THE LAW SOCIETY OF NEW SOUTH WALES
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Submission on IP Australia's Indigenous Knowledge Consultation Paper

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IP Australia – Indigenous Knowledge Project

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The NSW Young Lawyers Communications, Entertainment and Technology Committee (Committee) makes the following submission in response to the IP Australia Indigenous Knowledge (IK) Consultation Paper.

NSW Young Lawyers

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The Communications, Entertainment and Technology Law Committee of NSW Young Lawyers aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to information and communication technology (including technology affecting legal practice), intellectual property, advertising and consumer protection, confidential information and privacy, entertainment, and the media. As innovation inevitably challenges custom, the CET Committee promotes forward thinking, particularly with respect to the shape of the law and the legal profession.

Introduction

The NSW Young Lawyers Communications, Entertainment and Technology Law Committee (**the Committee**) welcomes the opportunity to comment on IP Australia's Indigenous Knowledge Consultation Paper (**Consultation Paper**).

The Committee notes, first and foremost, that the reform of decision-making processes affecting the interests of Aboriginal and Torres Strait Islander peoples, particularly in relation to ownership and use of Indigenous Knowledge (**IK**), should be predominantly informed by the perspectives of Aboriginal and Torres Strait Islander peoples. As such, this should be done through consultation with Aboriginal and Torres Strait Islander communities, community leaders, peak bodies and organisations. NSW Young Lawyers acknowledges the limitations of our views and intends that our submission is read accordingly.

Summary of Recommendations

1. **Question 5:** The Committee submits that IP Australia should employ a consent-based model for considering applications for the registration of trade marks containing IK.
2. **Question 6:** The Committee submits that applicants should be required to provide the following information in order to register a trade mark containing IK:
    a. Evidence with of consultation with Aboriginal and Torres Strait Islander peoples;
    b. Evidence of free prior informed consent of the knowledge holder(s); and
    c. Particulars of the applicant's purpose for use of IK.
3. **Question 7:** The Committee supports IP Australia's proposal of an Indigenous Advisory Panel.
4. **Question 8:** The Committee supports the view that if consent is not or cannot be obtained, then a trademark containing IK should not be registrable.
5. **Question 10:** The Committee submits that IP Australia should categorise the contents of the Trade Marks Register and the Register of Designs by marks and designs which contain IK and then incorporate this data into pre-existing IP databases with functionalities such as search filters to allow Aboriginal and Torres Strait Islander businesses and individuals to conduct a trade mark or design search and filter the results to those which contain IK.
6. **Question 11:** The Committee submits that despite the potential issues that may arise from any new avenues taken to detect the use of IK in trade marks and designs, the protection of traditional knowledge is paramount and should bear greater weight.
7. **Question 12:** The Committee submits that the best outcomes in supporting fair use of traditional knowledge would be those which safeguard IK from exploitation. Specifically, a compulsory disclosure system (Option 2).
8. **Question 14:** The Committee submits that the ability to attach information would provide a useful basis for conversations that:
    a. Promote best practice through education; and
    b. Improve awareness of Aboriginal and Torres Strait Islander ownership and associated rights, transparency, and quality of partnerships, limiting the burden of enforcement.
9. **Question 15:** The Committee submits that there are two broad categories of evidence that could be made available to IP Australia, being firstly, evidence of the initial establishment of ABS agreements and free, prior and informed consent, and secondly, ongoing compliance. Further, steps should be taken to ensure better protection of Indigenous data sovereignty, and that this is an area requiring legislative reform.

1. Measures for trade mark or design rights using IK

Options for new ways to check trade marks using IK

Question 5: Which of the three options, consent, offensiveness or deceptiveness do you prefer? Why?

1. The Committee submits that IP Australia should employ a consent-based model for considering applications for the registration of trade marks containing IK.
2. Consent and consultation must be at the centre of any proposed non-customary use of IK.[1] Depending on the circumstances and the nature of the IK, consent may only need to be obtained from an individual, while in other cases, broader community consultation will be required.[2]
3. A consent-based model would be consistent with Aboriginal and Torres Strait Islander peoples' right under Article 31 of the UN *Declaration on the Rights of Indigenous Peoples* to 'maintain, control, protect and develop their intellectual property over [their] cultural heritage, traditional knowledge, and traditional cultural expressions.' [3] Consent and consultation are also key in achieving self-determination and respecting the right of Aboriginal and Torres Strait Islander peoples to participate in decision-making processes which affect their rights, including intellectual property rights.[4]
4. This model is further supported by the UN *Global Compact Business Guide on the Declaration on the Rights of Indigenous Peoples*, which recommends that consent is obtained 'before using any cultural or intellectual property of [I]ndigenous peoples', particularly 'images or names of [I]ndigenous peoples… as part of logos, trade marks, trade names or in other company materials'.[5]
5. Three key issues will arise under a consent-based model, which must be dealt with appropriately. These are as follows:
    a. Firstly, difficulties may arise in identifying the correct Elder, traditional owner, custodian, peak body, organisation, individual or community with authority to provide consent. An Indigenous Advisory Panel (**IAP**) could play a key role in ensuring the correct stakeholders are consulted.[6] Please see our submissions below in relation to Question 7 for further detail.

