

# KIMBERLEY LAND COUNCIL

ABN 96 724 252 047 ICN 21



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IK Project Team  
Policy & Stakeholders Group  
IP Australia

Via email: [IKProject@ipaustrialia.gov.au](mailto:IKProject@ipaustrialia.gov.au)

To Whom it May Concern,

## **Submission on *Interim Report Scoping Study on Standalone Legislation To Protect And Commercialise Indigenous Knowledge 2022***

1. The Kimberley Land Council (KLC) is pleased to provide the following submission on the *Interim Report Scoping Study on Standalone Legislation to Protect and Commercialise Indigenous Knowledge 2022 (Interim Report)*.
2. The KLC is an Aboriginal organisation that was established in 1978 for the purpose of working for and with Traditional Owners of the Kimberley region to get back country, look after country and get control of the future. The KLC's mandate is driven by its broad membership of Kimberley Aboriginal people, and delivered by a Board of culturally and regionally representative Executive Directors. The KLC plays a leading role amplifying the views and voices of Kimberley Aboriginal people locally, nationally and internationally, and we are dedicated to improving the cultural, social and economic well-being of our people.
3. The KLC welcomes the opportunity to provide feedback on the scope and feasibility of new stand-alone legislation protecting Indigenous cultural intellectual property, including traditional knowledge (TK) and Traditional Cultural Expressions (TCE). The KLC has a strong history in supporting and strengthening the rights of Kimberley Aboriginal people to claim intellectual property in their heritage, traditional knowledge and traditional cultural expressions. This is an important right set out in Article 31.1 of the Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>1</sup>
4. Over a number of years, Kimberley Aboriginal People have become concerned about the use of their Aboriginal cultural and intellectual property. This use has been without proper acknowledgement of the contributions of Traditional Owners, and without their prior informed consent. In many cases, Aboriginal cultural and intellectual property has been used inappropriately and in demeaning ways.
5. In response to these concerns, and the international recognition of traditional knowledge rights, the KLC developed an IP and TK Policy which sets standards in relation to how research is conducted with Aboriginal

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<sup>1</sup> Article 31.1, UNDRIP.

people in the Kimberley region.<sup>2</sup> It is therefore relevant that the KLC, in its representative capacity, shares its insights and experiences with IP Australia to assist in informing the development of standalone Indigenous knowledge legislation. The KLC's experience should be particularly useful to IP Australia, given the potential breadth and scope of such new legislation and its significant impact and interest to Aboriginal people.

### **Indigenous Knowledge – how broad or defined will the legislation be?**

6. Indigenous knowledge is broadly defined by IP Australia to include both TCE and TK. The KLC submits that the definition of Indigenous knowledge in any new legislation should encompass the Indigenous knowledge that Traditional Owners have in their cultural heritage, including intangible cultural heritage.
7. The definition of Indigenous knowledge should not be limited to standalone activities or products, and must acknowledge that Indigenous knowledge is not static and is continually reshaped and built upon by Traditional Owners. The language defining Indigenous knowledge will need to be broad enough to include the intellectual property that Aboriginal people have in their heritage, TK and TCE. The definition of Indigenous knowledge should also be consistent with article 31.1 of the UNDRIP which provides as follows.

#### *Article 31*

*1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

*2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*

8. The KLC notes that the Australian Parliament Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs is currently inquiring into the implementation of the UNDRIP in Australia and submits that any standalone legislation to protect and commercialise Indigenous knowledge should be informed by the outcomes of that inquiry, as well as the recommendations of the Joint Standing Committee on Northern Australia report on the Juukan Gorge disaster, titled "A Way Forward".

### **Recognising the commercial value of Indigenous Knowledge**

9. Indigenous knowledge is utilised across a range of industries in Australia. Many non-Indigenous corporations and individuals profit from this Indigenous knowledge and the benefits of Indigenous knowledge to the wider economy are significant including in sectors such as tourism, land management, quarantine services, health

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<sup>2</sup> KLC Intellectual Property and traditional Knowledge Policy, <https://www.klc.org.au/s/klc-intellectual-property-and-traditional-knowledge-policy1.pdf>

care, cosmetics, and scientific innovation, as identified in IP Australia's commissioned research in this area.<sup>3</sup> Despite these clear and calculable economic benefits of TK, these benefits often do not flow to Traditional Owners.<sup>4</sup> This occurs through direct appropriation as well as indirect or implicit appropriation such as "blackfishing".<sup>5</sup>

