AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

AIATSIS Submission

About AIATSIS

As a national institute, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) works at the intersection of Indigenous and non-Indigenous knowledges, playing an important role in the mediation of those knowledges and supporting their expression and protection via our research and collections work. Through this work AIATSIS has acquired significant expertise in the development, application and protection of Indigenous Knowledge.

AIATSIS is home to the world's premier collection of materials pertaining to Australian Aboriginal and Torres Strait Islander peoples, including written works, photographs, sound recordings, moving image recordings, artworks and artefacts. In keeping with our legislative functions, AIATSIS is committed to optimising appropriate access to our collections and respecting relevant laws and cultural protocols in doing so.

In fulfilling our legislative role to provide advice to the Australian Government on Indigenous culture and heritage, AIATSIS actively engages with Indigenous peoples, policy makers and researchers, placing AIATSIS in a unique position to provide advice on the protection of Indigenous Knowledge. AIATSIS also provides national and international guidance in the ethical practice of research concerning Indigenous peoples. AIATSIS has 55 years' experience in research and has long been committed to improving the standards of engagement and benefits generated for Indigenous peoples through research.

AIATSIS is committed to ensuring Indigenous peoples' knowledge, cultures and governance is understood, respected, valued and empowered by laws and policies that concern them. AIATSIS provides the following comments in relation to the opportunities created by the Indigenous Knowledge Consultation process.

The AIATSIS Indigenous Culture and Heritage Unit aims to support the active practice of culture through the protection and transmission of knowledge. Our research work at AIATSIS involves both academic and community-based investigation into and study of materials and sources in order to establish new evidence and reach conclusions, with the aim of enabling archive access and information management, repatriation and the recording of new materials within culturally informed frameworks.

Understanding Indigenous Knowledge

AIATSIS supports the use of Indigenous Knowledge rather than distinguishing between traditional knowledge and traditional cultural expressions. These categorisations problematically situate Indigenous Knowledge as unchanging or only of the past. Such a categorisation is inadequate and inaccurate as knowledge is always being relived and developed. Nakata provides that

> Indigenous' knowledge may simply mean 'experience' of the world as an Indigenous person, it may mean historical understanding passed down from the Indigenous perspective, it may mean local knowledge, or community-based experience or traditional knowledge. [1]

When considering Indigenous Knowledge within the discourse of intellectual property, it must be understood that intellectual property itself is a power-laden colonial process:

> Intellectual property law and policy thus exist in a persistent state of normative conflict that weighs heavily on the already complex relations among domestic and international actors involved with IP policymaking, cementing a highly politicized environment at all levels of global, regional, and national governance.[2]

This ongoing colonial process creates a situation in which all people have rights and an interest in their own data. However, Indigenous peoples have specific and unique ethical concerns in relation to the safe storage of data and its ongoing management.[3] With this in mind intellectual property cannot be treated as 'clauses in a funding agreement that have little connection to the ethics and protocols associated with gathering and interpreting information from real people and real communities'.[4]

One feature of intellectual property law which makes it inadequate to support use and management of Indigenous Knowledge is its handling of communal or collective property and the ongoing custodial relationship which Aboriginal and Torres Strait Islander peoples have with their knowledge and data produced from it. Further,

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[1] Martin Nakata, Vicky Nakata, and Michael Chin, 'Approaches to the academic preparation and support of Australian Indigenous students for tertiary studies', *The Australian Journal of Indigenous Education*, vol. 37, pp. 137-145, 2008.

[2] Ruth L Okediji, 'Does Intellectual Property Need Human Rights?', *New York University Journal of International Politics*, vol. 51, no. 1, 2018, p. 2.

[3] Iain Johnson, *Literature review of ethical research Indigenous studies*, AIATSIS, 2018.

[4] Minniecon et al., 'Indigenous Research: Three Researchers Reflect on their Experiences at the Interface', *Australian Journal of Indigenous Education*, vol. 36, pp. 23-31, 2007.

> the transmission of cultural knowledge is a key concept for Aboriginal and Torres Strait Islander peoples. Adhering to rules governing knowledge transmission is fundamental to maintaining cultural obligations. The interrelationship between wellbeing and knowledge within this context is one of personal and community duty that, while having economic and social benefit, is not derived from an economic basis.[5]

While this consultation is focussed on protection of Indigenous Knowledge through the intellectual property system, it should also be kept in mind that ultimately the practice of Indigenous Knowledges is what will fundamentally ensure their protection:

> Investment in processes that enable bottom-up control and engagement are a critical element of the positive protection and generation of Indigenous knowledge and heritage. One of the key elements of this protection is the renewal of heritage via cultural practice. Deacon has argued that 'the most successful incentives and safeguarding strategies will involve the use of intangible heritage forms as springboards for new cultural expression that have relevance and meaning in the modern world.'[6]

Legislative framework is required

Current legislative systems are fundamentally not designed with Indigenous Knowledge in mind and serve to isolate and fragment Indigenous Knowledge in an effort to protect.[7]

AIATSIS is of the view that reform to the intellectual property legislative framework is required to make meaningful progress on the protection of Indigenous Knowledge. Proposals should not just be aspirational but should seek to create changes which genuinely respect and empower Aboriginal and Torres Strait Islander peoples to share their knowledge and benefit from that sharing, while at the same time protect knowledge from appropriation and exploitation.

