Submission to IP Australia Indigenous Knowledge Project: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge

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The author of this submission is a non-Indigenous person. I acknowledge the traditional owners of the land upon which I live and work, the Gadigal people of the Eora nation, and I pay my respects to Elders past and present. I acknowledge them as the Owners of Country and Holders of Knowledge for this place.

Self-determination is critical to any stand-alone legislation for the protection of Indigenous Knowledge in Australia. Accordingly, the design and implementation of such legislation should be subject to the participation of, and consultation with, Aboriginal and Torres Strait Islander people and based on principles of free, prior and informed consent and mutually agreed terms. This submission identifies key elements that could be incorporated into a stand-alone regime. It draws upon work published by the author in '*Protecting Traditional Knowledge: Lessons from Global Case Studies*' published by Edward Elgar, particularly Chapter 6 'Lessons from Case Studies'.[1] The book outlines extensive research on the frameworks for the protection of traditional knowledge in India and Peru. It identifies lessons that may be used by Indigenous and local peoples in making decisions regarding the protection of traditional knowledge, using Australia as an example of how such lessons could be implemented at a domestic level. The ideas presented in this submission are offered to stimulate further discussion. They may be used by Aboriginal and Torres Strait Islander peoples in making decisions regarding the protection of Indigenous Knowledge.

Creating a new Indigenous Knowledge right

Prior informed consent must be a central principle in any stand-alone legislation for the protection of Indigenous Knowledge and is essential to building trust in any new legal regime. Any decisions about the use or exploitation of Indigenous Knowledge should be subject to the prior informed consent of the relevant knowledge holder or Aboriginal or Torres Strait Islander community in

[1] Evana Wright, *Protecting Traditional Knowledge: Lessons from Global Case Studies* (Edward Elgar, 2020).

accordance with customary laws and protocols. This approach is consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*[2] and the *Convention on Biological Diversity*.[3]

As acknowledged in the *Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge* (Interim Report), Indigenous Knowledge is a holistic concept that incorporates traditional knowledge, traditional cultural expressions and knowledge relating to genetic resources. Failure to protect Indigenous Knowledge as a holistic concept may lead to gaps in protection. This submission supports the characterisation of Indigenous Knowledge as a holistic concept that encompasses traditional knowledge, traditional cultural expressions and knowledge relating to genetic resources.

A range of legal tools should form part of a stand-alone regime for the protection of Indigenous knowledge.

A stand-alone regime for the protection of Indigenous Knowledge should incorporate a range of tools, including an access and benefit sharing regime, databases, and governance structures and institutions that support grassroots decision-making.

Access and Benefit Sharing

Any stand-alone legislation for the protection of Indigenous Knowledge should establish a nationally consistent access and benefit sharing regime based on prior informed consent and local decision-making. Access to Indigenous Knowledge should be regulated regardless of the type of proposed use or user (whether access to Indigenous Knowledge is sought for commercial, non-commercial or research use). Prior informed consent should be obtained from the relevant knowledge holder or Aboriginal or Torres Strait Islander community. Consistent with internationally established principles of free, prior and informed consent,[4] the decision maker must be given all relevant information on the proposed use of the Indigenous Knowledge, any risks and benefits. Local customary decision-making practices should be supported, including sufficient time to consult with the community and other advisors. This submission acknowledges that the decision-making process may differ between Aboriginal and Torres Strait Islander communities, reflecting a diversity of peoples and differences in local practices and customary laws. Any stand-alone legislation for the protection of Indigenous

[2] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) ('*UNDRIP*') arts 11, 19.
[3] Conference of the Parties to the Convention on Biological Diversity, *Programme of Work on the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity* (COP 5 Decision V/16, May 2000) General Principle 5 <https://www.cbd.int/traditional/pow.shtml>.
[4] See, e.g., Food and Agriculture Organization of the United Nations (FAO), *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities* (2016) 15-16 <http://www.fao.org/3/a-i6190e.pdf>.

Knowledge should acknowledge and provide for decision-making in accordance with customary laws and protocols.

