



Law Council
OF AUSTRALIA

Office of the President

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Mr Michael Schwager
Director-General
IP Australia
47 Bowes Street
PHILLIP ACT 2606

By email: IKProject@ipaaustralia.gov.au

Dear Mr Schwager

Response to consultation on the Interim Report on stand-alone legislation to protect and commercialise Indigenous Knowledge

The Law Council of Australia (**Law Council**) is grateful for the opportunity to respond to IP Australia's Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge (**IK**) (the **Interim Report**).¹

In the time available, the Law Council has relied on the expert contributions of members of the Law Council's Indigenous Legal Issues Committee and the Intellectual Property Committee of its Business Law Section to inform this response to the Interim Report.

As such, this response represents the Law Council's in-principle and, at times, preliminary views on the questions raised in the Interim Report, building from existing Law Council positions. The Law Council would be pleased to consult more broadly with its constituent bodies and Sections and provide a more developed submission in relation to a proposed legislative framework.

Executive Summary

The Scoping Study is underpinned by the following fundamental elements:

- (1) a recognition that the current legal framework does not and is not designed to provide First Nations people with the ability to obtain holistic recognition and protection of their Indigenous cultural and intellectual property rights or IK;^{2,3}
- (2) a commitment, in that light, from the Australian Government to establishing stand-alone legislation to provide for holistic recognition and protection of IK;⁴

¹ IP Australia, *Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge (Interim Report)*, undated, but citing laws and policies current as of August 2021, https://www.ipaustralia.gov.au/sites/default/files/interimreports/scopingstudyonstandalonelegislationtoprotectandcommercialiseindigenousknowledge2022_1.pdf.

² Ibid 4.

³ For the purpose of this letter, the Law Council understands IK in the same way as IP Australia, namely, ibid 3.

⁴ IP Australia, 'Stand-alone Legislation for Indigenous Knowledge: Interim Scoping Study Consultations' (Web page, accessed 8 November 2022) < https://consultation.ipaustralia.gov.au/policy/stand-alone-legislation-for-indigenous-knowledge/?_gl=1*12wlael*_ga*MjA0NDxMjg4NC4xNjY1MDMwMj11*_ga_QX1TTWEZ1L*MTY2NjkyMjk1Ny4xNi4xLjE2NjY5MjMyNjY1MC4wLjA.

(3) any solution should:

- be informed by and address the needs of First Nations people; and
- recognise the cultural governance of First Nations peoples including their cultural authority to protect, use and share their IK as they see appropriate, which may include growing the demand for authentic Indigenous industries.⁵

The Law Council supports in principle each of these elements. The Law Council has previously said that standalone legislation may be the best long-term option to resolve the complex challenges of properly recognising and protecting IK within the current legislative framework.⁶

Consistent with the Law Council's previous submissions⁷ and long-standing policy position,⁸ the development of laws and policies that recognise and protect IK should be directed towards realising applicable rights set out in Declaration on the Rights of Indigenous Peoples (**UNDRIP**).⁹ These include the right of Indigenous peoples to:

- self-determination¹⁰—a central right derived from common Article 1 of the International Covenant on Civil and Political Rights¹¹ and the International Covenant on Economic, Social and Cultural Rights;¹²
- provide free, prior informed consent prior to the adoption and implementation of legislative or administrative measures that may affect them;¹³ and
- maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions [and] to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and

⁵ Interim Report, 4.

⁶ Law Council of Australia, Submission to IP Australia, *Enhance and Enable – Indigenous Knowledge Consultations 2021* (3 June 2021), <<https://www.lawcouncil.asn.au/publicassets/7addc363-39c7-eb11-943c-005056be13b5/4012%20-%20Enhance%20and%20Enable%20-%20Indigenous%20Knowledge%20Consultations%202021.pdf>> [102] (**2021 submission to IP Australia**) and Law Council of Australia, Submission to the Productivity Commission *Aboriginal and Torres Strait Islander Visual Arts and Crafts Inquiry* (14 September 2022) (**2022 Submission to the Productivity Commission**) <https://lawcouncil.asn.au/publicassets/8c71b6c9-9335-ed11-9460-005056be13b5/2022%2009%2014%20-%20Attachment%20-%20Aboriginal%20and%20Torres%20Strait%20Islander%20Visual%20Arts%20and%20Crafts_.pdf> [24].

