

Australia's comments on WIPO/GRTKF/IC/9/5: 'The Protection of Traditional Knowledge: Revised Objective and Principles'

General comments

Australia welcomes the opportunity to comment on WIPO/GRTKF/IC/9/5 'The Protection of Traditional Knowledge: Revised Objectives and Principles'.

Australia is strongly of the view that the key initial step in the development of any regime or approach to the protection of traditional knowledge is to first determine the relevant policy objectives and general guiding principles. It is only once the objectives and principles are developed in a way that clearly outlines the intended purpose of the protection of traditional knowledge that the Committee will be able to focus on a possible outcome.

This is why Australia considers it critical to a successful outcome that further discussion on the draft policy objectives and general guiding principles for the protection of traditional knowledge be undertaken. We have stated previously, and continue in our belief, that it is premature to consider draft negotiating text given that there is no consensus yet among Committee members on these initial objectives and principles. Nor is there consensus on the appropriate vehicle to give effect to any substantive outcomes. We therefore welcome discussion on an appropriate process for further reviewing and commenting on parts I and II of document WIPO/GRTKF/IC/9/5 to enable consensus to be reached on the appropriate policy objectives and guiding principles. Such consensus would be a major step towards an achievable and practical outcome on this important issue. Our comments below are therefore limited to the provisions in Parts I and II of document WIPO/GRTKF/IC/9/5.

I. POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

Recognize value

(i) recognize the holistic nature of traditional knowledge and its intrinsic value, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are fundamentally important for indigenous and local communities and have equal scientific value as other knowledge systems;

Australia can give in principle support to this objective.

Promote respect

(ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of

traditional knowledge holders; and for the contribution which traditional knowledge holders have made to the conservation of the environment, to food security and sustainable agriculture, and to the progress of science and technology;

Australia acknowledges the importance of traditional knowledge systems to traditional knowledge holders and respects the role that they play in society. We can therefore support this objective in principle.

Meet the actual needs of holders of traditional knowledge

(iii) be guided by the aspirations and expectations expressed directly by traditional knowledge holders, respect their rights as holders and custodians of traditional knowledge, contribute to their welfare and economic, cultural and social benefit and reward the contribution made by them to their communities and to the progress of science and socially beneficial technology;

Australia could support objective (iii) to the extent that it is consistent with current international law and national law and policies and would not affect the integrity of the current IP system. In this respect the provision would be improved by the following amendment: ‘respect ~~their rights~~ *Indigenous people* as holders and custodians of traditional knowledge...’

We note that to meet the needs of traditional knowledge holders the objective provides for Member States to ‘contribute to their [TK holder’s] welfare and economic, cultural and social benefit...’. This provision would appear to extend well beyond the terms of reference of the Committee and thus its limits should be clearly delineated or the reference should be deleted.

Objective (iii) seeks to ‘reward the contribution’ made by traditional knowledge holders to their communities and to scientific progress. Although Australia acknowledges that reward may play a role in the protection of traditional knowledge it notes that the very broad coverage of this item needs further discussion. Would such reward be provided for all traditional knowledge in use generally in the wider community today? If so, how would such used be identified and how would the recipients of such reward be identified? It is also clear that such rewards may take different forms depending on the particular situation. We therefore suggest the following amendment ‘reward *as appropriate* the contribution.’

Australia acknowledges that the development of mechanisms to protect traditional knowledge should be the result of collaboration and consultation with the Indigenous communities.

Promote conservation and preservation of traditional knowledge

(iv) promote and support the conservation and preservation of traditional knowledge by respecting, preserving, protecting and maintaining traditional knowledge systems and providing incentives to the custodians of those knowledge systems to maintain and safeguard their knowledge systems;

Australia acknowledges the importance of conserving and preserving traditional knowledge. However we query the reference to ‘protecting’ traditional knowledge systems, particularly where this would imply intellectual property protection that would adversely conflict with current intellectual property law rather than contribute to the preservation of traditional knowledge systems.