Decisions regarding access to Indigenous Knowledge should take into account the interests and concerns (if any) of other knowledge holders or communities, where relevant. Peruvian legislation provides a valuable example of how such an approach might work. *Law 27811 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources 2002* (Peru) provides that representative organisations of Indigenous communities must notify the largest possible number of Indigenous peoples who possess collective knowledge that they are entering into negotiations with a third party. The representative organisations are then required to take into account the interests and concerns of the other knowledge holders.[5] In Australia, a similar approach could be facilitated through representative organisations or other local institutions.

Sharing benefits arising from the utilisation of Indigenous Knowledge should be as important as regulating access. Any stand-alone legislation for the protection of Indigenous Knowledge in Australia should recognise the importance of benefit sharing and the value of both monetary and non-monetary benefits. Particular attention should be paid to capturing benefits for Aboriginal and Torres Strait Islander communities rather than any central administrative organisation. Consistent with the *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* and principles of benefit and reciprocity,[6] benefit sharing should be central to any access agreement and should be provided in return for sharing Indigenous Knowledge regardless of any commercial outcome. Benefits should be negotiated on a case-by-case basis with specific regard to the needs and expectations of the relevant Aboriginal or Torres Strait Islander community and 'should reflect the current and potential future value of the knowledge being shared. This value should be determined not only from an economic perspective but should also take into account the value of traditional knowledge from a spiritual and cultural perspective.'[7] Monitoring and compliance mechanisms are essential to ensure that proposed recipients receive the agreed benefits, including non-monetary benefits. This monitoring and compliance function could be performed by a national-level institution such as the National Indigenous Knowledge Authority proposed in the Interim Report.

[5] *Law 27811 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources 2002* (Peru) art 6.
[6] Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Code of Ethics for Aboriginal and Torres Strait Islander Research* (2020) Principle 3.
[7] Evana Wright, *Protecting Traditional Knowledge: Lessons from Global Case Studies* (Edward Elgar, 2020) 232.

Databases

Databases may also form an important part of any stand-alone regime for the protection of Indigenous Knowledge. Such databases may be established at a local, regional or national level and may have different purposes. National databases could be used for defensive purposes to prevent the grant of patents over inventions involving Indigenous Knowledge by documenting potentially invalidating prior art that may be used by patent examiners when reviewing novelty or inventive step. Examples of such defensive databases include the Traditional Knowledge Digital Library in India[8] and the Peruvian National Public Register of Collective Knowledge of Indigenous Peoples.[9] Local databases can be used by Aboriginal and Torres Strait Islander communities to record and share knowledge according to customary laws and protocols.

A national database could be used to both protect Indigenous Knowledge and reinforce the integrity of the patent system. However, unlike the Traditional Knowledge Digital Library in India, any documentation of Indigenous Knowledge should be subject to the prior informed consent of the relevant knowledge holder or Aboriginal or Torres Strait Islander community. This '[p]rior informed consent must relate to the information or knowledge that is being documented, how the information is being stored and shared, and the implications of documenting traditional knowledge in such a database.'[10]

This submission supports the proposal to establish a database or register as outlined in the Interim Report. However, there is uncertainty in Australia as to the legal protection of database contents. Copyright does not provide sufficient protection for the contents of databases as protection as a literary work does not prevent a third party from viewing the content and putting the ideas into practice. Furthermore, while the compilation of information in a database may 'attract some form of intellectual property protection, this typically extends only to the manner in which the information is organised and stored, as opposed to protecting the contents.'[11] The experience of India in establishing local People's Biodiversity Registers may be instructive in this regard. Concern about the lack of protection for databases and the associated lack of trust in the system limited the participation of local communities in the People's Biodiversity Registers and, therefore, the

[8] Traditional Knowledge Digital Library <http://www.tkdl.res.in/tkdl/langdefault/common/Home.asp?GL=Eng>.
[9] Established under *Law 27811 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources 2002* (Peru) art 15.
[10] Evana Wright, *Protecting Traditional Knowledge: Lessons from Global Case Studies* (Edward Elgar, 2020) 235.
[11] Evana Wright, *Protecting Traditional Knowledge: Lessons from Global Case Studies* (Edward Elgar, 2020) 240; Merle Alexander, K Chamundeeswari, Alphonse Kambu, Manuel Ruiz and Brendan Tobin, *The Role of Registers & Databases in the Protection of Traditional Knowledge: A Comparative Analysis* (UNU-IAS, January 2004) 12. In the Australian context, see *Nine Network Australia Pty Ltd v Ice TV Pty Ltd* [2007] FCA 1172.

effectiveness of the system.[12] Therefore, consideration should be given to establishing a legal regime for the protection of databases.