⁷ Law Council of Australia, Submission to IP Australia, *Enhance and Enable – Indigenous Knowledge Consultations 2021* (3 June 2021), <<https://www.lawcouncil.asn.au/publicassets/7addc363-39c7-eb11-943c-005056be13b5/4012%20-%20Enhance%20and%20Enable%20-%20Indigenous%20Knowledge%20Consultations%202021.pdf>>, [5]; Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) [15] (**UNDRIP inquiry submission**).

⁸ Specifically, that the Declaration on the Rights of Indigenous Peoples should be implemented in Australia: Law Council of Australia, Policy Statement: Indigenous Australians and the Legal Profession (February 2010) <https://www.lawcouncil.asn.au/publicassets/f56b7bd7-e1d6-e611-80d2-005056be66b1/1002-Policy-Statement-Indigenous-Australians-and-the-Legal-Profession.pdf> [16] on page 3.

⁹ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex

¹⁰ Ibid. art 3.

¹¹ International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

¹² International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹³ Ibid. art 19.

traditional cultural expression¹⁴—a right which gives expression to the central right of self-determination as applied to IK.

The Law Council notes that the rights in UNDRIP appear to have been formative in the development of the Interim Report¹⁵ and to have informed the content of the fundamental elements cited above.

Part A: Challenges for IK Protection

In Part A of the Interim Report, IP Australia asks what other issues, aside from those issues identified by Terri Janke and Company in the Discussion Paper prepared for IP Australia,¹⁶ affect the capacity of Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK.

As discussed in the Law Council's 2022 submission to the Productivity Commissioner, access to justice for First Nations artists is a key area of concern in relation to introducing IK protections, noting that any scheme to protect cultural rights is not effective unless First Nations artists can access it and its remedies.¹⁷ In this context, some barriers include:

- prohibitive costs of enforcing cultural rights, including legal costs;
- the timeliness of the remedies provided; and
- effective and culturally sensitive education and legal assistance for First Nations persons involved in relevant civil claims under such a scheme.¹⁸

The provision of additional specific funding for culturally appropriate legal assistance services for First Nations people to protect their IK is critical in this context. During the Law Council's Justice Project, its own national inquiry into access to justice for marginalised groups, the Law Council heard directly from bodies such as the Arts Law Centre of Australia, that its resourcing was clearly insufficient to meet national demand.¹⁹ Therefore, the Law Council strongly welcomes the proposal within the Interim Report that funding would be available for dedicated legal advice for Traditional Owners to enforce their rights.

The Law Council adds the following potential challenges for consideration:

- some First Nations peoples may face issues pertaining to internet access and computer literacy in remote and regional communities; and
- any non-legislated resourcing package included to make the system accessible to Aboriginal and Torres Strait Islander peoples should be implemented with a First Nations-led communications approach which is holistic, potentially including Indigenous engagement managers, communications companies, and radio stations, and extending to remote and regional communities.

¹⁴ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex ('UNDRIP'), article 31.

¹⁵ Terri Janke and Company, *Indigenous Knowledge: Issues for protection and management Discussion Paper* (2018) 24.

¹⁶ Namely: (a) misappropriation of Indigenous arts and crafts; (b) misuse of Indigenous languages and clan names; (c) ownership of recordings and digitised records of IK; (d) commercial exploitation of IK without benefits flowing to Indigenous communities; (e) unauthorised use of IK relating to genetic resources; and (f) misuse of sensitive secret sacred knowledge

¹⁷ 2022 Submission to the Productivity Commission [31]-[37].

¹⁸ *Ibid.*

¹⁹ Arts Law Centre of Australia, *Submission to the Law Council of Australia, The Justice Project: A National Blueprint for Justice for All*, (9 October 2017).

Part B: potential elements for stand-alone legislation to help address the challenges

Part B of the Interim Report asks which of four potential elements should form part of a stand-alone legal framework for the protection of IK in Australia.

