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NEW SOUTH WALES ABORIGINAL LAND COUNCIL RESPONSE TO THE INDIGENOUS KNOWLEDGE CONSULTATION PAPER IP AUSTRALIA

Please find the attached submission from the New South Wales Aboriginal Land Council (**NSWALC**) in response to the Indigenous Knowledge Consultation Paper - IP Australia.

NSWALC provides this submission in our capacity as the peak body representing Aboriginal peoples in NSW and as the largest Aboriginal member-based organisation in Australia. NSW. NSWALC has legislative responsibilities to protect and promote the rights of Aboriginal peoples, including Aboriginal culture and heritage.

If you have further questions regarding the content of this submission, please contact [redacted],

Sincerely,

[redacted]

James Christian PSM
Chief Executive Officer
NSW Aboriginal Land Council

NEW SOUTH WALES ABORIGINAL LAND COUNCIL

RESPONSE TO THE INDIGENOUS KNOWLEDGE CONSULTATION PAPER IP AUSTRALIA

JUNE 2021

The New South Wales Aboriginal Land Council (**NSWALC**) welcomes the opportunity to respond to the Indigenous Knowledge Consultation Paper of IP Australia. NSWALC provides its responses in our capacity as the peak body representing Aboriginal peoples in New South Wales (**NSW**) and as the largest Aboriginal

NSWALC is committed to pursuing cultural, social and economic independence for Aboriginal peoples. As a self-funded statutory corporation established under the *Aboriginal Land Rights Act* 1983 (**ALRA**), NSWALC has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples and communities across the state.

NSWALC also provides support to a network of 120 Local Aboriginal Land Councils (**LALCs**), with a combined membership of over 25,000 Aboriginal people. LALCs are autonomous, elected bodies representing the interests of their members as well as the wider Aboriginal community in each of their respective regions. The core business of each LALC is to protect Aboriginal culture and heritage, acquire and manage lands for cultural and economic purposes, and as compensation for dispossession.

NSWALC's responses seek to advance the human rights of Aboriginal peoples, protect and create opportunities and/or processes for Aboriginal peoples to be active participants in the intergenerational protection and management of Indigenous Knowledges.

Accordingly, NSWALC draws IP Australia's attention to Article 11 and Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which respectively state:

Article 11

"1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

Article 31

"1. 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. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights".

NSWALC highlights these Articles as they reference two themes that underpin this submission: Aboriginal community-control; and a human rights-based approach to the protection and preservation of Indigenous Knowledges.

NSWALC is also a member of the Coalition of Aboriginal and Torres Strait Islander Community Controlled Peak Organisations (Coalition of Peaks). The Coalition of Peaks is a representative body of more than fifty-five Aboriginal and Torres Strait Islander community controlled peak organisations and members that came together as an act of self-determination to be formal partners with Australian governments on Closing the Gap. The Coalition of Peaks and its' members are accountable to our communities. We have worked for our communities for a long time and are working to ensure the full involvement of Aboriginal and Torres Strait Islander peoples in shared decision-making with Australian governments across the country to improve the life outcomes of our people.

NSWALC welcomes IP Australia's acknowledgment of the new National Agreement on Closing the Gap, that was negotiated and agreed between all Australian governments and the Coalition of Peaks, and its efforts to align IP Australia's workplan and ways of working with its commitments.

NSWALC's submission responds to the questions in the Indigenous Knowledge Consultation Paper.

1. ESTABLISHING AN INDIGENOUS ADVISORY PANEL TO IP AUSTRALIA

NSWALC welcomes the proposal for IP Australia to work in deeper partnership with Aboriginal and Torres Strait Islander organisations and peoples. However, NSWALC does not support the establishment of an Indigenous Advisory Panel and instead proposes that a formal partnership between IP and Aboriginal and Torres Strait Islander representatives be agreed, reflecting the National Agreement on Closing the Gap.

To ensure consistency with the National Agreement on Closing the Gap and the commitments made by the Commonwealth Government on 'Priority Reform One', the partnership needs to be underpinned by shared decision making between IP Australian and Aboriginal and Torres Strait Islander community-controlled representatives. This is a shift beyond 'advisory' panels of the past and where governments choose the Aboriginal and Torres Strait Islander advisors.