Institutions

This submission supports the establishment of a National Indigenous Knowledge Authority as proposed in the Interim Report. However, stand-alone legislation should recognise the importance of local decision-making by Aboriginal or Torres Strait Islander bodies or organisations within a national framework. As discussed above, decisions regarding access and benefit sharing or documenting Indigenous Knowledge should be subject to the prior informed consent of the relevant knowledge holders or Aboriginal or Torres Strait Islander community in accordance with customary laws and protocols. As observed by Behrendt, local institutions are 'more responsive' and allow 'Indigenous community groups to take responsibility for decision-making processes on issues that affect them.'[13]

A National Indigenous Knowledge Authority should be established independently of government and operate in cooperation with other national, state and local authorities, including Aboriginal and Torres Strait Islander representative organisations and IP Australia. Membership of the National Indigenous Knowledge Authority should be determined following consultation with Aboriginal and Torres Strait Islander peoples.

The National Indigenous Knowledge Authority could have responsibility for, among other things, monitoring the implementation and operation of the stand-alone legislation, including enforcement actions; facilitating or liaising between parties seeking access to Indigenous Knowledge and knowledge holders or the relevant Aboriginal or Torres Strait Islander community representatives; recording details of access and benefit sharing agreements or permits; collecting and distributing benefits where requested by the knowledge holders or Aboriginal or Torres Strait Islander community; maintaining national level databases or registers; challenging patent applications over Indigenous Knowledge where such patents involve acts of biopiracy; and education and capacity building initiatives.

Sufficient funding will be critical to the success of a National Indigenous Knowledge Authority. This funding should be provided by 'the federal government and be budgeted for on a long-term basis.

[12] See Kanchi Kohli, Mashqura Fareedi and Shalini Bhutani, *6 years of the Biological Diversity Act in India* (Kalpavriksh and GRAIN, 2009) 41. See also Evana Wright, *Protecting Traditional Knowledge: Lessons from Global Case Studies* (Edward Elgar, 2020) Chapter 5.
[13] Larissa Behrendt, 'Power from the People: A Community-Based Approach to Indigenous Self-Determination' (2003) 6 *Flinders Journal of Law Reform* 135, 147.

Additional funding may be sought from other domestic and international sources. Funds should be protected from being folded back into government consolidated revenue.'[14]

Interaction with other laws

While stand-alone legislation for the protection of Indigenous Knowledge may be separate from laws relating to biological diversity or intellectual property, there will be a necessary interaction between the different laws to the extent required to ensure consistency and mutually supportive implementation. In addition to stand-alone legislation for the protection of Indigenous Knowledge, additional legislative reform will be needed to achieve the objectives in the Interim Report. Other reforms include the implementation of a nationally consistent framework for the protection of genetic resources and associated traditional knowledge, along with amendments to existing intellectual property legislation, including disclosure of origin obligations in patent legislation (as envisaged under the ongoing IP Australia consultation). Stand-alone legislation to protect Indigenous Knowledge should be developed and implemented as part of a broader reform package to ensure consistency and secure effective protection of Indigenous Knowledge from exploitation and misappropriation.

In summary, this submission supports the establishment of stand-alone legislation for the protection of Indigenous Knowledge. Such legislation based on the principles of self-determination, prior informed consent and mutually agreed terms may empower Aboriginal and Torres Strait Islander people and communities. Acting as a form of corrective justice, a stand-alone regime may, among other tools, address historical and contemporary wrongs and return to Aboriginal and Torres Strait Islander communities institutions that affirm Indigenous culture, values and practices.[15]

[14] Evana Wright, *Protecting Traditional Knowledge: Lessons from Global Case Studies* (Edward Elgar, 2020) 226.
[15] Douglas Sanderson, 'Redressing the Right Wrong: The Argument from Corrective Justice' (2012) 62 *University of Toronto Law Journal* 93, 93.