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[1] Terri Janke and Company, 'Indigenous Knowledge: Issues for protection and management' (Discussion Paper, 2018) 59.
[2] Ibid 16.
[3] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 31.
[4] Ibid arts 3, 18; Australia Council for the Arts, *Protocols for using First Nations Cultural and Intellectual Property in the Arts* (2019) 26, 30–33.
[5] United Nations Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (Report, 2013) 74.
[6] Terri Janke and Company, 'Options for IP Australia's Indigenous Advisory Panel' (Discussion Paper, 2020) 3.

b. Secondly, the consenting knowledge holder must be adequately educated and informed on what is being proposed and the implications of giving consent. As previously highlighted by the Australian Institute of Aboriginal and Torres Strait Islander Studies (**AIATSIS**), 'having an understanding of intellectual property is a necessary part of giving free prior informed consent'.[7] IP Australia should work with communities to develop further education and awareness initiatives to enhance Aboriginal and Torres Strait Islander peoples' understanding of the IP system, contractual arrangements and what it means to consent to commercial use of IK. IP Australia should require applicants to provide evidence and particulars of information provided to Aboriginal and Torres Strait Islander communities and individuals during consultation. Please see our submissions below in relation to Question 6 for further detail.

c. Thirdly, consultation in relation to requests for consent can place a large decision-making burden on Aboriginal and Torres Strait Islander communities. This burden is likely to be even more significant where the applicant has not established connection to or relationship with the community. In such cases, knowledge holders should be fairly compensated for the expertise shared and effort exerted in the consultation process.[8]

6. A consent-based model will require applicants to consult with knowledge holders on the use of IK. It will also provide some protection against inappropriate use of IK. However, IP Australia must ensure that consent is not used as a mechanism to allow the registration of deceptive, offensive or otherwise culturally inappropriate use of IK.[9]

7. The consent requirement may be complemented by a further ground for rejection/objection in regard to the appropriateness of the proposed use of IK. The Committee agrees with views expressed in previous consultations that the existing 'scandalous' ground may not always appropriately define the misappropriation or misuse of IK.[10] What is considered 'scandalous' is a matter of opinion that changes over time according to prevailing community standards, but must cause a significant degree of disgrace, shock or outrage to a 'not insubstantial' number of people.[11] The proposed 'offensiveness' and 'deceptiveness' grounds are also limited to particular forms of misuse and are also unlikely to provide adequate protection. 'Offensiveness' is also already partially covered by the 'scandalous'

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[7] Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission to IP Australia, *Protection of Indigenous Knowledge in the Intellectual Property System* (1 April 2019).
[8] Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission to IP Australia, *Protection of Indigenous Knowledge in the Intellectual Property System* (2018) 7.
[9] IP Australia, Protection of Indigenous Knowledge in the Intellectual Property System (Consultation Report, August 2019) 16.
[10] International Trademark Association, Submission to IP Australia, *INTA Comments and Recommendations Regarding Australia Indigenous Knowledge Consultation* (2019) 5; Terri Janke and Company (n 1).
[11] Mark Davidson and Ian Horak, Shanahan's Australian Law of Trade Marks and Passing Off (Thomson Lawbook Co, 6th ed, 2016) 249; *Re Hanlon* [2011] ATMO 45, [15].

ground, and deceptiveness is partially dealt with by section 43 of the *Trade Marks Act 1995* (Cth) and section 18 of the *Australian Consumer Law*.[12]

8. Other forms of inappropriate use of IK must also be protected against. These may include unauthorised use of sacred or secret knowledge, use in connection with unrelated goods or services (for example 'biame', meaning creator, used by a wine company),[13] unestablished connection to the source community or country, or use of the names of deceased persons, places or sacred sites. For example, in New Zealand, several Māori nations requested that the owners of Lego stop using their native language in its toys and films because its use was culturally insensitive, trivialising, inappropriate and without free, prior and informed consent (**FPIC**).[14] A broader 'culturally inappropriate' ground may provide an additional layer of protection against inappropriate commercial use of IK.
9. The term 'culturally inappropriate' would need to be defined in the *Trade Marks Act 1995* (Cth). Such a definition would need to be drafted in close consultation with communities and experts in Aboriginal and Torres Strait Islander law and protocols. The definition may include offensiveness, deceptiveness and a broader 'catch all' provision to account for the differing cultural sensitivities applicable to different communities and types of IK.
10. The Committee acknowledges the limited extent to which IP Australia can apply a culturally inappropriate ground for rejection. Determinations on whether a trade mark containing IK is culturally inappropriate must be made in consultation with the relevant community and the Indigenous Advisory Panel.

Question 6: What information should people provide to show that they should be able to use Indigenous knowledge in a trademark? How does this change between Indigenous and non-Indigenous people?

11. The Committee submits that applicants should be required to provide the following information in order to register a trade mark containing IK:
    a. Evidence of consultation with the relevant Elder, traditional owner, custodian, peak body organisation, or community with authority to provide consent, including that the person was properly informed of the purpose of the use of IK, the nature of the IP system and the rights

[12] *Trade Marks Act 1995* (Cth) s 43; *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law').
[13] Terri Janke and Company (n 1) 56.
[14] Eru Kapa-Kingi, 'Kia Tawharautia Te Matauranga Maori: Decolonising the Intellectual Property Regime in Aotearoa New Zealand' (2020) 51(4) *Victoria University of Wellington Law Review* 643, 646.

attached to a registered trade mark, and their options, including in relation to access and benefit sharing;[15]

b. Evidence of FPIC obtained from the knowledge holder; and

c. Particulars of the applicant's purpose for use of IK. This may include whether the applicant is connected to the source community, the applicant's goods or services are related to, or for the benefit of, the source community, or some other legitimate purpose.