AIATSIS does not support an approach that relies entirely on the current mechanism which combines contract and protocols. While this approach has proven to be a useful workaround, it is not an ideal approach and does not address the

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[5] AIATSIS, *Submission to the Productivity Commission's Inquiry into Australia's Intellectual Property Arrangements*, 2016, https://aiatsis.gov.au/sites/default/files/products/submission/aiatsis_submission_to_inquiry_on_inauthentic_art_attachment_a.pdf.

[6] Tran Tran and Clare Barcham, *(Re)defining Indigenous Intangible Cultural Heritage*, AIATSIS Research Discussion Paper no. 37, 2018, p. 17, citing Deacon et al., 2004, *The subtle power of intangible heritage*, p. 3. https://aiatsis.gov.au/sites/default/files/products/discussion_paper/dp_tranbarcham_final.pdf.

[7] Tran and Barcham, *(Re)defining Indigenous Intangible Cultural Heritage*.

shortcomings in the intellectual property system. Australia has led the world in utilising contracts and protocols which has provided a significant body of practice and an understanding of the limitations. This body of practice can now inform an appropriate legislative response.

Legislative reform is needed because regardless of the assignment of rights, research protocols or agreements, there remains a substantial number of issues related to information and knowledge falling outside the ambit of the legislative framework. This legislative change would logically also cover copyright. This is one area in which a coordinated government approach is clearly necessary.

In advocating for legislative reform it is also important to consider the impact of the relationship between the IP system which protects knowledge in material form or which has gained approval on the one hand; and on the other, state legislation protecting intangible cultural heritage. In the absence of Commonwealth initiatives to protect intangible cultural heritage—including Indigenous Knowledge—states are beginning to legislate their own alternatives. Victoria has introduced legislation to protect intangible cultural heritage and NSW's proposal to create standalone legislative protection for Aboriginal cultural heritage, including intangible heritage, has received strong support. These pieces of legislation are designed to, among other things, fill in gaps in protection created by the intellectual property system. However, in doing so, Storey expressed that the Victorian legislation is at risk of being inconsistent with the Commonwealth intellectual property regime and therefore being limited in its operation.[8] The state legislation is at risk because where there is an inconsistency between the two statutes, the Commonwealth statute will prevail to the extent of any inconsistency. Similar legislation addressing intangible cultural heritage in other states would likely face the same issue.

AIATSIS has a particular legislative provision which allows it to carry out its collection work whilst maintaining cultural safety:

> 41 Certain information not to be disclosed:
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> (1) Where information or other matter has been deposited with the Institute under conditions of restricted access, the Institute or the Council shall not disclose that information or other matter except in accordance with those conditions.
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> (2) The Institute or the Council shall not disclose information or other matter held by it (including information or other matter covered by

[8] Matthew Storey, Tangible Progress in the Protection of Intangible Cultural Heritage in Victoria, *Australian Indigenous Law Review*, vol. 20, p. 108, 2017.

> subsection (1)) if that disclosure would be inconsistent with the views or sensitivities of relevant Aboriginal persons or Torres Strait Islanders.

This demonstrates that legislation can enable certain organisations to refrain from sharing information where it will be inconsistent with the views of Aboriginal or Torres Strait Islander peoples.

Engagement with Aboriginal and Torres Strait Islander peoples

A significant issue that arises regardless of the approach adopted by IP Australia is a question around who constitutes the Aboriginal and Torres Strait Islander peoples of Australia and how the intellectual property framework can successfully engage with communities and knowledge holders. The issue of engagement arises in many of the proposals put forward in the consultation paper. Most of the proposals involve some sort of initial or ongoing consultation—including to obtain consent, make IP plans, and manage IP rights into the future. In creating guidelines or engaging in this work, it must be noted that 'crafting processes and institutional responses that marry cultural practices with structures in a way that is appropriate to the community should provide a basis for more effective structures.'[9]

Jacqui Katona has noted:

> [S]ystems of committees, action groups and other bodies designed by non-Aboriginal industry and governments to replace traditional political systems have nearly always failed due to exhaustion and or disinterest resulting from cultural inappropriateness.[10]

Three communities that AIATSIS worked with as part of a recent project utilised or created a variety of decision-making models to facilitate granting permissions for the access and use of their materials. These included utilising regional bodies, specific native title Prescribed Bodies Corporate (PBCs), and creating distinct cultural arms of existing organisations. Importantly, each community needs to have the independence to select an appropriate decision-making structure.

Currently a widely adopted approach is to engage through corporations and legislative bodies such as PBCs in native title and Registered Aboriginal Parties in

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[9] Lisa Strelein and Cedric Hassing, *An office for advocacy and accountability in Aboriginal affairs in Western Australia*, AIATSIS Submission, 2018, https://aiatsis.gov.au/sites/default/files/products/research_outputs_submission/aiatsis_submission_-_wa_government.pdf.

