



**NATIONAL
ABORIGINAL AND
TORRES STRAIT
ISLANDER
MUSIC OFFICE**

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Intellectual Property Policy Group
IP Australia
PO Box 200
Woden ACT 2606

Dear Chair

**SCOPING STUDY ON STAND-ALONE LEGISLATION TO PROTECT AND COMMERCIALISE
INDIGENOUS KNOWLEDGE**

1. The National Aboriginal and Torres Strait Islander Music Office (**NATSIMO**) is an Indigenous-led initiative of APRA AMCOS and peak body for Aboriginal and Torres Strait Islander (**ATSI**) music creators.
2. NATSIMO/ APRA AMCOS is grateful for the opportunity to make a submission to IP Australia's Interim Scoping Study Consultations for Stand-alone Legislation for Indigenous Knowledge (**IK Study**).
3. NATSIMO / APRA AMCOS understands the objective of the IK Study to be assessing the potential scope and feasibility of new stand-alone legislation protecting Indigenous Cultural Intellectual Property (**ICIP**), including Traditional Knowledge (**TK**) and Traditional Cultural Expressions (**TCE**). As the Interim Report commissioned by IP Australia on behalf of the Intellectual Property Policy Group (**Interim Report**) states, the aim of the IK Study is to identify models that could aid Indigenous Australians to protect and commercialise their knowledge and cultural expressions. NATSIMO / APRA AMCOS offers its utmost support for this important initiative.
4. NATSIMO / APRA AMCOS supports the IK Study's goals and stresses that, alongside high-profile modes of ATSI creation such as visual arts and craft, music is a core cultural expression for ATSI communities and has its own unique cultural characteristics and economic structure which must be examined in full within the IK Study and incorporated in a comprehensive fashion into any proposed legislative outcomes.

NATSIMO

5. The mission of NATSIMO is to support the growth and development of songwriters and composers and advocate for a thriving, self-determined Aboriginal and Torres Strait Islander music industry. NATSIMO has crafted this vision around the principles of value; self-determination; connection; and advancement.
6. A core goal of NATSIMO's program is to assist ATSI APRA AMCOS members in understanding how the value of their music can be realised in the marketplace. NATSIMO's activities involve encouraging greater understanding of the role of APRA AMCOS amongst ATSI music creators; growing APRA AMCOS' ATSI membership; and increasing financial returns to these members. These goals dovetail with the proposed new IK Right and commercialisation objectives of the IK Study.
7. NATSIMO is committed to empowering self-determination for ATSI musicians, with the intersecting goals of the growth of a self-determined ATSI music industry; the connection of ATSI APRA AMCOS members with the music industry whilst encouraging best practices; and the championing of ATSI songwriters and composers to advance their careers.
8. NATSIMO seeks to nurture and facilitate ATSI participation in the music industry to increase representation and career opportunities and support members in their business development and partnerships with non-indigenous participants in the music industry. However, it is vital that the music industry be a culturally safe space for ATSI songwriters and composers. As such, the extant issues around systemic inequality in economic returns for ATSI cultural expression and the cultural issues around authenticity and ownership of ICIP must be addressed in a comprehensive and progressive fashion.

APRA AMCOS

9. As noted, NATSIMO is an Indigenous-led initiative of APRA AMCOS.
10. APRA AMCOS has more than 111,000 Australian and New Zealand members, comprising songwriters, composers, lyricists and music publishers, and reciprocal agreements with over 120 overseas similar copyright management organisations. The membership is diverse, ranging from unpublished writers to major music publishers. Licensee stakeholders range from sole traders to multinational content platforms across all industries. APRA owns the exclusive rights of performance and communication in millions of songs written by composers all across the world and therefore represents the majority of musical works and lyrics performed and communicated to the public in Australia and New Zealand.
11. AMCOS has around 24,000 members including music publishers, composers, and songwriters. Licensees include all major broadcasters and video on demand and music streaming services, as well as businesses such as background music suppliers. AMCOS controls the right to reproduce a vast number of musical works and lyrics in certain circumstances in Australia and New Zealand.
12. APRA AMCOS has participated fully and openly in reviews of creative industries and intellectual property legislation in Australia. Given the importance of ensuring protection, economic inclusion, and efficient administration of rights for our members, we have expended considerable resources in gathering evidence, considering issues, preparing submissions, and appearing before the

relevant reviewing bodies when required. APRA AMCOS welcomes the chance to do so for IP Australia in the context of the IK Study.

