

SBS SUBMISSION TO IP AUSTRALIA COMMENTS ON THE INDIGENOUS KNOWLEDGE CONSULTATION PAPER

Key Points

- The Special Broadcasting Service Corporation (**SBS**) is an Australian public broadcaster, with the principal function of providing multilingual and multicultural radio, television and digital media services that inform, educate and entertain all Australians and, in doing so, reflecting Australia's multicultural society.
- National Indigenous Television (**NITV**) is a national free-to-air channel on SBS made by, for and about Aboriginal and Torres Strait Islander peoples,¹ providing content across broadcast television, radio and digital platforms.
- Indigenous peoples' right to their cultural heritage, referred to as Indigenous knowledge (**IK**) in the Consultation Paper, incorporated as trade marks, language, stories and culture are key components of SBS and NITV's content. This is important because screen content for Aboriginal and Torres Strait Islander peoples contributes to a positive sense of identity, cultural continuity and ultimately social and emotional wellbeing.
- SBS is the owner of 78 registered trade marks and many more unregistered marks. Some of these trade marks incorporate IK.
- SBS has developed leading cultural protocols in the media industry based on respect for Indigenous peoples and consent for use of IK, and its submission is based on those principles.
- SBS strongly supports the consultation process and work being done by IP Australia to ensure that Aboriginal and Torres Strait Islander people can benefit from and be involved in decisions regarding their IK.
- SBS supports the development of an Indigenous Advisory Committee at IP Australia which has demonstrated responsibility and autonomy.
- SBS supports new checks for trade mark applications involving IK which require applicants to follow cultural protocols and provide statutory declarations (option 1). SBS submits that this option should be supplemented with a combination of option 2 and/or 3 relating to tests for cultural offense and deceptive use.



Introduction

SBS appreciates the opportunity to submit to IP Australia on its proposals Indigenous Knowledge Consultation Paper (Consultation Paper).

A quarter of Australians were born overseas, almost half have at least one parent born overseas, and 21 per cent (4.87 million people) speak a language other than English at home, according to the 2016 Australian Census. As Australia's multilingual and multicultural public broadcaster and the home of Australia's Indigenous broadcaster NITV, SBS is therefore needed now more than ever to build understanding and cohesion in our society. SBS reaches almost 100 per cent of the population in Australia through its -free-to-air TV channels (SBS, SBS VICELAND, SBS World Movies, SBS Food and NITV) and seven radio stations (SBS Radio 1, 2, 3, SBS Arabic24, SBS PopDesi, SBS Chill and SBS PopAsia). SBS also has extensive digital services, including:

- the SBS On Demand platform, which provides Australians with a distinctive streaming destination that connects audiences to premium content from Australia and around the world; and
- the SBS Radio App, which provides access to content from SBS's broad range of language programs, plus live streaming of four 24/7 digital radio stations (SBS Arabic24, SBS PopAsia, SBS PopDesi and SBS Chill).

NITV, proudly part of SBS since 2012, is a national free-to-air channel made by, for and about Aboriginal and Torres Strait Islander peoples. NITV delivers Australia's only national Aboriginal and Torres Strait Islander television news service *Nula*, current affairs program *The Point*, award winning children's animation *Little J & Big Cuz*, as well as a range of entertainment, factual and other programs.

SBS owns and uses many registered and unregistered trade marks related to NITV including in relation to its channel name, stylised words and logos, slogans and program titles. Some of these trade marks incorporate IK through design or language words.

SBS's Greater Perspective Cultural Protocols and the aim of IP Australia's consultation

SBS strongly supports the aim of the consultations as stated in the Consultation Paper, which is to enhance the IP system to ensure that Aboriginal and Torres Strait Islander peoples and communities can benefit from and protect their Indigenous Knowledge (**IK**). This is in accordance with Article 31 of the United Nations Declaration on the Rights of Indigenous People (**the Declaration**), to which Australia is a signatory, which states that:

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 expressions¹.