[10] Jacqui Katona, 'Cultural Protection in Frontier Australia', in Esmaeili Hossein, Worby Gus, and Simone Tur (eds), *Indigenous Australians, Social Justice and Legal Reform*, Federation Press, Sydney, 2016, p. 84.

the Victorian Heritage Act.[11] AIATSIS also often engages with Aboriginal corporations and language centres in managing rights and permissions relating to particular forms of Traditional Knowledge work. In AIATSIS' experience, the issues which arise in the process of seeking consent and permissions through these organisations is largely a resourcing not a process issue. Often these organisations are carrying out rights management work that they are not resourced to do and the work is consequently difficult to prioritise.

For example, in one case, even where there was strong community desire to review the IP arrangements of one of their collections, a large regional language centre did not have the resources to do so.[12] The regional language centre deferred to individual language groups to seek permission. However, resourcing of both the regional and language groups' organisations was one of the main limiting factors in being able to carry out the work.[13]

In many instances the relevant rights may be appropriately held or managed by an individual, family or larger group. This makes seeking consent and managing rights into the future more complex. For example, language is communal, and may be considered to be 'owned' in some sense by a group of people.[14] It can be particularly difficult when grappling with a situation where one person is a better speaker or may be more knowledgeable than another.

This process should recognise that knowledge holders have the right to determine how they will be consulted and how they will give their consent. Knowledge holders should be empowered to select appropriate decision-making processes. Any legislation or framework should not specify that consent must be gained through a 'customary decision making process' as is detailed on page six of the Consultation Paper. Instead this should specify 'a decision making process' giving groups agency to select an appropriate decision-making process.[15]

At times engagement can be simplified where a specified body or person is authorised to make decisions about certain material. In providing consent for the recording, use, or reuse of Traditional Knowledge, legislation could require an authorisation process be adopted which is then enforceable in the courts. This authorisation process is to be decided by the relevant Indigenous group but once

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[11] *Native Title Act 1993* (Cth); *Aboriginal Heritage Act 2006* (Vic).
[12] AIATSIS, Preserve, Strengthen and Renew in Community: Workshop Report, 2018, https://aiatsis.gov.au/sites/default/files/docs/research-and-guides/psr_workshop_report.pdf.
[13] AIATSIS, Preserve, Strengthen and Renew in Community.
[14] AIATSIS, Preserve, Strengthen and Renew in Community, p. 12.
[15] Lisa Strelein et al., *Submission to Reforms to the Native Title Act 1993 (Cth) Options Paper*, AIATSIS Submission, 2018, p. 18, https://aiatsis.gov.au/sites/default/files/products/submission/aiatsis_submission_native_title_amendment_act_reforms_2018.pdf.

decided, adherence to that process is enforceable in the court system. The authorisation could occur in a culturally appropriate way or way determined most fitting by the relevant group. Where one individual becomes authorised to undertake certain actions or give certain permissions, a fiduciary relationship could still apply, as was imposed in *Bulun Bulun*.[16]

Engagement is an inherent part of all of the proposals. As such there will be an increase in these consent seeking processes which will inevitably lead to an increase in demand for services facilitating this engagement. This could create an additional benefit for Indigenous businesses who are able to provide a service facilitating this engagement.

A further question to ask is at what point a community or knowledge holders should be engaged. Consider that, for example, contact is unlikely to be needed for a Year 10 student's project based on secondary library sources, however, a PhD project will almost certainly require engagement at a very early stage of planning. Projects should be built in partnership and this requires talking to people. Upon engaging a group or individual, it may become apparent that a project may go outside the scope of the initially proposed project—this may be within the capabilities of the individual or group who proposed the research or it may not. In either case, the project that the community has described as meeting its needs and priorities should be undertaken instead, with the possible consequence that the initial proposal does not proceed.

In practice, this places a large burden on Aboriginal and Torres Strait Islander peoples. It is important to consider the implications if a project does not proceed. If someone looking to use Indigenous Knowledge sought permission from an organisation, is the burden then unfairly shifted onto that organisation to then undertake consultation with the appropriate people? The chance of creating this burden may be higher when the person wishing to utilise Indigenous Knowledge has no established relationship with the relevant community or knowledge holders.

The above issues are largely related to situations in which a certain piece of knowledge or information can be linked to one group or individual. In some instances, however, information or knowledge may be related to a geographic region. In other instances, consent may need to be sought for large data sets, including de-identified data sets. Consent or some form of ethics approval to use these datasets will still be required where they were collected 'with or about' Indigenous peoples and may require an Indigenous data governance framework to be put in place.

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[16] *Bulun Bulun & Anor v R & T Textiles Pty Ltd* [1998] 1082 FCA 1082.

In these instances, AIATSIS recommends that it would be appropriate to form a committee that is representative of the people 'with or about' whom data was collected. In some circumstances, this function could be performed by an Indigenous Advisory Committee of some kind.

