

## **AIATSIS Submission to the Productivity Commission's Inquiry into Australia's Intellectual Property Arrangements**

### **AIATSIS' Expertise and Context**

The Australian Institute of Aboriginal and Torres Strait Islander Studies (**AIATSIS**) welcomes the opportunity to contribute to the Inquiry. The Inquiry is a valuable opportunity to revisit how Australia's IP arrangements interact with Indigenous cultural and intellectual property (**ICIP**).

AIATSIS has acquired significant expertise in developing, applying and protecting ICIP through its research, collections and publishing functions. AIATSIS holds the world's premier collection of materials pertaining to Australian Aboriginal and Torres Strait Islander research, including written works, photographs, sound recordings, moving image recordings, artworks and artefacts. To discharge our legislative functions-including using the collection to strengthen and promote knowledge and understanding of Aboriginal and Torres Strait Islander culture and heritage-AIATSIS makes its collection as accessible as possible, whilst respecting relevant laws and cultural protocols. During the last 25 years AIATSIS' Native Title Research Unit (**NTRU**) has also provided research and information resources to support the native title sector. Drawing on this expertise we advise the Inquiry on aspects of ICIP formation, collection, publication and use that remain outside contemporary IP definitions.

AIATSIS acknowledges the diversity and comprehensiveness of submissions made to the Inquiry by others and we confine our submission to AIATSIS' role as a research, publishing and cultural institution. We also note our previous submissions to: IP Australia on how Indigenous Knowledge can work with the IP system, the Australian Law Reform Commission's Inquiry into Copyright and the Digital Economy; and the Department of Communication and the Art's stakeholder consultations on proposed reforms to the *Copyright Act 1969* (Cth).

### **AIATSIS' Approach to ICIP**

In the absence of clear legislative protection of ICIP rights, AIATSIS has developed and implemented protocols supporting ethical research, access to the collection and the publication of Aboriginal and Torres Strait Islander materials. These protocols are based on community priorities, including those articulated in the United Nations' *Declaration on the Rights of Indigenous People* (**UNDRIP**).<sup>1</sup>

In this context, AIATSIS engages with ICIP in the following key areas:

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<sup>1</sup> UNDRIP was adopted by the United Nations General Assembly in 2007 and Australia in 2009. For example, tangible rights attached to the expression of 'traditional knowledge' and 'traditional cultural expression' find their origins in Article 31 of UNDRIP. Similarly, the protection of rights to practice culture, determine land use and apply technology are influenced by Article 11 of UNDRIP.

- Providing access to and use of the collection by individuals, researchers, governments, native title bodies, academics and international users;
- Publishing and selling works by Aboriginal and Torres Strait Islander authors containing ICIP. The relationship between publisher and Indigenous knowledge holders is governed by author-publisher agreements which explicitly state how ICIP can be used;
- Preserving and making available the collection through digitisation of material;
- Building the collection through acquiring new and significant material;
- Administering copyright and managing rights holders' interests in publications, research and research outputs and materials deposited in the collections; and
- Discharging our legislative responsibilities including using the collection to promote knowledge and understanding of Aboriginal and Torres Strait Islander culture and heritage and providing leadership in ethics and protocols.

AIATSIS' use of ICIP and leadership in promoting ethical practice is governed by five key documents, namely:

- Guidelines for Ethical Research in Australian Indigenous Studies (**GERAIS**);
- Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services (the **ATSILIRN** protocols);
- Guidelines for the ethical publishing of Aboriginal and Torres Strait Islander authors and research from communities;
- AIATSIS Access and Use Policy; and
- Section 41(2) of the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth) (**AIATSIS Act**).

With respect to the specific findings and information requests made by the Commission we make the following recommendations / observations.

### **Analytical framework for intellectual property**

The Inquiry is considering Australia's IP arrangements through an economic lens, with a view to encouraging innovation and productivity growth. AIATSIS supports reforms that enable and facilitate an IP system that improves wellbeing and economic development. However the Commission's approach excludes Indigenous knowledge structures which do not stem from an economic framework, even though they can contribute to substantial economic outcomes and social benefit.

Further, connections between wellbeing and knowledge protection are drawn in a manner that do not account for Indigenous conceptions of wellbeing. The transmission of cultural knowledge is a key concept for Aboriginal peoples and Torres Strait Islanders.<sup>2</sup> 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. As such, we note that the commission's analytical framework may not allow an appropriate discussion ICIP.

