Law Council
OF AUSTRALIA

Enhance and Enable – Indigenous Knowledge Consultations 2021

IP Australia

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Intellectual Property Committee of its Business Law Section, its Indigenous Legal Issues Committee, the Law Society of South Australia and the Queensland Law Society, for their assistance in the preparation of this submission.

Executive Summary

1. The Law Council thanks IP Australia for the opportunity to respond in relation to its *Enhance and Enable – Indigenous Knowledge Consultations 2021* (**the consultation**), and, specifically, to the proposals and questions set out in its *Indigenous Knowledge Consultation Paper* published in February 2021 (**the consultation paper**).[1]

2. The Law Council strongly supports IP Australia's intention to contribute to the development of an intellectual property (**IP**) system that aims to help manage, support and protect Indigenous Knowledge (**IK**). IK is a unique, important and valuable resource of benefit to all Australians, who recognise, respect and celebrate the cultural distinctions of Aboriginal and Torres Strait Islander peoples and value their rich and positive contributions across this continent.

3. In recent times, IP systems across the world have begun to grapple with the importance of providing adequate recognition and protection of the cultural products and expressions of indigenous peoples.[2] The Law Council notes the fundamental importance of IK to the lives and wellbeing of Aboriginal and Torres Strait Islander peoples today and the notion that tradition and culture belong to a community, rather than any particular individual, and are not static but change over time. The United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**)[3] – the international standard informing the way governments across the globe should engage with and protect the rights of indigenous peoples,[4] which Australia formally announced its support for on 3 April 2009 – expressly refers to IP over IK under article 31:

> *(1) 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.*
>
> *(2) In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*[5]

4. This is based in the principle of self-determination, which forms common article 1 of the International Covenant on Civil and Political Rights (**ICCPR**)[6] and the International

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[1] Australian Government, IP Australia, *Indigenous Knowledge Consultation Paper* (February 2021) ('**IP Australia, Consultation Paper**') <https://www.ipaustralia.gov.au/sites/default/files/ik_consultation_2021.pdf>.
[2] See, eg, Stoianoff, Natalie and Roy, Alpana, 'Indigenous Knowledge and Culture in Australia – the case for sui generis legislation' (2015) 41(3) *Monash University Law Review* 745.
[3] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex ('**UNDRIP**').
[4] See, eg, Australian Government, Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>; United Nations Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc A/HRC/9/9 (11 August 2008) [85]-[86].
[5] UNDRIP, art 31.
[6] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('**ICCPR**').

Covenant on Economic, Social and Cultural Rights (**ICESCR**),[7] and is given specific expression in the context of the rights of indigenous peoples through article 3 of the UNDRIP, as follows:

> *Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

5. In this context, the Law Council strongly supports enhancing Australia's IP system to better support the ability of Aboriginal and Torres Strait Islander peoples to maintain, control, protect and develop their IP over their IK. It is pleased to make the following recommendations with the aim of assisting IP Australia as far as possible to this end:

- the proposed Indigenous Advisory Panel (**IAP**) should have a meaningful scope of authority in providing decision-makers with advice, and processes that facilitate and prioritise the views of Traditional Owners, Knowledge Holders or First Nations, as the traditional custodians with authority to speak for country;
- consideration be given to complementary mechanisms, such as statutory rights to seek administrative (merits) review of decisions and emergency declarations to prevent the inappropriate use of IK, in order that the views of traditional custodians and communities are not limited to an advisory role in entirety;
- IP Australia and the proposed IAP prioritise culturally competent processes including community legal education and two-way learning approaches, to foster understanding and robust dialogue between Aboriginal and Torres Strait Islander communities, government and the wider public about IK and IP;
- a consent model should be introduced to consider applications seeking to use IK in a trade mark or design, with evidence of consent provided via a statutory declaration and letter/s of consent – provided appropriate supports are in place to help Aboriginal and Torres Strait Islander peoples navigate these processes and related legal matters, including adequate resourcing of specialist legal services;
- it is likely unnecessary at this early stage to introduce additional penalties to motivate disclosure of a source in the patent and plant breeder's rights systems, as the effect of existing provisions is that a failure of an applicant to make an accurate declaration about the source of IK, where that failure materially contributed to the grant of the right, would lead to revocation of the right provided it is just and equitable to do so; and
- when considering labelling options to promote authentic Indigenous products, close regard should be had to the prior Parliamentary Standing Committee report on the impact of inauthentic art and craft in the style of First Nations peoples.[8]

Background and Preliminary Comments

6. The Law Council understands that the current consultation follows a significant body of work previously commissioned or undertaken by IP Australia relating to the

[7] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('**ICESCR**').
[8] Standing Committee on Indigenous Affairs, *Report on the impact of inauthentic art and craft in the style of First Nations peoples* (Final Report, 2018).

protection and management of IK,[9] and forms part of the *Indigenous Knowledge Work Plan 2020-21*.[10]

7. Through the current consultation, IP Australia seeks feedback on four specific proposals, which have been developed from this previous research and consultation, as follows:

   - establishing a panel to advise IP Australia in relation to IK;
   - new measures for checking trade marks or designs using IK;
   - new requirements to declare the source of IK used in innovations; and
   - labelling to promote authentic Indigenous products.

8. The Law Council notes that many of the questions in the consultation paper are directed specifically at Aboriginal and Torres Strait Islander peoples and businesses, and that the options presented for further feedback 'have been developed through consultation and refinement with Aboriginal and Torres Strait Islander stakeholders'.[11]

9. The Law Council responds to the consultation in terms intended to assist IP Australia with its deliberations as much as possible, noting, however, that it is not an Aboriginal and Torres Strait Islander representative body. It does not purport to provide a definitive view on issues that are more appropriately dealt with by Aboriginal and Torres Strait Islander stakeholders. It offers observations on the legal and practical aspects of implementing the proposals that are currently under consideration, and raises some further issues for consideration, guided as much as possible by the Aboriginal and Torres Strait Islander members of its committees, sections and constituent bodies.

10. To be clear, the comments that follow are premised on the principle that those best placed to advise on IK matters are the traditional custodians of that knowledge – Aboriginal and Torres Strait Islander peoples, and, more specifically, First Nations, Traditional Owners, Elders and Knowledge Holders.

