



**NATIONAL
INDIGENOUS
LAND AND
SEA
STRATEGY**

Discussion Paper: Indigenous Cultural and Intellectual Property



Australian Government
Indigenous Land and Sea Corporation



The ILSC GROUP

PEOPLE. COUNTRY. OPPORTUNITY.

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Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

UN Declaration on the Rights of Indigenous Peoples, Article 31

Aboriginal and Torres Strait Islander people have lived in Australia since time immemorial. Despite the disruption and destruction of colonisation, Indigenous people continue to practice and strengthen their traditional knowledge and expression which includes ecological knowledge, as well as performances and storytelling. Today, Indigenous people are finding innovative and contemporary ways to leverage traditional knowledge for economic opportunity. Indigenous peoples' calls for greater protection of Indigenous rights to their heritage is being driven by the use and development of rights in Indigenous Cultural and Intellectual Property (ICIP).

Indigenous people are increasingly relying on Intellectual Property (IP) rights to protect and manage their knowledge and business interests. If managed effectively and where IP rights are vesting in Indigenous ownership, IP can provide significant economic and social returns. However, where IP laws fail to capture and protect the full breadth of Indigenous culture, Indigenous Cultural and Intellectual Property (ICIP) is at risk.¹

Indigenous land and sea rights holders can use IP or ICIP rights to their advantage by using contracts, and existing laws such as copyright, trade marks, patents and confidential information. A key part of the IP opportunities for Indigenous people is to authenticate and guide the use of Indigenous Knowledge. Branding, labelling and trade marks are important tools to denote the origin and authenticity, but also protect Indigenous Knowledge from unauthorised use or exploitation.

It is also important to advocate for ICIP rights in protocols, policy and law, domestically and internationally, including in trade agreements and as part of the World Intellectual Property Organisation's discussion on the recognition of traditional knowledge and cultural expressions to provide for the broadest protection for Indigenous culture.



Harvesting kuti (pipis) on Ngarrindjeri country in SA.
Photo Credit: Andy Steven Photography & Goolwa PipiCo.



1 Definitions

Intellectual Property (IP)	<p>These are rights to control creations of the mind such as art, literary and musical work, designs, names and knowledge. Types of IP include:</p> <ul style="list-style-type: none"> • Trade marks • Copyright • Confidential Information is also considered an IP right • Plant Breeder Rights • Patents
Indigenous Cultural and Intellectual Property (ICIP)	<p>ICIP rights are Indigenous peoples' rights to their heritage and culture, and all that it encompasses. This includes rights to languages, ancestral remains and genetic material, flora and fauna, significant sites and Indigenous Knowledge. ICIP rights are not recognised under the law and are based in customary law.</p>
Indigenous Knowledge (IK)	<p>The term Indigenous Knowledge has two distinct categories</p> <ol style="list-style-type: none"> (a) Traditional Knowledge includes traditional know-how, skills, innovations applied in various contexts such as ecological, scientific and agricultural knowledge. (b) Traditional Cultural Expression refers to the tangible and intangible forms in which traditional knowledge and culture are expressed. This includes dances, customs and visual art.²

2 Opportunities

The following areas indicate common alignment with Indigenous peoples' aspirations, actions and endeavours, and the type of support the ILSC can provide to progress these enterprises.

2.1 Bushfoods and bush products industry

The Bushfood industry provides a wealth of opportunities for the use of Indigenous Knowledge, with its economic and social value not yet fully realised. Indigenous people and businesses are finding innovative ways to utilise and adapt their cultural knowledge in a way that provides competitive edge in the contemporary marketplace. For example, Seven Seasons produces gin using Bushfoods such as green ants and native yams collected in accordance with the sustainable harvesting practices and knowledge of the Larrakia People.³

Organisations also play a pivotal role in fostering these opportunities for Indigenous businesses in this industry. The ILSC played a formative role in 2016 supporting a consortium of nine Aboriginal corporations to establish the Northern Australian Aboriginal Kakadu Plum Alliance (NAAKPA) to undertake Indigenous community harvesting and processing enterprises, and facilitate access to large scale markets for Kakadu Plum and its extracts. NAAKPA is one of the largest Indigenous controlled native food supply networks in Australia demonstrating Indigenous influence and control in the market to maximise the flow of benefits back to Indigenous communities.⁴



Plant-based industries provide further opportunity to leverage Indigenous Knowledge for the positive benefit of local communities. The use of Access and Benefit Sharing (ABS) agreements is one mechanism limiting the exploitation of Indigenous Knowledge⁵ – the details of which are provided for in the Nagoya Protocol, which is yet to be ratified in Australia. Piecemeal legislative protection for Access and Benefits Sharing Schemes⁶ means that organisations such as universities, government research entities or any other body entering into partnerships with Indigenous Knowledge holders need to ensure that the principles of the ABS are applied as a default.⁷