<sup>2</sup> Janke, T 31 May 2012 *New Tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system. Response to: Finding the Way: a conversation with Aboriginal and Torres Strait Islander people's conducted by IP Australia and Office for the Arts.* p 6, viewed 30 June 2016 [https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_terri\\_janke\\_and\\_company\\_ip\\_lawyers.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_terri_janke_and_company_ip_lawyers.pdf)

Within the space of economic development, Australia's current IP arrangements are similarly insufficient to maximise the commercial exploitation of ICIP. This has been discussed at length in previous submissions and is expanded below under the heading, *Copyright, Trade Marks and Design*.

#### **Draft finding 4.1**

The draft finding that Australia's copyright system has expanded over time with no transparent and evidence-based policy analysis contrasts with how Indigenous rights and interests in ICIP are recognised. Specific Indigenous knowledges are indirectly protected via land rights, native title and heritage legislation as landscapes and places associated with cultural knowledge are protected based on the strength of knowledges held. Further, these rights are often communal and not expressed in material form. In contrast, IP's individual nature imperfectly protects communal rights and does not facilitate communal decision making processes.

Under the *Native Title Act 1993* (Cth), mechanisms that protect rights and interests in land are based on proof of knowledge. However, only property rights in land are recognised, not the knowledges that form the proof the right or interests. The communal nature of ICIP can therefore be discussed with respect to 'quantum of, new rights'. There is a strong argument for aligning IP with ICIP as implicitly recognised under native title, land rights and heritage laws.<sup>3</sup> Accordingly there is a demonstrated need to expand Australia's copyright system to better align with ICIP rights as recognised in property law based regimes.

#### **Draft Recommendation 15.1 Publicly-Funded Research**

As AIATSIS is publicly funded, it must balance communities' rights with making research results accessible (including deposited materials from grants). This balance is often achieved via negotiated research contracts. These contracts can include clauses that: enable participants to identify ICIP; provide permissions to deposit materials at AIATSIS; and determine the conditions under which people can access those materials.<sup>4</sup> Research contracts enable interviews and sensitive cultural material to be protected or vetted but also enable final research results to be disseminated widely. These contracts are based on the principles of GERAIS (discussed in further detail below).

AIATSIS supports draft recommendation 15.1 but wishes to ensure that any contractual and ethical obligations can be fully supported.

<sup>3</sup> 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).

<sup>4</sup> 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, [https://aiatsis.gov.au/sites/default/files/products/report/rr\\_tranlangford.pdf](https://aiatsis.gov.au/sites/default/files/products/report/rr_tranlangford.pdf)

### **Information request 5.1**

We recognise the lack of ICIP rights protection as a significant barrier to discharging our legislative functions.

Researchers have created and deposited many unpublished and unique materials with AIATSIS. Access and use of this material is commonly determined by deposit agreements, research grant agreements, the *Copyright Act 1968* (Cth) and / or section 41 of the AIATSIS Act, which restricts the disclosure of certain information.

Some items were created without public access in mind and prior to the development of rigorous processes that acknowledge and document ICIP contained in these materials. AIATSIS recognises the rights of Aboriginal and Torres Strait Islander peoples to control expressions containing ICIP and manages its collection in accordance with its Access and Use Policy.

However, this creates tension between AIATSIS' legal duties and less secure protocols enacted to promote and safeguard IP rights of Aboriginal and Torres Strait Islanders. This ambiguity would be assisted by legislative reforms protecting ICIP in existing and future material in the AIATSIS collection.

### **Information request 5.2 Gaps Identified by Current Protection of Rights**

AIATSIS' express guidelines address these gaps in ICIP protection and cover the conduct of research, materials produced through native title litigation and publishing.

#### ***Guidelines for Ethical Research in Australian Indigenous Studies (GERAIS)***

AIATSIS' research is based on the Guidelines for Ethical Research in Australian Indigenous Studies (**GERAIS**). The GERAIS provide principles to conduct research and collect and story materials from the research processes. GERAIS is embedded in the Australian Code for Responsible Conduct of Research and the National Health and Medical Research Council's 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.

To encourage responsible research practices, all research proposals and Australian Research Council 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 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 who 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 or group.

This structure enables decision making about IP to be made individually, or where required 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.

### ***Managing Information in Native Title***

The native title claims process represents 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 March 2015 Managing Information in Native Title workshop held at AIATSIS, 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 on multiple scales.'<sup>5</sup> was noted. These complexities relate to the fraught interaction between Indigenous cultural laws and norms and IP law systems, as well as practicalities of native title claim processes themselves.

Our research and consultations show 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. 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
- The development of greater flexibility within IP to account for the unique priorities, contexts and circumstances of different groups and organisations.

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.

