

Submission to the Senate Standing Committees on Environment and Communications

Inquiry into the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019

29 August 2019



Introduction

IP Australia is pleased to make this submission at the invitation of the Senate Standing Committees on Environment and Communications inquiry into the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (the Bill). IP Australia is currently reviewing the protection of Indigenous Knowledge¹ under the intellectual property (IP) system. We have conducted research and public consultation on the issues associated with how Indigenous Knowledge is protected and managed. We are pleased to share some of the insights we have gained with the Committee. We also take this opportunity to inform the Committee about the potential interaction between this Bill and the *Trade Marks Act 1995*.

IP Australia

IP Australia is the Australian Government agency responsible for administering Australia's patents, trade marks, designs and plant breeder's rights (PBR) systems. IP Australia operates as a listed entity within the Industry, Innovation and Science portfolio and is primarily funded by the fees it charges for administering registered rights.

As well as granting exclusive rights under the statutes it administers, IP Australia works closely with the Department of Industry, Innovation and Science to advise the Australian Government on IP policy; provides IP information and education services to business and the broader community; and regulates the IP attorney profession. IP Australia also contributes to bilateral and multilateral negotiations and development cooperation programs to promote a more harmonised global IP system. This includes IP Australia's role representing Australia at the World Intellectual Property Organization (WIPO) including its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

IP Australia contributes to Australian Government work on Indigenous Knowledge in partnership with other Commonwealth agencies, including the Department of Communications and the Arts, which is responsible for administering copyright legislation.

Our vision is to deliver a world leading IP system building prosperity for Australia.

¹ We use the term 'Indigenous Knowledge' to refer to a wide range of Indigenous cultural elements. The term includes, for example, rituals, techniques, know-how and scientific, medicinal and environmental knowledge, as well as cultural expressions including language, art, dance stories, songs, crafts etc. It encompasses products of the type referred to in the Bill.

Submission

In making this submission, IP Australia acknowledges the complexity surrounding the protection of Indigenous Knowledge. We note that the Bill relates to issues considered by the House of Representatives Standing Committee on Indigenous Affairs inquiry and its [*Report on the impact of inauthentic art and craft in the style of First Nations peoples*](#). These issues touch on matters of cultural heritage and identity, the arts, competition and consumer protection, IP rights and economic development. Addressing these issues will require a multi-faceted response developed in consultation with Indigenous stakeholders.

IP laws provide certain types of protection in specific circumstances and enable people to earn economic benefits from, and to be recognised for, their innovation and creativity. However, IP laws did not develop with Indigenous culture and knowledge systems in mind and are generally not well-suited to protecting Indigenous Knowledge.

IP laws focus on individual ownership and protection is generally granted to, and controlled by, a distinct creator or owner. Patents, designs, PBR and copyright all have limited periods of protection and after that period ends the protected material becomes part of the public domain. Generally, Indigenous communities observe specific cultural protocols in relation to the transmission and sharing of Indigenous Knowledge and emphasise ongoing custodianship rather than individual ownership for a limited time. Any treatment of an element of Indigenous Knowledge requires specific discussion with the individual custodian(s).

IP Australia conducted several roundtables and received written submissions and survey responses in relation to the protection and management of Indigenous Knowledge. Indigenous stakeholders recognised and welcomed the economic benefits in pursuing commercial opportunities involving Indigenous Knowledge. But they cautioned that there were circumstances where any commercial application would be deeply offensive and noted that any engagement should be culturally appropriate. We identified four themes from the stakeholder feedback we received, which are more significant to Indigenous people than any standalone initiative:

- *Control* – Indigenous people want to be able to control who uses Indigenous Knowledge and how it is used.
- *Protection* – Indigenous people are seeking measures that can be used to stop unauthorised use of Indigenous Knowledge and impose sanctions against misappropriation.
- *Recognition* – Indigenous people want to be recognised as the owners of their Indigenous Knowledge.
- *Respect* – Indigenous people want their ownership of Indigenous Knowledge and the cultural protocols associated with it to be respected.

Goods of the nature specified in the Bill may be eligible for protection under trade marks or designs. This can assist Australia's Indigenous people to benefit from their knowledge and expressions, by helping them to promote the reputation of authentic products or by giving them exclusive rights over the visual elements of a product. However, IP rights do not prevent the production, distribution or sale of inauthentic Indigenous 'style' products if the goods do not infringe a specific IP right.

Although there is some protection under the *Competition and Consumer Act 2010* (CCA) against making false and misleading claims about the authenticity or origin of Indigenous 'style' products, as confirmed in the recent court case *Australian Competition Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595, many inauthentic products fall outside the reach of existing consumer protection laws.

We understand that the intent of the Bill is to fill the gap that exists in the protection currently available under the CCA and IP laws by preventing the sale of inauthentic products. During our consultation we heard from stakeholders that such products misappropriate Indigenous culture, cause offence and deprive Indigenous communities of economic opportunities.

Further information about our Indigenous Knowledge consultation including the written submissions we received can be found [on the IP Australia website](#).

Interaction with the Trade Marks Act

Paragraph 42(b) of the *Trade Marks Act 1995* provides that a trade mark application must be rejected if the use of the trade mark would be contrary to law. If passed, the measures in the Bill would make it illegal to supply or offer to supply certain goods that include an Indigenous cultural expression. We have not sought legal advice on this issue, but it is possible that a trade mark that includes an Indigenous cultural expression would be rejected under paragraph 42(b) as a result of this new law.

Definition of traditional cultural expressions

IP Australia has been involved in discussions at the WIPO IGC on draft international instruments concerning the protection of Indigenous cultural expressions. This has included discussions about international definitions of the similar term ‘traditional cultural expression’. The text being discussed in WIPO may be of interest to the Committee and is [available on the WIPO website](#). The views of Aboriginal and Torres Strait Islander people will be important for the Committee in considering the definition.