SBS has a long history of supporting the culturally appropriate use of IK. In 1990 SBS commissioned the late Lester Bostock to create cultural protocols for SBS, later updated in 1997 and 2018. These protocols, the *Greater Perspective: Protocol and Guidelines for the Production of Film and Television Aboriginal and Torres Strait Islander Communities* (**the Greater Perspective²**) set a benchmark in the screen industry for use of IK and depiction of Aboriginal and Torres Strait Islander peoples and stories. The Greater Perspective is based on the fundamental principle of free, prior and informed consent for the use of IK, or any program which incorporates Indigenous elements³. This approach is consistent with Article 31 of the Declaration.

While the Greater Perspective is not legally binding, in the absence of consistent formal legal recognition for Aboriginal and Torres Strait Islander peoples in Australia of IK, it is a mechanism under which SBS and producers can agree to act in accordance with best cultural practice (including via contractual commitment). In SBS's view, what makes the Greater Perspective and similar cultural protocols so effective is both the principles they establish and the ways in which the protocols can be adopted through:

1. making cultural protocols (getting consent) a condition of contracting or engaging with your organisation
2. building on the existing best practice of cultural protocols that have developed for recognition of IK
3. upskilling the industry on how to follow best practice through education and resources and
4. setting a leading example for others in a specific industry.

Establishing an Indigenous Advisory Panel to IP Australia

SBS supports IP Australia's proposal to establish an independent Indigenous Advisory Panel to provide Aboriginal and Torres Strait Islander perspectives on the IP system. Having Aboriginal and Torres Strait Islander perspectives in decisions relating to their IK and Intellectual Property is critical, and reflective of the rights in Article 31.

This panel should be established in a way that guarantees autonomy to make decisions and recommendations under a guiding framework. Guaranteed responsibility and power is critical for Aboriginal and Torres Strait Islander peoples to not only give opinions about their IK, but to make decisions about their cultural heritage. If the panel is given responsibility for decision making, then conflicts about the use of IK should be resolved by the panel, in consultation with the relevant traditional owners, community groups and peak bodies whose IK is subject to an application.

¹ <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

² The Greater Perspective, and the 2018 Supplementary Guidelines, are available on SBS's website: <https://www.sbs.com.au/aboutus/the-greater-perspective-indigenous-protocols>

³ page 29, Greater Perspective, Page 16 Supplementary Guidelines



Any panel established by IP Australia should ensure that members have security of tenure for a set period so that they can confidently make decisions relating to IK, ensuring that the panel can be truly independent.

IP Australia could look at the following boards or panels as examples for consideration:

- National NAIDOC Committee⁵ – The NNC is a voluntary committee independent of government and comprises of eight committee members and two co-chairs. NNC members are appointed for a term of three years following a following a public expression of interest process.
- ATSIAB of the Australia Council for the Arts – this Aboriginal and Torres Strait Islander board promotes the recognition of Indigenous cultural and intellectual property and the importance of Aboriginal and Torres Strait Islander peoples to control their cultural assets and knowledge.
- University research ethics committees – these committees operate in all universities across Australia under different structures, with the purpose of assessing the ethics in research applications. Additionally, some ethics committees or offices offer support, advice and training for researchers to guide them through the application process⁴.

Measures for trade mark or design rights using IK

IP Australia is seeking feedback on new checks for applications for trade marks and designs which incorporate IK. As a media company with a significant trade mark portfolio, including trade marks incorporating IK, SBS can comment on applications relating to trade marks. In summary, SBS supports the introduction of option 1, to be supplemented with a combination of either or both options 2 and 3.