11. The Law Council supports IP Australia's emphasis on prioritising the views of Aboriginal and Torres Strait Islander peoples in the consultation process, and its express recognition at the beginning of the consultation paper that it has commitments under the recently revised National Agreement on Closing the Gap to engage in shared decision-making with Aboriginal and Torres Strait Islander people.[12]

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[9] See Australian Government, IP Australia, *Indigenous Knowledge Project*, 'Publications' (website, 14 May 2021) <https://www.ipaustralia.gov.au/understanding-ip/getting-started-ip/indigenous-knowledge/indigenous-knowledge-project>. This includes: a discussion paper commissioned in 2017 from Terri Janke and Company, *Indigenous Knowledge: Issues for Protection and Management*; a consultation paper released in 2018, seeking input on proposed initiatives for the protection and management of IK within IP Australia's areas of responsibility, and subsequent report published in 2019; a report commissioned in 2019 from the Centre for Aboriginal Economic Policy Research at the Australian National University on *Methods for Estimating the Market Value of Indigenous Knowledge*; and two further research papers from Terri Janke and Company on *Options for IP Australia's Indigenous Advisory Panel* and *Indigenous Protocols and Processes of Consent Relevant to Trade Marks*. It also draws on information from the House of Representatives Standing Committee on Indigenous Affairs' *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples*, and the Australian Government response to that report – work that is occurring across a range of government agencies.

[10] Ibid. The *Indigenous Knowledge Work Plan 2020-21* outlines a range of initiatives relating to IK being undertaken by IP Australia, including a review of the *Guide to IP Rights for Indigenous Businesses* originally published in 2014. See also IP Australia, Consultation Paper, 18.

[11] IP Australia, Consultation Paper, 3.

[12] Ibid.

12. Understandably, given the early stage of the process, the proposals raised for consideration are framed at a high level of generality. Consequently, the Law Council's responses are also framed at a similarly high level. It will be necessary in due course for IP Australia to elaborate in some detail how these proposals, if pursued, would be implemented procedurally and legislatively. The Law Council is willing to assist IP Australia in that work when it occurs, including by drawing on the expertise of the Intellectual Property Committee of its Business Law Section.

Establishing an Indigenous Advisory Panel

13. The Law Council sees merit in the proposal to establish the IAP as 'an independent voice for Aboriginal and Torres Strait Islander perspectives' to IP Australia.[13] The starting point for any IAP must be adherence to the principle of self-determination. The Law Council supports enhancing Australia's IP system to better support, in accordance with article 31 of the UNDRIP, the right of Aboriginal and Torres Strait Islander peoples to 'maintain, control, protect and develop' their IP over their IK. Depending on its membership, functions and structure, the IAP has the potential to facilitate greater control and protection of IK within the IP system in Australia.

Role and Functions

14. The consultation paper proposes that the IAP 'would be able to provide views and advice to IP Australia for consideration at a high level'.[14] As well as engaging with Aboriginal and Torres Strait Islander communities to raise awareness and access to IP Australia's information and services, and advising on policies for promoting IK recognition in IP systems, its third key function would be 'providing advice to IP Australia on IP applications that include IK'.[15] The consultation paper later clarifies, however, that 'examiners at IP Australia could assist with identifying IK issues in IP applications, make preliminary assessments, and request the Panel's consideration on applications where required'.[16] This suggests that the IAP would not have a proactive function in relation to applications, could only intervene in an application process upon request, and would be limited to providing advice rather than having any decision-making authority or enforceable statutory powers.

15. In the research paper, *Options for IP Australia's Indigenous Advisory Panel*, it was proposed in a similar manner that:

> *The IAP is not about examiners receiving definitive answers about applications, but rather a source of guidance on cultural issues and referrals to other external authorities for examiners (where appropriate). The IAP could also be very influential in leading reforms to IP Australia policies and procedures to allow for the appropriate handling of IK. There are a range of different Indigenous governance structures that government departments have put in place to advise them on Indigenous themes.*[17]

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[13] Ibid, 5.
[14] Ibid.
[15] Ibid, 6.
[16] Ibid, 5.
[17] Dr Terri Janke and Desiree Leha, Options for IP Australia's Indigenous Advisory Panel (Managing Indigenous Knowledge: Report 3, 2020) <https://www.ipaustralia.gov.au/sites/default/files/options-for-ip-australias-indigenous-advisory-panel.pdf> 3.

16. The Law Council is of the view that consideration needs to be given to the scope of the IAP's authority or decision-making power to ensure it has meaningful authority to provide decision-makers with advice.

17. The drawbacks of Aboriginal and Torres Strait Islander advisory bodies have recently been highlighted in the comparative legal and policy areas of cultural heritage and environmental protection.

18. For example, the Law Council's submission to the inquiry into the destruction of the caves at Juukan Gorge considered the Aboriginal Cultural Materials Committee (**ACMC**) established under section 28 of the *Aboriginal Heritage Act 1972* (WA), drawing on the advice of the Western Australian Law Society.[18] The ACMC is described in this statute as an 'advisory body', the members of which 'shall be selected from amongst persons, whether or not of Aboriginal descent, having specialist knowledge, experience or responsibility'.[19] A number of concerns were raised about the ACMC, including the fact there was no requirement for Aboriginal and Torres Strait Islander representation among its members, its advice could be overridden by the relevant Minister, and it did not facilitate consideration of the views of Traditional Owners or those First Nations people with knowledge of the cultural significance of the land or recognised as speaking for country.[20]

19. The bipartisan Parliamentary Committee, in its Interim Report, recognised these significant deficits and made several recommendations, including that the Western Australian Government '[u]rgently establish new procedures to improve the quality and transparency of decision making by the Registrar and ACMC' and '[i]nstitute rolling membership of the ACMC to ensure the involvement of Traditional Owners of the country that is the subject of any decision'.[21]

20. The Law Council's submission also included more positive examples of representative bodies currently in existence, such as under the Victorian legislative framework, which appoints 'Registered Aboriginal Parties'.[22] It is the traditional owners, through the Registered Aboriginal Parties, that must decide whether to approve a cultural heritage management plan or cultural heritage permit.[23] While these bodies still have limitations, such as the absence of processes to deal with intangible cultural heritage, they provide an example of a system where significant authority is held by Aboriginal

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[18] Law Council of Australia, Submission to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (21 August 2020) <https://www.lawcouncil.asn.au/publicassets/24891840-2ef3-ea11-9434-005056be13b5/3864%20-%20Juukan%20Caves%20Submission.pdf> 30, [100].