The National Agreement on Closing the Gap sets out the elements that should form the basis of the proposed Indigenous panel to IP Australia are available in full: Priority Reform One - Formal partnerships and shared decision-making | Closing The Gap

Key features of the elements for consideration in the Indigenous panel to IP include:

- Aboriginal and Torres Strait Islander representation should be determined by Aboriginal and Torres Strait Islander people in a transparent way, based on their own structures and where they are accountable to their own organisations and communities.

- A formal agreement should be in place, agreed to by all parties, that:
    - defines who the parties are, what their roles are, what the purpose and objectives of the partnership are, what is in scope of shared decision-making, and what are the reporting arrangements, timeframes, and monitoring, review and dispute mechanisms
    - is structured in a way that allows Aboriginal and Torres Strait Islander parties to agree the agenda for the discussions that lead to any decisions

- is made public and easily accessible.

- Decision-making is shared between the IP Australia and the Aboriginal and Torres Strait Islander representatives on matters that have a significant impact on Aboriginal and Torres Strait Islander peoples and where shared decision-making is:
    - by consensus, where the voices of Aboriginal and Torres Strait Islander parties hold as much weight as the governments
    - transparent, where matters for decision are in terms that are easily understood by all parties and where there is enough information and time to understand the implications of the decision
    - where relevant funding for programs and services align with jointly agreed community priorities, noting governments retain responsibility for funding decisions
    - where partnership parties have access to the same data and information, in an easily accessible format, on which any decisions are made.

The National Agreement on Closing the Gap also recognises that adequate funding is needed to support Aboriginal and Torres Strait Islander parties to be partners with governments in formal partnerships so that they can: engage independent policy advice; meet independently of governments to determine their own policy positions; support strengthened governance between and across Aboriginal and Torres Strait Islander organisations and parties; and engage and seek advice from other Aboriginal and Torres Strait Islander people being impacted by the decisions.

Q1: What have you seen work in other successful Panels or similar groups that IP Australia could consider here?

NSWALC refers IP Australia to the Partnership Agreement on Closing the Gap for a model of shared decision making between governments and community-controlled representatives; as well as the National Agreement on Closing the Gap to ensure the proposed Indigenous Panel is built around the partnership elements that the Commonwealth Government has committed to.

Q2: How should a Panel engage with communities or peak and representative bodies?

In addition to Priority Reform One of the National Agreement on Closing the Gap and building a partnership based on shared decision making with community-controlled representatives, NSWALC also refers IP Australia to Priority Reform Three. Priority Reform Three sets out commitments from all governments, including the Commonwealth, on when and how it should engagement with Aboriginal and Torres Strait Islander communities and organisations on policy and program changes that are likely to have a significant impact on them. This includes ensuring the engagements are open and transparent and done in a way where Aboriginal and Torres Strait Islander people: have a leadership role in the design and conduct of engagements; know the purpose and fully understand what is being proposed; know what feedback is provided and how that is being taken account of by governments in making decisions; and are able to assess whether the engagements have been fair, transparent and open. Further information is available here: Priority Reform Three – Transforming Government Organisations | Closing The Gap

Q3: What role should the Panel have when problems/conflicts arise about the use of IK?

If the panel is based on shared decision making between IP Australia and Aboriginal and Torres Strait Islander community-controlled representatives, it could jointly agree responses to problems and conflicts that arise from the use of Indigenous Knowledge. This function would need to be negotiated and agreed as part of the formal arrangements that govern the partnership and be made transparent so that any decisions are accountable to communities and organisations.

2. MEASURES FOR TRADEMARK OR DESIGN RIGHTS USING INDIGENOUS KNOWLEDGE

NSWALC acknowledges IP Australia's recognition that it can not be for the Agency to determine alone culture and consent in relation to rights being granted over Indigenous Knowledge.

NSWALC supports the role of an Indigenous Panel, based on shared decision making and community-controlled representation, in assessing evidence and decisions of IP Australia.

