

# Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge

Commissioned by IP Australia on behalf of the  
Intellectual Property Policy Group



## ACKNOWLEDGEMENTS

We acknowledge Aboriginal and/or Torres Strait Islander Peoples as the Traditional Custodians of our land and its waters. Ninti One, and IP Australia wish to pay their respects to Elders, past and present, and to the youth, for the future. We extend this to all Aboriginal and/or Torres Strait Islander people reading this report.

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## DISCLAIMERS

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The laws and policies cited in this Interim Report are current as at August 2021. They are generally discussed for the purposes of providing this discussion paper. No person should rely on the contents of this document for a specific legal matter.

## OUR LOGO STORY

Our logo is based on the painting 'Two Women Learning', created by Aboriginal artist Kathleen Wallace. Kathleen was born and raised at Uyetye, on the Todd River – her father's homeland. Her mother is from Therirrerte. Her grandfather taught her stories of her culture and land from an early age. 'Two Women Learning', which illustrates how different people hold different knowledge, different parts of the story, and how they are responsible for keeping that story safe and passing on the knowledge.



## INTRODUCTION

The Australian Government has commissioned this study into the scope and feasibility of new stand-alone legislation protecting Indigenous Cultural Intellectual Property, including Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE). The objective of the study is to identify models that could aid Indigenous Australians to protect and commercialise their knowledge and cultural expressions.

In this paper, the term 'Indigenous Knowledge' or 'IK' is used to cover a range of knowledge held and continually developed by Aboriginal and Torres Strait Islander peoples. It includes TCE, TK and knowledge relating to Genetic Resources.

Previous work, such as the House of Representatives Standing Committee on Indigenous Affairs' [Report on the impact of inauthentic art and craft in the style of First Nations peoples](#) found that existing laws do not provide an appropriate framework for protecting traditional communal rights and recommended a consultation process to develop new legislation.

This interim report of the study has been made available to seek initial input, particularly from Aboriginal and Torres Strait Islander people, on the potential elements which should be contained in new stand-alone legislation. This will be followed by a final report into the options for stand-alone legislation and consideration of next steps.

The interim report is presented in three parts to seek feedback on:

- Part A: the challenges in protecting Indigenous Knowledge.
- Part B: potential elements for stand-alone legislation to help address the challenges.
- Part C: a methodology to assess the costs and benefits of any new legislation.

This report does not cover reform to the existing Intellectual Property (IP) legislation. IP Australia's Indigenous Knowledge [consultations](#) in 2021 sought feedback on enhancing existing IP laws to support Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK. IP Australia is currently investigating a range of policy measures, including possible change to existing legislation, in response to stakeholder feedback.

## HAVE YOUR SAY

There are a range of questions for you to provide feedback. Request a call back or send a submission to [IKproject@ipaaustralia.gov.au](mailto:IKproject@ipaaustralia.gov.au) [http://mailto/](http://mailto:IKproject@ipaaustralia.gov.au) by no later than 2 November 2022.

If you have any questions, please email [IKproject@ipaaustralia.gov.au](mailto:IKproject@ipaaustralia.gov.au)

## PART A: CHALLENGES FOR INDIGENOUS KNOWLEDGE PROTECTION

The report recognises and builds upon the extensive feedback collected from Aboriginal and Torres Strait Islander people about the challenges with protecting IK as part of the government inquiries and public consultations to date.

Building upon that feedback, the overarching problem with existing protection has been defined for the purpose of this study as:

*The current legal framework does not and is not designed to provide First Nations people with the ability to obtain holistic recognition and protection of their Indigenous cultural and intellectual property rights. Any solution should be informed by and address the needs of First Nations people. It should recognise the cultural governance of First Nations peoples including their cultural authority to protect, use and share their IK as they see appropriate, which may include growing the demand for authentic Indigenous industries.*

### PREVIOUS CONSULTATIONS

The 2018 [Standing Committee on Indigenous Affairs' inquiry](#) gathered a wide range of evidence and found that the continuing prevalence of inauthentic products denies Aboriginal and Torres Strait Islander people the chance to earn a living from their culture and has a profound and harmful effect on culture and heritage.

In 2019, IP Australia undertook community consultation which confirmed six issues as primary concerns of Aboriginal and Torres Strait Islander peoples relating to their IK. These were set out in the discussion paper by Terri Janke and Company entitled [Indigenous Knowledge: Issues for Protection and Management](#) as:

- misappropriation of Indigenous arts and crafts
- misuse of Indigenous languages and clan names
- ownership of recordings and digitised records of IK
- commercial exploitation of IK without benefits flowing to Indigenous communities
- unauthorised use of IK relating to genetic resources
- misuse of sensitive secret sacred knowledge.