[19] *Aboriginal Heritage Act 1972* (WA) s 28.

[20] Law Council of Australia, Submission to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (21 August 2020) 28-31.

[21] Joint Standing Committee on Northern Australia, *Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report* (December 2020) xvii <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024579/toc_pdf/NeverAgain.pdf;fileType=application%2Fpdf>. The Law Council similarly raised recommendations relating to better oversight and support of native title bodies corporate and specific corporate structures for native title benefits management in its submission to Phase 2 of the Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth): Law Council of Australia, Submission to National Indigenous Australians Agency, Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (1 October 2020) <https://www.lawcouncil.asn.au/publicassets/4fc09979-7e0e-eb11-9435-005056be13b5/3894%20-%20Review%20of%20the%20CATSI%20Act%20Phase%202.pdf>.

[22] Ibid, 61-68.

[23] Ibid, 64.

and Torres Strait Islander custodians as part of the cultural heritage decision-making process.[24]

21. Similarly, the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) Final Report stated in October 2020:

> *The operation of the EPBC Act Indigenous Advisory Committee (IAC) exemplifies the culture of tokenism. The Act does not require the IAC to provide decision-makers with advice. The IAC is reliant on the Environment Minister inviting its views. This is in contrast to other statutory committees, which have clearly defined and formal roles at key points in statutory processes. The effective operation of the IAC is further limited by the lack of adequate funding.*[25]

22. Professor Samuel recommended that 'to harness the value and recognise the importance of Indigenous knowledge, the EPBC Act should require decision-makers to respectfully consider Indigenous views and knowledge'.[26] He further recommended that immediate reform was required to:

- amend the Act to replace the Indigenous Advisory Committee with the Indigenous Engagement and Participation Committee. The mandate of the Committee will be to refine, implement and monitor the National Environmental Standard for Indigenous engagement and participation in decision-making;
- adopt the recommended National Environmental Standard for Indigenous engagement and participation in decision-making; and
- amend the Act to require the Environment Minister to transparently demonstrate how Indigenous knowledge and science is considered in decision-making.[27]

23. The Law Council is not necessarily suggesting that an appropriate function for the IAP would be ruling on applications or providing definitive answers on applications to IP Australia's examiners. Such a function would require the IAP to accrue, via its membership, highly specialist knowledge and significant resources – although this could be a legitimate long term goal, it might not be viable in the short term.

24. However, the advisory role of the IAP should be invested with appropriate authority in order to make its existence meaningful. It would seem sensible, for example, for the IAP to be able, of its own accord, to raise concerns over applications that potentially engage IK and, further, to require examiners to consult with the relevant external authorities in such circumstances prior to progressing or approving an application.

25. One model to potentially inform the structure, role and operation of the IAP is the New Zealand Maori Trade Marks Advisory Committee (**MTMAC**). In addition, the Law Council also notes the operation of research and ethics advisory committees in universities and hospitals throughout Australia, which are generally considered to operate successfully, by concentrating expertise, and building corporate knowledge

[24] Ibid.
[25] Professor Graeme Samuel, *Final Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* (October 2020) <https://epbcactreview.environment.gov.au/resources/final-report>.
[26] Ibid, recommendation 5.
[27] Ibid.

over time, on very specific matters.[28] Although often designated as 'advisory', such committees typically have delegated to them the power to make determinations.[29]

26. The Law Council further notes the importance of ensuring within the IP system that the voices of Aboriginal and Torres Strait Islander peoples are not limited to advisory roles in entirety. It suggests consideration be given to complementary mechanisms to ensure Aboriginal and Torres Strait Islander peoples are able to effectively challenge applications or appeal decision-making to prevent the inappropriate use of their IK, and to ensure that examiners or other authorities or bodies in charge of determining applications are obliged to take into account, and give appropriate weight to, submissions from Aboriginal and Torres Strait Islander voices – particularly, Traditional Owners, Knowledge Holders and First Nations. That is, IP Australia's aim of 'protecting' IK presupposes the existence of mechanisms for legal challenge and redress.

27. Such mechanisms would, for example, include statutory rights to seek administrative (merits) review of decisions, and to seek emergency declarations or injunctions to prevent inappropriate use of their IK by other persons and bodies who are not entitled to use it.

28. More practically, they would include additional resources for access to specialised, culturally appropriate legal assistance. In this context, the Law Council's recent Justice Project, overseen by a Steering Committee chaired by the Hon Robert French AC, highlighted that nationally, there is a substantial deficit in funding for civil legal assistance for Aboriginal and Torres Strait Islander persons despite urgent and multi-faceted need.[30] In particular, the Arts Law Centre submitted to the Justice Project that there are high levels of unmet demand for legal assistance to Aboriginal artists and creative communities for services including on copyright, moral rights, performers rights, trade marks business names and reputation, designs and patents, Indigenous cultural and intellectual property, as well as legal education on these matters.[31] It emphasised that 'artists throughout Australia require legal empowerment to properly protect, manage and enforce their legal and financial interests'[32]. Protecting the legal and cultural rights of Aboriginal and Torres Strait Islander artists was fundamental to protecting their careers, their livelihoods and their economic independence.[33]

29. The Law Council would support a funding package for these kinds of services to ensure that IP Australia's objectives in supporting IK are realised in practice. It recognises that this would require broader portfolio support (eg, led by the Attorneys-General Department with National Indigenous Australians Agency support) but also notes that such measures would not present a substantial budgetary impact given their targeted nature.

Membership and Representation

30. The Law Council accepts that there will be challenges in constituting the IAP in a manner that is appropriately representative, given the cultural, linguistic and geographic diversity of Aboriginal and Torres Strait Islander communities and First

[28] See, eg, National Health and Medical Research Council, 'Ethical conduct in research with Aboriginal and Torres Strait Islander Peoples and communities' (website, undated) <https://www.nhmrc.gov.au/about-us/resources/ethical-conduct-research-aboriginal-and-torres-strait-islander-peoples-and-communities>.
[29] Ibid.
[30] Law Council, Justice Project (2018), Aboriginal and Torres Strait Islander Chapter, 4, 12-14.
[31] Arts Law Centre of Australia, Submission to the Law Council of Australia responding to its Justice Project, 9 October 2017, available online.
[32] Ibid.
[33] Ibid.