### ***Guidelines for the Ethical Publishing of Aboriginal and Torres Strait Islander authors and research from those communities***

These Guidelines arise from the same philosophical space as AIATSIS' GERAIS. They embody the key idea that the publishing Aboriginal or Torres Strait Islander authors, and research or stories about them, must be done ethically. That means: Aboriginal and Torres Strait Islander authors have been encouraged to tell their stories in their own way; research with Aboriginal and / or Torres Strait Islander people has been undertaken with their prior and informed consent and will benefit them in ways they value; and subsequent publishing practices share those philosophical underpinnings. Ensuring the rights of Indigenous knowledge holders in relation to how their stories are told and shared underpin these guidelines. This includes recognition of ICIP rights which aren't adequately recognised in current copyright legislation.

<sup>5</sup> McGrath, P, Dinkier, 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 February 2016, [https://aiatsis.gov.au/sites/default/files/products/report/mint\\_report\\_master\\_final.pdf](https://aiatsis.gov.au/sites/default/files/products/report/mint_report_master_final.pdf)

Specifically the nature of Indigenous storytelling has:

- Derived from oral cultures, meaning stories weren't written down but shared in spoken form. In contrast, Australian copyright law covers ideas expressed in a material form;
- Existed for a far longer time than the period of copyright in Australian law (life of the author plus 70 years); and
- Been held and managed communally and for future generations, whereas copyright focuses on individual rights in a finite timeframe.

### **Copyright, Trade Marks and Design**

The intersection between ICIP and Australia's legislated IP regime was reviewed in Terri Janke and Company's submission *"New Tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system. Response to: Finding the Way: a conversation with Aboriginal and Torres Strait Islander people's conducted by IP Australia and Office for the Arts"*

AIATSIS endorses conclusions drawn in this paper and submits ICIP rights remain inadequately protected under the traditional banners of copyright, trade mark and design. Further the protection offered by contract, consumer protection and protocols is both piecemeal in its application and difficult to enforce.

The following dichotomies expressed in this paper remain relevant when examining IP protections through an economic lens: the individual nature of copyright protection; ICIP being held communally; the requirement for expressions to be in material form; ICIP is often held and transmitted in non-material forms; the duration of copyright being relative short; expressions of ICIP have been reproduced over tens of thousands of years; the inability to protect images via design and trade mark regimes; symbols and designs being intrinsically valuable to communities; and copyright in stories, knowledge, technologies and art being held by non-Indigenous film makers, anthropologists and linguists; ICIP residing in communities.

From an economic perspective, these dichotomies show how Australia's existing IP arrangements have aided in appropriating substantial elements of ICIP away from communities over many decades. This may now preclude a community from being able to control and commercially exploiting any aspect of their ICIP in addition to the detrimental wellbeing impacts noted above.

AIATSIS has responded to this situation through its interpretation of section 41(2) of the AIATSIS Act and its own Access and Use Policy. Both documents restrict the disclosure of material embedded with expressions of ICIP if likely to offend the sensitivities of relevant Aboriginal and Torres Strait Islander communities. Practically, this limits who may access and use certain material containing secret, sacred, gendered or personal content. While these mechanisms do not give ICIP holders complete control over material, it limits otherwise open content from being made available publically and indiscriminately exploited.

While the protection of ICIP may be achieved through by protocols, contracts and trade practices laws, its underlying owners are unlikely to regain sufficient control of material without legislative protection. Ensuing economic losses and diminished community wellbeing are therefore likely to continue if rights in this critical material cannot be controlled.

### ***Creation of Stand Alone IC/P Rights Structures***

AIATSIS notes the Productivity Commission has considered *sui generis* rights within the content of plant breeder's rights and circuit layouts. This concept of separate rights regimes therefore appears neither unique nor extreme.

We therefore submit it is appropriate to consider a separate category of ICIP rights protection stemming from systems of laws and customs that are unique to our own. As noted in the discussion above, many rights and interests are managed via negotiated protocols or contracts to fill gaps in the IP regime. This means Aboriginal and Torres Strait Islander communities and individuals can and do commercially exploit ICIP, however this is only done in a limited form.

Again the Terri Janke and Company IP Lawyers argue convincingly for this to occur and we concur with her statement:

"Indigenous people's ability to protect and practice their Indigenous Knowledge and Cultural Expression according to their cultural laws is limited in the existing IP framework. Legal change is needed to provide better recognition of their rights."<sup>6</sup>

Material containing ICIP is currently being controlled and used by Aboriginal people and Torres Strait Islanders through existing legal frameworks. Contracts prevent certain exploitation, protocols require strict cultural clearances and copyright subsist in individual authors. However, the limited framework available to protect communally held rights reduces the full impact, both in terms of economic benefit and social wellbeing, which comprehensive ICIP rights protection can deliver.

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<sup>6</sup> Janke, T, *ibid* p 26.