A further consideration when seeking consent and engaging Aboriginal and Torres Strait Islander peoples is payment for their expertise. This does not mean payment for their consent but rather for the knowledge and expertise provided. In applying for an ARC grant, there is an expectation to pay people in accordance with guidelines. This is the case whether specific knowledge holders are engaged or some kind of advisory group is established.

A further consideration in engaging Traditional Owners in the economic development of Northern Australia is Indigenous knowledge and traditional ecological knowledge and other forms of knowledge that can inform development. There is currently limited protection under Australian intellectual property law for this kind of knowledge, although there is great value in this, including by product differentiation and the marketing of authentic products. It is necessary to consider that there is enormous value in engaging with Aboriginal and Torres Strait Islander peoples. This engagement does not just lead to a checked consent form; it can lead to gaining expert knowledge and authority which is commercially valuable in a marketplace where authenticity and a culturally-based product is highly valued.[17]

Product differentiation created by the specific knowledge associated with methods and locations of cultural practice (for example, fish catch, traditional names and associated health or other benefits) is an untapped source of economic value for Indigenous peoples.[18] Currently the lack of protection and the ease with which this knowledge can be exploited or appropriated is detrimental to economic development. There also emerges an aspect of self-regulation in the engagement with Indigenous Knowledge, in that the consumer will select an 'authentic' product over another. Associated with this is a societal responsibility to promote the diversity of First Nations, to value and use Indigenous Knowledges, and enable wider participation

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[17] Hristina Mikić, 'Measuring the Economic Contribution of the Cultural Industries: A Review and Assessment of Current Methodological Approaches', *UNESCO Institute of Statistics*, Montreal, 2012; Nicola Boccella and Irene Salerno, 'Creative Economy, Cultural Industries and Local Development', *Procedia—Social and Behavioral Sciences* vol. 223, pp. 291-296, 2016; David Throsby, 'Development Strategies for Pacific Island Economies: Is There a Role for the Cultural Industries?', *Special Issue: Health Policy Challenges in Asia and the Pacific*, vol. 2, no. 2, pp. 370-382, 2015.

[18] Lisa Strelein, Hansard, Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia, Joint Standing Committee on Northern Australia, 2019.

without misappropriating knowledge. This misappropriation and the potential cultural harm caused as a result of commercialisation also need to be kept in mind. [19]

Taking a coordinated government approach

IP Australia's current consultation relates to an area of policy and practice which requires a coordinated government response. The proposals contained within the consultation paper require whole-of-government support for the initiatives in their totality and consideration of the implications of implementing these changes on the ground. For example, the approach taken by IP Australia in relation to trademarks, patents, designs, and plant breeder's rights needs to be consistent with the approach taken by the Department of Communications and the Arts in relation to copyright. Intellectual property is ordinarily perceived as a whole and it can be quite confusing for people to consider copyright distinctly from patents, trademarks etc. whilst also trying to work out the interaction between cultural authority, cultural rights, and intellectual property rights.

In considering the current proposals, it is pertinent to think about the relevant government actors— including but not limited to IP Australia, Department of Communication and the Arts, AIATSIS, the possible formation of a National Indigenous Arts and Cultural Authority (NIACA), and the Department of Prime Minister and Cabinet.

In considering each of these organisations, it is important to consider each of their existing functions and boundaries, what each organisation can feasibly do and where their expertise lies. There is a need for government to show leadership in streamlining these processes.

AIATSIS has strong Indigenous governance structures as well as legislative responsibility to provide leadership in Aboriginal and Torres Strait Islander research, and ethics and protocols for research. AIATSIS also has 55 years of experience in conducting research, providing ethical clearances for projects, managing collections, and publishing. In addition, AIATSIS could play a role in collaboration with IP Australia to engage a wider audience in the conversation around ICIP. This could include increasing awareness and understanding of issues related to ICIP and promoting best practice, for example through IP Australia's publications relating to trademarks, patents, designs, and plant breeder's rights. IP Australia's clients or stakeholders could be directed to refer to GERAIS (a revised version is due for release this year). IP Australia does have a particular reach into the scientific

[19] See examples in Terri Janke and Maiko Sentina, *Indigenous knowledge: Issues for Protection and Management*, Terri Janke and Company Pty Ltd, Sydney, 2017, p. 31; *Yumbulul v The Reserve Bank of Australia* (1991) 21 IPR 481, 482.

community which AIATSIS does not have and which could assist in increasing awareness.

1. **Are there any other issues associated with the protection and management of Indigenous Knowledge not addressed above that you would like IP Australia to consider?**

AIATSIS has identified the lack of communal rights in intellectual property as a particular issue facing Aboriginal and Torres Strait Islander peoples in the protection and management of their knowledges.[20]

There is a strong argument for aligning IP with ICIP as implicitly recognised as communal under native title, land rights and heritage laws.[21] AIATSIS has sought to do this by heavily involving community in designing the decision-making processes related to the access and use of AIATSIS collection items. As part of the process of recording new materials a variety of research results and mechanisms were developed by community groups to ensure ICIP could be handled appropriately. One of these mechanisms was the election of a corporation as the selected decision maker. Another was the establishing of a cultural arm of the group's existing native title holding body.[22]

There are a substantial amount of issues and solutions presented in Terri Janke's extensive report commissioned by IP Australia related to languages which should be given further consideration.[23] Given 2019 is the International Year of Indigenous Languages, it would be prudent for IP Australia to engage in some commentary around this.

