

1 August 2008

Secretariat

Intergovernmental Committee on Intellectual Property and Genetic Resources,  
Traditional Knowledge and Folklore

By Email: [grtkf@wipo.int](mailto:grtkf@wipo.int)

Dear Secretariat

**Comments of the Arts Law Centre of Australia on the Draft Gaps analysis  
document on TCEs and TKs**

Thank you for the opportunity to comment on the Draft Gap Analysis on the  
Protection of Traditional Knowledge and the Draft Gap Analysis on the Protection of  
Traditional Cultural Expressions/Expressions of Folklore.

**About the Arts Law Centre of Australia**

Arts Law was established in 1983 and is the national community legal centre for the  
arts. Arts Law is a not for profit company limited by guarantee.

Arts Law provides expert legal advice, publications, education and advocacy services  
each year to more than 5000 Australian artists and arts organisations operating  
across the arts and entertainment industries.

**About our clients**

Our clients not only reside in metropolitan centres, but also contact us from regional,  
rural and remote parts of Australia, and from all Australian states and territories. Arts  
Law recognises the diversity in the arts community and our client base is multi-  
cultural, and both Indigenous and non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them. Arts Law also supports artists from across all art sectors, although we acknowledge that the visual arts and crafts comprise the largest group of artists utilising our services (35% of all legal advices).

The comments that we make in this submission are informed by the services we provide to our Indigenous client group. Whilst Arts Law has provided services to Indigenous artists and organisations throughout our 25 years, in January 2003, Arts Law established a service called Artists in the Black (**AITB**) specifically for Indigenous artists, organisations and communities. AITB aims to provide access to legal and business advice, information, resources and education relevant to Indigenous arts practices across all art forms. The service employs two Indigenous staff (an Indigenous solicitor and an information/liason officer).

The outcry that we hear time and time again from Indigenous artists around Australia is a need for better protection of TCEs and TKs. The significant gaps in Australian and international intellectual property laws mean that TCEs and TKs are and can be exploited and misappropriated. Our comments to the draft gap analysis document support a binding international instrument that will cover these gaps internationally and put pressure on national governments to implement into national legislation.

### **Arts Law supports the development of an internationally binding instrument**

Arts Law supports the development of an internationally binding instrument that will endeavour to cover the gaps that exist in protecting Traditional Cultural Expressions (**TCEs**) and Traditional Knowledge (**TKs**). Arts Law supports the IGC's recognition of the harm that can result because there are currently 'forms of misuse and other illegitimate actions that cannot be prevented under existing law'. For example, when a non-Indigenous person takes photos of Indigenous rock art, absence any contractual arrangement to the contrary, the Indigenous community will not be entitled to control or receive benefit from the reproduction, publication or communication of the photograph unless the person who created the rock art died less than 70 years ago (ie unless the rock art is still protected by copyright). Arts Law acknowledges that the above example is more relevant to the protection of TCEs, rather than TK. However it is Arts Law's view that TK is inseparable from TCEs, which are the product and embodiment of Traditional Knowledge.

## **Comments of the Arts Law Centre of Australia on the Draft Gap Analysis on the Protection of Traditional Cultural Expressions/Expressions of Folklore**

The areas covered by the gap analysis for traditional cultural expressions and expressions of folklore (**TCEs**) are the main focus of the Arts Law through its AITB service. AITB works to assist Indigenous artists to better protect their creative endeavours including literary and artistic productions such as music, visual arts and performances of TCEs, designs, secret TCEs and Indigenous names, words and symbols. Arts Law/AITB provides legal advice, representation and advocacy to Indigenous artists, arts organisations and communities.

The comments that Arts Law expressed at the 11<sup>th</sup> session of the IGC have been discussed in this gap analysis document. Arts Law strongly supports this gap analysis and the need for an internationally binding instrument to protect TCEs. Concurrently Arts Law encourages the Australia Government and other national Governments to tackle this issue of better protection of TCEs at a national level as a matter of urgency.

