Wurundjeri
Woi-wurrung

Cultural Heritage
Aboriginal Corporation

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Dear IK Project Team

Response to Indigenous Knowledge Consultation Paper

Thank you for the opportunity to make a submission to IP Australia's "Enhance and Enable – Indigenous Knowledge Consultations 2021."

This submission is made on behalf of the Wurundjeri Woi-wurrung Cultural Heritage Aboriginal Corporation (**Wurundjeri**) which is the representative body for the Wurundjeri Woi-wurrung people, the traditional owners of the country in and around Melbourne, Victoria. Wurundjeri is a Registered Aboriginal Party under the *Aboriginal Heritage Act 2006 (Vic)* and is incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth).*

Executive Summary

Although we support IP Australia's objective of "enhancing Australia's IP system to support Aboriginal and Torres Strait Islander peoples to benefit from and protect their Indigenous Knowledge (IK)"[1]we do not consider that the proposals set out in the Consultation Paper are suitable to achieve can this objective.

IK is a concept that extends beyond the portfolio of intellectual property rights (IP) that IP Australia oversees. Although some categories of IP Australia-overseen rights are capable of providing a degree of protection for some indigenous-related IP, in many cases:

[1] See IP Australia, *Indigenous Knowledge Consultation Paper,* February 2021 at p 3. See https://www.ipaustralia.gov.au/sites/default/files/ik_consultation_2021.pdf

- these will not provide appropriate or adequate protection for IK;
- the use of these categories of IP rights to protect IK will in some cases undermine or damage IK; and
- the nature of the legal protections provided by IP Australia's legislative portfolio are not aligned with indigenous customary laws.

Many types of IK will not qualify for protection under the patents regime because information about an invention will have been shared amongst an indigenous community over many years. Other examples of IK will be collectively owned by an indigenous people, not an individual. Complex lines of authority may need to be negotiated before IK can be used for a particular purpose. A variety of consents may need to be negotiated and obtained depending on how IK is to be used and how benefits will be derived. The author or creator of IK may be unknown but its custodian may be known. Many examples of IK are protected indefinitely under indigenous customary law.

Most IK will be a collective, rather than an individual, right. IP Australia's portfolio of IP laws are not well suited to support the conferral or enforcement of collective rights.

We are concerned that protections for IK that have, to date, relied on non-disclosure outside an indigenous people will be eroded if individuals are able to opportunistically appropriate group rights for their own, individual benefit. A system of protections that involves a disclosure trade-off for a period of protection or which restricts protections to categories of goods and services subject to the payment of fees is unsuitable and inconsistent with systems of indigenous customary law.

Given Australia's long history of dispossession, marginalisation, racism and injustice towards Aboriginal and Torres Strait Islander peoples' tangible property, it would be unacceptable for this to be replicated for intangible property.

Our position is that the development of *sui generis* legislation, consistent with Australia's international obligations, is the preferred approach to the protection of IK and forms of traditional expression. By this we mean that we support the development of specific legislation outside of Australia's existing intellectual property framework for the specific protection of Aboriginal and Torres Strait Islander IK or forms of traditional cultural expression. We urge IP Australia to support this approach.

Self-determination

The OECD states that:

> Across advanced OECD nations there has been a shift toward self-determination (the right for indigenous communities to govern their own affairs and shape relations with institutions with the framework of the nation state)...
>
> Self-determination is now generally accepted across many countries as a key principle in indigenous policy, and is reflected in the institutional arrangements which have been established within their policy frameworks for indigenous affairs...Principles of self-determination have led to a decentralisation of competences, for example, giving indigenous peoples control in terms of the governance of municipal, education and health services.[2]

[2] Organisation for Economic Cooperation and Development. See https://www.oecd.org/regional/regionaldevelopment/Indigenous-Commuities-project.pdf

Self-determination in the context of IK involves ascertaining how IK was protected and used by indigenous peoples and building a legal framework that reflects those traditions. Self-determination does not occur where existing IP rights are tinkered with to absorb or cover aspects of IK. It is a denial of self-determination to shoehorn IK into categories of intellectual property rights that were not designed to protect IK and where the requirements for, or extent of, protections conflict with or attenuate indigenous customary law.