12. Aboriginal and Torres Strait Islander applicants should be required to provide the same information and obtain consent if they intend to use IK from a community other than their own.
13. Where Aboriginal and Torres Strait Islander applicants intend to use IK from their own community, requirements for consent and information should be a matter determined by, or in close consultation with, the relevant community. Whether consent is necessary may depend on the nature of the IK and whether the IK is owned by an individual or is communally owned.[16]
14. Importantly, it is not appropriate for IP Australia to make determinations as to whether a person is Aboriginal and Torres Strait Islander.[17] If an applicant's identity is relevant to assessing their entitlement to use IK, this should be determined by the relevant community.

Question 7: What sort of decisions about the existence of consent do you think IP Australia can make? How could an Indigenous Advisory Panel add to these decisions?

15. The Committee supports the proposed establishment of an IAP. Establishing an IAP would be consistent with Aboriginal and Torres Strait Islander peoples' international law rights to be involved in decision-making processes and consulted on matters concerning IP in IK.[18]
16. An IAP could provide guidance to IP Australia on cultural issues, advise on reforms to IP Australia's policies and strategy in relation to the protection and handling of IK and help develop education initiatives for communities. An IAP could also play a key role in identifying and engaging with stakeholders in the trade mark application process.
17. The Committee supports the view that IP Australia is not best placed to make decisions about the existence of consent. An IAP may be better placed to make such decisions where it is supported by an Indigenous connections officer. The Indigenous connections officer should be hired to consult with

[15] Terri Janke and Company (n 1) 8.
[16] Terri Janke and Company, 'Indigenous protocols and processes of Consent relevant to trade marks' (Discussion Paper, 2020) 15.
[17] Ibid 22.
[18] *United Nations Declaration on the Rights of Indigenous Peoples* (n 3) arts 3, 18, 31; Australia Council for the Arts (n 4) 30–33.

the relevant Indigenous people when needed for applications. The IAP should be properly constituted through a formal appointment process (see below), and the diversity of Aboriginal and Torres Strait Islander cultures in Australia should be taken into account in appointing members to the IAP.[19] An IAP should not be expected to make decisions on behalf of all Aboriginal and Torres Strait Islander communities.[20]

18. However, an IAP could provide broader guidance on cultural issues and referrals to individuals, groups and organisations with expertise and authority to advise on issues affecting particular communities.[21]
19. The Committee submits that an IAP should consist of a number of permanent members, who are supported by a pool of rotating or ad hoc local members from different regions and communities, with a range of technical expertise and a mix of genders.[22] This will ensure a level of consistency, along with the flexibility to engage with appropriate community leaders where necessary.
20. In evaluating the existence of consent, the IAP should be equipped with the resources and expertise to identify and engage with the correct individuals, groups or organisations. An IAP could assist in identifying the relevant stakeholders by engaging with cultural authorities and infrastructures within Aboriginal and Torres Strait Islander communities. A useful list of organisations is provided in the Australia Council for the Arts *Protocols for using First Nations Cultural and Intellectual Property in the Arts*, which include:
    - Elders, traditional owners and custodians of the relevant community;
    - Where the IP relates to an individual, that individual and their family members;
    - National peak bodies, including the National Congress of Australia's First Peoples;
    - Local, regional or state Aboriginal land councils;
    - Native title organisations;
    - Peak bodies in the arts, including AIATSIS and First Languages Australia;
    - Indigenous art centres;
    - Indigenous language and cultural centres;
    - Indigenous theatre, dance and music organisations; and
    - local, regional and national Indigenous representative organisations in health, education, legal and other industries.[23]
21. An IAP should prepare and utilise a database of cultural authorities and organisations to assist in identifying knowledge holders.

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[19] Terri Janke and Company (n 16) 19.
[20] IP Australia (n 9).
[21] Terri Janke and Company (n 6).
[22] IP Australia (n 9).
[23] Australia Council for the Arts (n 4) 32-3.

Q8: What do you think IP Australia should do in the case of an applicant providing evidence that they took all the steps they think are necessary, but did not (or could not) get written consent or find a person or authority to provide consent?

22. The Committee supports the view that if consent is not or cannot be obtained, then a trade mark containing IK should not be registrable.[24] As discussed above, consent is essential for the commercial exploitation of IK and non-authorised use is likely to cause offence or be otherwise deemed culturally inappropriate.
23. The consultation and consent process already places a significant burden on knowledge holders to engage with applicants in relation to the proposed use of IK in trade marks.[25] To allow trade marks to be registered without consent would require Aboriginal and Torres Strait Islander peoples and organisations to actively enforce their own rights in IK, including by commencing oppositions against inappropriate uses of IK. Proactive enforcement against the misuse or misappropriation of IK is difficult, time consuming and often too expensive for Aboriginal and Torres Strait Islander peoples and organisations. [26]
24. Rejection of registration would not preclude culturally inappropriate use of IK in an unregistered trade mark. In circumstances where another organisation is entitled to use that IK as a trade mark (for example, because of its cultural connection to the source community), then rejection of the prior application would allow for the entitled user to register its mark. This is important as the trade mark system should not only protect against inappropriate use, but also provide opportunities to empower Aboriginal and Torres Strait Islander peoples and organisations to benefit from the commercial value of their IK.[27]

Question 10: What do you think is the best way to help Indigenous businesses find out if Indigenous Knowledge (IK) they want to use is in other trade marks and designs?

