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IP Australia



Delivering a world leading IP system

# Submission to the House of Representatives Standing Committee on Indigenous Affairs inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise

3 November 2017



# Introduction

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IP Australia is pleased to make this submission to the House of Representatives Standing Committee on Indigenous Affairs' inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise. This submission provides an overview of IP Australia's responsibilities and initiatives as relevant to this inquiry's terms of reference.

## 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 intellectual property (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 (WIPO 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 and arts policy.

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

## Submission

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This submission outlines how the IP system can assist Indigenous people to benefit from their Indigenous knowledge, and how IP Australia is exploring ways to better provide for the protection and management of Indigenous knowledge in the future. IP Australia uses 'Indigenous knowledge' in this submission to mean traditional knowledge and traditional cultural expressions of Indigenous peoples which includes stories, dance, languages, symbols, and crafts.

There are a number of ways the Australian intellectual property (IP) system can assist Australia's Indigenous people to benefit from their knowledge and expressions, including through the use of trade marks to promote the reputation of authentic Indigenous products, and registered designs giving exclusive rights over the visual elements of a product. However, IP protections do not prevent the production, distribution or sale of inauthentic Aboriginal 'style' products – commonly marketed as souvenirs – if they do not infringe a trade mark or registered design. Many of these inauthentic products fall outside the reach of existing IP and consumer laws.

The nature and diversity of traditional cultural expressions makes them more difficult to protect through the IP system. Formal IP protection is generally granted to and controlled by a distinct creator, but for Indigenous communities, traditional cultural expressions are part of living cultures. Traditional cultural expressions might be transmitted by various members of a community and may have cultural protocols attaching to when and how they are used.

## Trade marks including certification trade marks

The *Trade Marks Act 1995* establishes the framework for registration and protection of trade marks. In general, a trade mark identifies the particular goods or services of a trader as distinct from those of other traders. The owner has the exclusive right to use, sell or license the trade mark. A trade mark registration may be renewed every ten years.

Trade marks can be used to inform consumers about the Indigenous origins of a product and can provide a signal of quality. This helps consumers recognise authentic Indigenous products which in turn can increase the value of the trade mark and help build a business.

The trade mark system also provides for certification trade marks which perform a different function to standard trade marks. While standard trade marks indicate the commercial source of origin to a consumer, certification trade marks indicate that goods have been ‘certified’ as meeting a particular standard or having a particular composition, mode of manufacture, or some other characteristic. A certification trade mark may be used, typically, with the payment of a licensing fee for products that meet the published standards. The rules for certification trade marks must be approved by the Australian Competition and Consumer Commission to ensure they do not mislead consumers or raise competition issues in Australia.

Certification trade marks are private rights which can be owned and administered by entities with legal personality, and are not compulsory for members of an industry to use. Certification trade marks are frequently used in combination with goods produced by a range of traders, alongside the standard trade marks of those other traders. Applying the certification trade mark to a product can give consumers guidance and confidence that they are purchasing authentic products. Examples of certification marks include the ‘Woolmark’ and Heart Foundation ‘Tick’ logos.

A certification trade mark scheme for authentic Indigenous cultural products existed previously in the early 2000s. The scheme ended in 2003 when the entity which owned the mark, the National Indigenous Arts Advocacy Association (NIAAA) – associated with the then Aboriginal and Torres Strait Islander Commission – ceased operations. IP Australia understands that a number of elements of the scheme contributed to its cessation, including administrative complexity, governance issues, costs to producers and onerous authenticity requirements to establish that a producer was Indigenous (applicants were required to execute a statutory declaration, along with two signed forms from an Aboriginal Corporation certifying that the applicant was Indigenous).

Certification trade marks may be useful in the souvenir market, taking into account lessons learnt from previous schemes. In appropriate circumstances, an authenticity certification trade mark scheme could provide opportunities to promote authentic products over inauthentic products. Potential options include a national authenticity certification trade mark or regionally-based schemes more closely designed to local needs. Demonstrating value in a certification trade mark scheme would rely on appropriate governance

arrangements and marketing efforts, and the sufficient participation of producers. While a certification trade mark scheme will not prohibit inauthentic Indigenous ‘style’ products from being sold in Australia, it may increase consumer understanding of what is or is not authentic.

