AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

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IP Australia
Trade and Policy Projects
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By Email: consultation@ipaustralia.gov.au

Re: How Indigenous Knowledge can work with the intellectual property (IP) system?

Dear Sir/Madam

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes this review. This review presents an opportunity to revisit how Indigenous Knowledge can work within the broad reach of the intellectual property (IP) system.

AIATSIS has acquired significant expertise in the development, application and protection of Indigenous Knowledge through its research and collections. AIATSIS is home to the world's premier collection of materials pertaining to Australian Aboriginal and Torres Strait Islander studies, including written works, photographs, sound recordings, moving image recordings, artworks and artefacts. In keeping with our legislative functions—including using the collection to strengthen and promote knowledge and understanding of Aboriginal and Torres Strait Islander culture and heritage—AIATSIS is committed to making its collection as accessible as possible, while respecting relevant laws and cultural protocols. Further, for over 20 years AIATSIS' Native Title Research Unit has provided research and information resources to support the native title sector. Drawing on this expertise we advise the inquiry of aspects of Indigenous Knowledge formation and collection that remain outside contemporary IP definitions.

AIATSIS acknowledges the diversity and comprehensiveness of submissions made by others and we confine our submission to AIATSIS' role as a cultural institution, the Guidelines for Ethical Research in Australian Indigenous Studies (GERAIS), used and referenced by others (including the Indigenous Advisory Committee, p. 4; Patricia Adjei, p. 1; Indigenous Higher Education Advisory Council, p. 4-5, 6; Terri Janke and Company IP Lawyers, p. 1; Ninti One Limited, p. 5; and UTS, p. 4), and our recent research findings about the management of information aggregated to further native title claims.

Indigenous Knowledge and AIATSIS Research and Collections

Indigenous Knowledge takes multiple forms, and within our research and collections practices is linked to philosophical and legal traditions, language and education, stories, song and

ceremonies. These are in turn related to specific places and knowledge of critical ecological relationships. Practically, this varied knowledge is from diverse origins and stored or transmitted in many formats including photographs, film and reports. AIATSIS recognises the lack of protection of Indigenous Cultural and Intellectual Property (ICICP) in law as a significant barrier to discharging our legislative functions in relation to the Indigenous Knowledge held within and supported by the Institute.

A large number of unpublished and unique materials held by AIATSIS were created by researchers. Access and use of unpublished material is commonly determined by deposit agreements, research grant agreements, the *Copyright Act 1968* (Cth) and/or section 41 of the *AIATSIS Act 1989* (Cth), which restricts the disclosure of certain information or matters. Some items in the collection were created without public access in mind and prior to the development of rigorous processes that acknowledged and documented the ICIP contained in these materials.

AIATSIS recognises the rights of Aboriginal and Torres Strait Islander peoples to control their cultural heritage and intellectual property and manages its collection in accordance with its Access and Use Policy.[1] However, this situation sometimes creates a tension between legal duties owed by AIATSIS, and less secure protocols enacted to promote and safeguard intellectual property rights of Aboriginal and Torres Strait Islanders. The resulting ambiguity would be well served and potentially clarified by a set of *sui generis* legislative reforms to protect ICIP in materials already within the AIATSIS collection, and future materials generated in a range of forums including native title.

We are aware of other organisations with significant Aboriginal and Torres Strait Islander material in their collection which remain unsure of how to share their material.

Indigenous Knowledge Management and Native Title Practice

At the time of writing there are 252 current native title claims and 151 registered native title bodies corporate (RNTBCs). These RNTBCs manage rights and interests over approximately 30 per cent of Australia's land mass.

As a part of asserting native title rights over these areas, native title holders have engaged in an unprecedented research effort to document traditional laws and customs. This involves reviewing historical, ethnographic and archaeological information to meet the evidential requirements under section 223 of the *Native Title Act 1993* (Cth).

However, at a recent Managing Information in Native Title (MINT) workshop held at AIATSIS in March 2015, it was noted that the 'scale and complexity of the practical, cultural, legal and conceptual issues involved in managing native title information…contrast with the very limited resources and expertise available to deal with them'.[2] These complexities relate to the fraught

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[1] AIATSIS Collections Access and Use Policy, Australian Institute of Aboriginal and Torres Strait Islander Studies, viewed 29 February 2016, <http://aiatsis.gov.au/sites/default/files/docs/collections-and-library/access-and-use-policy-aiatsis-collection.pdf>.

[2] McGrath, P, Dinkler, L & Andriolo, A 2015, Managing information in native title: survey and workshop report, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, p. 1, viewed 8

interaction between Indigenous cultural laws and norms and IP law systems, as well as practicalities of native title claim processes.

Role of Native Title Representative Bodies and Native Title Service Providers

Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) are funded to provide legal representation to native title claim groups. Practically, NTRBs/NTSPs often commission anthropologists and other experts to develop claim materials, which are then shared with the Federal Court or National Native Title Tribunal throughout a native title claim. This process means that while cultural material, and the Indigenous Knowledge therein, is obtained from traditional owners, it is repackaged into 'connection materials' (court affidavits and expert reports) to meet with evidentiary requirements. These relationships are further complicated by the later shift in relationship between NTRBs/NTSPs and native title holders who must establish an RNTBC after a court determination to hold and manage native title rights and interests. RNTBCs then become new clients for NTRBs/NTSPs following a successful determination.