25. In order for Aboriginal and Torres Strait Islander businesses to determine whether the IK they want to use has already been incorporated in registered trade marks and designs, the threshold requirement

[24] Terri Janke and Company (n 1) 60.
[25] Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission to IP Australia (n 8).
[26] IP Australia (n 9).
[27] See generally, Boyd Blackburn et al, *Methods for Estimating the Market Value of Indigenous Knowledge* (Final Report, 2019).

is to categorise the contents of the Trade Marks Register and the Register of Designs by marks and designs which contain IK. IP Australia could then incorporate this data into pre-existing IP databases with functionalities such as search filters to allow Aboriginal and Torres Strait Islander businesses and individuals to conduct a trade mark or design search and filter the results to those which contain IK.

26. However, the process of categorising the vast amounts of data on the Trade Marks Register and the Register of Designs poses a significant challenge. There are several ways that IP Australia can undertake the task of categorising the Trade Marks Register and Register of Designs with reference to IK.

Manual processes

27. IP Australia could manually undertake this process by recruiting a task force of experts on Aboriginal and Torres Strait Islander languages, culture and traditions with the mandate to systematically review the Trade Marks Register and Register of Designs to flag pending or registered trade marks and pending, registered or certified designs which contain IK.
28. However, given that from 2010 to 2019 alone, there were 486,247 trade mark registrations[28] and 65,502 design registrations,[29] there is a large subset of data to be analysed, meaning this task will likely be labour and resource intensive, with a high potential for human error.
29. A further challenge is the assembly of a taskforce of experts with expertise in the myriad of First Nations languages. There are over 250 First Nations languages spoken in Australia including 800 dialects making it difficult to identify a task force of people with expertise in all First Nations languages.[30]
30. Further, of the 250 First Nations languages identified in Australia, only 120 First Nations languages are still spoken.[31] Many First Nations languages are on at risk of extinction and the lack of written records to safeguard these languages means that it would be difficult to independently verify all IK incorporated in registered trade marks and designs.
31. Any such taskforce should be overseen by Aboriginal and Torres Strait Islander people, with the majority of the taskforce also comprising of Aboriginal and Torres Strait Islander people to ensure autonomy of Aboriginal and Torres Strait Islander communities over their language, culture, traditions and data.

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[28] 'Chapter 3: Trade Marks', *IP Australia* (Web Page, 2020) <https://www.ipaustralia.gov.au/ip-report-2020/trade-marks>.
[29] 'Chapter 4: Designs', *IP Australia* (Web Page, 2020) https://www.ipaustralia.gov.au/ip-report-2020/designs>.
[30] 'Living languages', *AIAboriginal and Torres Strait IslanderS* (Web Page) https://aiatsis.gov.au/explore/living-languages#:~:text=Many%20languages-,In%20Australia%20there%20are%20more%20than%20250%20Indigenous%20languages%20including,spoken%20over%20a%20small%20area.
[31] Rona Glynn-McDonald, 'First Nations Languages', *Common Ground* (Online Article, 12 April 2021) <https://www.commonground.org.au/learn/indigenous-languages-avoiding-a-silent-future>.

32. In order for Aboriginal and Torres Strait Islander people to have true autonomy over data about their communities that will be stored and accessed by non-Indigenous groups, companies and individuals, Aboriginal and Torres Strait Islander people must be empowered to determine the rules by which this occurs.[32]
33. Alternatively, the onus could be placed on the applicants and owners of trade marks and designs to identify whether their trade mark or design contains IK. This could be achieved by:
    a. Sending a questionnaire to all owners of pending and registered trade marks and pending, registered and certified designs to request confirmation of whether their trade mark/s and design/s contain IK; or
    b. At the time that a registered trade mark or registered design is due for renewal, requesting, as a condition of the renewal, that the trade mark owner or design owner confirm whether their trade mark or design incorporates any IK.
34. The first option does not provide an impetus for a trade mark owner or design owner to provide this information to IP Australia. Further, the drawback of the second methodology is that a trade mark is valid for a period of 10 years and a registered design must be renewed within 5 years of filing. This means that the compilation of an exhaustive database of IK contained on the Trade Marks Register and Designs Register cannot be compiled for up to 10 years.

Use of artificial intelligence (AI)

35. A more efficient way for IP Australia to compile a database that categorises and identifies whether trade marks and designs contain IK is through the use of technology. Technology such as AI and machine learning have already been utilised by various government bodies and companies, in conjunction with Aboriginal and Torres Strait Islander communities, for environmental conservation and preservation of First Nations languages.
36. In 2018, the ARC Centre of Excellence for the Dynamics of Language (**CoEDL**) partnered with Google to utilise AI technology and machine leaning to transcribe audio recordings of First Nations languages so that the languages could be preserved**.** Google's machine learning software reviews the audio recordings for patterns, significantly reducing transcription time.[33] AI and machine learning have also been used in the Healthy Country Project which was initiated in 2019 through collaboration between various entities such as the Kakadu Board of Management, Bininj co-researchers and Indigenous rangers, CSIRO, Microsoft and Parks Australia to eradicate invasive species of para grass (a

[32] Matthew Snipp, 'What Does Data Sovereignty Imply: What Does it Look Like?' in Tahu Kukutai and John Taylor (eds) *Indigenous Data Sovereignty: Toward an Agenda* (ANU Press, 2016) 39.
[33] Abbie O'Brien, 'How AI is helping preserve Indigenous languages', *SBS News* (News Article, 31 May 2018) <https://www.sbs.com.au/news/how-ai-is-helping-preserve-indigenous-languages>.

significant environmental weed) in the Kakadu wetlands.[34] The project achieves this by monitoring the number of magpie geese in the region which is an indicator of a 'healthy country' by traditional Aboriginal and Torres Strait Islander custodians.