13. APRA AMCOS and NATSIMO stand ready to engage and consult with IP Australia's Intellectual Property Policy Group on the scope and feasibility of any proposed legislative or regulatory outcomes from the IK Study, in particular in our capacity as an advocate for the best interests of ATSI songwriters and composers. APRA AMCOS submits in the strongest possible terms that ensuring protection for and appropriate commercialisation of the ICIP, TK, and TCE of these practitioners is of equal importance to the protection of their fellow ATSI practitioners who embody and deploy ICIP, TK, and TCE in modes such as visual arts and craft, theatre, and dance.

Standalone legislation is necessary

14. NATSIMO / APRA AMCOS offers its strongest support for the IK Study's approach to formulating a *sui generis* IK right enshrined in new, standalone legislation. We support the establishing of 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, as put forward as Element 1 of the IK Study.
15. The value, nature, and structure of the traditions and contemporary expressions of IK are unique. The intersection of IK with existing Australian IP regimes and a competitive digital marketplace must be treated with appropriate respect and in a consultative manner with IK custodians so as to achieve a bespoke and workable legislative solution that encompasses all IK cultural practices, not just those that have a higher profile with the general public such as visual arts and craft.
16. As such, NATSIMO / APRA AMCOS emphasises that the IK Study must ensure that the specific qualities and structures of music creation in an ICIP context are adequately protected in any standalone IK legislation. Along with these protections, any standalone legislation must be drafted to empower ATSI songwriters and composers to commercialise their IK rights in a manner that befits the structural and cultural community norms of the custodians of those IK rights.
17. NATSIMO / APRA AMCOS joins IP Australia in its view that the preferred means to protection of ICIP, TK, and TCE in music – as well as other creative practices – is through the drafting and passing of dedicated legislation based on a *sui generis* IK right and a recognition of the concept of communal ownership. The use of ICIP without the permission or authorisation of traditional custodians and the lack of economic benefits flowing back to ATSI people and communities are serious problems in Australia's cultural industry and should be addressed with specifically-designed legislation, rather than via piecemeal amendments of existing law and policy.
18. At this juncture, with the weight of evidence and recommendations from cultural industry stakeholders, it is clear that specific and robust protections for a new IK right are required and that is necessary to enshrine such protections in new law so that ATSI cultural traditions are preserved and the full economic benefit of the expression of those cultural traditions in contemporary creative practices flows to their rightful owners.

Integration of the unique characteristics and economics of music into the IK Study

19. NATSIMO / APRA AMCOS emphasises the importance of protection for all indigenous cultural expression and draws the attention of IP Australia to the unique structural and economic characteristics of music creation and commercialisation.
20. While the Interim Report does include music as an example of the tangible and intangible forms of expression and communication that constitute TCE, NATSIMO / APRA AMCOS is concerned that an understanding of the full economic benefits of music has not been incorporated into the IK Study to date.
21. We note that one of the six issues set out in the Interim Report as primary concerns of ATSI peoples relating to their IK is “ownership of recordings and digitised records of IK”. While this could encompass music to a degree, further clarity is required around how music is incorporated in the IK Study as both TCE but also as know-how, practices, skills and innovations – that is, TK.
22. In terms of authenticity in cultural product – which would fall under Element 2 of the IK Study music presents unique challenges in this regard.
23. NATSIMO / APRA AMCOS draws the attention of IP Australia to the long history of issues around the authenticity of the recording and use of indigenous music. This has taken the form of indigenous music (as a form of ICIP) being used by non-indigenous or non-authorized artists who have failed to seek permission or have failed to appropriately and adequately consult with and attribute the appropriate copyrights to the writers and/or custodians of this cultural material.
24. There are both cultural protocols and cultural sensitivities in the use of indigenous music outside of its customary context, and NATSIMO / APRA AMCOS is committed to ensuring that these protocols and sensitivities are upheld and protected, including by enshrining protections in specific legislation developed for this sector.
25. The unique nature, cultural status, and forms of transmission embodied in ICIP remain at risk of exploitation if protections are not put in place to ensure that authenticity is preserved. APRA AMCOS submits that compliance with an authenticity regime should be mandatory for the creative industries where ICIP is incorporated into cultural products, including music.
26. The mechanism for compliance will need to be developed in consultation with ATSI stakeholders and the larger indigenous community. Dedicated legislation in this area will need to be sensitive to the needs and obligations of the custodians of indigenous music traditions.
27. However, NATSIMO / APRA AMCOS recognises that music, which is primarily distributed digitally and through performance, poses unique challenges for authentication, as opposed to a mode such as crafts, where a single physical product is produced. While there are technologies for the labelling of digital music, such as the International Standard Recording Code or ISRC which can serve as an identifier for both video and music recordings, challenges remain as to how this would be regulated in a digital distribution context and how authenticity would be determined.
28. For example, how might an authenticity regime distinguish between samples of traditional instruments played by traditional cultural custodians used in TV and film and recorded

performances of traditional instruments used in TV and film where those instruments have been played by musicians who are not the traditional cultural custodians?