Who holds IP (entity, group of persons or persons) is influenced by the varied legal aspects of native title claim processes. This can lead to a shift in the definition of 'owners' of cultural material collected throughout these processes. These Indigenous Knowledges include not only cultural but also critical ethno-biological knowledge that has not been recorded elsewhere. Indigenous Knowledges collected through native title may include copyright (films, genealogies, photos for example) and patents (environmental and biological techniques, land management as well as medicinal uses of plants).

Our research and consultations show that what Australian law prescribes regarding the ownership of materials, and the IP contained in these materials, at times conflicts with expectations or cultural obligations of traditional owners. In particular:

- Cultural or moral ownership of materials is not easily identified or taken into consideration when material is created, stored or shared across multiple organisations involved in the native title claim process;
- The preservation of materials for future use (archiving), including intergenerational use, is not contemplated when knowledge is recorded and material collated; and
- Legal advice is retrospectively sought as native title organisations have no explicit funds to support or negotiate the return of native title materials to traditional owners in a culturally appropriate manner.

Chronic underfunding of the native title sector exacerbates these challenges and AIATSIS seeks:

- The recognition of the challenge of protecting and sharing claim material and the IP contained in this material; and

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February 2016, <http://aiatsis.gov.au/publications/products/managing-information-native-title-survey-and-workshop-report>.

- The development of greater flexibility within in the system to account for the unique priorities, contexts and circumstances of different groups and organisations.

This may in turn promote solutions to safeguard traditional owners, NTRBs/NTSPs and others who collect or present information on their behalf from misappropriation. From our research, suggested solutions have been contractual (or relationship based) in nature and include:

- Individual or group consent for the collection, preservation and future use of materials, prior to a native title determination being reached or ordered; and
- Incorporating Aboriginal and Torres Strait Islander laws in service agreements following a native title determination (to manage information flow and usage between traditional owners and NTRBs/NTSPs).

AIATSIS acknowledges that the native title sector, while significant in this context, is only one area of Indigenous Knowledge creation and collection that face similar challenges.

Management of Communal and Individual Property Rights in Native Title Research

AIATSIS research is based on the Guidelines for Ethical Research in Australian Indigenous Studies (GERAIS). GERAIS provides principles to conduct research as well as collect and store materials from research processes. GERAIS is embedded within the Australian Code for Responsible Conduct of Research and the NHMRC National Statement on Ethical Conduct in Human Research, and referred to by the Australian Research Council and in the Ethical Principles and Guidelines for Indigenous Research produced by the Australian Housing and Urban Research Institute.

AIATSIS research plans and associated contracts and permissions are reviewed by the AIATSIS Research Ethics Committee, which also considers external applications for ethical clearance against GERAIS. To encourage responsible research practices, all proposals and ARC-funded research projects are either recommended or required to conform to these principles and their successor documents, as stipulated within the scheme-specific funding rules.

The GERAIS principles mandate research practices inclusive of Indigenous partners in research design, delivery and the production of final products (e.g. publications or articles) and provide reciprocal benefits to partners. More importantly, this partnership extends to how IP in material is shared between researcher and partner individuals or organisations. For example, AIATSIS has negotiated these shared arrangements in its research with the Martu traditional owners in Matuwa and Kurrara Kurrara[3] and the Karajarri Traditional Lands Association in Bidyadanga.[4]

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[3] Tran, T & Langford, L 2015, Negotiating the shared management of Matuwa and Kurrara Kurrara, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, viewed 8 February 2016, <http://aiatsis.gov.au/sites/default/files/products/report/rr_tranlangford.pdf>.

[4] Tran, T, Strelein, L, Weir, J, Stacey, C & Dwyer, A 2013, Changes to country and culture, changes to climate: strengthening institutions for Indigenous resilience and adaptation, National Climate Change Adaptation Research Facility, Gold Coast , viewed 8 February 2016,

As AIATSIS works with native title holders who hold claimed lands communally, our research practices involve signing head agreements with representative organisations and separate agreements with individuals who are either interviewed or directly involved in the research process. This practice ensures any IP derived from research processes (e.g. publications) is shared with partner organisations that hold rights and interests on trust for traditional owners. IP in recordings (for example copyright in stories, songs and ceremonies) is retained by the individual, who may have a fiduciary relationship to the group. Under IP law, IP is held only by individuals, which is problematic for the protection of Indigenous Knowledges.

AIATSIS research agreements enables decision making about IP to be made individually or where required, by the collective group or organisation via their own cultural protocols. We note Indigenous partners and researchers agree, through this practice, to proactively manage knowledge production and to benefit equitably from the outcomes of research.

We appreciate the opportunity created by IP Australia to align cultural priorities and understandings of intellectual property with the existing legal regime and practices in place. We hope that this alignment will account for the unique circumstances in which Indigenous knowledge is created, maintained and shared with others.

Yours sincerely

Dr Lisa Strelein
Executive Director of Research

<https://www.nccarf.edu.au/sites/default/files/attached_files_publications/Tran_2013_Changes_to_country_and_culture.pdf>.