10. Any new legislation to protect Indigenous knowledge must ensure that the benefits of the use of that knowledge, in any commercial context, flow to the owners of that knowledge.
11. While research into this area supported by IP Australia is invaluable,<sup>6</sup> further studies are needed into the commercialisation and economic value of Indigenous knowledge in order to form an understanding of the actual value of Indigenous knowledge across a broad range of its uses before new legislation is introduced. This will help to ensure there is a basis for Traditional Owners to receive a fair benefit in accordance with the way their Indigenous knowledge is used. This could be considered on the basis of a percentage of the market value of a product, or a set-amount for a particular activity that utilises Indigenous knowledge.
12. The Commonwealth Government should also consider how it will address the unauthorised use of Indigenous knowledge, practices such as "blackfishing", where an owner may not be able to be identified but harm is still suffered to the community, and the need for compensation to Traditional Owners and communities who suffer a loss as result of unauthorised use. The KLC supports consideration of both civil and criminal remedies to address these diverse categories of harm. This should include IK already captured in collections held by large collecting institutions, in particular where the provenance, or establishment of ownership has not already been clearly identified or established.<sup>7</sup>

### Indigenous knowledge in Cultural Heritage

13. Any new legislation to create a right in Indigenous knowledge needs to recognise the Indigenous knowledge that exists in Traditional Owners' cultural heritage, including intangible cultural heritage. In this regard, legislation to protect Indigenous knowledge should be considered in the context of the Joint Standing

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<sup>3</sup> Blackwell, Bodle, Hunt, Hunter, Stratton and Woods, *Methods for Estimating the Market Value of Indigenous Knowledge*, Centre for Aboriginal Economic Policy Research, report to IP Australia, November 2019.

<sup>4</sup> *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 Report by Hon Elizabeth Evatt AC 21 June 1996*, available at: <http://www.austlii.edu.au/au/other/IndigLRes/1996/1/index.html>; See also: Kimberley Land Council, Submission No. 101 to Joint Standing Committee on Northern Australia, *The inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (14 August 2020) and Jacqueline Carroll, 'Indigenous knowledge: adding value to science and innovation' (Flagpost, Parliamentary Library, Parliament of Australia, 30 November 2017)

<sup>5</sup> <https://www.news.com.au/lifestyle/fashion/designers/bestless-accused-of-blackfishing-after-launching-new-clothing-line/news-story/25561d68619d642d99662a3869e2840f>

<sup>6</sup> Footnote 3 above.

<sup>7</sup> Jane Anderson, (2006), Indigenous knowledge, intellectual property, libraries and archives: crisis of access, control and future utility, in *Australian Indigenous Knowledge and Libraries*, UTSePress, Sydney.

Committee on Northern Australia's recommendations to create a new framework for cultural heritage protection at the national level, following the inquiry into the destruction of Juukan Gorge.<sup>8</sup>

14. The lack of any legal protection for Indigenous intellectual property, in a form consistent with traditional property rights and obligations, is a gap that currently exists between the *Native Title Act 1993* (Cth), the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and legislation dealing with specific forms of property rights such as intellectual property. A new legislative approach to cultural heritage protection, and cultural property including Indigenous knowledge, should be undertaken by the Australian Government to fill these gaps.
15. Misuse or misappropriation of Indigenous knowledge, particularly when motivated by profit and facilitated by misrepresentation of the interests or status of Traditional Owners, should also be addressed in Commonwealth legislation. A significant and widespread example of this type of misuse for profit is the misrepresentation of cultural heritage, such as rock art, by individuals and operators even where the identity of the Traditional Owners is made clear in judicial determinations, formal notification and popular publications, such as books authored by Traditional Owners.

#### **Enforceability and benefit sharing**

16. The KLC submits that the proposed new legislation must include a mechanism that enables Traditional Owners to enforce their rights in Indigenous knowledge. An enforcement mechanism must be easily accessible to Traditional Owners if the legislation is to have any real effect in preventing and deterring the unauthorised use of Indigenous knowledge.
17. The existing infringement framework for existing intellectual property within Australia is something that can and should be modelled to be included in any new legislative framework to protect Indigenous knowledge. This should include the ability to receive damages, account of profits, delivery up and injunctions where necessary.<sup>9</sup>
18. It is important that the legislation assists Traditional Owners to make benefit sharing agreements with third parties seeking to utilise their Indigenous knowledge. Many Traditional Owners in the Kimberley region do not have access to the resources needed to effectively make a benefit sharing agreement with a third party. The majority of representative corporations or prescribed bodies corporate (**PBCs**) in the region also do not have access to adequate funding and resources for this purpose. The new legislation will need to make provision for Traditional Owners to be resourced to make benefit sharing agreements, and to be in an equal bargaining position to the third parties seeking to access the Indigenous knowledge.

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<sup>8</sup> *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*, Parliament of the Commonwealth of Australia, Joint Standing Committee on Northern Australia, October 2021

<sup>9</sup> Australian Government, 'IP Australia', *Outcomes from Court Action* 'Outcomes from Court Action', <https://www.ipaustralia.gov.au/ip-infringement/enforcing-your-ip/going-to-court/outcomes-court-action>.