Nations across Australia. It is currently proposed that the IAP 'could have a number of permanent members, who are supported by a pool of rotating members … [which] would support representation from different regions, a range of technical expertise, and a mix of genders'.[34]

31. The Law Council supports in principle this proposal for rotating representation on the IAP, understanding it as a pragmatic approach to the issue of membership numbers. For example, it is likely impractical that every Tribal or Language group would be able to be represented at all times on the IAP. There are more than 250 Aboriginal and Torres Strait Islander languages including 800 dialects spoken or maintained across the continent.[35] Similarly, there are over 500 different clan groups or nations, having distinctive cultures, beliefs and customs.[36] However, without complete representation, the IAP cannot be the sole source for consultation with and authority from Aboriginal and Torres Strait Islander communities and First Nations.[37]

32. Due to the heterogeneity of Aboriginal and Torres Strait Islander communities and First Nations, it is inevitable that there will be instances where a matter of IK will sit outside the knowledge or expertise of the IAP's members. It is also inevitable that, where applications do not relate directly to their local region, these members will not have the authority of traditional custodians, which is derived from connection to country, to speak on matters of IK and TCEs. The purpose of the IAP should be to provide cultural expertise and lived experience to inform IP Australia in general about matters such as traditional knowledge, cultural practices, spiritual knowledge, ancestral material and languages, and, as canvassed above, to ensure specific consultation where necessary with the relevant external authorities, particularly First Nations, Traditional Owners and Knowledge Holders.

33. In order for the IAP to achieve this purpose, it will need to develop a collaborative and proactive method of facilitating genuine and meaningful participation by traditional custodians in its decision-making. To operate successfully, the governance structure adopted by the IAP will need to be robust and carefully considered and ensure that the processes involved in decision-making are clearly articulated.

34. As it has suggested in other legal and policy areas, including cultural heritage and its submissions on a First Nations Voice to Parliament, the Law Council encourages IP Australia to consider developing and implementing a formal process of a tiered approach to identifying and consulting external authorities, with the order of priority correlating to the level of authority to speak for country.

35. In the context of its supplementary submission to the Joint Standing Committee on Northern Australia's inquiry into the destruction of caves at Juukan Gorge, the Law Council described a tiered approach as follows:

> *Determination of the Traditional Owners of a place or object of cultural heritage must be the primary starting point in ensuring cultural heritage protection. The process for establishing a PBC under the Native Title Act ensures that such bodies, where they exist, satisfy the criteria for a body*

[34] IP Australia, Consultation Paper, 5.
[35] Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Living Languages* (website, undated) <https://aiatsis.gov.au/explore/living-languages>.
[36] Australian Government, *Our People* (website, undated) <https://info.australia.gov.au/about-australia/our-country/our-people>.
[37] See, eg, *Jabree Ltd v Gold Coast Commonwealth Games Corporation* [2017] ATMO 156.

> *appropriately representative of Traditional Owners, and are therefore well placed to control management of cultural heritage.*[38]

36. Similarly, in relation to the Indigenous Voice Co-Design Process, it suggested:

> *The identification of Local and Regional Voice structures might employ an order or priority of appointment beginning with First Nations. The First Nations might choose to identify an existing community organisation that is controlled and operated by First Nations, or that contributes to First Nations governance in a positive manner. In situations where no First Nations or people with the right to speak for country exist, then other Aboriginal and Torres Strait Islander-led local and regional organisations might be engaged.*[39]

37. In the current context, the relevant external authorities must include the First Nations, Traditional Owners and Knowledge Holders in existence. Where traditional custodians do not exist, following reasonable efforts to find such custodians, it may be appropriate for an Aboriginal or Torres Strait Islander community-led organisation to be consulted, and then experts such as academics and historians, such as through the 22 Indigenous language centres established around Australia.[40]

38. In order to identify, seek further information from and consult with the relevant authority, the IAP will need to build effective working relationships and engage in ongoing and open dialogue with Aboriginal and Torres Strait Islander communities, experts and peak and representative groups.

39. The Law Council considers that in many instances there may already be bodies established under statutory regimes to be representative of Traditional Owners on these or closely related matters, – such as Registered Native Title Bodies Corporate and, in jurisdictions such as South Australia and Victoria, recognised Aboriginal representative bodies appointed under cultural heritage legislation at the state and territory level. If there is a Registered Native Title Body Corporate in existence, the Law Council recommends this body be consulted, if it not be the consent authority, as often these bodies are the only entities with the resources and expertise to properly consider the ownership and use of resources including IK. At the same time, the Law Council emphasises the importance of resourcing for the proper oversight and support of these bodies as they take on ever-more tasks.[41]

40. Equally important is the trust of First Nations in the value and effectiveness of such a process. In this respect, the Law Council agrees that the key functions of the IAP should include direct engagement with Aboriginal and Torres Strait Islander communities, and an ongoing educational role to increase awareness and knowledge within these communities about the IP system and how it relates to the protection of

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[38] Law Council of Australia, Supplementary Submission to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (20 October 2020) 4.
[39] Law Council of Australia, Submission to the National Indigenous Australians Agency, *Indigenous Voice Co-Design Process* (30 April 2021) 22.
[40] Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Living Languages* (website, undated) <https://aiatsis.gov.au/explore/living-languages>. Some language groups are directly constituted of First Nations, such as the Ngaiyuriija Ngunawal Language Group, comprised of a number of Ngunawal family groups.
[41] Law Council of Australia, Submission to National Indigenous Australians Agency, Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (1 October 2020) <https://www.lawcouncil.asn.au/publicassets/4fc09979-7e0e-eb11-9435-005056be13b5/3894%20-%20Review%20of%20the%20CATSI%20Act%20Phase%202.pdf>.

IK. Building understanding should increase people's willingness to engage with the IP system and application process.