NSWALC also notes that whilst the proposed additional checks are a step forward, this does not replace the need for more comprehensive legislative and policy reforms to protect Aboriginal peoples' Traditional Knowledge and rights.

Q4: Would you have concerns about providing a statutory declaration, a letter of consent or other evidence, if you wanted to use IK (such as words or symbols) in a trademark application? If so, what would your concerns be?

NSWALC supports the addition of further checks to support applications for trademarks or design rights using Indigenous Knowledge and support those proposed.

In introducing any new checks, it is important that the processes are easily accessible for Aboriginal people and that any introduced administration or related costs do not preclude Aboriginal people from applying for and being granted trademarks or design rights.

Q5: Which of the three options, consent, offensiveness or deceptiveness do you prefer? Why?

Option 1 is preferred as it requires positive consultation and support by impacted Aboriginal and Torres Strait Islander communities. However, all options may be required in certain circumstances.

NSWALC also supports the role of an Indigenous Panel, based on shared decision making and community-controlled representation, in assessing evidence.

Q6: What information should people provide to show they should be able to use IK in a trademark? How does this change between an Indigenous and non-Indigenous applicant?

Information provided should demonstrate that engagements used to obtain consent meet the requirements under the Declaration of the Rights of Indigenous Peoples and that were was free, prior and informed consent.

Non-Indigenous applicants should also draw from the engagement principles outlined in the National Agreement on Closing the Gap under Priority Reform Three and show evidence that Aboriginal and Torres Strait Islander people had a leadership role in the design and conduct of engagements to obtain consent.

Q7: What sort of decisions about the existence of consent do you think IP Australia can make? How could an Indigenous Advisory Panel add to these decisions?

Decisions should be shared between the Indigenous Advisory Panel, that is based on community-controlled membership, and IP Australia.

Q8: What do you think IP Australia should do in the case of an applicant providing evidence that they took all the steps they think are necessary, but did not (or could not) get written consent or find a person or authority to provide consent?

Information provided should demonstrate that engagements used to obtain consent meet the requirements under the Declaration of the Rights of Indigenous Peoples and that were was free, prior and informed consent.

Non-Indigenous applicants should also draw from the engagement principles outlined in the National Agreement on Closing the Gap and show evidence that Aboriginal and Torres Strait Islander people had a leadership role in the design and conduct of engagements to obtain consent.

Q9: If IP Australia asked you to identify if you had used IK, or to name the source where you found the IK, do you think either would be an onerous requirement? Why or why not?

NSWALC supports an upfront requirement asking applications of trademarks or design rights to identify if they had used Indigenous Knowledge and name the source of the Indigenous Knowledge if it is being used in their application form.

Indigenous Knowledge continues to be misappropriated and misused by non-Indigenous businesses and organisations and introduction of the upfront requirement may assist in better assessments of applications.

Q10: What do you think is the best way to help Indigenous businesses find out if IK they want to use is in other trademarks and designs?

The proposal for a national data base of existing trademarks and designs that utilise Indigenous Knowledge would need to be carefully designed and agreed between IP Australia and an Indigenous Panel, based on community-controlled representation. NSWALC has significant concerns associated with the development and maintenance of government owned data bases associated with Indigenous Knowledge.

Q11: Would new avenues to highlight IK in trademark or designs help combat misappropriation, or could it cause additional issues?

If IP Australia proceeds with the establishment of a database, NSWALC strongly recommends IP Australia learn from and model Aboriginal owned and run community databases. Whilst NSWALC is not able to identify a specific database that encompasses all aspects of best practice, NSWALC suggests IP Australia begin with those identified in the report "Indigenous Knowledge Databases in Northern Australia"7 with the intention to mirror aspects of best practice from a variety of databases.

Any proposed data base or additional avenues should be designed and agreed with an Indigenous Panel based on community-control representation.

3. REQUIREMENTS TO DECLARE WHEN IK IS USED IN NEW INNOVATIONS

NSWALC supports the development of requirements to declare when Indigenous Knowledge is used to develop inventions. NSWALC advocates for comprehensive legislative and policy reforms to protect Aboriginal peoples' Traditional Knowledge and notes that this is an area that requires significant reform.

