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CREATIVE CONSULTANCY

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Submission to IP Australia in response to Indigenous Knowledge Consultation Paper

About Dreamtime Art Creative Consultancy

Dreamtime Art Creative Consultancy (**DACC**) engages in collaborative projects that promote supplier diversity, Aboriginal and Torres Strait Islander businesses and knowledge about Arts & Culture. The DACC strategy improves corporate and government business engagement with Aboriginal and Torres Strait Islander businesses. We assist in the longevity and success of artists and our fellow Aboriginal and Torres Strait Islander business owners whilst educating and sharing knowledge about the Aboriginal and Torres Strait Island culture through the Arts.

We aim to provide cultural relevance and strong collaborative partnerships with a strong focus on the protection of artists' intellectual property and Indigenous Cultural intellectual property (**ICIP**) known as Indigenous Knowledge (**IK**) via IP Australia. The individuals behind DACC have backgrounds in Cultural heritage management, Indigenous studies, community development, sales and marketing and business advertising.

DACC's key concerns regarding IK arise out of systemic problems and practices resulting in disenfranchisement of Indigenous people and misappropriation of their IK. DACC is deeply concerned about the continuation of Cultural theft through lack of action and accountability around policy development and complaints handling, and the ultimate harmful impacts on Indigenous artists, designers and innovators of our country and communities. We embrace the opportunity to provide the following submission to IP Australia.

Priorities for protection of Indigenous Knowledge

The priority for reform around the protection of IK is that the consultation process and any substantive bodies or systems that are established must be **constituted, driven and controlled by** Indigenous representatives. DACC would welcome an Indigenous led consultation process and series of round tables Indigenous industry leaders, artists, practitioners, peak bodies, growers, knowledge holders and other community members. These round tables would be facilitated by IP Australia with an unlimited scope encouraging brainstorming and lateral-thinking ideas to be genuinely considered. For example,

the current process excludes from its scope the idea that IK would in fact be best protected by a standalone legal framework which sits next to the current IP rights schemes, which DACC considers a genuine alternative.

Nonetheless, the key priorities for DACC in relation to the four proposals identified in the current consultation paper are:

(a) any **Indigenous Advisory Panel** (**Panel**) must be a genuine and cross-sectional representation of communities. It must have integrity and power such that its consultation is more than a mere "tick box" for IP Australia;

(b) **consent mechanisms** proposed as changes to the Trade Marks Act (**TMA**) must account for the fact that in many circumstances, no one person or group will be able to give sufficient consent;

(c) a **disclosure requirement** in patent and PBR applications is not sufficient to address the concerns. There must be economic recognition included reflecting the value of the IK to be exploited;

(d) an **authentic labelling scheme** may be helpful, provided it does not risk further disempowerment of Indigenous businesses, individuals and communities.

Proposal 1: Indigenous Advisory Panel

DACC's greatest concern in the proposed Panel is that it lacks accountability and may be used as a "tick box" mechanism by IP Australia. The proposed function of the Panel requires it to get things right every time. Where a mistake or complaint is made, IP Australia could shield itself from responsibility by pointing to its prior consultation with the Panel. Any effective Panel therefore needs to well-resourced and constituted so it can **drive** IP Australia's decisions on IK.

DACC also seeks answers to the following questions:

- *How and when will a matter be referred to the Panel?* If it is at IP Australia's discretion, it is very likely that issues will be missed. It may not always be obvious when IK is involved.
- *What is the process to decide on members?* Members of panels such as this tend to be the same type of people ("industry experts") and we know from experience that this leaves many important voices and considerations out of the conversation.
- *What will be the Panel's power and function?* Will it be limited to advising on discrete issues only when requested, or (as we submit should be the case) would the Panel be empowered to proactively impact decisions and raise ideas or concerns more generally with IP Australia?
- *How will the Panel interact with other bodies?* It is imperative that the Panel cooperates and engages with other bodies such as Australia Council for the Arts. The approach to protecting IK cannot be a siloed one and is not limited to the work of IP Australia.
- *How, when and where will the Panel meet?* It needs to be accessible and how transparent will these findings and decisions be to community. Will community members for the panel be financially compensated for their time?

Proposal 2: Amendments to trade marks legislation

More recently, the application to trade mark under Class 25, the phrase 'Always was, Always Will Be'[1] shows that the trade mark system is not equipped to deal with IK rights. Any applicant can attempt to register any term, phrase, name or image containing IK.

[1] While this application is yet to be accepted, Dreamtime Art believes that a well-constituted Panel would advise against registration of this mark on the ground(s) that it would be either scandalous or contrary to law under the current regime, or culturally offensive under the proposed new grounds for rejection.

Issues with consent

DACC supports change to the trade mark application system, **but does not support a lack of consent as a new ground of rejection.**

The notion of consent is difficult for Indigenous communities, primarily due to the barriers around education and language gaps. It is difficult to predict the true extent of any proposed future use of the IK. Traditional owners of IK must understand the nature of their rights or they risk being misled in consent-seeking processes and relinquishing their rights to an unreasonable extent.

Further, it is our position that consent can never truly be provided for the use of IK in the manner suggested by IP Australia. This is because one of the most intrinsic characteristics of IK is that it is often so far reaching in terms of creation and ownership that no one person or group can claim exclusive rights to it and cannot therefore give consent to its use. The permission of one Indigenous person cannot be extrapolated to community, who in our Culture are all equal owners of the knowledge. The proposed reforms to the legislation do nothing to explain how many people or mobs are expected to be consulted and provide consent for marks. IK stems from community and stories passed from generation to generation and any one piece of Indigenous work invariably draws inspiration from years of established IK.