37. Traditionally, CSIRO researchers would review thousands of hours of videos to manually count the number of magpie geese and other animals in the environment and identify para grass in its different states. However, researchers, scientists, and custodians have been able to harness Microsoft's CustomVision AI, which is trained with machine learning, to automatically identify and tally the number of animals returning to the Kakadu wetlands and the different stages of para grass.
38. The Healthy Country Project is a success story in how technology can be utilised to make efficient use of limited resources whilst closely collaborating with Aboriginal and Torres Strait Islander custodians of the land to ensure that Indigenous values drive the focus of the project. The co-management framework adopted in the Healthy Country Project is publicly available via opensource on GitHub.[35] A similar project has been rolled out in Cape York, applying a combination of aerial surveys, AI and cloud computing along with traditional knowledge to locate and monitor endangered baby turtle nests.[36]
39. The CoEDL project, the Healthy Country Project and the Cape York project have demonstrated that technology such as AI and machine learning can be used responsibly and ethically alongside IK resulting in positive outcomes for the environment and Aboriginal and Torres Strait Islander communities. Utilising a similar co-management framework for collaboration with Aboriginal and Torres Strait Islander communities and harnessing the functionalities of AI and machine learning, IP Australia could adopt this technology to identify any IK inherent in registered and pending trade marks and pending, registered and certified designs. The technology is readily available through commercial products offered by Microsoft and Google. These companies have also demonstrated a track record of adapting the AI and machine learning technology for various applications.
40. This methodology is time efficient, minimises risks of human error and could be continuously applied to automatically capture any IK present in future trade marks and designs. Further, it can be used to centre Aboriginal and Torres Strait Islander involvement in the initial stages of coding and categorising the input data, without burdening communities with hours of manual review. Having a database that categorises whether trade marks and designs maintained by IP Australia incorporate IK will allow Aboriginal and Torres Strait Islander businesses to easily search the database to identify whether any IK they wish to use is incorporated in other trade marks and designs.

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[34] 'Science, Indigenous knowledge and AI weave environmental magic', *Microsoft News Centre* (News Article, 20 November 2019) <https://news.microsoft.com/en-au/features/science-indigenous-knowledge-and-ai-weave-environmental-magic/>.
[35] 'Healthy Country AI', *Github* (Forum Thread, 18 February 2021).
[36] 'Indigenous knowledge and AI help protect baby turtles from predators on Australia's remote Cape York', *Microsoft News Centre* (News Article, 17 February 2021) <https://news.microsoft.com/apac/features/indigenous-knowledge-and-ai-help-protect-baby-turtles-from-predators-on-australias-remote-cape-york/>.

Question 11: Would new avenues to highlight IK in trade mark or designs help combat misappropriation or could it cause additional issues?

41. There will inevitably be issues and challenges associated with any endeavour to highlight IK in existing databases of trade marks and designs. There have been several challenges identified above including the risk of complacency from current IP holders, risk of a non-Indigenous taskforce being appointed which could compromise Aboriginal and Torres Strait Islander communities' autonomy over their language, culture and heritage or conversely, the risk of burdening Aboriginal and Torres Strait Islander communities. Further, highlighting IK incorporated in trade marks and designs could raise a conflict between the rights of Aboriginal and Torres Strait Islander communities over their language, culture and traditions and the intellectual property rights of trade mark owners or design owners who have, prior to the implementation of these changes, validly registered a trade mark or design which incorporates IK.
42. Despite the risks identified, it is important that Aboriginal and Torres Strait Islander communities are recognised and attributed for any use of IK and that the Aboriginal and Torres Strait Islander communities are adequately compensated for any third party use of their IK. Highlighting IK in trade marks and designs should yield positive outcomes for Aboriginal and Torres Strait Islander communities and the wider public. It facilitates a way for Aboriginal and Torres Strait Islander communities and advocacy groups to monitor any unauthorised use or commercialisation of IK. This allows for Aboriginal and Torres Strait Islander communities to oppose the registration of any trade marks or designs that incorporate IK without the prior informed consent of the community or to negotiate with the trade mark or design owner to return benefits derived from the use of IK back to the community, such as through profit sharing agreements.
43. Further, emphasis by IP Australia on IK considerations with respect to trade marks and designs will garner much needed public awareness about the need to obtain prior informed consent before using IK generally. The requirement to declare any IK incorporated in a trade mark or design and for any such intellectual property to be registered with prior informed consent of the relevant Aboriginal and Torres Strait Islander community should influence commercial practices when formulating trade marks or designs from the outset and embed these considerations within common business practice. The Committee expects that the introduction of requiring prior informed consent with respect to the use of IK should have the flow on effect of deterring the misappropriation of IK.

2. Requirements to declare when IK is used in new innovations

Options for disclosure in patents

Question 12: Which option do you think provides the best outcomes in supporting fair use of traditional knowledge? Are there other ways to encourage disclosure?