The NZ Trademarks model[24] is a useful model, but it is much simpler to deal with such a small number of groups with a shared language when compared to the number of distinct groups in Australia. This kind of representation would be very difficult to manage in an Australian context. Consider, for example, a member of the general public brings forward a trademark for assessment. The assessment would need to be involve someone who has the ability to recognise what language is being used and to then refer to that language group for further consultation.

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[20] AIATSIS, Preserve, Strengthen and Renew in Community, p. 12.
[21] This alignment has been demonstrated in the reform of taxation laws and carbon farming: see *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), *Tax Laws Amendment (2012 Measures No. 6) Act 2013* (Cth) and *Tax Laws Amendment (2013 Measures No. 2) Act 2013* (Cth).
[22] AIATSIS, Preserve, Strengthen and Renew in Community, p. 32.
[23] Terri Janke and Maiko Sentina, *Indigenous Knowledge: Issues for protection and management Discussion Paper*, Terri Janke and Company Pty Ltd, Sydney, 2017.
[24] Janke and Sentina, *Indigenous Knowledge*, p. 55.

2. **What do you consider to be the greatest challenges for Indigenous people in ensuring that Traditional Knowledge is not misappropriated or misused?**

The greatest challenge is the inadequacy of legal protections for Traditional Knowledge. All of the proposals that are aimed at vesting IP rights in Indigenous people may be well intentioned however this does not address the fact that the IP rights available to protect Indigenous Knowledge remain limited and inadequate.[25]

In AIATSIS' work, even where all other forms of protection are followed—FPIC gained, cultural protocols followed—we are still facing issues due to the lack of legal protections for Traditional Knowledge.

The lack of legal protections has resulted in knowledge holders lacking the ability to enforce protocols and guidelines.[26] In the cultural sector, the degree to which Indigenous Knowledge is recognised often depends upon the policies of institutions. There is currently no burden placed upon keeping places and companies to ensure management of materials and data is up to date and to undertake regular assessments of their materials or to return material to Indigenous peoples or involve them in the management of and access to material.

3. **What are your views on the proposals considered above for the protection of Traditional Knowledge?**

Proposal 1 - collective or certification trademarks; GIs

Proposal 2 - Standardise research protocols and guidelines

It is important to firstly understand the existing standardised research protocols and guidelines and the activities which constitute research. The overarching document that outlines responsible research in Australia is the *Australian Code for the Responsible Conduct of Research 2018* (the Code). The Code was developed by the National Health and Medical Research Council (NHMRC), the Australian Research Council (ARC) and Universities Australia (UA) and it 'articulates the broad principles that characterise an honest, ethical and conscientious research culture'. It provides an encompassing definition of research that is inclusive of the multiple methods that individuals and groups use to investigate and gather knowledge; it notes that

[25] AIATSIS, Preserve, Strengthen and Renew in Community, p. 12.
[26] Janke and Sentina, *Indigenous Knowledge*.

research is a broad concept and varies considerably across disciplines and that research can involve synthesising or developing existing knowledge in creative ways.[27]

The existing standards for research is provided by the *Australian Code for the Responsible Conduct of Research*, the *National Statement on Ethical Conduct in Human Research* and the *Guidelines for Ethical Research in Australian Indigenous Studies* (GERAIS).[28] GERAIS is notable as the guidelines break from conventional ethical formation and are not based on vulnerability but instead are focused on rights. AIATSIS notes that GERAIS is currently under review and we anticipate that a draft of the new Guidelines will be available in July 2019. This will include further guidance on ICIP and particularly the use of large data sets. While these research and ethics protocols and guidelines can be continued to be reviewed and standardised, it does not necessarily solve some of the more difficult questions which arise.

IP Australia may have a role in collaborating on guidelines or referring particular areas of specialisation to particular guidelines. For new parties or disciplines now engaging with or wishing to engage with Traditional Knowledge, for example the business sector, IP Australia is able to reach a wider audience who can then be referred to the more specific guidelines on engaging with Traditional Knowledge such as GERAIS. These new parties may, for example, be businesses who are seeking to engage with Traditional Owners or use Indigenous knowledge in the marketplace. It would be desirable to avoid the over-specialisation of guidelines or production of multiple guidelines on a similar issue.

One area which requires further development is to dramatically increase the consideration of and action undertaken to ensure proper storage and management of data, particularly the documentation relating to research projects in addition to the physical expression and data which contain Indigenous Knowledge.