41. The Law Council's Justice Project also highlighted some key features of effective community legal education (**CLE**) for First Nations peoples which may also be relevant in this context. These included that CLE delivery must be culturally competent, and informed by the different cultural experiences of communities and individuals. By incorporating elders and community leaders into its design and delivery, CLE is most likely to overcome distrust of the legal system, engage people more effectively and provide information in the language of non-legal stakeholders.[42]

42. However, education is a reciprocal process. There must also be a high level of cultural competency within IP Australia, and in particular among examiners working on applications engaging issues of IK and staff interacting with the IAP. The importance of cultural competency can be emphasised through considering the implications on the health and safety of Aboriginal and Torres Strait Islander participants where cultural competency is lacking. For example, the Law Council notes that Aboriginal participants or applicants may feel shamed if they feel they are being forced to reveal information that is beyond their traditional authority, and be reticent to do so. Where IP Australia examiners approach applications without understanding how the cultural information they need is best obtained, the integrity of the application process is compromised.

43. 'Two-way learning' approaches are valuable in this regard, as they allow service providers to become familiarised with cultural perspectives, communities' legal literacy needs and conceptions of the law. The Justice Project highlighted relevant examples of two-way learning such as the North Australia Aboriginal Justice Agency's CLE programs for remote communities which incorporated principles of adult learning, traditional Aboriginal and Torres Strait Islander learning styles, bilingual education and intercultural communication.[43]

44. Cultural competency can also be enhanced through externally produced and provided training courses, internal cultural liaison officers, and generally increasing representation within the agency, provided the appropriate supports are offered for groups that are minorities within the workforce. Strategies to employ Aboriginal and Torres Strait Islander peoples more broadly than only as members on the IAP, including as part of any IP application examination team, will be important.

45. In this regard, the Law Council welcomes IP Australia's recent announcements that it is to increase Indigenous representation amongst its staff through a range of significant measures. It understands that its activities in progress include:

- participating in the Indigenous Graduate Pathway and Indigenous Australian Government Development Program;
- revising job application forms to assist in identifying Aboriginal and Torres Strait Islander heritage;
- advertising on Indigenous job boards throughout Australia;
- targeting Indigenous University graduates at career fairs;
- liaising with Indigenous Student Associations at universities; and
- developing IP Australia's Reconciliation Action Plan.[44]

[42] Law Council of Australia, 'People – Building Legal Capability and Awareness', *Justice Project* (Final Report, August 2018) 21-23.
[43] Ibid.
[44] Australian Government, IP Australia, 'Indigenous recruitment' (online), 24 March 2021.

46. These are all important and positive developments. Consideration might also be given to the appointment of two or more First Nations persons to the Board of IP Australia, in order to ensure cultural perspectives and competency at the governance level of the agency.

47. In order to avoid confusion for prospective applicants and the wider public, the Law Council also recommends that IP Australia dedicate sufficient resources to educating prospective applicants and the wider public about IK and TCEs and how applications will be examined by IP Australia, including what material or evidence is required to support certain applications. Again, culturally appropriate legal assistance services with specialist knowledge are well placed to deliver these services effectively and efficiently with Aboriginal and Torres Strait Islander communities.

48. The Law Council further considers that accountability and transparency as to the IAP's activities could be enhanced by introducing a requirement that the IAP table annual reports in relation to the scope and outcomes of its activities.

49. Finally on this topic, all members of the IAP should be remunerated at an amount commensurate to the unique expertise they are providing and the level of work required.

Measures For Trade Mark or Design Rights Using IK

50. IP Australia checks that all trade mark and design applications meet legislative requirements. Currently, there are checks relating to Aboriginal and Torres Strait Islander group names, words and secret or sacred knowledge, however, in the language of the consultation paper, 'this does not cover everything' and 'new checks could be introduced'.[45]

Preliminary remarks

51. In making the remarks below, the Law Council is conscious that, as set out in its Justice Project's Aboriginal and Torres Strait Islander Chapter, while they form a highly diverse group, many Aboriginal and Torres Strait Islander persons may face substantial barriers in navigating legal matters which must be taken account of designing laws, policies and processes.

52. Such barriers may include:

- language – there are more than 250 Aboriginal and Torres Strait Islander languages including 800 dialects spoken or maintained across the continent,[46] and English may be a second, third or fourth language, particularly in remote areas, while Aboriginal English is also common. Access to interpreters is particularly limited;[47]
- English literacy skills, due to a combination of language and less formal education - meaning that formal, paper-driven systems can be more difficult to navigate – without appropriate support, some people will give up and discard such paperwork;
- communication - Aboriginal and Torres Strait Islander peoples have higher rates of the types of disabilities that require a different type of communication;

[45] IP Australia, Consultation Paper, 7.
[46] Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Living Languages* (website, undated) <https://aiatsis.gov.au/explore/living-languages>.
[47] Law Council of Australia, Justice Project Final Report (2018), Aboriginal and Torres Strait Islander Chapter, available online, 31-32.

- distance and technology– while most Aboriginal and Torres Strait Islander people live in cities and regional areas, those in remote areas will find it particularly difficult to obtain statutory declarations or download guidelines; and
- lack of trust in, and lack of knowledge of, the law – given the legacy of dispossession that has occurred under Australian legal systems, many Aboriginal and Torres Strait Islander persons find it difficult to engage with these systems.[48]

53. In the current context, this may, for example, affect individual applicants to the extent that they rely on paperwork requirements and printed English guidelines without broader responses being adopted, or communities asked to provide their consent.

54. None of these barriers is insurmountable, and there is strong evidence as to 'what works', including through innovative, Indigenous-led 'two way' education strategies and community engagement,[49] as discussed above. The Law Council encourages IP Australia to consult closely with Aboriginal and Torres Strait Islander legal services and those such as Arts Law Centre, which delivers the 'Artists in the Black' program on how to ensure that any requirements can be best met, and best practice guidelines can be implemented, in practice, given their substantial expertise in this area. It further recommends that their advice be remunerated.

Asking for More Evidence about the Use of IK

55. It is noted in the consultation paper that 'for any new checks introduced regarding IK, Indigenous and non-Indigenous applicants would be asked to provide evidence that demonstrates their application can be accepted'.[50] IP Australia proposes the following three options for receiving additional information regarding the use of IK, and asks whether stakeholders would have concerns about providing such forms of evidence:

    - a statutory declaration that describes the circumstances surrounding use of IK, whether an applicant is using their own IK or covering consent obtained;
    - a letter of consent, such as from an Aboriginal or Torres Strait Islander organisation or language centre; and
    - other evidence of a consultation process or authority to use IK.[51]

56. Subject to the above remarks, the Law Council considers that requiring a statutory declaration about the use of IK in a trade mark or design is generally not an undue burden on the applicant for registration. There are already a number of stages in the application process in which a statutory declaration from an applicant may be required.