Our specific comments on the gap analysis are as follows:

- Under paragraph 20, **Relevant international IP conventions and treaties-** IP protection is a matter for domestic law but there needs to be an international convention that helps to regulate the international arena and prevent exploitation from 3<sup>rd</sup> parties like multinational corporations for example. An international instrument would also set international standards and practice, encouraging countries to adopt it. It is a way of highlighting countries which deny Indigenous people better protection of their TCEs in their respective countries.
- As stated in paragraph 34, Arts Law agrees there is a profound conceptual problem with developing protection for TCEs within the IP system in view of its inherent concern with individual/private ownership rather than community ownership which is based upon customary laws. For this reason at a national level, it may be necessary for States to develop sui generis legislation to provide appropriate means of protection.
- Under paragraph 35, there is a discussion about using other non-IP mechanisms such as laws relating to “blasphemy and cultural rights etc:”. Cultural rights could be recognised under national human rights legislation.

Such laws need to be consistent with IP legislation so that there is no conflict in these laws. Some governments may also need to ratify the Declaration on the Rights of Indigenous Peoples.

- As stated in paragraph 39, Arts Law strongly argues and supports that TCEs are often closely bound up with forms of TK and cannot be separated.
- Paragraph 41 (a)- the **element of originality** in copyright protection excludes works, stories and music that are passed down the generations. For many TCEs the works may not satisfy the originality requirements despite the low thresholds applied by the courts.
- Para 44- **Performances of TCEs**- There needs to be specific protection of performances because often they are not fixed in material form by the community who owns them so are excluded from copyright protection for that community. Arts Law sees extensive exploitation in this area due to the lack of protection. Arts Law advocates for better international protection as well as for States to address this issue at a national level.
- Paragraph 48- **Secret TCEs**- The law of confidentiality provides a bandaid form of protection for secret TCEs but it may be too onerous on Indigenous communities either to bring legal action or to enter into appropriate contracts. We note that in Australia many Indigenous communities have limited literacy skills in the national language, English and live remote from city centres. The onus should therefore be placed on the user of any secret TCE to gain permission from the appropriate custodian of the community.
- Paragraph 52 – **Defensive protection- refusal to register trade marks** that are “contrary to morality or public order”. Such mechanism exists as part of Australia’s trade marks law however there is no mechanism in place to prevent registration of trade marks which are offensive to Indigenous communities of New Zealand. It is essential that this issue be addressed specifically within both international and national frameworks.
- Paragraph 55(d) - **Term of protection**- Arts Law advocates for protection in perpetuity as there needs to be ongoing protection as long as a relevant Indigenous community exists in a custodial capacity.

- 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.<sup>1</sup>

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/>

---

<sup>1</sup> 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](http://www.humanrights.gov.au/social_justice/bth_report/report/index.html)

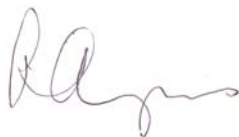
Detailed information about native title claims can be obtained through the National Native Title Tribunal, <http://www.nntt.gov.au>. Their 'Facts for Journalists' provides some basic information about native title in Australia: <http://www.nntt.gov.au/News-and-Communications/Facts-for-Journalists/Pages/Tips-for-Understanding-Native-Title.aspx>

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



Robyn Ayres

Executive Director  
Arts Law Centre of Australia

- 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.<sup>1</sup>

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/>

---

<sup>1</sup> 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](http://www.humanrights.gov.au/social_justice/bth_report/report/index.html)

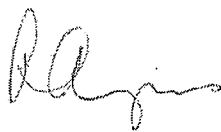
Detailed information about native title claims can be obtained through the National Native Title Tribunal, <http://www.nntt.gov.au>. Their 'Facts for Journalists' provides some basic information about native title in Australia: <http://www.nntt.gov.au/News-and-Communications/Facts-for-Journalists/Pages/Tips-for-Understanding-Native-Title.aspx>

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



Robyn Ayres

Executive Director  
Arts Law Centre of Australia