In line with the principle of free, prior and informed consent, SBS supports option 1 – asking for evidence of consent for any trade mark applicant seeking to register a trade mark which incorporates IK. This ensures that any applicant (non-Indigenous or Aboriginal and Torres Strait Islander from the knowledge holding community or otherwise) who has a trade mark application with IK must provide some evidence that they have gone through the appropriate consultation processes and sought the right consents. SBS has the following specific remarks relating to this option:

- It relies on the applicant identifying that they have IK in their application. If an applicant fails to identify the IK (through ignorance or otherwise), how will the IK be protected?
- In SBS's view, a statutory declaration signed by the applicant attesting to the consultation process and what consents have been sought is the most appropriate form of evidence. In our experience, many consultations do not result in a formal consent letter so this should not be the standard requirement. However, without a formal cultural protocol framework in place from IP Australia, applicants may lack sufficient information to get the appropriate consents, so a system of a statutory declaration on its own may be insufficient.
- SBS recommends IP Australia develop a cultural protocol to guide applicants through the consultation process and what it requires from both a process and as a standard of proof in order to meet its evidence obligations.

⁴ <https://www.sydney.edu.au/research/research-integrity-and-ethics.html>



- SBS suggests that even with the protections in place as suggested above, there is still room for improvement as option 1 relies on the applicant following the correct process without any check or balance from IP Australia. As such, SBS suggests that an additional protection should come from 2/Option 3 being in place.

Accordingly, SBS suggests that IP Australia also implement a combination of either or both options 2 and 3 in conjunction with option 1. The Indigenous Advisory Panel, as well as Indigenous Examiners, can work to establish if cultural offence is caused or if the IK is deceptive for any trade mark application.

SBS supports these measures to protect IK, but also notes that there should be certainty for trade mark applicants as to what may constitute cultural offence and deception for the purposes of an application incorporating IK. This is important so that applicants have guidance when making an application.

For example, an applicant has undertaken the appropriate consultation process and received free, prior and informed consent from traditional knowledge owners. Throughout the process there has been no suggestion from the consulted community that the suggested use of IK is offensive. However, before the IP Australia's examination is complete, there is dispute in the community relating to the use of the IK being incompatible with the traditional meaning. In that instance, if IP Australia's cultural protocols have been followed, IP Australia would need to consider whether that dispute would meet the threshold of cultural offence.

The example of the South Australian Museum in relation to the Ngintaka exhibition may provide useful guidance in this situation. In that case, there was a dispute between the traditional owners over the disclosure of IK contained in a proposed exhibition by the Museum. Despite widespread consultation being undertaken by the Museum, a small group of elders applied to the Supreme Court for an injunction against the exhibition. The injunction was ultimately dismissed by the court. The Chief Justice accepted that it would be a blow to the maintenance of Anangu law and custom for there to be a disclosure of that law and custom, but that the exhibition had widespread support from elders.

This is a common scenario faced by trade mark users and media practitioners as many Aboriginal and Torres Strait Islander communities share traditional knowledge, cultural practices and language and despite broad community consultation, use can be disputed.

Guidance on a key issue like this would be necessary for applicants. This could include information on appropriate consultation processes, collaborating with traditional knowledge holders and peak bodies of that region or language group who can advise on those persons with the authority to provide or withdraw consent. -Rather than voiding the free, prior and informed consent obtained by the applicant a dispute may inform consent parameters or protocols for the use of the IK.



SBS has attached a confidential annexure to this submission to illustrate some of the practical considerations.

Labelling options to promote authentic Indigenous products

Fake Aboriginal and Torres Strait Islander art, products and programs continue to be sold in Australia – where those products have no connection to Aboriginal and Torres Strait Islander people and communities.

NITV, Australia's only national Indigenous free to air network, works closely with the independent Aboriginal and Torres Strait Islander production sector, and has long held a policy of ensuring that two out of three of any creative team working with NITV must be Aboriginal or Torres Strait Islander.

SBS supports initiatives which make it easier for these producers, and other owners of IK to highlight their authentic goods and services, and to make it easier for consumers to identify and choose authentic products, including by paying to use a certification trade mark. In particular, SBS supports access to funding and advice for the sector on this issue by government to build awareness of the legal options.