Collective trade marks are another type of trade mark that can be used by members of an association to distinguish their goods or services. A collective trade mark authenticity scheme would rely on the association’s rules of membership, rather than the rules governing the use of the trade mark. An international example of the use of collective marks is the Taita Basket collective trade mark in Kenya. The collective trade mark is owned by the Taita Baskets Association, comprising over 400 female basket weavers using traditional methods in Kenya’s Taita Taveta County. As with certification trade marks, a collective trade mark authenticity scheme would not prohibit inauthentic products from being sold in Australia. However, they may be an effective way to give prominence to goods produced by members of an association of Indigenous producers.

## Registered Designs

The *Designs Act 2003* provides a framework to register and protect new designs which have an industrial or commercial use. The design must be new and distinctive if it is to obtain enforceable rights. A renewal fee for registered designs protection is due after five years, with a maximum protection period of ten years.

A design right protects the visual appearance of a product, but not the way it works. The owner has the exclusive right to use, sell or licence their product in Australia. A registered design can provide proof of ownership and a deterrent against copycats for Indigenous designers of new and distinctive products – for example a piece of jewellery or furniture incorporating Indigenous designs. However a design right will only provide protection over a specific (and new) design, and will not prevent the sale of inauthentic Indigenous ‘style’ products in Australia that do not infringe the registered design.

## Education and awareness

Since 2010, IP Australia has maintained a dedicated education and awareness program for Aboriginal and Torres Strait Islander businesses, *Nanga Mai Arung*, roughly translated as *Dream Shield*. The program, which includes online text and video content, demonstrates to Indigenous businesses the value of intellectual property rights, and provides guidance on intellectual property considerations when starting a business. The content highlights how Indigenous artists and businesses are benefiting from IP protection, and their legal rights against IP infringement. It also illustrates the importance a brand’s reputation can play in demonstrating the authenticity of products. This content is available on IP Australia’s website, [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au).

## The World Intellectual Property Organization

IP Australia works with the Department of Communications and the Arts and the Department of Foreign Affairs and Trade to represent Australia’s interests at the World Intellectual Property Organization (WIPO). Since 2009, the WIPO IGC has been developing a potential multilateral instrument for the international protection of Indigenous peoples’ Traditional Cultural Expressions – which includes traditional arts, crafts and designs. The WIPO IGC has been chaired by Mr Ian Goss, an Australian and former senior executive of IP Australia, for the 2016-17 biennium.

Australia engages in the WIPO IGC with the aim of promoting international recognition of Indigenous peoples, including our Aboriginal and Torres Strait Islanders, legitimate interests in the protection, maintenance and preservation of their knowledge and cultural expressions. Discussions have canvassed issues including the balance between adequate protection of Traditional Cultural Expressions and maintenance of a vibrant public domain, as well as the different levels to which moral rights and economic rights might be protected. The WIPO IGC negotiations continue to explore aspects of authenticity where the use of a Traditional Cultural Expressions may create a false or misleading association with a specific Indigenous community. IP Australia has contributed to the WIPO IGC Voluntary Fund for Accredited Indigenous and Local Communities to support the vital participation of Indigenous peoples in the work of the committee.

These issues contain many challenging elements for the intellectual property system. The conventional 'Western' view of intellectual property is the recognition of particular rights in a new idea for period of time in order to incentivise further creation and innovation. Much Indigenous knowledge is derived from iterative development over thousands of years, and it can be difficult to fulfil the requirements of IP rights protection. Other issues may arise where Traditional Cultural Expressions are sacred or culturally sensitive, and their use by others for commercial benefit is not appropriate. A response to the issues identified by the Committee's terms of reference may benefit from keeping in mind the work of the WIPO IGC in developing a potential multilateral instrument for the international protection of Traditional Cultural Expressions.

## **Indigenous Knowledge Joint Project**

In 2017 the Department of Industry, Innovation and Science (DIIS) and IP Australia commenced a joint project to investigate the protection and management of Indigenous Knowledge in Australia. 'Indigenous Knowledge' includes both Traditional Cultural Expressions and Traditional Knowledge (know-how, skills and traditional processes). DIIS and IP Australia commissioned specialist Indigenous IP legal firm Terri Janke and Company to develop a discussion paper on Indigenous Knowledge issues in Australia.

The discussion paper will be used to consult with the public in 2018 on ways to improve the protection and management of Indigenous Knowledge in Australia, and to identify opportunities for Indigenous people to benefit economically from their knowledge. While the project touches on issues that overlap with this Committee's Terms of Reference concerning inauthentic products, in terms of the protection and management of Traditional Cultural Expressions, this is not the main focus of the joint project.

The growing presence of inauthentic Aboriginal and Torres Strait Islander style art and craft products and merchandise for sale across Australia.  
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