**Who will benefit from the right to protect Indigenous knowledge?**

19. The Interim Report notes that new legislation would create a new right in Indigenous knowledge, and the right would be held collectively by the Traditional Owners of the Indigenous knowledge. An issue that the new legislation will need to grapple with is how the holders of the Indigenous knowledge will be identified. All of the holders of the Indigenous knowledge may not be readily identifiable, and could include a very broad group of people depending on the particular Indigenous knowledge that a third party is intending to utilise.
20. For example, Indigenous knowledge about a dreaming story or a songline may be held by a number of Traditional Owner groups if the story or songline relates to the traditional countries of multiple groups of people. Indigenous knowledge about a particular method of burning country to promote the growth of food sources and prevent bushfires might also be held by a large number of Traditional Owners and groups. This creates a difficulty for how third parties will inform the holders of rights in Indigenous knowledge when a third party intends to utilise Indigenous knowledge. How will Traditional Owners know about, and be in a position to provide their free, prior and informed consent to the use of their knowledge by a third party? There may be a role for any IK Authority to direct third parties to entities representing Traditional Owners, such as PBCs, as part of the process of informing the holders of Indigenous knowledge that their Indigenous knowledge is intended to be utilised.
21. In designing new legislation, the Department will need to consider what the legislation will require a person to do in order to demonstrate that they hold a right in Indigenous knowledge. It will be important to ensure that any new legislation does not lead to disputes among Indigenous people about who holds a right in any particular Indigenous knowledge.
22. The legislation should recognise that PBCs, as a corporation holding or managing native title rights and interests, can hold and enforce rights in Indigenous knowledge on behalf of their members and common law holders of native title. This would provide a mechanism for a defined entity (the PBC) to be able to take steps to enforce a right in Indigenous knowledge held collectively by Traditional Owners. It would also make provision for PBCs to be a party to license agreements about the use of Indigenous knowledge. A similar mechanism exists under the *Native Title Act*, which allows PBCs to bring compensation claims on behalf of the common law holders of the lost or impaired rights in country.
23. The legislation will need to include tangible actions that a person with a right in Indigenous knowledge will be able to take to protect their right.

**Indigenous Knowledge Authority**

24. An authority that can assist Indigenous people to protect their knowledge and enforce their rights in relation to it will be an important part of any new legislation creating a right in Indigenous knowledge.
25. There will need to be consideration of how this Authority is formed and structured. It is important that any authority with the functions discussed in the Interim Report is governed by Indigenous people, and that

Indigenous people have a say in who sits on the board of the Authority. It is important that Traditional Owners are represented in the decision-making of the Authority, as well as its day-to-day operation.

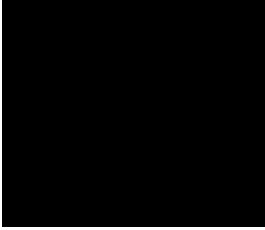
### **Interaction between Commonwealth and State legislation**

26. The Western Australian Government is considering introducing new legislation in Western Australia that will recognise Aboriginal people's rights in TK about genetic resources that are used in the biodiscovery process.
27. Consultation papers about the Biodiscovery Bill released by the WA Department of Jobs, Tourism, Science and Innovation outline that the Bill would require proponents to enter benefit sharing agreements with TK holders, if their TK about a genetic resource is used for a commercial purpose.
28. The Commonwealth Government will need to consider how any new legislation about Indigenous knowledge might interact with State legislation dealing with the same subject matter.

### **Examples from the Kimberley**

29. While the Interim Report focuses on the example of inauthentic products as an issue that the new legislation would address, there is a broad range of ways in which the knowledge of Traditional Owners is or can be used inappropriately to benefit third parties, without the consent of or benefit to the Traditional Owners.
30. In the Kimberley, examples include tourism operators taking paying clients to sites of significance, either without the consent of the Traditional Owners, or without providing any of the commercial benefit of that activity to the Traditional Owners. The knowledge about the site and its significance is valuable Indigenous knowledge. Any new legislation will need to protect Indigenous knowledge in this circumstance, and ensure that if the holders of the rights in the Indigenous knowledge do consent to its use in a commercial tourism activity, that the benefits from that activity flow to the Indigenous knowledge holders.
31. Another issue faced by Kimberley Traditional Owners is research into elements of their Indigenous knowledge. Traditional Owners often struggle to adequately manage how the results of that research are utilised or published by organisations and individual researchers. The new legislation must make provision for Traditional Owners to be able to enforce their rights in their knowledge and negotiate benefit sharing agreements in this situation.
32. It must also be recognised that many organisations and institutions, including the KLC, have implemented policies in an effort to protect Indigenous knowledge in the absence of Commonwealth or State legislation. It is therefore vitally important that any new legislation strengthens, rather than diminishes the rights of Traditional Owners in relation to Indigenous knowledge, and that measures are in place to ensure Traditional Owners are supported and resourced to benefit from such rights.

Yours sincerely



Tyronne Garstone  
Chief Executive Officer  
Kimberley Land Council