The consultations revealed four consistent themes that Aboriginal and Torres Strait Islander people indicated they want in relation to IK:

- **Control** - to be able to control who uses IK and how it is used
- **Protection** - measures that can be used to stop unauthorised use of IK and impose sanctions against misappropriation
- **Recognition** - to be recognised as the owners of their IK
- **Respect** - for their ownership of IK and the cultural protocols associated with it.

### PART A Consultation Question

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

## PART B: MODELS FOR SUI GENERIS LEGISLATION

This scoping study has considered stand-alone laws directed to the protection of IK in other countries including the US *Indian Arts and Crafts Act*, Panama's *Special System for the Collective Intellectual Property Rights of Indigenous People's Law* and the Pacific Model Law. Each model has both advantages and disadvantages and incorporates aspects tailored uniquely to the circumstances of its legal system and cultural context.

Looking at these models, four potential elements for a legal framework for the protection of IK in Australia have been identified:

- an enforceable communal legal right covering TK and TCE
- measures to prevent trade in inauthentic product and to promote authentic product
- a National Indigenous Knowledge Authority with powers to administer and enforce the new IK rights
- measures to support and build the capacity of Indigenous businesses to manage and commercialise their IK.

The cornerstone for a new system for protecting IK is *Element 1: Create a new IK right* but the complexity of the issues identified in the consultations undertaken to date indicate that other additional elements may be needed to secure comprehensive, effective protection. The study is also seeking feedback on three additional elements which would complement any stand-alone legislation establishing new IK rights.

The various elements include proposals not only for new laws but also accompanying policies, resources, communication and education packages and capacity building strategies.

This study does not suggest a regime for new rights relating to genetic resources which presents specific challenges and requires a different approach. An international system for access and benefit sharing of genetic resources is the subject of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*.

### ELEMENT 1: CREATE A NEW IK RIGHT

Stand-alone legislation could establish a new form of IP right recognising collective or communal rights in TCE and TK owned by the communities, language groups or peoples who are the Traditional Owners of that TK and TCE.

Unlike other IP rights, ownership and protection would not be dependent on any requirement of originality or novelty and would not have a set term for protection. These rights would recognise the ancient, continuing and evolving cultural knowledge and heritage of Aboriginal and Torres Strait Islander peoples. Similar to copyright, protection would not be dependent on either a registration process or inclusion in a database.

There would be no legal restrictions on commercial and non-commercial use of the IK by Traditional Owners or members of communities which own the rights and where use is consistent with their own cultural protocols.

It would be the responsibility of third parties that want to use IK to obtain the free, prior and informed consent of the Traditional Owners and to enter into appropriate licence agreements to share financial and non-financial benefits. The new IK rights could include accompanying 'moral rights' requiring all third-party users to acknowledge the owners of IK correctly when using it and to use licensed IK respectfully in a way that is not derogatory to traditional communities.

Commercial and non-commercial use by third parties would be prohibited unless the free and prior informed consent of the rights holders has been obtained. There may be limited exceptions made available for education or news reporting, however such exceptions would be designed in consultation with Aboriginal and Torres Strait Islander people. Those undertaking research into or using IK, whether for commercial or academic purposes, would still be required to secure the authorisation of the Traditional Owners.

The enactment of legislation to implement these new rights could be accompanied by a non-legislated resourcing package to make the system accessible to Aboriginal and Torres Strait Islander peoples, including education and communication strategies. Funding would be available for dedicated legal advice for Traditional Owners to enforce their rights. It would also deliver education for the broader public to build understanding that IK rights exist and outlining best practice approaches to avoid infringing on IK.

## ELEMENT 2: MEASURES AIMED AT INAUTHENTIC PRODUCT

Element 1 could be complemented by additional legislative measures designed to deter trade in inauthentic product and to promote trade and commerce in authentic product.

At present, Australia's consumer laws allow action to be taken if a product is falsely labelled or marketed as being made by an Indigenous business or artist. However, this does not wholly prevent the sale of products 'in an Indigenous style' or 'inspired by' Indigenous art if there is no claim that they are authentic.