57. In principle, it also does not seem unduly burdensome to require an applicant to obtain a letter of consent from the appropriate authority as to the applicant's use of IK. The Law Council acknowledges that in certain circumstances it may be difficult for the applicant to identify or access the appropriate authority or to obtain consent from the authority. However, the Law Council considers that this is more likely to be the case the further the applicant is removed from the source or authority of the knowledge –

[48] See discussion in Law Council of Australia, Justice Project Final Report (2018), Aboriginal and Torres Strait Islander Chapter, available online.
[49] See also Law Council of Australia, Justice Project Final Report (2018), People – Building Legal Capability and Awareness Chapter, available online.
[50] Ibid.
[51] Ibid.

and, given that a key aim is to protect against the inappropriate use of IK, it makes sense for the burden on an applicant to increase in this manner.

58. It might be appropriate for the IAP to take on the function of preparing, through its engagement with Aboriginal and Torres Strait Islander communities, best practice guidelines on how applicants should approach the issue of requesting consent. To this end, the Law Council notes that in Queensland, consultation is now open on draft Traditional Knowledge in Biodiscovery Code of Practice and Guidelines.[52] These reforms aim to better protect First Nations peoples' knowledge and support the growth of the biodiscovery industry in line with international standards. Notably, the draft Code:

> *Outlines the principles, performance outcomes and minimum requirements for the use of traditional knowledge. This includes practical steps for identifying the custodians of the traditional knowledge; obtaining free, prior and informed consent for the use of the knowledge; and establishing benefit sharing on mutually agreed terms.*[53]

59. The proposed Code of Practice and Guidelines may be of interest to other jurisdictions and experts in comparative areas of law and to IP Australia in the production of any educative material for the public about IK, identifying traditional custodians of IK and the requirements for obtaining free, prior and informed consent.

Options for New Ways to Check Applications Using IK

60. It is stated in the consultation paper that 'IP Australia aims to enhance the trade marks and designs systems to prevent rights being granted over IK in circumstances that Aboriginal or Torres Strait Islander people or communities consider is inappropriate, unfair or offensive'.[54] The consultation paper proposes three options for ways that IP Australia could consider applications where someone seeks to use IK in a trade mark, these being:

- asking for evidence of consent;
- assessing if cultural offence to a community or communities is caused; or
- looking at whether the use of IK is deceptive.[55]

61. Stakeholders are asked which of the three options – consent, offensiveness or deceptiveness – they prefer as an approach. The Law Council is inclined to lean towards the first of these. Where an applicant is seeking to register a trademark that uses IK, it would be particularly appropriate to require the applicant to show that it has obtained consent from the appropriate authority.

62. The Law Council emphasises that the consent model should align with the standard that consent should be 'free, prior and informed', which is a well-known concept in the area of the rights of indigenous peoples, used, for example, in article 19 of the UNDRIP.

63. In the Law Council's view, an evidentiary approach of a statutory declaration that deposes to the following, together with annexing a letter (or letters) of consent

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[52] See Queensland Government, Department of Environment and Science, *Consultation – Traditional Knowledge in Biodiscovery Code of Practice and Guidelines* (website, 8 April 2021) <https://environment.des.qld.gov.au/licences-permits/plants-animals/biodiscovery/biodiscovery-act-reform/consultation>.
[53] Ibid.
[54] IP Australia, Consultation Paper, 7.
[55] Ibid, 8.

received from the relevant Aboriginal or Torres Strait Islander authority (or authorities), is a sufficient basis for IP Australia to accept that an application for IP registration meets legislative requirements:

- the steps taken to obtain consent (which is 'free, prior and informed'), including any interactions with Aboriginal or Torres Strait Islander communities and custodians and, where relevant, the IAP;
- the outcome of the steps taken, including any limitations or conditions that have been imposed on the consent;
- information about the authority from which the consent has been obtained, including that entity's connection to the IK; and
- where the mark for which registration is sought is, or contains, a word in an Indigenous language, information about the meaning of the word in that language and the extent of its usage, including whether it has special usage or significance such as in ceremonies or secret or sacred business.

64. *Jabree Ltd v Gold Coast Commonwealth Games Corporation* [2017] ATMO 156 is informative as to the kinds of steps that a prospective applicant might reasonably be expected to undertake before seeking to register the IP right – such as formal community consultation and 'letters of support' or 'letters of consent'.

65. The ability for IP Australia, as informed by the IAP, to request additional information to ensure IK owners benefit from, or have consented to, the use of their IK will be vital to the integrity of the system. It will be important for IP Australia to adopt a regime that is not rigid but remains flexible and adaptable to reflect the unique and diverse nature of applications relating to IK.

66. Conversely, where an examiner of their own motion or with the assistance of the IAP identifies that an application includes IK, IP Australia should have the ability to reject an application for IP registration if the statutory declaration and letter of consent is not provided.

67. This approach encourages applicants to engage and enter into consultation with relevant Aboriginal and Torres Strait Islander communities to obtain consent for the use of IK. In placing consent at the heart of the process, it also aligns with the principle of self-determination. On this basis, it is the Law Council's view that in cases where an applicant is unable to obtain consent, for whatever reason, IP Australia should reject the application. As canvassed in the above section, the Law Council does not consider that difficulty for the applicant in obtaining consent justifies waiving the requirement to obtain consent. To authorise an IP application using IK without consent would, in the Law Council's view, disregard the fundamental purpose of these changes to support Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK.

68. To the extent that the consent model is not preferred, retrospectively identifying and justifying the source of IK would be an onerous requirement on applicants and detrimental to affected Aboriginal and Torres Strait Islander custodians as harm may have already been done.

69. If this approach is adopted, the Law Council recommends that appropriate guidance be provided to applicants to avail them of the requirements for satisfying consent. Additionally, it is important that the relevant Aboriginal or Torres Strait Islander authority providing consent to the use of IK is aware of what 'free, prior and informed consent' looks like, and that they can place limitations on consent. This is one area in which the IAP could play an important role. It could also be helpful for the IAP,

consulting with Aboriginal and Torres Strait Islander communities and First Nations, to prepare guidelines for the wider public on when uses of IK may be culturally offensive or deceptive.