The final element of objective (iv) also suggests ‘providing incentives’ and Australia acknowledges that since such incentives may take different forms depending on the situation and suggests that this objective should contain the following changes in italics ‘providing incentives, *as appropriate*’

Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems

(v) be undertaken in a manner that empowers traditional knowledge holders to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and the need to tailor solutions that meet the distinctive nature of such systems, bearing in mind that such solutions should be balanced and equitable, should ensure that conventional intellectual property regimes operate in a manner supportive of the protection of traditional knowledge against misappropriation, and should effectively empower traditional knowledge holders to exercise due rights and authority over their own knowledge;

Australia could not support this objective if its aim was to allow any right given over traditional knowledge to prevail over existing IP laws and principles or run counter to prevailing national or international laws and principles. Australia therefore suggests the following amendment in italics:

‘(v) be undertaken in a manner that empowers traditional knowledge holders to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and the need to tailor solutions that meet the distinctive nature of such systems, bearing in mind that such solutions should be *balanced and subject to international law and national laws and policies* and equitable,...’

Australia notes that the term ‘misappropriated’ can potentially cover a broad scope of issues and therefore encourages greater discussion about the meaning of ‘misappropriated’ to ensure that the term is fully considered by Member States.

Support traditional knowledge systems

(vi) respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between traditional knowledge holders; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;

Australia could not support this objective if it supported practices conflicting with international law and national laws and policies. We would therefore suggest that the

objective be made subject to international law and national laws and policies, eg, through prefacing the objective with the words ‘*Consistent with international law and national laws and policies....*’

Contribute to safeguarding traditional knowledge

(vii) contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary practices, norms, laws and understandings of traditional knowledge holders, for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general;

Australia agrees in principle provided such customary laws and practices do not conflict with established international law and national laws and policies.

Repress unfair and inequitable uses

(viii) repress the misappropriation of traditional knowledge and other unfair commercial and non-commercial activities, recognizing the need to adapt approaches for the repression of misappropriation of traditional knowledge to national and local needs;

Australia acknowledges the importance of measures to help prevent the misappropriation of traditional knowledge and the need for such approaches to be adaptable to ‘national and local needs.’

We could therefore support this objective where it would not conflict with existing proprietary rights.

However, as above, Australia notes that the meaning of the term ‘misappropriation’ has not been fully explored and considers that further analysis of the term by WIPO and Member States would be beneficial to discussions.

Respect for and cooperation with relevant international agreements and processes

(ix) take account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that regulate access to and benefit-sharing from genetic resources which are associated with that traditional knowledge;

Regarding objective (ix), the wording here refers to the need to ‘take account of and operate consistently with, other international and regional instruments and processes.’ However we believe that this wording has the potential to render the existing IP system subject to any possible mechanism for the protection for traditional knowledge.

Australia notes that in paper WIPO/GRTKF/IC/7/5 there was reference to the need to ‘concord’ with said international and regional instruments and thus our preference would be for the use of this term in this objective.

Promote innovation and creativity

(x) encourage, reward and protect tradition-based creativity and innovation and enhance the internal transmission of traditional knowledge within indigenous and traditional communities, including, subject to the consent of the traditional knowledge holders, by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge;

Australia acknowledges the importance of rewarding and protecting tradition-based creativity and innovation because it helps promote the dissemination of knowledge.

We can therefore give in principle support to this objective but would suggest the following amendment in italics ‘encourage, reward *as appropriate*....’.

Ensure prior informed consent and exchanges based on mutually agreed terms

(xi) ensure prior informed consent and exchanges based on mutually agreed terms, in coordination with existing international and national regimes governing access to genetic resources;

Australia notes that the role of prior informed consent in any possible mechanism for the protection of traditional knowledge has yet to be determined and we would support further discussions on the contexts in which prior informed consent will be practicable, possible and desirable, consistent with national laws noting that there is no internationally recognized right or principle of prior informed consent. We therefore suggest that the term ‘ensure’ be replaced with ‘*promote*’.

We can give in principle support to consultation and participation of Indigenous people in decisions that affect them.

