NATIONAL NATIVE TITLE COUNCIL

Ms Lisa Chesters MP
Chair, Joint Standing Committee on Treaties
PO Box 6021, Parliament House
Canberra ACT 2600
Via email: *jsct@aph.gov.au*

Wednesday 10 June 2026

Dear Ms Chesters,

Inquiry into WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge

The National Native Title Council (**NNTC**) is the peak body for the native title sector. It supports and advocates for First Nations people's right to true self-determination, including their rights to:

- speak for and manage their own Country,
- govern their own communities,
- participate fully in decision-making, and
- self-determine their own social, cultural and economic empowerment.

The NTCC has been an active participant in the current consideration of federal ICIP legislation. In doing do, it has sought to strengthen rights existing under the United Nations *Declaration on the Rights of Indigenous Peoples* (**UNDRIP**) and provide a basis from which Traditional Owners can both protect and assert economic proprietary rights on their cultural knowledge.

As the Australian Government considers ratification of the WIPO *Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge* (**WIPO Treaty**), it is important to examine how the Treaty should be implemented in the Australian jurisdiction. Critical to such implementation would be subsequent legislative reform reflecting the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (**Nagoya Protocol**) and UNDRIP.

The WIPO Treaty represents a small but positive step towards recognition of Indigenous Peoples Traditional Environmental Knowledge (**TEK**) and ICIP. Like other progressive steps being made at international law, it will require implementation through positive legislative reform to provide any tangible outcomes for Traditional Owners.

Regards,

Jamie Lowe
Chief Executive Office

Benefit Sharing

Section 5 of the WIPO Treaty is explicit in requiring implementation through robust legislative enactment. Particularly, at 5.1:

> Each Contracting Party shall put in place appropriate, effective and proportionate legal, administrative, and/or policy measures to address a failure to provide the information required in Article 3 of this Treaty.

In implementation of the WIPO Treaty, a robust framework for undertaking Benefit Sharing Agreements is required to fulfil the requirements of UNDRIP. In developing such a framework, consideration of Part 8A of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) would provide a good starting point.

This section requires a Benefit Sharing Agreement with Traditional Owners as a part of a permit to collect Genetic Resources on Commonwealth land. In turn, this approach is contained in the Nagoya Protocol so maintains conformity with a broader range of international instruments. Specifically, article 7 'Access to Traditional Knowledge Associated with Genetic Resources':

> In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.[1]

First Nations Participation

The NNTC has been expanding its engagement with world heritage processes and structures, through engagement with ICOMOS, IUCN and Australian bodies. Similar to these and the WIPO Treaty proposal for an Assembly, it is essential that First Nations Peoples are actively involved. More than consultation and feedback from communities, they must be represented on the very panels and assemblies that make decisions on their cultural heritage. In turn, it is important that those Traditional Owner participants are supported by the broad Australian First Nations community and report back to them about their engagements. Without this accountability, First Nations TEK, ICIP and rights under UNDRIP are not being respected through many existing international processes; either through a lack of culturally appropriate representation or support for that representation. It is essential that Australia's engagement is informed by Aboriginal and Torres Strait Islander Peoples in culturally appropriate ways and have structured First Nations governance arrangements.

To support Australian Traditional Owner participants, a revised multi-level structure for representation should be implemented. An example of this would be the creation of a First Nations Heritage Council (**FNHC**) within the Australian Heritage Council (**AHC**) structure. The FNHC could perform a number of functions:

- provide First Nations expertise and knowledge to a range of federal legislation (including the *ATSIHP Act* and *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
- provide a male and female co-chair as Indigenous representative members on the AHC.

[1] United Nations, *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, (adopted by the Conference of the Parties on 29 October 2010)) ('Nagoya Protocol').

- in turn, the FNHC representative members on the AHC would be co-representatives on the Treaty Assembly, and
- would advise IP Australia on implementation of the new statutory regime.

The requirements at 10.1, that Indigenous Peoples should be encouraged to participate in the Assembly as 'accredited observers' is not providing voice or appropriate participation to cultural knowledge holders. As with the recommendation above for participation of Australian Traditional Owners in international committees, the request that States 'consider financial arrangements for participation of Indigenous Peoples and local communities'[2] must be realised in actual financial support.