New legislation could make it an offence to sell goods featuring or incorporating TCE unless they are made by Aboriginal or Torres Strait Islander people or are made by non-Indigenous businesses which have entered licences with the relevant owners of the TCE, unless the goods are clearly labelled as inauthentic.

Such a system operates in the United States where the *Indian Arts and Crafts Act* ensures that only traditional native American Indians or communities (or those authorised by them) can produce, market and sell goods identified as associated with American Indian culture. Goods imitating American First Nations style products that don't have authorisation must clearly indicate that they are inauthentic.

In addition, a scheme to identify genuine Indigenous products through product labelling or packaging could be introduced. This would provide consumers, retailers and authorities, particularly border officials, with a simpler way to identify at the point of purchase or importation whether a product has been made by, or under licence from, an authentic source. Such a system might involve a single identification mechanism for all Indigenous products or could provide for different identification markers for different communities, regions and Traditional Owners. There are also a range of technological solutions to explore, including unique digital labels which could be used to trace provenance through supply chains.

In 2021, IP Australia sought Indigenous businesses' and creators' views on whether they saw an authenticity labelling scheme as a useful tool to indicate authenticity of products, and heard mixed feedback. Some sectors expressed interest but others raised the concern that labelling products as authentic doesn't address the sale of inauthentic products and instead places a burden on Aboriginal and Torres Strait Islander creators. As a result, this element introduces a voluntary labelling scheme accompanied by legislative measures designed to deter trade in inauthentic product.

To address some of the consultation concerns and shortcomings of historic labelling schemes, the positive labelling system should avoid onerous proof of identity requirements and could:

- be free for use by Indigenous businesses;
- be voluntary for Indigenous businesses;
- include corrective measures and penalties for misuse by non-genuine businesses.

Key considerations in developing a labelling system would be how to characterise goods as inauthentic or genuine product, and how barriers to adoption, such as accessing digital technology, might be overcome.

This element could also include enhanced, and appropriately resourced and funded, border protection measures to prevent international trade in inauthentic product. Currently there are avenues for businesses to take action to prevent the importation of product made overseas which they suspect will infringe copyright or consumer laws, but this is costly and requires the advance knowledge of suspect shipments. New legislation could be enacted empowering border officials to act proactively to prevent the entry into, or export from, Australia of products featuring or incorporating Indigenous designs and styles unless evidence is provided demonstrating that they have been manufactured under agreement with Traditional Owners. Problematic products could be identified by the absence of authentic product labelling as described above.

The enactment of legislation would be accompanied by a government resourced education and marketing campaign promoting the value of Australia's TCE and encouraging consumers and tourists to 'buy genuine.'

### ELEMENT 3: NATIONAL INDIGENOUS KNOWLEDGE AUTHORITY

This element proposes adding the supporting structure of a legislative body to Elements 1 and 2 which would work in partnership with Aboriginal and Torres Strait Islander peoples to assert, protect and enforce their IK rights. This body could help reduce the burden on Traditional Owners to enforce the new IK rights which would otherwise require expensive legal action and to negotiate legal agreements. It would also help streamline processes for businesses working with IK and provide legal certainty where the obligations under Elements 1 and 2 had been met.

A 2018 [discussion paper by Terri Janke and Company](#) commissioned by IP Australia and the Standing Committee on Indigenous Affairs' Report both flagged the need for an Indigenous decision-making body to assist in the protection of IK.

This Authority could exercise a range of responsibilities including:

- Traditional Owners could choose to authorise the Authority to negotiate IK licences and collect licence fees on their behalf.
- Establishing processes to help third parties (collaborators, businesses and researchers) to identify and secure the consent of Traditional Owners to the use of their IK.
- Distributing any licence fees collected from the third-party users to the Traditional Owners less a small commission applied towards its cost of operations.
- Managing and enforcing a system to identify genuine Indigenous product proposed in Element 2.
- Liaising with Customs to identify and verify the authenticity of products at the point of import into, or export from, Australia.
- Education and advice to Traditional Owners on how to protect and enforce their IK and implementing a range of compliance tools for business.
- Power to initiate enforcement action against unauthorised use and misappropriation of IK, breaches of licence agreements, unauthorised imports and breaches of the labelling standards.

The services offered by this body would be accessible to all Aboriginal and Torres Strait Islander peoples, but it would not be mandatory to use them. Traditional Owners could choose to negotiate their own licences directly with third parties and collect licence fees directly. There would be no fee to Traditional Owners to access the services of this body other than a commission on licence fees.