Element One—create an enforceable communal legal right covering TK and TCE

Element One is that the stand-alone legislation could establish a new form of IP right recognising collective or communal rights in Traditional Cultural Expressions (**TCE**) and TK owned by the communities, language groups or peoples who are the Traditional Owners of that TK and TCE.

The Law Council emphasises that careful consideration will need to be given to the definition and scope of a new collective right, and whether and how there would be any exceptions to this right, including, to use the examples in the Interim Report, in the context of education or news reporting.²⁰

Importantly, though, the Law Council suggests that the new collective right cannot be onerous on First Nations communities, and there needs to be comprehensive consultation as to its implementation. The Law Council agrees, for example, with the suggestion in the Interim Report that the design of any exceptions to the right should be conducted in close consultation with First Nations peoples.

Consideration could be given to the scheme of cultural rights that applies in Panama²¹ and to the way in which the Kimberley Aboriginal Law and Culture Centre supports the traditional cultural practices of the 30 language groups of the Kimberley region.²²

Finally, the Law Council notes that there should be a co-ordinated approach to the creation of a new collective right. This must apply:

- domestically—for example ensuring a coherent approach to National Cultural Policy and the Productivity Commission recommendations on Visual Arts and Crafts; and
- internationally—noting the ongoing international treaty on traditional knowledge negotiations with the World Intellectual Property Organisation.²³

Element Two: Measures aimed at inauthentic production

Element Two introduces legislative measures to deter inauthentic products and to promote trade and commerce in authentic products, including:

- creating an offence to sell goods featuring or incorporating TCE unless they are made by Aboriginal or Torres Strait Islander people or are made by non-Indigenous businesses which have entered licences with the relevant owners of the TCE, unless the goods are clearly labelled as inauthentic; and

²⁰ Interim Report, 6.

²¹ Special System for the Collective Intellectual Property Rights of Indigenous Peoples ACT 20 June 26, 2000 (Published in *Gaceta Oficial* (Official Gazette) No. 24,083 of June 27, 2000) <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/pa/pa015en.html>.

²² Kimberley Aboriginal Law and Culture Centre (webpage, accessed on 8 November 2022), https://aodknowledgecentre.ecu.edu.au/key-resources/organisations/1434/?title=Kimberley+Aboriginal+Law+and+Culture+Centre+%28KALACC%29&contentid=1434_3.

²³ See, World Intellectual Property Organisation, 'International negotiations on Indigenous knowledge to resume at WIPO: a view of the journey so far and the way ahead', *WIPO Magazine*, (Online, February 2022), https://www.wipo.int/wipo_magazine_digital/en/2022/article_0001.html

- a scheme to identify genuine Indigenous products through product labelling or packaging.

The experts consulted by the Law Council for the purpose of this submission (listed above) expressed a preference for the creation of civil penalties, as opposed to criminal offences, which allows IK holders the possibility of being active proponents of, or participants in and potential direct beneficiaries of, remedial legal processes. In light of the necessarily limited consultation conducted for the purposes of this response, the Law Council is not in a position to further address the possible creation of criminal offences. If new offence provisions are proposed in new stand-alone legislation, the Law Council's position will be informed by the advice of its National Criminal Law Committee and its constituent bodies, in addition to the expert contributors to this response.

The Law Council also notes that, in the creation of any civil penalty relating to breaches of the new communal right, the measure of compensatory remedies should include both identifiable commercial loss and cultural loss including spiritual hurt or injury to feelings caused by the compensable acts analogous to the heads of compensation identified in *Northern Territory of Australia v Griffiths* [2019] HCA 7.²⁴

The Law Council's recent submission to the Productivity Commission expressed conceptual support for a mandatory labelling scheme for inauthentic products, which would indicate to consumers that those products were not created by or under licence from an Aboriginal and Torres Strait Islander person.²⁵ The Law Council, however, raised some reservations regarding the model proposed by the Productivity Commission, in particular that:

- the authenticity definition had an ambiguous scope;
- the treatment of implied licences was not addressed;
- the definition of whether a product is of 'an Indigenous Cultural Expression, or of Aboriginal and Torres Strait Islander origin or style' was ambiguous; and
- non-compliance with the labelling scheme will be widespread and difficult to enforce.²⁶

The Law Council observed that the crafting of clear definitions will be key to the workability of the scheme.²⁷ The submission also observed the difficulty with defining authenticity in relation to 'indigeneity' criteria. In this context the Law Council noted:

*The Law Council is concerned that an unintended consequence of the mandatory nature and structure of the proposed inauthenticity scheme may be to impose a default assumption of failure to satisfy Indigeneity criteria. Disproving that assumption in order to avoid the imposition of the inauthenticity label on their artworks and products (and avoid action under the Australian Consumer Law (ACL) and/or other penalties introduced by the scheme) may be complex and costly and impose an additional burden and indirect disadvantage on First Nations people legitimately wishing to sell authentic Indigenous products and artworks.*²⁸

²⁴ See in particular, *Northern Territory of Australia v Griffiths* [2019] HCA 7; 269 CLR 1 [155] (per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

²⁵ Law Council of Australia, Submission to the Productivity Commission, Submission on Aboriginal and Torres Strait Islander Visual Arts and Crafts, (Submission 14 September 2022) <https://www.lawcouncil.asn.au/publicassets/54eacdbc-9335-ed11-9460-005056be13b5/2022%2009%2014%20-%20L%20-%20Aboriginal%20and%20Torres%20Strait%20Islander%20Visual%20Arts%20and%20Crafts_.pdf>

²⁶ 2022 submission to the Productivity Commission [7]-[10].

²⁷ *Ibid* [15].

²⁸ *Ibid* [16].

The Law Council also notes that IK is region-specific; in order for measures to protect it (such as labelling) to be effective, it should also be region-specific, which is acknowledged in the Discussion Paper.²⁹

Element Three: National Indigenous Knowledge Authority

The Interim Report suggests creating a 'National Indigenous Knowledge Authority' (the **Authority**) to '*work in partnership with Aboriginal and Torres Strait Islander peoples to assert, protect and enforce their IK rights*'.³⁰

The Law Council submits there should be at least two separate bodies which respectively are empowered with regulatory functions and the promotional and advocacy functions. This could assist to mitigate any conflict that may arise between those two functions—for example, between:

- the role of the Authority in negotiating IK licences and collecting licence fees on the behalf of Traditional Owners (where requested); and
- establishing processes to help third parties (collaborators, businesses, and researchers) to identify and secure the consent of Traditional Owners to the use of their IK.

The Law Council considers it is critical that any regulatory body or bodies are properly funded to enable them to perform their tasks effectively. The Law Council recommends that the amount of funding required for such a body/bodies be very carefully considered.

The Law Council suggests IP Australia could consider the Aboriginal Areas Protection Authority of the Northern Territory as a model, which is an independent statutory authority established under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT). The Law Council notes that the Aboriginal Areas Protection Authority Board comprises representatives of ten custodians of sacred sites, together with two Government appointees.³¹ To be clear, it is not suggested that a national body should have any representatives other than First Nations people, nor should it have powers that might interfere with the cultural authority holders decision-making responsibilities.

The Interim Report also states that the Authority could maintain a voluntary database or register of IK information. In this context, the Law Council emphasises the importance of addressing the management of secret knowledge and of First Nations peoples having to ability to maintain and control secret knowledge and relevant databases that contain IK in accordance with their individual cultural practices.

The Law Council notes there would need to be strict permissions if databases were used, and these databases should be First Nations led and owned so that the data stays within local First Nations communities. Additionally, in this context the Law Council emphasises the importance of the principle of free, prior, and informed consent when considering Indigenous data and the control of this data.³²

²⁹ Janke Discussion Paper [2.1.3].

³⁰ Interim Report 7.

³¹ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s 6.

³² IP Australia, *Interim Report, Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge* (Report)

<https://www.ipaustralia.gov.au/sites/default/files/interimreportscopingstudyonstandalonelegislationtoprotectandcommercialiseindigenousknowledge2022_1.pdf>, 8.