Promote equitable benefit-sharing

(xii) promote the fair and equitable sharing and distribution of monetary and non-monetary benefits arising from the use of traditional knowledge, in consistency with other applicable international regimes, the principle of prior informed consent and including through fair and equitable compensation in special cases where the individual holder is not identifiable or the knowledge has been disclosed;

The role of prior informed consent in any possible mechanism for the protection of traditional knowledge has not been determined. Therefore we would support further discussions about prior informed consent in particular, concerning its meaning, status, source and when it may be relevant and practicable.

While Australia can give in principle support to the concept of encouraging the fair and equitable sharing of benefits as reflected in objective (xii), Australia believes that this objective is currently too prescriptive in its reference to when fair and equitable compensation can occur and believes that this is an area that requires more in-depth discussion.

Promote community development and legitimate trading activities

(xiii) if so desired by the holders of traditional knowledge, promote the use of traditional knowledge for community-based development, recognizing the rights of traditional and local communities over their knowledge; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries, where traditional knowledge holders seek such development and opportunities consistent with their right to freely pursue economic development;

Australia acknowledges the spirit of this objective and can give in principle support if the rights of traditional knowledge and local communities over their knowledge do not take precedence over any proprietary rights and if the concept of authenticity allows for more than one community to have the same traditional knowledge without providing the likelihood for conflict between relevant communities.

We would therefore suggest the following amendments in italics:

(xiii) if so desired by the holders of traditional knowledge, promote the use of traditional knowledge for community-based development, *recognizing the rights of traditional and local communities over their knowledge*; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries, where traditional knowledge holders seek such development and opportunities consistent with *the pursuit of their right to freely pursue* economic development;

Preclude the grant of improper IP rights to unauthorized parties

(xiv) curtail the grant or exercise of improper intellectual property rights over traditional knowledge and associated genetic resources, by requiring, in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit-sharing conditions have been complied with in the country of origin;

We oppose this policy objective including the reference here to the requirement that the disclosure in patent applications of the source and country of origin of traditional knowledge and associated genetic resources as well as evidence of prior informed consent and compliance with benefit sharing conditions be made a condition for the grant of a patent right. The issue of including such a disclosure requirement within the patent system is the subject of ongoing discussions which have not been finalised. The inclusion of such a specific and prescriptive requirement as an 'objective' is not

consistent with the nature of the material in this section which is the enunciation of policy objectives rather than specific actions. This issue is in any case relevantly covered in general guiding principle (e).

Enhance transparency and mutual confidence

(xv) enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct and the principles of free and prior informed consent;

Enhancing certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders and other users of traditional knowledge is important.

However Australia queries the reference here to ‘the principles of free and prior informed consent’ as such a concept is not a universally agreed principle and many questions remain about the content and appropriate context for such a concept. Australia would therefore recommend its deletion from this objective while encouraging further discussion about its meaning, status and source. Australia suggests substituting the phrase with "*the approval and involvement of the holders of such knowledge*".

Complement protection of traditional cultural expressions

(xvi) operate consistently with protection of traditional cultural expressions and expressions of folklore, respecting that for many traditional communities their knowledge and cultural expressions form an indivisible part of their holistic identity.

Australia can give in principle support to this objective.

Given the close relationship, any protection of traditional knowledge or traditional cultural expressions and expressions of folklore needs to be closely aligned and complementary.

II. GENERAL GUIDING PRINCIPLES

(a) *Principle of responsiveness to the needs and expectations of traditional knowledge holders*

Protection should reflect the actual aspirations, expectations and needs of traditional knowledge holders; and in particular should: recognize and apply indigenous and customary practices, protocols and laws as far as possible and appropriate; address cultural and economic aspects of development; address insulting, derogatory and offensive acts; enable full and effective participation by all traditional knowledge holders; and recognize the inseparable quality of traditional

knowledge and cultural expressions for many communities. Measures for the legal protection of traditional knowledge should also be recognized as voluntary from the viewpoint of indigenous peoples and other traditional communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access and use of their traditional knowledge.

Australia can give in principle support to this provision to the extent that such aspirations, expectations and needs of traditional knowledge holders are consistent with international and national laws and policies. For example, Australia would not be able to support customary practices that are inconsistent with national laws.

(b) Principle of recognition of rights

The rights of traditional knowledge holders to the effective protection of their knowledge against misappropriation should be recognized and respected.

