

Indigenous Knowledge Project
IP Australia
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Via email: IKProject@ipaustalia.gov.au

Dear IK Project Team

Indigenous Knowledge Project – Stand-alone Legislation for Indigenous Knowledge: Interim Scoping Study Consultations

Jamukurnu Yapalikurnu Aboriginal Corporation (**JYAC**) is the registered native title body corporate for the Western Desert lands of the Martu people and has a defined role as the trustee of Martu native title rights, ensuring the protection of Martu country and advancement of Martu people.

JYAC is disappointed that it has not been notified of this project and therefore has not been able to participate in discussion around this issue. JYAC having only learnt of this project yesterday has only had limited opportunity to make comment on the consultation questions and to provide a submission more broadly regarding the Interim Scoping Study document (**the Study**).

Background

Current law in Australia does not recognise, let alone protect, the collective and traditional intellectual property rights of Aboriginal and Torres Strait Islander (**ATSI**) people. Without significant changes to both the current property right and intellectual property right regimes, ASTI people will continue to be denied a fundamental traditional right of cultural protection and the traditional economic right of trade. Herein, JYAC maintains the issues here are twofold, regarding property and perpetuity.

Firstly, while this Study seeks to understand how to develop an intellectual property regime capturing indigenous knowledge, there is a fundamental issue of 'property'. The Native Title Act and all the determinations of native title, whether by consent or litigation since its inception, have provided the recognition of only limited property rights over land and waters to native title holders.

Martu strongly assert a traditional commercial right to use resources on country, however, it is almost always the case that native title holders will have the right to access and use the land and resources for purposes in keeping with their traditional law and custom, but not be protected by Australian law for the commercialisation of knowledge and resources in contemporary fields (while others who appropriate and commercialise Indigenous knowledge and resources are protected). Further, and by way of example, an artist who wishes to paint on

turtle shell or to use native flora, must first seek the permission and obtain a license from the government even in the context where a native title group have been recognised as holding the area to the exclusion of all others. It is absolutely foundational and complimentary to the objects of this Study to adequately empower ATSI people to use the resources of their country without limit.

Additionally, and as recognised by this Study, the current Intellectual Property regime in Australia does not recognise nor protect the traditional and indigenous knowledge (**IK**) of ATSI people. As it currently stands, the kind of rights that would be associated with IK cannot even be contemplated by the current legislation. IK is not and should not be limited by time nor should it be an individual right, it is a collective and evolving body of knowledge that is without end. Any proposed legislation should capture the collective communally held rights, to be held in perpetuity. It is insufficient for an IK right to be created but then for it to fall within the current IP system, with the result that knowledge is released into the public domain. IK should not fall into the area of public domain, but remain always in the control of the traditional owners of that knowledge.

Without limiting the comments to follow, JYAC supports the call for *sui generis* legislation to protect IK rights and is broadly supportive of the purpose and proposals put forward in the Study.

Consultation Questions

Part A

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

In addition to the four areas outlined in the Study of control, protection, recognition and respect, it is our view that ATSI peoples will face a significant resourcing issue in protecting and exercising their rights under any new regime. For the label of 'free, prior and informed consent' to attach to any legal right, JYAC strongly believes that resourcing of expert advice and assistance is essential.

In relation to 'control' it is critical that the wording and concepts relating to this area are sound. In our submission, there is no purpose to recognising a right of IK without correctly identifying the right persons or groups of persons to make decisions in relation to that knowledge. It is a fair measure that the onus is put on the proponent or third party to seek out the correct owners of the IK, but at what point is the search or inquisition enough? In the circumstances where there a groups of knowledge holders had not been identified, then what is the test for how far should the proponent have investigated? How will it be determined who holds the IK, if it is multiple groups, who has the right to speak for that knowledge? JYAC is of the firm view that further discussion and consultation is required about this point.

In relation to the element of 'respect', JYAC would like to see this have a definitive purpose. Proponents wishing to use IK should respect the cultural practices, invest time and effort meeting with people, and if the decision is ultimately no, proponents should respect that too.

Part B

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?*

JYAC endorses the inclusion of all four elements in stand-alone legislation model for the protection of Indigenous Knowledge.

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

It is not clearly contemplated by the term IK or IP what form this new form of rights will take, and how they may be used. Perhaps it is intended and not made expressly clear, but the IP in the IK should be able to be used in ways similar to that of copyright, in that it can be licensed for use in a particular prescriptive way with a limited time period, at the conclusion of which the licensee no longer holds the rights to that IP.

Further, it is a complicated issue, but with regards to there being no restriction on the use of the IK by members of the group for commercial or non-commercial use, this could cause intra-mural and inter-group disputes regarding the use of the knowledge which by definition is collective. Thought and consideration is required into an authorisation process for the use of IK, and this process will likely transcend native title boundaries and language groups, and could ultimately prove to be an expensive exercise.

Consideration of the primacy of collective rights is important, however, as multiple land holding groups may hold the same IP and IK, or different parts of the same story or knowledge. The use of which in another area could cause significant cultural and spiritual harm, and in a commercial sense it could see traditional knowledge holders removed from being financially compensated for the use of the IK. Careful attention is required to ensure all knowledge holders, their communities, are compensated for the use of knowledge.

Part C

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

Element 1 would deliver the most benefit to Martu, however, a combination of all elements is most preferred.

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

As abovementioned, there will be increased costs to ATSI people in asserting and defending their IK rights, negotiating agreements, upskilling in this new area of Intellectual Property and taking up already stretched resources of Prescribed Bodies Corporate, or regional cultural councils.

There may also be the increased risk of greater intra-indigenous disputes regarding the ownership, control and profit from IK which may affect multiple groups across a regional society area. It may be the case that each group could speak for that one piece of knowledge in each area, but the use of it in another area may cause significant cultural or spiritual harm to others. Even in the event that each group are in agreement to share the knowledge, how are the

benefit arrangements to be worked out, and what safeguards would be included in the legislation to protect the rights of other indigenous groups?

Similar to the point made above, what mechanism will be used to ascertain if 'free, prior and informed consent' has been achieved, what steps are required and is it the free, prior and informed consent of all the IK holders, or is it to be limited by reasonableness?

In answering the above questions, JYAC asks for further consultation opportunities to discuss the questions it raises both with IP Australia and to hear from other stakeholders, particularly as steps are taken towards the drafting of a Bill. In general terms, the proposal could take a significant step to addressing part of the inequality that persists structurally and institutionally in Australia.

JYAC looks forward to participating in future discussions on this issue.

Yours sincerely,



Rewi Lyall

Manager, Land & Community Development; Legal