Researchers need to prepare data in a coherent way that demonstrates provenance. This includes engaging data archives at an early stage of the research and ensuring all relevant records are kept and maintained. This further includes participant information and consent forms, copyright assignment forms, as well as the data which contains the expressions. However, researchers cannot make representations to research partners that an archive will accept the research data. All archives and collecting bodies have their own processes for assessment of material before being accepted. Projects should also have budgets to ensure the viability and sustainability

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[27] Iain Johnson, *Literature review of ethical research in Indigenous studies.*

[28] For health and medical research see NHMRC, *Ethical conduct in research with Aboriginal and Torres Strait Islander Peoples' and communities: Guidelines for researchers and stakeholders*

of ongoing data management. Materials need to be prepared for long term archiving with notification given to communities about where their data has gone and how it is being managed. AIATSIS is able to facilitate these genuinely long-term relationships that are required to ensure data is controlled and managed in accordance with the direction of the knowledge holders represented in that data. The Deepening Histories of Place project developed some of the more comprehensive, publically available materials related to community clearance and archiving of materials.[29]

However, in managing data post-project, researchers need to be cautious of placing too large a burden on Indigenous people to manage relationships beyond those envisioned by the project. For example a PhD researcher completes their project and deposits all materials with their university, as required. A year passes where the researcher still has a say over the materials at which point all control passes to the university. The community involved in the research then need to establish and maintain a relationship with the university to retain some sort of authority over the materials collected from or with them as part of the research.

Further, due to the communal and intergenerational nature of Indigenous Knowledges, engagement, consent and benefit sharing should be ongoing. Paying knowledge holders for consent or for a particular piece of information is not sufficient benefit sharing because knowledge is handed down and communally owned. Knowledge may have been paid for—which under intellectual property is now owned in perpetuity. However that communally owned knowledge will then be handed down to younger generations. This creates the need to ensure that benefit-sharing is not done through a once-off agreement but rather occurs through an ongoing relationship. Companies and researchers will need to work out a mechanism to do this.

Proposal 3 - Develop and promote standard research and commercialisation agreements

Development of standard agreements would be useful because research agreements are usually written by the researcher who often will not have knowledge of how intellectual property in particular works.

However, there is also a need to allow for variation according to what is negotiated between the researcher and community. Standardised agreements cannot take the place of negotiated agreements gained with consent in addition to ongoing reformulation of projects where appropriate.

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[29] See Australian National University, Clearance Forms, Deepening Histories of Place, available at <http://www.deepeninghistories.anu.edu.au/documents/>.

Caution should be taken in making such terms mandatory as some organisations have developed their own set of standards to be complied with by research partners, and more organisations have expressed such a desire. For example, see the KLC Intellectual Property and Traditional Knowledge Policy, KLC Protocol, and Kimberley Saltwater Country Research Protocol.[30]

See above comments relating to the need to ensure ongoing consent and benefit sharing.

Proposal 4 - FPIC as a requirement for Australian Government-funded research programs

AIATSIS supports the application of the free prior and informed consent principles, however the framework for this already exists in GERAIS.

National framework for how to obtain FPIC to use Traditional Knowledge

In implementing this requirement, IP Australia should consider methods of engagement, as discussed above in 'Engagement with Aboriginal and Torres Strait Islander Peoples'.

AIATSIS notes that GERAIS includes four principles related to obtaining consent and consultation:

- Consultation, negotiation and free, prior and informed consent are the foundations for research with or about Indigenous peoples.
- Responsibility for consultation and negotiation is ongoing.
- Consultation and negotiation should achieve mutual understanding about the proposed research.
- Negotiation should result in a formal agreement for the conduct of a research project.

Requirements for Indigenous IP plans, and the vesting of Traditional Knowledge-based IP in Indigenous communities, in order to obtain Australian Government funding

AIATSIS has undertaken a project to explore models for the return of collection materials with a focus on ensuring those materials are then managed in a way dictated by the appropriate Aboriginal or Torres Strait Islander community. Drawing on this project, AIATSIS suggests that in vesting IP in Indigenous communities, consideration should be given to the future management of the relevant data and

[30] Available at https://www.klc.org.au/research-facilitation/

outputs.[31] AIATSIS is developing resources and templates for research agreements consistent with GERAIS.

IP plans need to properly assign all possible IP rights to the appropriate Indigenous group, individual, or entity (as knowledge holders see fit) to avoid issues arising in the future where rights holders are unable to be contacted but relevant rules and processes related to the material are still enforced. IP plans should also provide for permissions to deposit materials and determine the conditions under which people can access those materials to enable interviews and sensitive cultural material to be vetted or protected.[32] It is important that this information is archived and managed well to ensure the longevity and appropriate accessibility of the information. These plans should address the allocation of rights and management into the future of raw data as well as outputs etc.

Given that in some circumstances a need will arise to seek permissions from the appropriate people on the use of Traditional Knowledge, any data that is recorded should be done with detailed metadata. This will prevent problems arising in the future where seeking permission is very time consuming because a lack of metadata means the person from whom permission is required may not be clear.[33]

As a minimum, IP plans should include:

- that all intellectual property rights will be allocated to the Traditional Knowledge holders with licenses in place if appropriate
- Traditional Knowledge holders will have authority over all intellectual property gathered
- how and by whom the data will be stored or archived
- who can access the data
- who can use the data and for what purposes
- from whom permission is to be sought to access or use the data in the future—an individual, group, or organisation
- what ongoing benefit will the Indigenous partner or participants receive
- how an archiving process will be incorporated into the project and continue post-project
- how benefits are define and shared

Standard terms for licensing Traditional Knowledge to research partners and/or government for defined purposes

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[31] AIATSIS, Preserve, Strengthen and Renew in Community.
[32] AIATSIS, Preserve, Strengthen and Renew in Community.
[33] AIATSIS, Preserve, Strengthen and Renew in Community.