The Authority could maintain a database or register of IK information and establish processes for the management of that information. Traditional Owners could choose whether or not to register details of their

IK and the licences they have granted (even licences negotiated directly). Inclusion of information in the database would be voluntary. The register could make limited information publicly available, for example a general description of the IK, the identity and contact details of the IK owner, the name of the licensee and the date the licence commenced. This could be useful as a resource for potential licensees (or members of the public concerned at a third-party use) who could check if certain IK has been licensed or needs a licence. The register would not disclose secret sacred IK nor the confidential commercial terms of licences.

Such a register may be a useful repository for Traditional Owners to record details of their IK without disclosing more than they wish to disclose. Previous consultations have identified a need for a way to document and record IK while flagging the danger of allowing unrestricted access to any database or making inclusion in a database a precondition to protection.

It may not be appropriate for one body to carry out all the functions outlined above. The function and governance of any such body would be designed in partnership with Aboriginal and Torres Strait Islander peoples. The option of a distributed model of cultural authority could also be explored.

#### **ELEMENT 4: MEASURES TO SUPPORT COMPETITIVENESS OF INDIGENOUS BUSINESS**

This element reflects that legislation alone may not enough to assist Aboriginal and Torres Strait Islander people to derive commercial value from their IK.

Element 4 involves the development and implementation, in consultation with Aboriginal and Torres Strait Islander peoples, of specialised government programs and capacity building strategies to complement the measures described in Elements 1 to 3. An example could be an employment program for Indigenous rangers to work with Customs investigating fake and non-genuine product.

These programs could work in partnership with Aboriginal and Torres Strait Islander peoples, organisations and advisers to support Indigenous business to derive commercial value from IK. Element 4 would provide support in addition to current programs such as Indigenous Visual Arts Industry Support (IVAIS) funding for Indigenous art centres and initiatives such as the Federal government's Indigenous Procurement Policy and the Supply Nation database of verified Indigenous businesses.

An important aspect would be the evaluation and coordination of the existing programs currently delivered by government and non-government organisations to ensure the delivery of an integrated and effective level of support which is not fragmented. Better connecting Indigenous businesses with appropriate and effective support could be an initiative for existing government bodies, or one of the responsibilities exercised by the National Indigenous Knowledge Authority described in Element 3.

#### **PART B Consultation Questions**

**1. Should each of these four elements should be part of a stand-alone legislation model for the protection of IK? Why or why not?**

**2. Is there anything missing from any of these elements?**



## HOW MIGHT THE MODEL WORK IN PRACTICE – A HYPOTHETICAL

**Scenario: An Australian company imports souvenir boomerangs made overseas for sale in a number of shops it operates on the Gold Coast. These products are decorated with ‘look-alike’ Aboriginal style designs. The packaging and labelling does not say that the products are made by Aboriginal people.**

**The current position:** if the design painted on the boomerangs copied the art of an Australian artist, the copyright of that artist might be breached. The shape of the boomerang or how it works would not be protected by design and patent rights as they only apply to features which are new and have been kept secret prior to application. It would be difficult to use the Australian Consumer Law if the shops weren't falsely labelling and advertising the products as being authentic products made by Indigenous people.

**Under Element 1:** Where identified, the Traditional Owners of the IK in the creation and use of unique boomerang styles could stop the sale of products made in breach of their IK right (that is, made without the permission of the Traditional Owners). The Indigenous communities that owned IK rights in the motifs or particular style of decoration used on the boomerangs could also take action as the misappropriation of their traditional form of cultural expression would breach their IK rights.

**Under Element 2:** Border officials would have the power to seize shipments of the fake boomerangs coming into Australia unless the importer could show that they had been made by, or with the permission of, the Traditional Owners. If the products were already in Australia, it would be an offence to sell them unless they were clearly labelled as not being authentic – even if no claim of breach of an IK right was made. The producers of genuine products would be entitled to use the authenticity labelling system and marketing campaigns would encourage tourists and consumers to use that labelling system to identify authentic product. It would be an offence for the importer to use that labelling system on its inauthentic product.

**Under element 3:** A new National Indigenous Knowledge Authority would liaise with Customs to help identify and stop the import of the fake product. It could also either assist the Traditional Owners to take action or start legal proceedings itself against the importer to stop the sale of the inauthentic product. The Traditional Owners would be entitled to use Authority services to negotiate licences and permissions to make genuine product. The Authority could also manage the labelling system and take action against the importer if it used the authenticity label on the inauthentic boomerangs.