Australia gives in principle support to this provision. As discussed above, Australia considers there should be further consideration of the term ‘misappropriation’.

(c) Principle of effectiveness and accessibility of protection

Measures for protecting traditional knowledge should be effective in achieving the objectives of protection, and should be understandable, affordable, accessible and not burdensome for their intended beneficiaries, taking account of the cultural, social and economic context of traditional knowledge holders. Where measures for the protection of traditional knowledge are adopted, appropriate enforcement mechanisms should be developed permitting effective action against misappropriation of traditional knowledge and supporting the broader principle of prior informed consent.

Australia acknowledges the importance of guiding principle (c) in any system of protection of traditional knowledge. However since the role of prior informed consent has yet to be determined Australia considers it should be deleted from this provision. This would not detract from the flexibility of implementation of this guiding principle and would be consistent with Australia’s comments on objectives (xii) and (xv). It would also promote consistency between guiding principles (c) and (d) as (d) provides for flexibility in implementation of any protection. Australia suggests the following amendments:

‘Where measures for the protection of traditional knowledge are adopted, appropriate enforcement mechanisms should be developed, *consistent with international law and national laws and policies*, permitting effective action against misappropriation of traditional knowledge ~~and supporting the broader principle of prior informed consent~~’

Again, Australia would support further discussion of the term ‘misappropriation’ to ensure that the term is given fully explored by Member States.

(d) *Principle of flexibility and comprehensiveness*

Protection should respect the diversity of traditional knowledge held by different peoples and communities in different sectors, should acknowledge differences in national circumstances and the legal context and heritage of national jurisdictions, and should allow sufficient flexibility for national authorities to determine the appropriate means of implementing these principles within existing and specific legislative mechanisms, adapting protection as necessary to take account of specific sectoral policy objectives, subject to international law, and respecting that effective and appropriate protection may be achieved by a wide variety of legal mechanisms and that too narrow or rigid an approach may preempt necessary consultation with traditional knowledge holders.

Protection may combine proprietary and non-proprietary measures, and use existing IP rights (including measures to improve the application and practical accessibility of such rights), *sui generis* extensions or adaptations of IP rights, and specific *sui generis* laws. Protection should include defensive measures to curtail illegitimate acquisition of industrial property rights over traditional knowledge or associated genetic resources, and positive measures establishing legal entitlements for traditional knowledge holders.

Australia can support this provision in principle but would suggest that the final paragraph be made less prescriptive through the terms '*as appropriate*' and/or '*may*' rather than '*should*'.

A flexible approach to the protection of traditional knowledge helps ensure that appropriate mechanisms are available to suit the range of needs of Indigenous people, and that an appropriate balance is achieved between those needs and the maintenance of a stable framework for investment. This flexibility should also extend to respect for the diversity of legal systems amongst member States.

(e) *Principle of equity and benefit-sharing*

Protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and maintain traditional knowledge, namely traditional knowledge holders, and of those who use and benefit from traditional knowledge; the need to reconcile diverse policy concerns; and the need for specific protection measures to be proportionate to the objectives of protection and the maintenance of an equitable balance of interests. In reflecting these needs, traditional knowledge protection should respect the right of traditional knowledge holders to consent or not to consent to access to their traditional knowledge and should take into account the principle of prior informed consent.

The rights of traditional knowledge holders over their knowledge should be recognized and safeguarded. Respect for prior informed consent should be ensured, and holders of traditional knowledge should be entitled to fair and equitable sharing of benefits arising from the use of their traditional knowledge. Where traditional

knowledge is associated with genetic resources, the distribution of benefits should be consistent with measures, established in accordance with the Convention on Biological Diversity, providing for sharing of benefits arising from the utilization of the genetic resources.

Protection which applies the principle of equity should not be limited to benefit-sharing, but should ensure that the rights of traditional knowledge holders are duly recognized and should, in particular, respect the right of traditional knowledge holders to consent or not to consent to access to their traditional knowledge.

Consistency with existing obligations under international law and national laws and policies is essential to Australia's support for this provision. This is acknowledged in, eg, general guiding principle (g) which provides for consistency with national laws regarding access to genetic resources.

