



AIATSIS

**AIATSIS Submission to
IP Australia**

Interim Report Consultation

November 2022

Introduction and Background to Submission

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to provide a submission in response to IP Australia's Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge. This submission is made under AIATSIS' legislated function to provide advice to the Commonwealth on the situation and status of Aboriginal and Torres Strait Islander culture and heritage.¹

This submission builds on AIATSIS' previous submissions to IP Australia in 2016², 2019³ and 2021⁴, and AIATSIS' ongoing participation in IP Australia's Indigenous Knowledge Working Group.

AIATSIS is Australia's premier national institute dedicated to telling the story of Aboriginal and Torres Strait Islander Peoples' knowledge, societies, and cultures. We are the custodian of Australia's national collection of Aboriginal and Torres Strait Islander heritage materials and a publicly funded research agency. Under the AIATSIS Act (1989), AIATSIS has statutory responsibility and authority to provide leadership in ethical practice and protocols in research and collections activities relating to Aboriginal and Torres Strait Islander peoples.

In 2020, AIATSIS launched the AIATSIS Code of Ethics in Aboriginal and Torres Strait Islander Research ("AIATSIS Code of Ethics" or "the Code").⁵ The Code is accompanied by A Guide to Applying the AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research.⁶

The Code sets consistent national standards for the ethical and responsible conduct of all Aboriginal and Torres Strait Islander research. The ethical principles underpinning the Code proceed from a presumption of Indigenous authority as self-determining peoples, and as rights holders, whose knowledge must be **recognised**, **respected** and **valued**, and who has authority to

¹ Australian Institute of Aboriginal and Torres Strait Islander Studies Act (1989), s 5(e).

² Australian Institute of Aboriginal and Torres Strait Islander Studies, How Indigenous Knowledge can work with the intellectual property (IP) system Mar 2016 (2016), <https://aiatsis.gov.au/publication/35865>

³ Lisa Strelein & Clare Barcham, AIATSIS Submission - Protection of Indigenous Knowledge in the Intellectual Property System (2019), <https://aiatsis.gov.au/publication/34963>

⁴ Australian Institute of Aboriginal and Torres Strait Islander Studies, Indigenous Knowledge Consultation Paper (February 2021), https://www.ipaustralia.gov.au/sites/default/files/aiatsis_submission_to_ip_australia_ik_consultation_paper_may_2021.pdf

⁵ Australian Institute of Aboriginal and Torres Strait Islander Studies, AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research (2020), <https://aiatsis.gov.au/sites/default/files/2020-10/aiatsis-codeethics.pdf>

⁶ Australian Institute of Aboriginal and Torres Strait Islander Studies, A Guide to Applying the AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research (2020), <https://aiatsis.gov.au/sites/default/files/2021-03/aiatsis-guide-applying-code-ethics-guide-revisedmarch21.pdf>

control their knowledge. AIATSIS welcomes that the core value or themes of the Code are recognised in the IP Australia's interim report.

Part A: Challenges for Indigenous Knowledge Protection

Q1: What other issues affect the capacity of Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK?

The importance of community and the collective as creating and maintaining culture is of immense significance when responding to the centrality of the artist. Current Intellectual Property (IP) and Copyright law within Australia continues to reinforce ideals of the artist as an individual, distinct from that of culture and community, as a result it neglects to recognise the concept of community control and collective ownership of Indigenous knowledges and culture. The current absence of a legal framework for Indigenous Cultural Intellectual Property (ICIP) or Indigenous Knowledge (IK) has a direct impact on, and affects the capacity of, Aboriginal and Torres Strait Islander peoples from providing protection to, and benefiting from, their IK, as highlighted in the recent inquiry into fake art.

Further, the Copyright Act 1968 which provides specific rights to copyright owners could hinder Aboriginal and Torres Strait Islander peoples from exercising their rights over IK.

Part B: Models for SUI Generis Legislation

Q1: Should each of these four elements be part of a stand-alone legislation model for the protection of IK? Why or why not?

While the drafting of sui generis legislation may be considered by some as overly ambitious or burdensome, as noted in the findings of the Fake Art inquiry⁷ and highlighted in the *Bringing it Forward Report*⁸, all four elements should be considered as part of any stand-alone legislation model for IK moving forward as a wholistic view and legislative framework which provides for the recognition, expression and protection of IK is required.

⁷ House of Representatives Standing Committee on Indigenous Affairs 2018, *Report on the impact of inauthentic art and craft in the style of First Nations peoples*, Commonwealth of Australia, November 2008

⁸ Australia Council for the Arts 2022, *Bringing it Forward: The journey towards a national body for First Nations arts and culture*.

Q2: Is there anything missing from any of these elements?

Whilst we do not see anything missing from these elements, there are several factors which need to be carefully considered in the drafting of any new legislation on IK. For example,

- How will the new Act interact with existing IP and intangible cultural heritage laws (i.e., Copyright Act 1968)? Will one Act have the authority to override the other?
- How will communal rights over traditional knowledge and traditional cultural expressions be decided? and by whom?
- If the Indigenous knowledge is registered to a singular group/family could another family also claim the same IK?
- How and who will have authority to investigate and enforce breaches of the Act? How will penalties be applied and who will be the beneficiary.

Part C: Proposed Cost Benefit Analysis Methodology

Q1: Which element (1 to 4) and combination of elements would deliver most benefit to you?

While all four Elements provide several benefits, Elements 1 and 3 would provide the most direct benefit to AIATSIS. Both Element 1 and 3 build upon the development of, and contribute to, the AIATSIS Code of Ethics, which sets the national standard for the ethical and responsible conduct of all Aboriginal and Torres Strait Islander research, across all disciplines, and includes guidance on the management of ICIP. The establishment of Elements 1 and 3 would help to further cement the AIATSIS Code as a national standard, whilst providing the much-needed legal framework for the protection of IK. Further, Element 1 would enforce the adoption of the AIATSIS Code by researchers.

Q2: What broader benefits, costs or risks would stand-alone legislation like this deliver to Aboriginal and Torres Strait Islander peoples?

In the absence of the draft bill, it is anticipated the creation of new stand-alone IK legislation would deliver a number of broad benefits to Aboriginal and Torres Strait Islander peoples. Firstly, it will enshrine the strongest message, both domestically and internationally, that IK is valued and protected within Australia. It would also provide a unique opportunity for the Australian Government to better engage with Aboriginal and Torres Strait Islander communities and artists in the resurgence and strengthening of their cultures and acknowledge the enduring connection to, and importance of knowledge, lore, traditions, expression, and Country for Aboriginal and Torres Strait Islander peoples.

Significantly, the creation of stand-alone IK legislation would deliver on a long overdue need, and call for, greater protection and control over IK by Aboriginal and Torres Strait Islander peoples and is consistent with the Australian Government's commitment to Article 31 of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁹, which asserts the right of Indigenous peoples to "maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions".

However, it is difficult to identify the costs or risks of any stand-alone legislation at this present point.

Conclusion

AIATSIS, in principle, supports the development of new stand-alone IK legislation. We believe the broad benefits of IK legislation would far outweigh the cost of its creation and provide for greater protection of IK. Further the creation of legislation would bring Australia in line with many of our Pacific neighbours who have successfully introduced legal mechanisms to protect their First Nations IK.

AIATSIS would welcome an opportunity to work with the IP Australia in the development of new legislation and shaping of the National Indigenous Knowledge Authority.

⁹ UN General Assembly, United Nations Declaration on the Rights of Indigenous People (October 2007), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

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