For the purpose of this submission, the Committee takes the view that the *best* outcomes in supporting fair use of traditional knowledge would be outcomes which protect IK from exploitation. Introducing adequate disclosure requirements would ensure traditional owners have provided free, prior, and informed consent, and that any benefits flowing from the direct or indirect use of IK in patents are shared with the relevant Aboriginal and Torres Strait Islander stakeholders. We outline two potential options below – being a voluntary disclosure system (Option 1) and a mandatory disclosure system (Option 2).

Option 1

44. The Committee agrees with IP Australia's recognition that broader disclosures of both direct and indirect use of IK would be more easily encouraged by a voluntary disclosure system than a compulsory disclosure system that specifies the type of information and the circumstances that require disclosure. Ideally, a focus on the benefits of transparency and respect for IK would provide sufficient motivation for disclosure. However, there are several factors that will determine whether this motivation will be sufficient in practice.
45. For example, disclosures regarding how IK has been used as part of a patent application may itself demonstrate non-compliance with an access and benefit sharing scheme (**ABS**) or consent arrangement established for the underlying research.[37] In this case, the benefit provided from making a voluntary disclosure would have to be significant to overcome any potential detriment to an applicant resulting from the disclosure.
46. In addition, a key priority in the discussion of disclosure requirements at an international level is to prevent the patent system from rewarding inequitable use of IK. [38] At worst, a voluntary disclosure system will give those that have purposefully not engaged with IK owners an option to circumvent the disclosure requirements. At best, those that are unaware that some of their sources may have originated from IK will not be required to undertake any form of investigation, potentially robbing IK owners of the potential to collaborate with a willing party. Therefore, the Committee submits that there

[37] *Invitation to WIPO From the Conference of the Parties Convention on Biological Diversity*, 32nd sess, WO/GA/32/8 (24 August 2005) [99].
[38] Ibid [92].

is a risk to only encouraging disclosure through a voluntary disclosure system in that the Australian patent system will fail to protect IK from inequitable use to the greatest extent possible.

47. The Committee also acknowledges that the current penalties in relation to fraud or false suggestion, resulting in the revocation of a patent, would remain.[39] The provisions require the fraud or false suggestion to have been a material factor in the decision to grant a patent. [40] However, as omissions are not sufficient to meet the standard for fraud or false suggestion, these penalties are unlikely to be a sufficient deterrent to not disclosing the use of IK.
48. For the reasons above, the Committee submits that a voluntary disclosure system alone would provide inadequate protection to IK from inequitable or exploitative use in patents.

Option 2

49. The second option involves requiring disclosure of any use of IK in patents through the introduction of penalties for withholding information about IK used. The Committee acknowledges that there are some issues with the Option 2.
50. Firstly, the drafting of a compulsory disclosure requirement would have to address specific circumstances (e.g. is disclosure only necessary where IK has been used directly, and to what extent must ABS arrangements or FPIC be disclosed) and is likely to be accompanied by some level of uncertainty. However, it is important to consider that even a 'narrow' compulsory disclosure requirement would provide additional protection for IK and does not preclude applicants from disclosing additional information voluntarily.
51. The Committee acknowledges that penalties relating to the revocation of patents are severe and may discourage researchers, particularly if the requirements for compliance are uncertain.[41] In response, the Committee refers to the current legislative framework for patents in Australia. Section 20 of the *Patents Act 1990* (Cth) already provides that the validity of a patent is not guaranteed. Therefore, there is an inherent level of uncertainty in every patent application that an IK disclosure requirement would not change. In addition, disclosure would create additional certainty for applicants that any complying patent granted will endure and the potential for a patent to be revoked would provide substantial motivation to disclose all relevant available material at the time of an application.
52. The Committee also refers to the current requirement for applicants to disclose the results of foreign searches of the prior art base.[42] It seems that any expansion of this requirement to apply to reasonable

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[39] *Patents Act 1990* (Cth) s 138(3)(d)-(e).
[40] IP Australia*, Distinction Between Lack of Full Description, Inutility and False Suggestion* (Patent Manual of Practice and Procedure, 16 December 2020) [2.11.3.16].
[41] *Invitation to WIPO From the Conference of the Parties Convention on Biological Diversity*, 32nd sess, WO/GA/32/8 (24 August 2005) [93].
[42] *Patents Amendment Act 2001* (Cth) s 45(3).

investigations of relevant IK sources would improve outcomes by encouraging fair use of IK. IP Australia could also consider mirroring the penalty for failing to provide the requisite information as an alternative to revoking the patent.

53. The Committee refers to IP Australia's point regarding the revocation of patents impacting IK owners that would have otherwise benefitted under an ABS arrangement. To address this issue the Committee submits that, in certain circumstances, the ownership of a patent could be transferred to a more appropriate party instead of revoking the patent.
54. In conclusion, the Committee submits that a compulsory disclosure system (Option 2) is necessary to support the best outcomes regarding fair use of IK. This view is subject to the below qualifications:

a. The Committee notes that care should be taken to ensure that the penalties for non-disclosure do not discourage discussions with owners of IK (whether this results in ABS, FPIC or other arrangements). For example, if engagement with traditional owners is not otherwise required by law, a requirement to share any details of such engagements with IP Australia may be considered a burden for researchers and the process may be avoided altogether. If IK has directly contributed to a patent application, entry into an ABS arrangement (along with evidence of the arrangement) could be made compulsory, whereas disclosure of the terms of such arrangement and any FPIC could remain optional, but encouraged, by IP Australia.
b. Compulsory disclosure requirements should initially deal with circumstances where applicants unintentionally fail to comply (or are unable to comply due to documentation being unavailable).[43] Any penalties for non-disclosure should allow for opportunities to remedy misuse. There must be clear communication to create certainty around any exemptions that may apply.
c. A compulsory disclosure system will require IP Australia to provide additional resources for enforcement (e.g. by conducting audits or investigating complaints). However, Aboriginal and Torres Strait Islander peoples would bear the burden of claiming misuse of IK under either option. Option 2 is more likely to reduce the burden on Aboriginal and Torres Strait Islander peoples by pre-emptively uncovering issues in a mutual forum.
d. While compulsory disclosure is an important step, it should be implemented with additional measures, particularly to reflect the content of what is disclosed (e.g. attaching conditions of ABS arrangements, FPIC and traditional concepts of ownership to an application granted).

[43] *Invitation to WIPO From the Conference of the Parties Convention on Biological Diversity* (n 42) [82].

ABS and consent: Should we enable these to be publicly declared?

Question 14: Do you think having the ability to attach information on ABS or consent to IP rights would provide a useful basis for better conversations about ABS and consent?

55. The Committee submits that the ability to attach information would provide a useful basis for conversations that:

a. Promote best practice through education; and

b. Improve awareness of Aboriginal and Torres Strait Islander ownership and associated rights, transparency, and quality of partnerships, limiting the burden of enforcement.

Education and best practice

56. The Committee draws attention to the public availability of permits granted for access to biological resources under the *Environment Protection and Biodiversity Conversation Regulations 2000 (Cth)* (***EPBC Regulations***),[44] and the subsequent recognition of the educational value that such availability provides.[45] While the majority of these permits are for non-commercial purposes, the benefits related to transparency would also be relevant to permits granted for commercial purposes. The *EPBC Regulations* require applicants for a permit to access biological resources to attach benefit-sharing agreements reached with access providers (which, in some circumstances, will be an Aboriginal and Torres Strait Islander corporation recognised by the appropriate Aboriginal and Torres Strait Islander knowledge holders),[46] and the model ABS agreement published under the *EPBC Regulations* requires applicants to include details of any agreement for the use of IK.[47]
57. The Committee therefore recommends that IP Australia provide the option for applicants to attach information on ABS or consent as it complements current legislative processes relating to the protection of IK.
58. The Committee submits that the educational value of publishing information about ABS and consent will be beneficial for both researchers and Aboriginal and Torres Strait Islander people. Details of previous ABS and consent arrangements may serve as an important resource for researchers, particularly by increasing awareness of the existence of IK, informing expectations for the time it takes

[44] Department of Agriculture, Water and the Environment, *Science and Research Permits 2020* (Web Page) <https://www.environment.gov.au/resource/science-and-research-permits-2020>.
[45] *Australian Government Response to Notification 2011-216: Access to Genetic Resources and Benefit-sharing*, SCBD/ABS/VN/SG/74553, 3.
[46] *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.07.
[47] Ibid reg 8A.08(j).

to engage and reach agreement with IK custodians, and providing examples of options for monetary and non-monetary benefits for incorporation during planning stages.

59. By increasing awareness of and recognising Aboriginal and Torres Strait Islander rights to IK through ABS and consent arrangements, IK may be afforded additional protection in the form of recording sources and ownership of IK explored during the process.[48] The Committee acknowledges that IP Australia recognises the current issue of Aboriginal and Torres Strait Islander groups lack of access to legal advice and other resources when negotiating ABS agreements or considering the provision of consent associated with protecting IK under current legislation.[49]
60. While there are requirements for ABS agreements related to the use of IK in various jurisdictions in Australia,[50] the diversity between Aboriginal and Torres Strait Islander communities inherently means that a precedent template will be unable to cater for every scenario.[51] By making previous examples (or at least key details) of ABS and consent procedures available, Aboriginal and Torres Strait Islander groups may benefit from the empowerment to adapt agreements to meet their own needs based on these examples.
61. Furthermore, the Committee submits that by publishing information relating to ABS and consent, prospective partnerships between researchers and Aboriginal and Torres Strait Islander groups or individuals may benefit from further education if parties with previous experience with ABS agreements and seeking FPIC are willing to share learnings with third parties looking to enter similar arrangements. If parties choose to have contact details published as part of the ABS and consent information, then direct communication would enable parties (both researchers and Aboriginal and Torres Strait Islander representatives) to seek ongoing feedback regarding the arrangement, including issues that should have been raised during the negotiation stage.
62. Based on the above, the Committee submits that the education benefits resulting from conversations about ABS and consent outlined above are likely to prove valuable for the development, assessment, and implementation of best practice.

Enforcement

63. In addition to evolving best practice, the Committee submits that increased transparency around ABS and consent has the potential to increase the integrity of partnerships between researchers and

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[48] *The Protection of Traditional Knowledge: Updated Draft Gap Analysis*, 37th sess, WIPO/GRTKF/IC/37/6 (20 July 2018) 7.
[49] IP Australia (n 9) 6.
[50] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 301; *Biological Resources Act 2006* (NT) s 29; *Biodiversity Act 2005* (Qld) pt 5; Department of Agriculture, Water and the Environment, *Permits for commercial or potentially commercial purposes* (Web Page) <https://www.environment.gov.au/topics/science-and-research/australias-biological-resources/permits-%E2%80%93-accessing-biological-resourc-0>.
[51] IP Australia (n 9) 6.