First Nations Representative Bodies

To strengthen Australian integration of the Treaty into the Australian context, a consideration of the terms in the Treaty need be made. In particular, the 'source of traditional knowledge associated with genetic resources'[3] must be identified as being held by those collective and representative traditional owner organisations who manage the collectively held cultural rights to traditional knowledge.

The existence and recognition of First Nations' Representative Institutions is essential to give effect to the collective rights contained in UNDRIP. Collective rights defined through UNDRIP include the right to self-determination, land rights and the right to protect and enjoy cultural heritage. A key element of collective rights is the nature of the collectivity.

Recognised in UNDRIP as 'collective rights',[4] the authority to speak for cultural rights comes from this position of collective management and ownership. These are rights held by Indigenous communities themselves, as a collective and not by individuals in community with others.[5] Throughout UNDRIP the distinction between the rights of "Indigenous peoples" (collective rights) and "Indigenous individuals" is highlighted.[6]

Individuals can enjoy the culture of their society and contribute to it. However, culture itself can only exist as a community construct. It can be said that only a society (community) can give rise to laws and customs. The same is even more true of culture. Language, dance, and art only have meaning in a social context. Whilst access to culture can be a right held by an individual, the rights inherent in that culture must be held collectively.

In the jurisprudence emanating from the Committee on Economic, Social and Cultural Rights (**CESR**), regarding the right of everyone to take part in cultural life, there is reference to the 'community or group'. This supports collective participation and ownership approach to cultural rights detailed in the UNDRIP.

Article 18 of UNDRIP provides for "the right to participate in decision making in matter which would affect their rights through representatives chosen by themselves in accordance with their own

---

[2] Ibid WIPO Treaty, Article 10.1, 7.
[3] Ibid WIPO Treaty, Article 2, 3.
[4] Ibid UNDRIP, Article 7 (2): *'Indigenous peoples have the collective right to live in freedom, peace and security…'*
[5] Ibid UNDRIP, Article 1: *'Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms…'*
[6] Ibid UNDRIP, Article 2: 'Indigenous peoples and individuals are free and equal to all other peoples…'

procedures…". Therefore, we see that a collectively held right to culture, and therefore ownership of that cultural knowledge, is 'managed' by a collectively determined representative of the Traditional Owner community that gave rise to the TK.

Under existing Australian law there is an extensive range of Traditional Owner organisations that satisfy the representative requirements of UNDRIP Article 18. The Prescribed Body Corporates (**PBCs**) and Native Title Representative Bodies (**NTRBs**) established under the *Native Title Act 1993* (**NTA**) are two examples of these. However Traditional Owner organisations established under other legislation such as the Victorian Registered Aboriginal Parties under the *Aboriginal Heritage Act 2006* or Tasmanian Aboriginal Land Council under the *Aboriginal Lands Act 1995* provide further examples

The existence and recognition of such institutions is essential to give effect to the collective rights, including the right self-determination, land rights and the right to protect and enjoy cultural heritage. Currently, structures for appropriate recognition of collective rights holding institutions like that described above, are being considered under commonwealth environmental and cultural heritage reforms. Particularly, in regard to a proposed First Nations Engagement and Participation in Decision Making Standard.

Similarly, the fact that Indigenous Peoples rights arise and exist collectively, but can be enjoyed individually, is a well-established concept in Australian jurisprudence. The most authoritative statement in the issue is that of *Brennan J in Mabo No 2*[7] when his Honour states at [68]:

> *… so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs,* ***the communal native title*** *survives* ***to be enjoyed by the members*** *according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed*. (Emphasis added)

The point regarding rights under traditional law and custom arising from the collective identity but taking a form as both individual and collective rights is made quite explicit by his Honour in the following paragraph:

> [69] Thirdly, where an indigenous people (including a clan or group), as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession ***may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title***. Those rights and interests are, so to speak, carved out of the communal native title. A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title. A communal native ***title enures for the benefit of the community as a whole and for the sub-groups and individuals within it*** who have particular rights and interests in the community's lands. (Footnotes omitted, emphasis added.)

