

- Paragraph 69- As stated previously, Arts Law strongly supports an international instrument which will highlight to national governments the need to implement appropriate national laws. It can establish international best practice and place pressure on national governments to sign the international instrument.
- Paragraph 80- Arts Law supports a special, stand alone law to provide protection for TCEs to address the gaps as the focus and foundation will be geared to Indigenous TCE and not a Western approach. Current IP and Trade practices laws are based on Western ideas and cannot accommodate for Indigenous culture. See previous comments re paragraph 34.
- Paragraph 82 discusses **Indigenous communal moral rights**. The 2003 Australian draft Bill was NEVER introduced into parliament and in fact given very limited circulation. This draft Bill was far too onerous for Indigenous communities in terms of the requirements they had to satisfy to qualify for the protection it purported to provide. If communal moral rights are introduced, there must be extensive consultation with communities and the rights provided should arise automatically in the same way that moral rights automatically arise for individual creators.

Comments of the Arts Law Centre of Australia on the Draft Gap Analysis on the Protection of Traditional Knowledge

Qualification for protection through specific legal mechanisms

Paragraph 4 and 41

Paragraphs 4 and 41 effectively set out a possible qualification test for protection of Traditional Knowledge (TK). Arts Law notes that the draft uses the expression 'TK **may** need to be...' (emphasis added). This suggests to us that the Committee is uncertain as to whether this qualification test be applied. Arts Law does not support the current proposal for the qualification test.

The three stage test would be difficult for many Aboriginal and Torres Strait Islander communities to establish because of the disruption and dislocation many Indigenous communities have experienced in Australia. Across many generations the Australian government has enforced policies and practices aimed at disrupting, diluting and

assimilating the Indigenous culture. For example, the forced removal of Indigenous children resulted in many children being brought up outside of their traditional communities without contact with their families (the 'stolen generation').

Additionally, the second element of the test, that TK be 'distinctively associated with a traditional or indigenous community' is problematic. In view of diversity of Indigenous cultures in Australia, there is a need to recognise that there may be more than one community which has rights over traditional knowledge. Cases involving the determination of an application for native title provide numerous examples of how in Australia multiple Indigenous communities claim custodianship of particular traditional knowledge, cultural practices and land. The proposed test would appear to create difficulties in the Australian context because traditional knowledge may be associated with more than one traditional or indigenous community and thus would appear to fail to meet the second element of the proposed test.

In Arts Law's view there should be a lower bar for eligibility for protection, instead of the current proposal,

'that in order to be *protected* through specific legal mechanisms, TK may need to be:

- (i) generated, preserved and transmitted in a traditional and intergenerational context;
- (ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and
- (iii) integral to the cultural identity of an indigenous or traditional community people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.¹

For detailed information about the stolen generations and the dislocation of Indigenous communities in Australia, we recommend the following websites:

- Reconciliation Action Network Stolen Generations Fact Sheet
<http://reconciliation.org.au/nsw/education-kit/stolen-generations/>

¹ See paragraph 41 of the draft Gap Analysis on the Protection of Traditional Knowledge.

- Human Rights and Equal Opportunity Commission *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997)
http://www.humanrights.gov.au/social_justice/bth_report/report/index.html

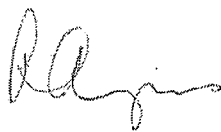
Detailed information about native title claims can be obtained through the National Native Title Tribunal, <http://www.nntt.gov.au>. Their 'Facts for Journalists' provides some basic information about native title in Australia: <http://www.nntt.gov.au/News-and-Communications/Facts-for-Journalists/Pages/Tips-for-Understanding-Native-Title.aspx>

There are many native title claims involving disagreement as to which Indigenous group is entitled to 'speak for country' for a specific area. An ongoing example is the dispute over native title in the Lake Cowal area where the Condobolin Wiradjuri Native Title Claim Group and the Mooka/Kalara United Families disagree as to who is entitled to speak for country and enter into legal arrangements regarding the native title in the area.

Further information

Please contact Robyn Ayres or Patricia Adjei if you would like us to expand on any aspect of this submission, verbally or in writing.

Yours faithfully



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