Q 12: Which option do you think provides the best outcomes in supporting fair use of traditional knowledge? Are there other ways to encourage disclosure?

NSWALC supports option 2 – the use of penalties for non-Indigenous businesses and applicants where they fail to disclose if their invention uses Indigenous Knowledge. Additional measures and protections, that includes penalties, are needed to stop the misuse of Indigenous Knowledge by non-Indigenous businesses.

For Aboriginal applicants, NSWALC supports a strength-based approach based around option 1 in the first instance, to ensure that Aboriginal applicants and businesses are not penalised if they do not understand the requirements properly or have the resources to demonstrate what is required.

Q14: Do you think having the ability to attach information on ABS or consent to IP rights would provide a useful basis for better conversations about ABS and consent?

NSWALC supports free, prior and informed consent being demonstrated with any application for intellectual property rights that involve Indigenous Knowledge.

Q15: What types of evidence of ABS/consent would it be possible to make available to IP Australia?

A best practice approach to demonstrating and assessing free, prior and informed consent for use of Indigenous Knowledge should be developed and agreed in partnership between IP Australia and an Indigenous Panel, based on shared decision making and Aboriginal community-controlled representation.

Q13: Should a disclosure of source be required for use of traditional knowledge that led to a new plant variety or was used in research to develop a new plant variety?

NSWALC supports a requirement to disclose whether Traditional Knowledge has been used to develop a new plant variety or was used in research to develop a new plant variety. Only requiring location is not sufficient. Further locations can be used by non-Indigenous businesses to falsely portray Indigenous Knowledge, involvement, or heritage.

4. LABELLING OPTIONS TO PROMOTE AUTHENTIC INDIGENOUS PRODUCTS

NSWALC supports efforts to address the sale and use of inauthentic Indigenous products and knowledge, as well as greater penalties for those businesses that promote inauthentic goods or market themselves with a perception that they are an Indigenous business when they are not. That said, reform in this area must not place additional burden on Indigenous businesses and organisations, making those already under resourced unable to access any certification requirements. Additional resourcing for Indigenous businesses and organisations should be considered as part of any changes.

NSWALC also notes that certification and labelling options need to take account and be responsive to different industries and supply chains. For example, the bush food industry will have different requirements and supply chain considerations to the art industry.

5. OTHER COMMENTS

NSWALC considers the lack of a comprehensive legal framework (and accompanying policy framework) tailored and designed to protect Aboriginal people's Traditional Knowledges is a significant challenge when dealing with the misappropriation or misuse of Traditional Knowledges.

Whilst we recognise the steps that IP Australia are taking, including engaging with Aboriginal peoples, NSWALC supports much more significant reform to protect Indigenous Knowledge, that is designed, negotiated and agreed between IP Australia, other Commonwealth agencies, State and Territory governments and industry and Aboriginal and Torres Strait Islander community-controlled representatives.

Adequate funding, training and legal support are required for Aboriginal people, communities, organisations and businesses protect and manage their Indigenous intellectual and cultural property rights. NSWALC recommends IP Australia explore the creation of a legal fighting fund for the protection and management of Indigenous intellectual and cultural property rights. Such a fund could provide financial, legal and professional assistance to Aboriginal and Torres Strait Islander peoples facing major legal issues that have the potential to set legal precedents in relation to intellectual and cultural property rights in Australia. Further, NSWALC encourages IP Australia to undertake training and legal support to Aboriginal communities as this will facilitate informed decision making. NSWALC recommends that IP Australia implement any training and legal support with a human rights-based approach.

NSWALC also supports a national Government funded redress scheme for Aboriginal artists, individuals and/or communities who have had their IP rights infringed upon. This proposed scheme would initially be administered by IP Australia with a long-term view to be administered by a National Indigenous Arts and Cultural Authority (NIACA). Such an initiative would serve two primary purposes; firstly, to justly compensate those Aboriginal persons who have been wronged by inadequate legal protections and secondly, to serve as a deterrent to those who would seek to impinge upon the rights and interests of Aboriginal peoples and communities.