The Law Council supports the suggestion that databases for secret TK should be optional and notes that internet and computer literacy may be a barrier for these optional databases.

Element Four: Measures to Support Competitiveness of Indigenous Business

Element 4 is said to involve ‘the development and implementation, in consultation with Aboriginal and Torres Strait Islander peoples, of specialised government programs and capacity building strategies to complement the measures described in Elements 1 to 3.’³³

The Law Council supports the provision of additional funding to Indigenous arts business support through the Australia Council for the Arts and Supply Nation.

Part C: Costs and benefits of the elements proposed

Part C of the Interim Report asks which of the four elements would deliver the most benefit.

The Law Council submits the benefits that stand-alone legislation could deliver to First Nations peoples include:

- reducing the production of inauthentic art;
- addressing the inappropriate use of IK by non-Indigenous peoples; and
- assisting to educate the wider public to respect Indigenous culture and the significant value of authentic First Nations products.

Other considerations

The Law Council draws attention to work undertaken in jurisdictions in recognising and protecting IK, which may assist IP Australia in determining its recommendations for standalone legislation:

- *Wai 262 Report (Aotearoa/New Zealand)*—This report addresses the ownership and use of *mātauranga Māori* (traditional knowledge and culture).³⁴ The reforms proposed by the Tribunal ultimately ‘aim to establish genuine partnerships in which Māori interests and those of other New Zealanders are fairly and transparently balanced.’³⁵
- *Framework Agreement on First Nation Land Management (Canada)*—under the voluntary framework agreement, land administration is transferred to First Nations via local ‘Land Codes’. These Land Codes provide First Nations the authority to enact laws with respect to land, the environment, and resources.³⁶ The Framework Agreement promotes First Nations’ self-government by creating an option for

³³ IP Australia, *Interim Report, Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge* (Report) <https://www.ipaustralia.gov.au/sites/default/files/interimreportscopingstudyonstandalonelegislationtoprotectandcommercialiseindigenousknowledge2022_1.pdf>, 8.

³⁴ Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (WAI 262, 2011), <https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356054/KoAotearoaTeneiTT1W.pdf> xxiii.

³⁵ Waitangi Tribunal, *Ko Aotearoa Tēnei: Report on the Wai 262 Claim Released* (Media Release, 2 July 2011) <<https://waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>>.

³⁶ *Framework Agreement on First Nation Land Management* (1999), <<https://36gwxj2v75xz3i87ov1ti3p6-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/Framework-Agreement-on-First-Nation-Land-Management-Dec-2018.pdf>>, cl 18.2.

participating First Nations to manage and govern their land, environment and resources using a community approved land code.³⁷

- *Law Number 20 of 2000 (Panama)*—This law creates a *sui generis* system for collective intellectual property rights for Indigenous art and culture with specific Indigenous cultural authorities that protect culture and knowledge.³⁸
- *The Intellectual Property Laws Amendment Act of 2013 and the Promotion, Development and Management of Indigenous knowledge Act of 2019 (South Africa)* -The South African *sui generis* regime establishes a National Council in respect of Indigenous knowledge, a National Database for the recording of Indigenous knowledge, and a National Trust and Trust Fund for purposes of Indigenous knowledge.³⁹

Contact

If you would like to discuss this matter further, please contact Ms Claire Paton, Policy Lawyer, on 02 6246 3711 or at claire.paton@lawcouncil.asn.au.

Yours sincerely



Mr Tass Liveris
President

³⁷ McDonald, C., Figueiredo, L. 'A Framework for Comparative Assessment of Indigenous Land Governance' *Land*, 2022, 11, 906 <<https://doi.org/10.3390/land11060906>>.

³⁸ World Intellectual Property Organisation, *Traditional Knowledge Laws: Panama* (Web page) <https://www.wipo.int/tk/en/databases/tklaws/articles/article_0107.html>

³⁹ Nelson Mandela University, Submission to the Department of Sports, Arts and Culture, *Indigenous Knowledge as Content for the Cultural and Creative Industries* (Submission, September 2020).