The Dugalunji Aboriginal Corporation and the University of Queensland Agreement entered into in 2015 demonstrates one innovative way Indigenous people can control use of their knowledge whilst pursuing commercially strategic and beneficial partnerships. The Agreement provided for the research, use and commercialisation of spinifex grass, and importantly the equitable participation of the Indigenous peoples throughout this process.⁸ “Crucially the formal agreement recognises traditional owners’ contribution by giving the corporation the right to decide if and how products should be commercialised”.⁹ There are many other examples where Indigenous Knowledge and ICIP is being successfully used and managed by Indigenous people in different fields such as horticulture¹⁰ and in cosmetics.¹¹

2.2 Knowledge industries

Indigenous Knowledge is becoming increasingly recognised for its value and utility across many knowledge-based systems. Indigenous culture is intrinsically linked to Country, with the application of Indigenous ecological knowledge in environmental management practices well established.¹² Successful examples of Indigenous groups Caring for Country include through Indigenous Ranger Programs, fire management practices and through commercialising and leveraging the development of a successful Indigenous carbon industry.

The Digital Economy¹³ is another industry allowing for the dissemination of Indigenous Knowledge that can be securely managed, authenticated, and protected on the terms of Indigenous peoples. IP Australia is currently trialling the use of *Smart Trade Mark Technology* in the Kakadu Plum supply chain in northern Australia. Through the use of block chain and QR technology, consumers can learn about the entire supply chain process through the provision of verified information.¹⁴

2.3 Arts

The Arts industry continues to generate significant economic opportunities for Indigenous peoples that is closely linked with cultural sustainability and revitalisation. Through visual and performing arts Indigenous people can express and share their Knowledge and Culture. As people continue to demand authentic Indigenous art, Indigenous people and art centres should look towards the use of digital technologies such as QR codes and block chain to provide consumers with verified provenance and prevent the spread of unauthentic Aboriginal artwork. There is also a growing trend favouring Indigenous designers using their culture in the fashion sector.¹⁵ The success of the Mangkaja Arts Resources Agency and Gorman partnership represents a ‘positive benchmark’ for how Indigenous artists can participate and have their ICIP respected in major commercial collaborations.¹⁶ Arts and culture markets are supported by the Australia Council for the Arts who provide funding and set policy objectives, through its First Nations programs, as well as promote compliance with its Protocol for the use of ICIP in the Arts.¹⁷

2.4 Tourism

Indigenous Tourism holds significant potential for capturing and sharing Indigenous Knowledge through cultural experiences and education on Country. Central to the effectiveness of Indigenous Tourism ventures is strong Indigenous governance and branding of authentic Indigenous experiences, developed through the use of IP and ICIP rights. This then enables tourists to learn more about Indigenous culture and storytelling and Indigenous

experiences, whilst affirming Indigenous peoples' sense of place and identity.¹⁸

The Six Larrakia Principles, established under the Larrakia Declaration at the inaugural 2012 Pacific Asia Indigenous Tourism Conference Darwin provide a basis for ensuring equitable partnerships and include that “[the] tourism industry will respect Indigenous intellectual property rights, cultures and traditional practices, the need for sustainable and equitable business partnerships and the proper care of the environment and communities that support them.”¹⁹

The wukalina Walk in Tasmania is a successful example of an Indigenous tourism venture established by the Aboriginal Land Council of Tasmania. Along the walk, tourists participate in cultural activities, and listen to the lived experiences and perspectives of Indigenous guides.²⁰



Artefacts from
Esperance Nyungar
country, WA

2.5 Research and heritage industry

The transfer of Indigenous Knowledge through research and heritage projects and partnerships is another way for Indigenous peoples to control and manage how their knowledge and Country is accessed and handled. The UNESCO World Heritage listed Budji Bim Cultural Landscape located on Gunditjmarra Country in Victoria has been recognised for its ‘exceptional testimony to the cultural traditions, knowledge, practices and ingenuity of the Gunditjmarra’.²¹ The Gunditjmarra Traditional Owners manage the site in accordance with the ancestral practices and knowledge, and plan to operate it commercially for tourism and research.²²

3 Conclusion

The use of Indigenous Knowledge provides a wealth of opportunities for Indigenous people to become global players in the commercial marketplace.

As industries increasingly looking to use Indigenous Knowledge they must be educated on the appropriate ways to engage with Indigenous peoples, and on how to develop and embed protocols to ensure protection of ICIP rights.

To ensure Indigenous people control and retain ownership of their knowledge there needs to be support and education on how to licence these rights on negotiated terms. A national protocol, such as the True Tracks® framework, which defines ICIP rights and provides guidelines to respect and uphold these rights, could provide a critical tool to achieving Indigenous control and enabling opportunities to be leveraged.²³

4 Related Discussion Papers

The Investment, Trade and Export, Bushfoods and Caring for Country Discussion papers can be accessed at www.ilsc.gov.au.