70. With respect to the second of the three options, there are concerns that creating a definition of 'cultural offensiveness' would be a complex process that would ultimately require judicial interpretation, where views on cultural sensitivity and offensiveness can differ between, and among, communities. There may be potential for uncertainty and cost associated with such a definition and it may be not desirable on that basis.

71. The Law Council notes that while subsection 42(a) of the *Trade Marks Act 1995* (Cth) and sub regulation 4.06(d) of the *Designs Regulations 2004* (Cth) currently allow refusal of a trade mark or a design on the ground that it is 'scandalous',[56] the law is better versed in developing and interpreting definitions according to the ordinary meaning of words such as 'scandalous' than against standards engaging issues of sensitivity to particular cultures or communities.

72. In this context, the Law Council is further aware that under other laws, such as the *Racial Discrimination Act 1984* (Cth) (**RDA**), there are accepted and well-understood concepts as to what constitutes offensive behaviour on the basis of race, which may be a helpful starting point for comparison purposes. For example, section 18C of the RDA prohibits public acts which are 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people', and which are done because of a person's or group's race etc.[57] However, there has been significant judicial interpretation of these provisions[58] and IP Australia may feel less well-placed than the Australian Human Rights Commission to oversee these kinds of criteria in practice, even with the advice of the IAP (as discussed below).

73. However, the benefit of pursuing the consent option as the primary mechanism is that it would, in most cases, address both the issues of cultural offensiveness and deceptiveness, because it would require an applicant to engage and consult with the authority, and then positively depose to the circumstances surrounding the steps taken to obtain consent, as well as annexing a letter of consent. This would provide ample opportunity for the authority to raise concerns over cultural offensiveness or deceptiveness or to ultimately refuse consent on the basis that these concerns have not been adequately addressed.

74. Consideration must be given to how an application would be assessed and resolved where multiple groups or communities claim cultural authority over the IK and one group has consented but the other has refused consent, claimed cultural offensiveness or deceptiveness, or disputes any consent allegedly provided. The consultation paper proposes that the IAP 'could have a role in decisions about cultural offensiveness, which could involve connecting with the relevant community, Traditional Owners or Custodians'.[59] Issues in relation to consent and cultural offensiveness are complex and need to be handled with great care, and it will be vital to develop a reliable and consistent process to build confidence with Aboriginal and Torres Strait Islander communities. This is discussed in further detail below.

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[56] The reason that the application to register "BOROBI" as a trade mark was not refused in the *Jabree* case was because the hearing officer considered that "scandalous" required something more than just being "offensive". The Law Council understands that this case law history may be the reason the Consultation Paper canvasses adding "culturally offensive" as a ground of rejection.
[57] See discussion in Australian Human Rights Commission-CCH Guide, *Federal Discrimination Law* (2016), 70-80.
[58] Ibid, 75-80.
[59] IP Australia, Consultation Paper, 8.

75. The Law Council also raises for consideration the issue of whether it might be necessary to require evidence of consent at other stages of the rights granting process, such as upon assignment of an application – that is, assignment by an applicant to another person of the right to proceed with an application. This would be particularly important if the identity of the applicant was integral to the issuing of consent.

Consequences of Failure to Obtain Consent

76. As highlighted above, the Law Council strongly recommends that a refusal of consent should lead to a refusal to grant registration – even where the applicant took all steps reasonably necessary to obtain consent. Put simply, if it is appropriate to require consent as a condition of registration of a trade mark or design using IK, then a refusal of consent must be fatal to the registration.

77. The Law Council also considers that the failure to obtain any consent determined to be necessary – such as through consultations with communities, advice of the IAP, ruling of the IP Australia examiners, or challenge from other Aboriginal or Torres Strait Islander groups or communities – should be a ground of refusal or revocation of registration.

78. As already stated, the Law Council acknowledges that in certain circumstances it may be difficult for the applicant to identify or access the appropriate authority or to obtain consent from the authority. However, the Law Council considers that this is more likely to be the case the further the applicant is removed from the source or authority of the knowledge – and, given that a key aim is to protect against the inappropriate use of IK, it makes sense for the burden on an applicant to increase in this manner.

Decisions that Can be Made on the Requirement of Consent

79. In most instances, the IAP should be able to assist applicants in identifying and contacting the relevant authority. However, it is important that the IAP does not adjudicate between different groups or communities regarding whose consent is required in relation to the IK, as this runs the risk of undermining its credibility – as explained above, the membership of the IAP does not necessarily have the authority to speak for country.

80. Rather, the IAP should be transparent with the applicant, and require the applicant to consult with all the communities or groups making claims to the IK. The IAP could facilitate mediations or further discussions between these communities or groups – or their individual representatives who have authority to speak on their behalf – and the applicant.

81. The determination of any conflict within a particular community as to the issue of consent to IK in an IP application should be a matter solely for the particular community within which the IP rests, however, according to their own decision-making processes.

Options for Better Identifying Applications Using IK

82. The Law Council supports in principle the proposal that IP Australia change the application form to require applicants to state upfront if they have used IK, in order to make it easier to identify cases pertaining to IK. This would be through the inclusion of a new question in the application form.

83. It is appropriate, in the Law Council's view, for all applicants to be required to identify if they have used IK, which would then trigger the additional requirement for a statutory declaration and letter of consent as outlined in the consent approach above.

84. However, this is on the basis that the question asked of applicants is phrased along the lines of: '*To the best of your knowledge*, [does the subject matter of the application use IK?]'. That is, the question should only require a response based on the applicant's actual knowledge.

85. It is the Law Council's view that this identification and, where the applicant indicates that IK has been used, the consent process outlined above, should be required in all applications, regardless of whether the applicant is Indigenous or non-Indigenous.

86. The Law Council also agrees that it is a sensible approach to allow people considering lodging an IP application to be able to identify whether the IK they want to use is in other trademarks or designs. It submits that, as above, any IP application containing IK should be identified during the application process, which would enable it, subsequently, to be easily considered for upload on a search register. This would allow such applications to then be searched (for example, by reference to a particular code) by other applicants to check the use of IK.

87. However, consideration should be had to whether all information regarding the use of IK in a particular IP application should be publicly available to search as this may cause additional issues and increase the likelihood of misappropriation. For example, the IK consultation paper recognises that some IK is considered sacred and secret and should not be used commercially at all. There may also be limitations as to whether it is appropriate for public consumption including on a publicly available search register.[60] In some instances it may be preferable to display only limited information about the IK used.