The development of a series of terms which could be adopted by Indigenous groups, if they choose, would lessen the burden on Indigenous groups who are not resourced to undertake research or seek legal advice. AIATSIS suggests that this would be better undertaken by AIATSIS with such outputs promulgated and promoted by IP Australia to their audiences.

Communities have identified a need for a template illustrating the commonalities between various research and collecting institutions about the terms upon which information will be gathered from communities. With this information, groups could more easily assert their own standard for conducting research.

As mentioned above caution should be taken in making such terms mandatory as some organisations have developed their own set of standards to be complied with by research partners.

Proposal 5 - Develop a national database of Traditional Knowledge and genetic resources

AIATSIS holds several concerns about how such a large database may be resourced and function. The information and material to be covered by a database is very broad and could include every piece of information used in designs, knowledge used in tourism experiences, or information about a large range of plants.

AIATSIS advises caution in the establishment of such a database as the collection and storage of Traditional Knowledge and genetic resources in this way may be seen as an ongoing theft of knowledge, as has occurred throughout Australia's colonial history.[34]

A further concern is the potential for the database to contain secret or sacred knowledge. The inclusion of this kind of material in a publicly accessible database would not constitute a system which adequately ensures cultural safety. The resources required to administer such a database are significant, particularly in the instance where secret or sacred material is being handled. Consideration would also need to be given to the cultural competence of those administering or accessing the database.

The creation of a database could also increase the burden placed upon Aboriginal or Torres Strait Islander peoples in registering and administering information on the database. Significant work would need to be undertaken in order to register a piece

[34] Linda Tuhiwai Smith, Decolonizing methodologies: research and indigenous peoples, 2nd edn, Zed Books, London, New York, 2012, p. 32.

of information just to secure the opportunity to gain potential benefit from that information in future.[35]

> Creating an obligation for the registration of TK as a precondition for recognition of rights over it would place indigenous peoples under a heavier burden for recognition of rights than is generally required by existing intellectual property rights regimes which do not require prior documentation of intangible property as a condition for its protection.[36]

Discourse on the use of Traditional Knowledge databases emphasises that databases alone cannot ensure protection. For example,

> Rather, they must be seen as one element or mechanism in a wider system of TK governance including customary law and practice, national access and benefit-sharing legislation, and *sui generis* TK law and policy.[37]

> If databases are not done properly and are not backed by positive laws recognising the rights of indigenous people, [t]he ready accessibility of this information without sufficient safeguards makes it more vulnerable to misuse.[38]

Registers around the world are largely for medicines and genetic resources and are designed to encourage commercial engagement.[39] Some databases are made available to pharmaceutical companies to assist them in discovering new medicines to manufacture. These databases designed to encourage commercial engagement are vastly different from one which would seek to protect Traditional Knowledge through simple inclusion in a database.

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[35] Merle Alexander et al., *The Role of Registers and Databases in the Protection of Traditional Knowledge: A Comparative Analysis*, United Nations University Institute of Advanced Studies, 2004, p. 40.

[36] Alexander et al., p. 30.

[37] Alexander et al., p. 40.

[38] Adithi Koushik, *Indigenous Knowledge Database: Is It Something To Be Concerned About?* accessed 24/10/2018, available <http://www.ip-watch.org/2018/06/28/indigenous-traditional-knowledge-databases-something-concerned/> referencing Sue Noe, 36th meeting of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 25-29 June 2018, Geneva Switzerland.

[39] WIPO, Online Databases and Registries of Traditional Knowledge and Genetic Resources, accessed 24/10/2018, available <http://www.wipo.int/export/sites/www/tk/en/resources/pdf/gr_table.pdf>.

Proposal 6: Disclosure of source requirement for genetic resources in patent applications

Proposal 7: Provide training and legal support to Indigenous communities

Any training that is delivered should be culturally relevant and be delivered in a format, manner, and language which makes sense to individual communities. If training is provided it should also include training and information about intellectual property law. The intellectual property regime can be difficult to understand, particularly as it often operates to deprive people of things which, under their own knowledge systems, are their own. AIATSIS has consistently heard from research partners that concepts such as copyright are not well understood. Having an understanding of intellectual property is a necessary part of giving free, prior and informed consent. Training should be tailored to address specific situations which commonly arise for Indigenous peoples. For example, advice on knowledge holders seeking the assignment of copyright, the sharing of copyright amongst a group, and how to authorise one person to act on behalf of a group.

Organisations' current ability to seek legal support is largely a resourcing issue; they have the capability to seek out this expertise but do not have the resourcing to do so.