Regarding the references in the first and third paragraphs to prior informed consent our earlier comments regarding objectives (xii) and (xv) would apply to this provision also. We would therefore recommend deleting "respect for prior informed consent" and substituting it with '*respect for appropriate consultative measures*' and where appropriate consent should be encouraged.

(f) Principle of consistency with existing legal systems governing access to associated genetic resources

The authority to determine access to genetic resources, whether associated with traditional knowledge or not, rests with the national governments and is subject to national legislation. The protection of traditional knowledge associated with genetic resources shall be consistent with the applicable law governing access to those resources and the sharing of benefits arising from their use. Nothing in these Principles shall be interpreted to limit the sovereign rights of States over their natural resources and the authority of governments to determine access to genetic resources, whether or not those resources are associated with protected traditional knowledge.

Australia agrees that consistency with the applicable law governing access to genetic resources and benefit sharing is essential to prevent any conflict between obligations and can therefore give in principle support to this provision.

(g) Principle of respect for and cooperation with other international and regional instruments and processes

Traditional knowledge shall be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already codified in or established under binding legal instruments and international customary law.

Nothing in these Principles shall be interpreted to affect the interpretation of other instruments or the work of other processes which address the role of traditional knowledge in related policy areas, including the role of traditional knowledge in the conservation of biological diversity, the combating of drought and desertification, or

the implementation of farmers' rights as recognized by relevant international instruments and subject to national legislation.

Australia can give in principle support acknowledging that consultation and cooperation with other international fora is important and consistency with relevant provisions of existing international instruments is critical to ensure their continued and effective operation. Australia stresses that it can only recognise customary law where it does not conflict with international law and national laws and policies.

(h) Principle of respect for customary use and transmission of traditional knowledge

Customary use, practices and norms shall be respected and given due account in the protection of traditional knowledge, subject to national law and policy. Protection beyond the traditional context should not conflict with customary access to, and use and transmission of, traditional knowledge, and should respect and bolster this customary framework. If so desired by the traditional knowledge holders, protection should promote the use, development, exchange, transmission and dissemination of traditional knowledge by the communities concerned in accordance with their customary laws and practices, taking into account the diversity of national experiences. No innovative or modified use of traditional knowledge within the community which has developed and maintained that knowledge should be regarded as offensive use if that community identifies itself with that use of the knowledge and any modifications entailed by that use.

Australia can support this provision in principle, where customary law does not conflict with current international law and national laws and policies, including human rights.

(i) Principle of recognition of the specific characteristics of traditional knowledge

Protection of traditional knowledge should respond to the traditional context, the collective or communal context and inter-generational character of its development, preservation and transmission, its relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values, and constantly evolving character within the community.

Australia notes the broad nature of this principle and the difficulty that member States may have in ensuring that specific characteristics of a community's traditional knowledge which may be unknown are considered in developing mechanisms for protection.

In principle, Australia would support a provision which focuses on considering the general characteristics of Indigenous communities' treatment of traditional knowledge.

(j) Principle of providing assistance to address the needs of traditional knowledge holders

Traditional knowledge holders should be assisted in building the legal-technical capacity and establishing the institutional infrastructure which they require in order to effectively utilize and enjoy the protection available under these Principles, including, for example, in the setting up of collective management systems for their rights, the keeping of records of their traditional knowledge and other such needs.

Australia can give in principle support to this provision where collective management is appropriate, with the understanding that the assistance in setting up collective management systems would be in the form of 'principles' or 'guidelines' and not the development of specific laws.

CONCLUSION

Australia strongly encourages the development of the draft policy objectives and general guiding principles to enable consensus about these elements in order to guide the Committee's future work.

Australia has previously stated that agreement should be reached on the policy objectives and general guiding principles prior to further discussion of any substantive provisions. Australia is concerned that the identification and development of substantive provisions prior to agreement by Committee members of the objectives and principles will result in inconsistency.

There has been no agreement about the context and legal status of the work of the Committee. Australia is concerned that commenting on substantive provisions would pre-empt the Committee's decision on this key issue. Australia welcomes discussion of a process to take the Committee's work forward.