Aboriginal and Torres Strait Islander people. The AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research (**AIATSIS Code**) recognises that confidence of Aboriginal and Torres Strait Islander groups in researchers may be improved by reliable standards of conduct and research guidelines.[52]

64. By publicising commitments to ABS and consent, and, consequently, the standard of conduct that can be expected, collaborative partnerships are more likely to be developed by conversations based on trust and mutual understanding. Such partnerships are less likely to result in misappropriation of rights that require enforcement action as the parties are more likely to be willing to resolve issues before a dispute escalates.
65. Even in circumstances where misunderstanding or exploitation arises within a partnership, the Committee submits that the benefits of education and transparency around ABS and consent arrangements will still reduce the difficulty generally associated with enforcing agreements that deal with IK rights.[53] Firstly, education regarding requirements for ABS and consent for use of IK has previously reduced the need for enforcement actions.[54] Secondly, publishing information regarding ABS arrangements will mean that third parties are aware of the agreement terms and any conditions attached to consent, increasing the level of overall scrutiny.

Public availability

66. The Committee submits that the benefits ultimately achieved via the attachment of ABS and consent details to applications will be influenced by the extent of information made public. For example, whether IP Australia publish copies of ABS agreements or letters of consent in full, or whether only certain details are shared with the public.
67. At this stage, the Committee recommends considering a compulsory requirement to attach ABS and consent information to IP applications in recognition that such arrangements encourage visibility, directly support better conversations and development of best practice. However, to reduce the risk that researchers are dissuaded from undertaking activities because of the requirement to share sensitive information, the Committee recommends that IP Australia allow parties to request the redaction of information prior to any publication of the attachments. The Committee submits this would promote better conversations by increasing the amount of information available to IP Australia. It also reflects that parties have historically had the ability to maintain confidentiality, if requested.[55]

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[52] Australian Institute of Aboriginal and Torres Strait Islander Studies, *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* (2020) 3.
[53] IP Australia (n 9) 7.
[54] *Australian Government Response to Notification 2011-216* (n 46).
[55] Ibid 2.

68. The Committee has excluded considerations regarding the benefit of allowing applicants to attach information about ABS and consent generally (such as the ability for IP Australia to promote adequate benefit-sharing agreements by providing favourable treatment to applicants that do so, or the benefits that may arise from IP Australia having greater access to data regarding ABS and consent arrangements), as this would not necessarily be dependent on making the relevant information publicly available.

Question 15: What types of evidence of ABS/consent would it be possible to make available to IP Australia?

69. The Committee submits that there are two broad categories of evidence that could be made available to IP Australia, being evidence of the initial establishment of ABS agreements and free, prior and informed consent, and ongoing compliance.
70. As mentioned in our response to question 14, the Committee submits that the evidence made available to IP Australia is likely to be more extensive if parties are given the option of redacting sensitive information prior to it being published, in addition to the current power of the Commissioner under *Regulation 4.3(2)(b)* of the *Patents Regulations 1991* (Cth).

Initial evidence

71. The Committee submits that it would be possible to provide copies of ABS agreements, including statements regarding the source of any relevant IK and the types of benefits provided to stakeholders, as is currently practiced under other national regimes.[56] These may be supported by documented evidence of engagement with Aboriginal and Torres Strait Islander communities (for example, the results of any surveys undertaken could be provided, correspondence, etc).[57]
72. Existing regimes also require the provision of written permission from access providers,[58] which could be mirrored by IP Australia in relation to permission from the holders of IK. This evidence may be collected as consent forms that outline the scope of the consent (for example, the purpose of the research, the geographical regions involved, and the time period for which the research will be conducted),[23] and subsequently shared with IP Australia.
73. The Committee also submits that, if possible, applicants should include how they have identified the custodians of any IK included in the application and in what capacity, as Aboriginal and Torres Strait Islander concepts of ownership are not necessarily represented within the current legislative

[56] *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.08.
[57] Australian Institute of Aboriginal and Torres Strait Islander Studies (n 53) 22.
[58] *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.12.

framework.[59] The Committee submits that steps should be taken to ensure better protection of Indigenous data sovereignty, and that this is an area requiring legislative reform.

74. The Committee also draws attention to previous IP Australia consultation paper responses, as several organisations indicated they have developed or are developing protocols for engaging with Aboriginal and Torres Strait Islander communities in relation to IK-based research.[60] These protocols could be shared with IP Australia as evidence of the methods used to reach ABS agreements and obtain FPIC, accompanied by statutory declarations confirming compliance with such protocols.

Continuous reporting

75. The Committee also recommends that IP Australia consider continuous reporting processes for demonstrating compliance with ABS agreements and any conditions attached to a letter of consent. Using practices under the *EPBC Regulations* and the model agreement published in accordance with section 301 of the *EPBC Act* as guidance,[61] this may include:
    - A short statement about the progress of the research;
    - Samples of all genetic resources collected;
    - Where benefits shared are financial, an updated account of the value of the agreement to date; or
    - Sign off from the relevant Aboriginal and Torres Strait Islander group or rights-holders indicating the agreement has been complied with.

[59] IP Australia (n 9) 6 IS this reference accurate?.
[60] Ibid 10.
[61] *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg *8A.19;* Department of Agriculture, Water and the Environment, *Explanatory Guide: Model Benefit-sharing Agreement* (April 2012) 3-4.

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Concluding Comments

NSW Young Lawyers and the CET Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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