

AUSTRALIA

The following comments were received through a communication from IP Australia

Australia welcomes the development by the Secretariat of the World Intellectual Property Organisation Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPOIGC) of an overview of draft policy objectives and core principles for the protection of traditional cultural expressions (TCEs)/expressions of folklore (EoFs). Australia believes that the development of the draft objectives and principles provides a good basis to progress constructive discussion within the WIPOIGC on these important issues.

Australia is strongly supportive of a number of draft core principles. For example, the principle of “balance and proportionality” recognises that the protection of TCEs/EoFs may affect the interests (whether economic, moral or otherwise) of a range of parties including authors, performers, Indigenous communities, users and the community as a whole. Any protection of TCEs/EoFs should appropriately balance the competing interests of these parties.

Australia also strongly supports the draft core principle of “flexibility and comprehensiveness” given the diversity of TCEs/EoFs identified and the diverse needs of the beneficiaries of protection. The Australian experience is very similar to that identified in WIPO/GRTKF/IC/7/3 (Annex II, page 8) in that there have been a range of proprietary and non-proprietary, including non-IP, tools used for the protection of TCEs/EoFs. For example, in Australia trade practices law have been used to protect Indigenous communities against false advertising, while cultural heritage laws protect against the inappropriate export of Indigenous heritage items. Australia is also considering whether to amend its Copyright Act to introduce Indigenous communal moral rights provisions. It is important that any final consensus agreed to by the WIPOIGC takes into account the range of measures that are currently used (and being considered) to protect TCEs/EoFs and allows Member States the flexibility to continue to use and develop these measures.

However, Australia has concerns about the prescriptive nature of some of the substantive principles that focus on conferring legally enforceable rights. For example, the substantive principles on criteria of protection, scope of protection and beneficiaries of protection appear to be inconsistent with the core principle of flexibility and comprehensiveness. Under that core principle, measures to protect for TCEs/EoFs should acknowledge diversity in national circumstances and legal systems, and allow flexibility for national authorities to determine the appropriate means of achieving the objectives of protection. Ideally, to avoid these possible inconsistencies, the identification and development of substantive principles should occur only after the draft policy objectives and core principles have been properly considered and agreed.

Australia also has concerns about the principle dealing with the role of customary law. While potentially useful in the context of protecting TCEs/EoFs, it should be acknowledged that customary laws may be inconsistent with other international

instruments (eg, where practices that occur according to customary law contravene human rights standards).

Principle B.5 deals with the “Scope of Protection” of TCEs/EoFs. However there is no discussion about “derivatives”. Australia believes that there should be some limitation on this concept within this principle otherwise it will not be clear where TCEs/EoFs end and the public domain begins.

Principle B.6(iii) states that “limitations should not, however, permit the use of TCEs/EoFs in ways that would be offensive to the relevant community.” Mention is made elsewhere regarding consistency with other international instruments and Australian notes that this principle would need to be consistent with for example, the principle of freedom of free speech in the International Covenant on Civil and Political Rights (ICCPR)