The suggested reliance on the Panel to assist with applying the proposed new grounds of rejection is too great. It is unreasonable to expect the Panel to be sufficiently well-resourced and familiar with the many different languages and communities whose IK could arise in an application. Some issues will inevitably slip through the cracks.

Lastly, the proposed amendments to the trade marks legislation does not cover the situation where a party is using an unregistered trade mark containing IK without consent. We query what avenues would be available for traditional owners and communities of IK in such circumstances. This example links with our crucial position that a separate IP system should be created to deal with the unique set of IP rights in IK (an idea which again, has been excluded from the scope of the current consultation).

Proposal 3: Disclosure requirements

Suggestions of Acknowledgement and Recognition over patents and plant breeder's rights risk facilitating a model for exploitation of IK over community. Any proposed law or system should align and/or comply with United Nations Declaration on the Rights of Indigenous Peoples. A failure to do so risks leaving Indigenous groups economically excluded from potential IK commercialisations and economic autonomy in the immediate future.

First Nations Australian have the right to self-determine our economic, social and Cultural development. Owners of IK such as traditional fibres and foods should be economically empowered and recognised in the ultimate product. A financial incentive and/or recurring residual incomes must be included acknowledging the contribution of the traditional owners and IK holders.

The option suggested by IP Australia to introduce penalties for those who fail to comply with the proposed disclosure requirements might deter some. However, we think that the penalty is likely to be so insignificant to many large applicant businesses that they may just absorb the cost, making the penalty ineffective as a true disincentive.

The consultation paper also does not outline how these requirements will be enforced.

Proposal 4: Authentic labelling scheme

In our view, the proposed labelling scheme risks further marginalisation and division of community. Indigenous creators of IK or other products may have their own reasons for not wanting to participate in

this scheme. Primarily, the cost and effort involved in this scheme is a deterrent for Indigenous people. Further consultation is required to develop a scheme that will avoid these issues. A well-designed Certification Trade Mark (**CTM**) may be the best option, but requires significant engagement with community to be effective and respectful.

Some IK owners are likely to feel disempowered by the proposed authentication process. Questions such as "why should I have to prove my Indigenous heritage?" and Stolen Generation with associated barriers to provide their proof of Aboriginality will arise. An opt-in labelling scheme also enlivens the possibility that those who do not engage will be assumed to be producing inauthentic or non-Indigenous products. This issue is mentioned in the consultation paper but there is no recommendation as to how it might be dealt with.

Another concern that is left unanswered in the paper is the monitoring of this scheme – how will this occur? The ACCC would have power to sue for infringement of a CTM, and could seek large penalties, which would potentially be a successful deterrent to misuse. This lends weight to the CTM option. Deterrence, enforcement and penalties for the other options suggested must be considered before proceeding with them.

A further issue arising relates to determining at what point a product is eligible to be labelled as an authentic Indigenous product. There is no definition of the extent of Aboriginal and/or Torres Strait Islander involvement required and instances of disagreement will inevitably arise, which could prove highly divisive. The proposal also does not outline how authenticity labelling would be managed in licencing arrangements.

Consultation process

The present consultation process is insufficient to adequately address the relevant issues. DACC submits that community roundtables to discuss what the problems look like and what the priorities are required from community before we can effectively find solutions. The current process does not give power to the full range of voices, opinions, suggestions and recommendations that should be considered and what a delivery methodology looks like in the short, medium and long terms. While we acknowledge the Indigenous voices that were consulted in the first part of this process IP Australia has limited the scope of submissions to four proposed categories of legislative reform, thus excluding many other relevant issues with the protection of IK from the scope of the project.

All aspects of IK protection are inherently intertwined and a consultation on four 'priority issues' will inevitably fail to affect any significant positive change as it ignores the related issues which will be brought to the fore by these changes. An example of missing priorities can be found in the federal government's failure to change its own legal contracts where engagement with communities and individuals via funding and procurement contracts also subsume IP and IK under their terms and conditions. IK IP rights are being signed away to win contracts and obtain funding.

> *Example: The ACT ombudsman conducted an 'art competition' in early 2018, "calling all Aboriginal and Torres Strait Islander" artists, inviting them to create a piece of art that represents 'Our Community'. The winning artist was to receive a prize of $1,000.*
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> *The terms and conditions of the competition provided that the winning entry assigns all intellectual property rights (including but not limited to copyright and moral rights) to the Ombudsman's Office – permanently.*

IP Australia's limitation of the scope of submissions to the four issues raised means that submissions on related problems, such as the one in the example above, are not discussed. As a result, we are still not

closer to understanding what is really needed for IK protections both locally and internationally, from government to corporate, from community to customer. Restricting the conversation to four priorities ignores the many other intertwined issues, for example the responsibilities of government and corporate in areas including their own legal contracts, policies and frameworks, or the difference between tangible and intangible identity as it applies to First Nations people.

Further considerations are needed to understanding how community gets access to see other submissions, findings and reports so community can be better informed on what barriers and possibilities for solutions based on the scope of the data collected including those other suggestions which have been dismissed. This is working towards a transparent process and allowing community to be ahead of the process. From here we still need to understand who gets to make the final decisions on the establishment of the proposed panel members and any adoptions of findings and recommendations from this round of consultations. Who gets to decide on what is the right way forward for IP Australia and Indigenous communities and IK? Are these decisions being held with community at the centre of decision making or delegations opposed to governments normal top to bottom approach to decision making? Does this process empower community to take control of their IK assets both tangible and intangible?

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Ultimately, DACC is pleased that IP Australia is taking an active approach to considering much needed changes to acknowledge the traditional owners of IK. Our people have for so many years been deprived of the opportunity to economically participate in Australian society and reap the benefits of our knowledge.

Yours sincerely,

Matthew Everitt

Founder | Director