and visual arts and crafts. If only cultural assets in relation to visual arts and crafts were protected under new stand-alone legislation, cultural assets from the same community in, for example, other art forms or ecological knowledge would not enjoy the same protection. This may create concern or confusion for Aboriginal and Torres Strait Islander communities, as well as for non-Indigenous people, about what is protected and what is not.

IP Australia stakeholders have expressed support for stand-alone legislation to protect IK because it could be designed in a way that does not reflect the limitations of existing laws while tying into the patchwork of legal protections that are already available. For this reason, stand-alone legislation is likely to provide a more holistic recognition and protection of First Nations peoples' cultural and intellectual property rights than is currently possible under existing laws.

The design of the existing IP rights system may provide a useful model for thinking about the scope of stand-alone legislation. In most situations in the current system, IP rights do not change based on the area of the economy in which a business operates.

There is value in broadening the scope of new stand-alone legislation as much as possible beyond the visual arts and crafts sector to reflect the views of Aboriginal and Torres Strait Islander peoples and provide the greatest degree possible of consistent protection to First Nations peoples' IK.

Enhance and enable Indigenous Knowledge Consultations 2021

In 2021 IP Australia consulted on a range of potential changes to support IK within the registrable IP rights system we administer. Our report on the 2021 Enhance and enable Indigenous Knowledge consultations is available [here](#). Some broad and important issues were raised:

- IK and IP are 2 different knowledge systems. Trying to bridge them can be difficult. Any changes need to be carefully considered so they do not accidentally harm or negatively impact culture.
- consultation and consent are key when people want to use IK. Consent was seen as finding the right Elders, organisation, community, family, or person to provide permission.

- the need for more education about, and awareness of, IP and protecting IK was raised by many people. Accessible and easy-to-understand information is needed about the IP system, what IP can and cannot protect, and the impact of consenting to the use of IK in a commercial or IP situation.
- stand-alone legislation was seen to provide for holistic protection of IK.

We also heard specifically on options that could enhance Australia's IP system to support Aboriginal and Torres Strait Islander peoples to benefit from and protect their IK, including labelling for authentic products. We consulted directly with artists, producers, and businesses from a range of sectors around the country. There was overwhelming support for efforts to reduce the sale of inauthentic products. However, in practice, many stakeholders felt a national labelling scheme for authentic Indigenous products could place an unfair burden on Aboriginal and Torres Strait Islander creators.

Feedback on a labelling scheme varied according to community sector. In the arts sector, previous attempts at a labelling system have created hesitancy about such an approach. However, there was interest in labelling schemes, such as a certification trade mark or potential geographical indications, in the bush or traditional foods sector. IP Australia will continue to share information with producers that have an interest in the certification trade mark system.

Scoping study on stand-alone legislation

IP Australia, in collaboration with other Australian Government departments, has been working on a scoping study into stand-alone legislation. The objective of the study is to identify models that could help Indigenous Australians protect and commercialise their traditional knowledge and cultural expressions. While the study is still in progress, the protection it envisages covers all applications of IK. The draft report is available [here](#). The draft report will be subject to further consultations, with the final report to be presented to the Australian Government in December 2022.

Overview

The draft report identifies 4 potential elements that could be included in a legal framework aimed at protecting IK:

1. a new IP right, recognising collective or communal rights in TCE and TK
2. measures aimed at deterring trade in inauthentic product and promoting trade in authentic product
3. a statutory National Indigenous Knowledge Authority
4. measures to support Indigenous businesses.

New IP right for IK

The draft report finds stand-alone legislation could create a new IP right that recognises collective or communal rights in TCE and TK owned by the Traditional Owners of that TK and TCE. Features of the new right could include:

- no requirement for originality or novelty
- no registration requirement (protection would accrue automatically)
- no set term of protection
- no restriction on commercial and non-commercial use of IK by its traditional owners or members of the owning community in accordance with relevant cultural protocols
- moral rights would require third parties to correctly attribute IK and not use it in a derogatory manner
- third party use of IK would require free, prior and informed consent from traditional owners and appropriate licensing agreements to share financial and non-financial benefits

- commercial or non-commercial use of IK by third parties without free, prior and informed consent would be an offence
- possible exceptions for education and news reporting would be designed with Aboriginal and Torres Strait Islander peoples. Research into, or using, IK for academic or commercial purposes would require consent.