4. **Are there other ways in which collaboration between Indigenous communities and researchers could be encouraged and supported in order to create economic opportunities?**

5. **Are there other options that IP Australia should consider to protect Traditional Knowledge?**

IP Australia could consider developing an objection procedure within the registration processes for patents, trademarks, designs, and plant breeder's rights. While a group may not have the desire or resources to register certain information in a database, they may have the desire to retain the ability to utilise the information at a later date. An objection procedure would allow an individual or group to reserve the information for a future opportunity. This can be done without the need to go through costly description, recording and registration processes in order for a group to retain the opportunity to benefit from their Traditional Knowledge at a later date.

An objection process would give Indigenous peoples a procedural right to protect their traditional knowledge. The procedural right recognises that there are existing laws and customs relating to this information that must be taken into account. Such a

procedural right creates a point of entry within the existing IP system for Indigenous laws and customs to be applied.

However, considerable thought would need to be given to this model to make improvements upon the existing objection procedure within native title. That procedure allows native title holders to lodge an objection to the fast-tracking of proposed granting of tenement. The objection procedure is often tokenistic, however, with just 2.5% of objections resulting in a determination that the future act could not be done.[40]

IP Australia could also consider an option similar to the provisions relating to intangible cultural heritage in the *Aboriginal Heritage Act 2006* (Vic).

6. **What do you consider to be the greatest challenge for Indigenous people in ensuring that Traditional Cultural Expressions are protected from inappropriate commercial use?**

See above comments in Engagement with Aboriginal and Torres Strait Islander peoples.

7. **What are your views on the proposals considered above for the protection of Traditional Cultural Expressions in the trade marks and designs systems?**

Proposal 8: Measures to prevent registration of offensive trade marks and designs

Proposal 9: Database of culturally significant words and images

Proposal 10: Requirement for consent

As discussed above, any work with or about Aboriginal and Torres Strait Islander peoples, their cultures, knowledges and Traditional Cultural Expressions requires consent. See above for detail on engagement with Aboriginal and Torres Strait Islander peoples and consent seeking processes.

8. **Are you aware of any existing databases or collections of Traditional Cultural Expressions that could be used or built upon to implement the database option (Proposal 9) outlined above?**

[40] National Native Title Tribunal, available <http://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx>.

There are a large number of databases and platforms available including national, regional, and organisation or language specific databases. For example, Ara Irititja, Mukurtu, e-Mob, and Koorie Heritage Archive.[41]

9. **Are there any other options that you think IP Australia should consider to address the issue of inappropriate use of Traditional Cultural Expression in trade marks and designs?**

10. **What role do you think an Indigenous Advisory Panel (or similar body) could play in advising or assisting IP Australia on the protection of Indigenous Knowledge?**

An Indigenous Advisory Panel could be particularly useful in relation to the use of large and often de-identified or unclaimed data sets. Currently people are self-regulating when deciding whether or not to seek ethics approvals for this kind of data and create ad-hoc governance processes. An Advisory Panel could look at proposals and have some authority to provide advice and direction on ethics assessments and consultation. The Australia Data Archive or other data archives could flag particular datasets whose use requires clearance with the Advisory Panel.

AIATSIS is examining its role in providing data governance generally. Further collaboration on this would be beneficial.

11. **Are there any specific issues you would want IP Australia to consider, were it to set up an Indigenous Advisory Panel (or similar body)?**

AIATSIS is currently developing advice on how to set up effective data governance systems. This advice may be relevant upon completion.

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[41] Scales et al., "The Ara Irititja Project: Past, Present and Future," 157; P de Souza et al., "Aboriginal Knowledge, Digital Technologies and Cultural Collections," *Melbourne Networked Society Institute Research Paper* 4 (2016): 37; K Christen, "Opening Archives: Respectful Repatriation," *The American Archivist* 74, no. 1 (2011): 185–210; Christen, "Does Information Really Want to Be Free? Indigenous Knowledge Systems and the Question of Openness"; S O'Sullivan, "Reversing the Gaze: Considering Indigenous Perspectives on Museums, Cultural Representations and the Equivocal Digital Remnant," in *Information Technology and Indigenous Communities*, ed. L Ormond-Parker et al. (Canberra: AIATSIS Research Publications, 2013), 139–49; S Huebner, "A Digital Community Project for the Recuperation, Activation and Emergence of Victorian Koorie Knowledge, Culture and Identity," in *Information Technology and Indigenous Communities*, ed. L Ormond-Parker et al. (Canberra: AIATSIS Research Publications, 2013), 171–83.

12. **Are there any issues you think should be particularly included in any education and awareness campaign?**

13. **Do you have suggestions for how an education and awareness campaign should be conducted and whether any particular community or industry sectors should be targeted?**

Many Aboriginal and Torres Strait Island peoples and communities do not understand intellectual property rights and what rights or permissions they may be giving up if engaging in licensing or other IP processes. In addressing this an approach will need to be adopted which has Aboriginal or Torres Strait Islander peoples as the target audience and a campaign created specifically for this purpose.