Submission to the IP Australia Interim Report Scoping Study on Stand Alone Legislation to Protect and Commercialise Indigenous Knowledge
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We welcome the opportunity to respond to this interim report.

Watson and Bowrey are lawyers and long time collaborators on issues of international law and Indigenous rights and strategies to improve respect for First Nations knowledge rights. Tualima and Bowrey are intellectual property experts with considerable practical experience and scholarly engagement with discussion of TK and Indigenous knowledge rights. Regan is an Undergraduate LLB Honours student supervised by Bowrey, currently researching certification marks and appropriate governance models to evaluate their value for Aboriginal enterprises engaged in the cosmetics industry.

We address our comments with respect to the report headings below.

PART B. Models of Sui Generis Legislation

ELEMENT 1: CREATE A NEW IK RIGHT

Pacific Model Laws
Pacific Model Laws are cited as one of the inspirations for exploring standalone legislation. These laws were formulated as a point of reference for Pacific countries to regulate access to TK and prevent the misappropriation of knowledge and culture by third parties. To date this includes:

- Model Law on the Protection of Traditional Knowledge and Expressions of Culture 2002;
- Model Law on Traditional Knowledge, Biological Resources, Innovations and Practices 2002;
- the Pacific Island Forum's Traditional Knowledge Implementation Action Plan 2010; and
- the Melanesian Spearhead Group Framework Treaty on the Protection of Traditional Knowledge and Expressions of Culture 2011 (Secretariat of the Pacific Community, online).

Currently, only three countries in the Pacific have specific legislation concerning the protection of TK, namely Vanuatu (with its *Protection of Traditional Knowledge and Expressions of Culture Act 2019*), Cook Islands (with its *Traditional Knowledge Act 2013)* and Niue (with its *Taoga Niue Act 2012*).

PhD research by Hai-Yuean Tualima has revealed that while some of these laws have been in operation for a decade there is no operational example of use of the Pacific Model Law or stand alone TK laws where it has provided value in advancing protection or control over

knowledge. Rather, outsiders promoted new TK laws as the saving grace for protecting and preserving TK in the Pacific and countries felt obliged to accept expert advice from outsiders. These laws generally perpetuate existing agendas and reproduce legal priorities as already identified in international debates in the absence of research into the needs and expectations of the respective communities or peoples in the Pacific. They do not provide a workable basis to managing or improving regulation of TK in the Pacific. Given that they are not well regarded by Pacific Islanders for whom they were designed it is troubling that they could be promoted as a model of valuable rights to Australian First Nations Peoples.

The concept of a standalone law

The value of a standalone law is the educative value it plays in raising attention to the issue of misappropriation and piracy of First Nations' culture and bicultural heritage. However, under the Australian constitution it is impossible for any Australian law to standalone. The proposed new Australian law is not based in recognition of First Nations' laws, cultures and sovereignty. First Nations' Peoples and the Australian public who lack legal training and a sophisticated understanding of intellectual property law could easily be misled by this reference.

In standing alone—the new communal right has no articulation within mainstream IP law. First Nations' Peoples may be misled into thinking that the communal right takes priority over western intellectual property rights, including those administered by IP Australia. It is unclear how a communal right would be valued in the very likely event of a conflict with copyright, design, patent and trade mark rights. It is also uncertain how communal right disputes could be lawfully arbitrated between sovereign First Nations without reference to Aboriginal inter-nations law.[1]

If the intention is to provide for collective ownership and management of rights, there are multiple existing legal forms that already permit this- incorporation, co-operatives and other models for social enterprise, co-authorship, co-inventorship, trusts and fiduciary relationships, collective trade marks. Any case for creating a new communal right should be evaluated with reference to its practical benefits over established legal forms of collective rights ownership and management.

ELEMENT 2: MEASURES AIMED AT INAUTHENTIC PRODUCT

We are supportive of the use of consumer law to combat piracy of First Nations' knowledge, cultural heritage and bio-cultural knowledge and further investigation into the use of certification trade marks to appropriately signal to consumers connections to First Nations enterprise.

We strongly support enhanced, and appropriately resourced and funded, border protection measures to prevent international trade in inauthentic product.

[1] Watson, I., *Indigenous peoples as subjects of international law*, (Routledge, US, 2017) pp 96-119; Watson, I., 'Inter-Nation relationships and the natural world as relation', in U Natarajan & J Dehm (eds), *Locating Nature: Making and Unmaking International Law*, (Cambridge University Press, UK, 2022) ch. 14, pp. 354-374..

A ‘connection to country’ certification mark where community and supply chain links could be factually verified would do more work to support and protect knowledge than a vague communal right that is ‘standalone’. This kind of trade mark make could allow communities and First Nations’ enterprises to govern use of the mark without the need to create a bureaucracy assessing racialised entitlement to rights and authenticity of products.

ELEMENT 3: NATIONAL INDIGENOUS KNOWLEDGE AUTHORITY

We would support the funding of a body with educative functions, in particular assisting First Nations’ Peoples to better understand available protection under Australian law AND working with the ACCC to better communicate respect for First Nations knowledge, heritage and biocultural laws to the Australian Government and businesses.

Given impediments to access and funds to employ private legal services, funding to provide assistance with rights registration and licensing is also welcome.

We are more ambivalent about powers to investigate or initiate enforcement actions. Management of a fund to support the use of private legal services (like IP legal aid and a small claims Tribunal) may be more appropriate.

We do not support the term “authority” being included as part of the functions of any new body. What is being proposed is not Indigenous cultural governance but a bureaucracy authorised by the Australian state which is voluntary for First Nations’ Peoples to engage with. To suggest it has the power of an authority overstates the authority of such a body.

We would welcome working further with IP Australia in advancing practical solutions that enhance respect for First Nations’ rights.

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