5 Resources

Australian Human Rights Commission and National Congress of Australia's First Peoples', *Community Guide to the UN Declaration on the Rights of Indigenous Peoples* https://declaration.humanrights.gov.au/sites/default/files/document/publication/declaration_community_guide.pdf

Australian Institute of Indigenous and Torres Strait Islanders Studies, *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* (2020) <https://aiatsis.gov.au/sites/default/files/2020-10/aiatsis-code-ethics.pdf>

Australia Council, *Protocols for using First Nations Cultural and Intellectual Property in the Arts* (2019) <https://australiacouncil.gov.au/wp-content/uploads/2021/07/protocols-for-using-first-nati-5f72716d09f01.pdf>

Blackwell, Boyd, Kerry Bodle, Janet Hunt, Boyd Hunter, James Stratton and Kaely Wood, 'Methods for Estimating the Market Value of Indigenous Knowledge' (Final Report commissioned by IP Australia, November 2019) www.ipaustralia.gov.au/sites/default/files/caepr_final_report_on_ik.pdf

IP Australia, 'Indigenous Knowledge Consultation Paper' (February 2021) www.ipaustralia.gov.au/sites/default/files/ik_consultation_2021.pdf

IP Australia, 'Protection of Indigenous Knowledge in the Intellectual Property System' (Work Plan 2020-2021, September 2021) www.ipaustralia.gov.au/sites/default/files/ip-australia-indigenous-knowledge-work-plan-2020-2021.pdf Screen Australia, *Pathways and Protocols: A filmmaker's guide to working with Indigenous people, culture and concepts*, Screen Australia, May 2009 (Terri Janke under commission of Indigenous Branch) www.screenaustralia.gov.au/about-us/doing-business-with-us/indigenous-content/indigenous-protocols

Terri Janke, *True Tracks: Respecting Indigenous knowledge and culture*, NewSouth Publishing, Sydney, 2021

Terri Janke and Maiko Sentina, *Indigenous Knowledge: Issues for Protection and Management*, IP Australia, Commonwealth of Australia 2018 www.ipaustralia.gov.au/sites/g/files/net856/f/ipaust_ikdiscussionpaper_28march2018.pdf

United Nations Declaration on the Rights of Indigenous Peoples www.hreoc.gov.au/social_justice/declaration/assembly.html

United Nations Global Compact, *United Nations Declaration on the Rights of Indigenous Peoples: A Business Guide* www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf

World Intellectual Property Organisation, *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore* www.wipo.int/tk/en/

Endnotes

1. Terri Janke, *Our Culture, Our Future*, Michael Frankel and Company, Sydney, 1999 www.terrijanke.com.au/our-culture-our-future
2. Terri Janke and Maiko Sentina, *Indigenous Knowledge: Issues for Protection and Management* (IP Australia (Cth), Discussion Paper, 2018) 17 www.ipaustralia.gov.au/paust_ikdiscussionpaper_28march2018.pdf
3. Seven Seasons www.seven-seasons.com.au/our-story
4. www.ilsc.gov.au/home/project-profiles/kakadu-plum-project/#:~:text=The%20Northern%20Australia%20Aboriginal%20Kakadu,extracts%20by%20large%2Dscale%20markets
5. Terri Janke and Maiko Sentina, *Indigenous Knowledge: Issues for Protection and Management* at 105
6. *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and *Biodiscovery Act 2004* (Qld)
7. www.cbd.int/abs/information-kit-en/ Further information on the Nagoya Protocol refer to the Factsheet
8. Researchers have extracted high grade microfibers from the spinifex which can be used to make ultra-thin condoms and surgical gloves. See Janelle Miles, *The Courier Mail* 'Condoms from spinifex grass is the future of protection', (online, 30 June 2017) www.couriermail.com.au/news/queensland/condoms-from-spinifex-grass-is-the-future-of-protection/news-story
9. www.oric.gov.au/publications/spotlight/weaving-grass-gold; <https://www.austrade.gov.au/land-tenure/engagement-guide/how-do-i-engage-with-traditional-owners/indjalandji-dhidhanu-people-and-university-of-queensland>
10. For example, the Barengi Gadjin Land Council purchased the Dalki Garringa nursery, located on the old Wail Nursery Site in 2017. Dalki Garringa, which means Good Growing seeks to become a commercially viable nursery and leader in the supply of native plants. www.dalkigarringa.com.au/
11. For example, Bush Medijina is a successful cosmetic brand established by Warningakalina women which uses traditional recipes and cultural knowledge of botanicals to make contemporary skin care products. <https://bushmedijina.com.au/>
12. (n3) 78.
13. The Digital Economy refers to the global network of economic and social activities carried out on information and communication technologies such as the internet
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16. Matt Bamford, *ABC News*, 'Gorman Mangkaja collection breaks new ground for Indigenous fashion design collaboration' (online, 21 July 2019) www.abc.net.au/news/2019-07-21/gorman-fashion-label-collaborates-with-indigenous-artists/11328248. See also www.gormanshop.com.au/mangkaja-x-gorman-lookbook/?gclid=Cj0KCQiAxoiQBhCRARIsAPsvo-w3tA3fy2liVzezsqrX6cpRdLEQychHKPKTiBsOb96a5dmyDe9wEFDkaAsXbEALw_wcB
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Indigenous Bush Food products.
Photo Credit: Voyages Indigenous
Tourism Australia Pty Ltd.



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