Requirements to Declare Use of IK in New Innovations

88. As noted in the consultation paper, the Australian patent system does not currently require an applicant to inform IP Australia if they used a genetic resource (**GR**) or traditional knowledge (**TK**) to develop their invention.[61] IP Australia proposes implementing a disclosure of source requirement in the patent and plant breeder's rights (**PBR**) systems in order to make it clear when GR or TK have been used to develop an invention or new plant variety.

Options for Motivating Disclosure of Source

89. IP Australia suggests that 'the system can be designed to motivate disclosure of source by either encouraging disclosure or imposing penalties for withholding information',[62] and stakeholders are asked which option might provide the best outcomes in supporting fair use of traditional knowledge. The paper is not clear on what kinds of penalties are contemplated and whether they would be civil or criminal, eg, penalty of invalidation of the granted right, fines, or imprisonment. It is important to establish and consult further on what is most appropriate in this context.

[60] See also Law Council of Australia, Submission to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (21 August 2020) [186].
[61] IP Australia, Consultation Paper, 10.
[62] Ibid, 12.

90. The Law Council supports the position that the applicant for a patent or a PBR should be encouraged to disclose the source of any TK or GR used in the subject matter of the application. As above, any question incorporated into the application form should only require the applicant to make a disclosure based on the actual knowledge of the applicant.

91. As to whether there should be a penalty for a failure of the applicant to make an accurate disclosure of the source of any TK or GR used in the subject matter of the application, the Law Council's response is based on the principle that a penalty of invalidation of the granted right should apply only where the applicant's failure to make an accurate disclosure underpinned the grant of the right – that is, where the content of the (incorrect) declaration materially contributed to the examiner's decision to grant the patent or the PBR. Conversely, a penalty of invalidation of the granted right should not apply where the failure to make an accurate disclosure did not materially contribute to the decision to grant the right.

92. This principle currently applies to the revocation of a patent on the grounds that the patent, or an amendment of a patent, was obtained by fraud, false suggestion or misrepresentation, and to the revocation of a PBR on the grounds of facts existing, which, if known before the grant, would have resulted in refusal to grant.

93. On the advice of the Intellectual Property Committee of its Business Law Section, the Law Council considers that the effect of these existing provisions is that a failure of an applicant to make an accurate declaration about the use and source of IK, where that failure materially contributed to the grant of the patent or the PBR, could lead to the revocation of the patent or the PBR. Accordingly, the Law Council considers that the existing legislation provides a sufficient penalty for the failure of an applicant to make an accurate declaration about the use and source of IK.

94. In addition, and relevant to the issue raised in the consultation paper that 'revoking a patent would mean no more income or benefits are generated, which could have been shared with Traditional Owners and communities',[63] the Law Council notes that the requirement of it being 'just and equitable to do so' currently applies to the revocation of a patent on the ground that the patentee was not entitled to the patent. This requirement would also apply to the situation contemplated in the above paragraph.

95. Beyond the grounds of fraud, false suggestion or misrepresentation, it is unclear precisely what other grounds are contemplated as the basis for applying a penalty. If the intention is to apply the penalty for failure to disclose the source, careful consideration should be given to exceptions which should apply – including, for example, honest mistake (particularly if pecuniary or criminal penalties are intended), or obligations to protect its secrecy and sacredness, as discussed above.

96. There may be misunderstanding within the wider public that a 'source' should only be an individual person or legal entity under more Westernised concepts of law, rather than a Traditional Owner group or a First Nation. Consideration could be given to staging any regulatory approach by commencing with education first and moving to penalties later. Undertaking two-way education with the bodies referred to above could foster a more robust conversation and understanding in this regard.

[63] Ibid.

Usefulness of Opportunity for Voluntary Provision of ABS or FPIC

97. IP Australia proposes that, to complement existing laws, it could provide the opportunity for applicants to voluntarily provide evidence of any access and benefit sharing (**ABS**) or free prior and informed consent (**FPIC**) they have in place.

98. The Law Council is generally supportive of such a proposal, noting that, along with enhancing transparency to assist in achieving benefits flowing to Aboriginal and Torres Strait Islander peoples, and encouraging more businesses to take up best practice approaches, it might be seen as a mid-step towards an eventual consent model within the patent and PBR sphere, as is currently recommended for implementation for trade mark and design rights (discussed above).

99. It is noted in the consultation paper that 'Australia has signed but not yet ratified the Nagoya Protocol which would require an internationally recognised certification of compliance for use of genetic resources'.[64] The Law Council understands that some countries currently require, either prior to or as part of an application, this internationally recognised certification. Introducing the opportunity (as distinct from the obligation) for applicants to provide these certificates in Australia's IP system has the potential to increase general awareness and understanding in Australia of the Nagoya Protocol.

100. As discussed above, in the Australian context, entities such as Registered Native Title Bodies Corporate have been set up to represent Traditional Owners, and, where these are in existence, would likely be the appropriate consultation pathway to ensure, in accordance with the Nagoya Protocol, FPIC is properly obtained.

Labelling to Promote Authentic Indigenous Products

101. The Law Council notes that the questions in relation to this section are expressly directed to Aboriginal and Torres Strait Islander people and businesses. As a non-Indigenous led organisation, the Law Council reflects only briefly on this issue.

102. The Law Council understands that there are differing views about labelling schemes. In 2018, the Standing Committee on Indigenous Affairs (**the Standing Committee**) provided its 'Report on the impact of inauthentic art and craft in the style of First Nations peoples' (**the report**), making eight recommendations to government to 'curtail the prevalence of imitation of Indigenous art and create economic opportunities for First Nations artists and communities',[65] and discussing the issues with respect to labelling.[66] The Law Council considers that regard should be had to this work of the Standing Committee when considering labelling options. Ultimately though, labelling is unlikely in and of itself to prevent fake art and misappropriation of First Nations cultures. In this regard, the Law Council notes that the Standing Committee considered that 'stand alone legislation may be the best long-term option to resolve this complex issue'.[67]

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[64] IP Australia, Consultation Paper, 13.
[65] Standing Committee on Indigenous Affairs, *Report on the impact of inauthentic art and craft in the style of First Nations peoples* (Final Report, 2018) xiii <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Report>.
[66] Ibid, 46.
[67] Ibid, 58.