29. It is clear that the application of an authenticity regime to music practices is a complex question which may not have a clear and simple solution and should be the subject of further consideration within the IK Study.
30. Notwithstanding these challenges, NATSIMO / APRA AMCOS submits that any new legislative provisions should identify cultural harm as a species of damage incurred when TCE and TK is used in an unauthorised way and offers its full resources to assist IP Australia in scoping out potential mechanisms to mitigate cultural harm in the context of the use of ICIP in music.

Distribution of economic benefits flowing from music under a new IK rights regime

31. In an era of instantaneous worldwide digital distribution of music, any proposed legislative regime for IK must take into account the specific economic structures of music creation and distribution into the marketplace; as well as the revenue and royalty flows associated with those processes.
32. Here NATSIMO / APRA AMCOS submits that the IK Study should address how music distribution differs to that of, for example, visual arts and crafts. There is no clear equivalent of an art centre in indigenous music creation, and where some might draw an analogy between an art centre and a music publisher or collecting society, unlike an art centre those bodies are rarely indigenous-owned and operated.
33. There exists opportunities for economic autonomy for ATSI songwriters, composers, and musicians which the IK Study should carefully consider when developing proposed structures for the commercialisation of IK in this area.
34. Element 3 of the IK Study work proposes a new legislative body which could work in partnership with ATSI peoples to assert, protect and enforce their IK rights (**IK Authority**). The Interim Report suggests that traditional owners could choose to authorise this IK Authority to negotiate IK licences and collect licence fees on their behalf.
35. The IK Study presumes an entity between the IK legislation and the music creator. While this model is analogous to the existing model of a collecting society distributing royalties for existing licenced works, a *sui generis* IK right based on a concept of communal ownership requires a close examination of how existing distribution models for music can be adapted for this new rights regime, and how they might intersect with the operations of an IK Authority.
36. The IK Study needs to take into account the full scope of economic benefit that can flow to music creators. NATSIMO / APRA AMCOS notes that the *Methods for Estimating the Market Value of Indigenous Knowledge Final Report to IP Australia* produced by the Centre for Aboriginal Economic Policy Research at ANU 2019 includes a list of potential case studies to support and facilitate the economic success of ATSI practitioners and communities. In respect of music, there appears to be a focus on TCE in the form of “music festivals including indigenous instruments”, for example the Saltwater Festival and the Garma Festival.
37. While growth in these live performance markets is important, and the economic benefit from ticket sales and tourism associated with these festivals is notable, NATSIMO / APRA AMCOS submits

that the IK Study must take a broader view of the economic benefits of music flowing into ATSI communities.

38. This view must take in all possible royalty streams for ATSI communities, including mechanical, public performance, and sync royalties. Additionally, the mechanisms for the distribution of these royalties must be considered in light of the proposed new concepts of communal ownership of IK rights and the establishment of an IK Authority to license those rights.
39. The IK Study must also consider the tax implications around the distribution of royalties to communal owners, as well as the potential direction of royalty flows under communal ownership to community schools, language centres, or other initiatives led by the custodians of the IK rights.
40. NATSIMO has expertise in this area and should be consulted on these specific issues and on any proposed legislative structures which come out of the IK Study. We would be happy to provide the IK Study with detailed information and in-depth consultation in this area.

Conclusions

41. Across the board in the creative industries there has been an historic and systematic failure to acknowledge, consult and remunerate the custodians of IK. Given the sophistication of our contemporary creative industries, NATSIMO / APRA AMCOS submits that significant outreach is required to ensure the availability of remuneration for creative works is better understood, particularly in remote communities, and particularly in advance of a new *sui generis* IK Right being established in Australian law.
42. NATSIMO / APRA AMCOS has committed significant resources to working to assist in this aspect through changes to its internal processes and external outreach to indigenous communities. The type of outreach programs NATSIMO / APRA AMCOS is undertaking cover broad issues such as education on the economic benefits that can result from the consensual sharing of cultural expressions; and more practical needs such as the tax consequences of royalty payments or the availability of payment facilities for remote communities to ensure that remuneration from creative industries reaches the appropriate parties or groups.
43. Overall, NATSIMO / APRA AMCOS is dedicated to ensuring that any standalone legislation designed to protect and commercialise indigenous knowledge in music under a *sui generis* IK Right is designed and implemented in a culturally sensitive manner with adequate education and understanding for those impacted by the current market conditions and who might benefit from this new regime.

Thank you for the opportunity to provide submissions to the Interim Scoping Study Consultations for Stand-alone Legislation for Indigenous Knowledge.

If we can provide further information, or be of assistance in any other way, please do not hesitate to contact me at lflanagan@apra.com.au.

Regards,



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