The need for bespoke protection: *sui generis* rights

The World Intellectual Property Organisation (WIPO) has undertaken gap analyses to identify the extent to which existing western-based categories of intellectual property adequately protect IK.[3] It has concluded that they are unsuitable and has recommended the development of bespoke protections for what it refers to as Traditional Knowledge (TK), Traditional Cultural Expression (TCE) and Genetic Resources.[4]

Since 2008, WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Intergovernmental Committee) has been working on developing model protections that cover TK, TCE and genetic resources. In 2019, the Intergovernmental Committee produced draft articles for the protection of both TK[5] and TCE.[6]

We believe that these WIPO draft articles are a sound basis on which to develop bespoke Australian legislation that protects IK and that this approach should be preferred over IP Australia's approach.

Response to Proposals

IP Australia has sought responses about four proposals. Our response to these should be read against our preference for the development of sui generis rights.

Establishing an Indigenous Advisory Panel

This proposal is supported provided that:

- the panel is constituted under legislation that sets out the panel's legal powers and authorities;
- appointments to the Advisory Panel are Governor General in Council appointments;
- the composition of the Panel is inclusive and encompasses those with relevant expertise;
- the Panel's roles and responsibilities are clearly defined and documented; and
- the Panel is properly resourced and members are paid.

We do not believe that an advisory panel will be able to provide IP Australia with expertise about all of the ways in which traditional laws and customs protect IK or how these are applied and enforced. We note that there may be competing claims to country and its cultural associations that impact on IK entitlements. We would be interested to understand how IP Australia plans to approach and resolve questions of contested IK rights.

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[3] See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis,* 6 July 2018. WIPO/GRTKF/IC/37/7. See https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=410365

[4] For the purpose of this submission we use 'IK' to cover all of these. It should be noted that we have not attempted to provide an exhaustive definition of IK in this submission.

[5] See https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=439178

[6] See https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=439176

Measures for trade mark or designs using Indigenous Knowledge

IP Australia's objective "to enhance the trade marks and designs systems to prevent rights being granted over IK in circumstances that Aboriginal or Torres Strait Islander people or communities consider is inappropriate, unfair or offensive' is supported.

There are, however, a variety of complex practical challenges associated with operationalising this objective. How will Aboriginal and Torres Strait Islander views be ascertained? How will consultation occur? With whom will it take place? Aboriginal and Torres Strait Islander communities and cultures are not homogenous. There are over 500 distinct peoples, many of which have significantly different cultural practices. The specifics of IK vary community by community. We do not understand how an advisory panel could possibly discharge IP Australia's expectations. In the absence of a fully developed proposal we are concerned that this proposal amounts to the delegation of decision-making power to a panel whose functions, activities and accountabilities are unclear.

New requirements to declare the source of Indigenous Knowledge used in new innovations

Implementing this requirement would necessarily involve significant legislative amendments, not the least of which would be to introduce definitions of IK (Traditional Knowledge, Traditional Cultural Expression and Genetic Resources) into legislation administered by IP Australia, in particular the *Patents Act 1990 (Cth)* and the *Plant Breeders Rights Act 1994 (Cth)*.

On the basis that neither piece of legislation was purpose-built to protect IK, our view is that it would be preferable to develop *sui generis* legislation rather than to attempt to retrofit these protections into legislative frameworks not designed to support or recognise IK rights.

Labelling to promote authentic Indigenous Products

Traditionally issues associated with product labelling have been dealt with under Commonwealth, State and Territory consumer protection laws. We do not believe that a case has been made out to introduce a carve out of these responsibilities for IK across a range of intellectual property laws.

As consumer protection agencies are the organisations that generally oversee labelling laws they are equipped with investigatory and prosecution powers and functions that can be used to deter and punish false and misleading labelling. We do not understand how these powers and functions would be conferred on IP Australia and how it would undertake these activities.

Please do not hesitate to contact the Wurundjeri General Counsel, David Watts, if you require any further information.

Yours sincerely

[redacted]

Alex Parmington
CEO