Deterring inauthentic product and promoting authentic product

The draft report suggests the first element could be complemented by legislative measures aimed at deterring inauthentic product and promoting trade and commerce in authentic product. A key feature of this element would make it an offence to sell goods featuring or incorporating TCE unless they are made by Aboriginal or Torres Strait Islander people or non-Indigenous businesses with a licensing agreement with the owners of the TCE, or if the product does not meet one of these criteria and has not been clearly labelled as inauthentic. The draft report also suggests a labelling scheme to identify authentic product could be developed that avoids onerous proof of identity requirements, is voluntary and can be enforced.

The final features of this second element are powers to prevent the import or export of products incorporating Aboriginal or Torres Strait Islander designs where there is no evidence they have been manufactured under agreement with the Traditional Owners of the IK, and an education and marketing campaign to encourage consumers to 'buy genuine'.

Statutory National Indigenous Knowledge Authority

The draft report outlines a potential third element, being a statutory National Indigenous Knowledge Authority (authority) that would support the first 2 elements of the package. The authority, which could be an Aboriginal and Torres Strait Islander body, would work in partnership with First Nations peoples to assert, protect and enforce their IK rights. Additionally, the authority could streamline processes for businesses working with IK and provide legal certainty about when the obligations under Elements 1 and 2 had been met.

The draft report suggests the authority could have a range of responsibilities including:

- negotiating IK licences and collecting licence fees on behalf of Traditional Owners, if authorised by Traditional Owners
- establishing processes to help third parties (e.g. collaborators, businesses and researchers) identify and secure the consent of Traditional Owners to the use of their IK
- distributing any licence fees collected from third-parties to the Traditional Owners less a small commission applied towards the authority's cost of operations
- managing and enforcing a system to identify genuine Indigenous product
- liaising with Customs to identify and verify the authenticity of products at the point of import into, or export from, Australia
- education and advice to Traditional Owners on how to protect and enforce their IK and implementing a range of compliance tools for business
- initiating enforcement action against unauthorised use and misappropriation of IK, breaches of licence agreements, unauthorised imports and breaches of the labelling standards.

Previous consultations have shown a need to document and record IK in a database in a way that does not allow unrestricted access to information and does not make inclusion of IK in a database a precondition for protection. The draft report suggests the authority could maintain a database of IK, in which Traditional Owners could choose to register their IK, and establish processes to manage the information.

The interim scoping study notes one authority may not be able to perform all the functions listed above, and that its functions and governance would need to be designed in partnership with Aboriginal and Torres Strait Islander peoples.

Supporting the competitiveness of Indigenous businesses

The draft report proposes the development and implementation, in consultation with First Nations peoples, of government programs and capacity building initiatives to complement the other elements of the package and ensure Aboriginal and Torres Strait Islanders peoples can derive commercial value from their IK. These programs and initiatives would be in addition to existing mechanisms. The report notes existing government and non-government programs should be evaluated and coordinated to ensure support is delivered effectively and in an integrated way. Existing government bodies or the new statutory authority may be well placed to connect Indigenous businesses with support services.

Conclusion

IP Australia remains committed to looking at ways the IP system we administer can better support Aboriginal and Torres Strait Islander peoples to benefit from, and protect, their IK. We have used the feedback from our 2021 consultations to develop our [IK Workplan 2022-23](#). We will continue to work closely with Aboriginal and Torres Strait Islander peoples and Australian Government stakeholders to progress these measures as well as stand-alone legislation to protect traditional knowledge and culture.