**Under element 4:** the government would invest in capacity building programs, seed funding and other assistance to help Traditional Owners to develop their own products for sale and to grow strong businesses. Consumers would be less likely to buy fake product as there would be more ethical authentic product available.

## PART C: PROPOSED COST BENEFIT ANALYSIS METHODOLOGY

In 2019, IP Australia commissioned the report entitled '[Estimating the Market Value of Indigenous Knowledge](#)'. This report seeks to understand the economic value of IK.

Using the insights and understanding gained from this research about culturally appropriate methodologies, the Australian Government intends to undertake a preliminary cost benefit analysis (CBA) of the proposed elements. The analysis will assess how each element incrementally adds benefits for Aboriginal and Torres Strait Islander peoples over the current system and will determine the likely costs of implementation. This approach is in accordance with the Commonwealth's Office of Best Practice Regulation CBA guidelines.

The CBA analysis will be based on the introduction of new IK rights as a starting point (Element 1) then adding subsequent Elements (2 to 4) in incremental stages to understand the benefits of each element:

Elements	More detail
1	Create a new IK Right
1 + 2	New IK Right + Measures aimed at Inauthentic Product
1 + 2 + 3	New IK Right + Measures aimed at Inauthentic Product + National Indigenous Knowledge Authority
1 + 2 + 3 + 4	New IK Right + Measures aimed at Inauthentic Product + National Indigenous Knowledge Authority + Measures to Support Competitiveness of Indigenous Business

Options which present positive net benefits or best-cost ratios (BCRs) greater than one are preferred because they make society as a whole better off. Some sensitivity analysis will be undertaken to determine if key assumptions (e.g. discount rates or time periods) change the results of the CBA.

How stakeholders e.g. government, Indigenous business, Australian consumers may be impacted will also be assessed through a distributional analysis. This helps to identify which groups win and lose, and how much they win or lose. This information helps support decisions about the equity of the elements and options.

The results of that analysis, together with the results of this consultation, will contribute to the final report of the study.

### PART C Consultation Questions

1. Which element (1 to 4) and combination of elements would deliver most benefit to you?
2. What broader benefits, costs or risks would stand-alone legislation like this deliver to Aboriginal and Torres Strait Islander peoples?

## BACKGROUND

### DEFINITION OF INDIGENOUS KNOWLEDGE

In this paper, the term 'Indigenous Knowledge' or 'IK' is used to cover a range of knowledge held and continually developed by Aboriginal and Torres Strait Islander people. It includes:

- Traditional Cultural Expressions or 'TCEs' which refers to tangible and intangible forms of expression and communication such as language, music, performance, songlines, stories, dance, symbols, designs, visual art, crafts and architecture.
- Traditional Knowledge or 'TK' which refers to knowledge resulting from intellectual activity in a traditional cultural context and includes know-how, practices, skills and innovations. This can include environmental management knowledge, cultural and spiritual knowledge and practices, and agricultural, scientific, technical, ecological, medicinal and biodiversity-related knowledge.
- It includes knowledge about genetic resources which can be any biological material, including plants, fungi and animals.

Even though the word 'traditional' is used to describe these concepts, TK and TCE are not static or historical but are continually in use and evolving.

### DEVELOPMENT OF THIS REPORT

In response to the *Report on the impact of inauthentic art and craft in the style of First Nations peoples*, a cross-departmental Working Group was established to undertake this scoping study assessing how stand-alone legislation could help Australia's Aboriginal and Torres Strait Islander peoples to protect and commercialise their IK. The Working Group met monthly to contribute knowledge of policy development and existing legal systems to the development of the elements. In parallel, IP Australia's Indigenous Expert Reference Group contributed insights and perspectives directly to the development of this report.

Following publication of this report and feedback from stakeholders, Ninti One will complete the cost benefit analysis and make recommendations to government. Pursuant to the recommendations of the study, a wide-ranging consultation process will be considered following delivery of the final report.

This study is being undertaken alongside other government projects, including:

- the [Productivity Commission study](#) into the nature and structure of the markets for Australia's First Nations peoples' arts and crafts and policies to address deficiencies in these markets,
- development of the [Indigenous Visual Arts Action Plan](#)
- [IP Australia's Work Plan](#) aimed at enhancing the existing IP system to support Aboriginal and Torres Strait Islander people to benefit from their IK.