Individuals can enjoy the culture of their society and contribute to it; however, culture itself can only exist as a community construct. It can be said that only a society (community) can give rise to laws

[7] *Mabo & Ors v Queensland & Ors* (No 2) (1992) 175 CLR 1.

and customs, the same is even more true of culture. Access to culture can be a right held by an individual but the rights inherent in that culture must be held collectively.

A critical aspect of managing these rights is the application of agreement making regarding impacts on them by third parties and the exercise of FPIC over proposals affecting their TEK, ICIP and cultural heritage more broadly. This right can only be exercised through the relevant representative institution.

Enforcement

As an object of international law, the WIPO Treaty cannot provide the same robust penalties regime that jurisdictional regulation can. In this regard, Australia can implement sanctions and remedies that align with existing and proposed (eg. ICIP) legislation.

It is essential that legislative amendment should require evidence of a Benefit Sharing Agreement with relevant Traditional Owners where there is a declaration of use of TEK or ICIP. A subsequent identification of an "innocent" failure of disclosure of a Benefit Sharing Agreement should be imposed (under the legislation) on the patent holder and, where there is identification of a "deliberate" failure of disclosure the patent should be cancelled and transferred to the relevant Traditional Owners.

Such provisions would go some way to releasing the rights of Traditional Owners that are constrained under sanctions and remedies at Article 5. Largely relating to non-disclosure, the remedies that can be enforced on parties by the State are largely ineffectual in realisation of Traditional Owner rights to protect and manage their own cultural heritage. These sanctions and remedies do not reflect the application of FPIC, as detailed in both UNDRIP and the Nagoya Protocol, in that States cannot 'revoke, invalidate, or render unenforceable the conferred patent rights solely on the basis of an applicant's failure to disclose' the Traditional Owners of the cultural knowledge used.

Data Sovereignty

The strongest aspect of the Treaty is to be found at Article 6 Information Systems. Here it is identified that information systems may be established, in consultation with Indigenous peoples, that link genetic resources with their associated traditional knowledge.[8] Given the general regard for 'national circumstances', it is essential that in the Australian implementation of the Treaty, FPIC is integral to uphold community expectations of data sovereignty. It is the development of these 'safeguards' that will make or break the effectiveness of data management and information system utilisation by Traditional Owners. As has been found in Victoria, the establishment of a Register for Intangible Cultural Heritage was not enough. What is required is a Traditional Owner managed repository that embed FPIC and data sovereignty and control in the hands of the Traditional Owners rather than non-Traditional Owner public servants.

Whilst recognised at 6.2, the implementation of actual safeguards is essential. That they are 'developed, where applicable, in consultation with Indigenous peoples and local communities, and other stakeholders' does not appropriately speak to the rights-based ownership of Traditional Owner, distinct to stakeholders. Once established by the State however, the databases must be accessible to patents offices to examine patent information. Although this is a necessary aspect of the patent system, once implemented within an Australian context, there must be stringent accessibility

[8] Ibid WIPO Treaty, Article 6, 5.

safeguards and authorising requirements for access.[9] Consideration of such safeguards should be made alongside the development ICIP legislation and by the FNHC.

Conclusion

The recognition of Traditional Owner rights to ICIP, TEK and intangible cultural heritage more broadly is essential to give life to UNDRIP. Whilst this is being executed incrementally though various instruments of international law, the incorporation of instruments into jurisdictional legislation and regulation is another point at which they can be strengthened. An example of this would be the way in which the Treaty in implemented in Australia. The following are the NNTCs recommendations.

- The Treaty represents a small but positive step towards recognition of Indigenous Peoples TEK and should be signed by the Australian Government.
- To give practical effect to the provisions and aspirations of the WIPO Treaty requires strong and considered legislative amendment.
- That legislative amendment should require evidence of a Benefit Sharing Agreement with relevant Traditional Owners where there is a declaration of use of TEK or ICIP.
- Where there is subsequent identification of an "innocent" failure of disclosure a Benefit Sharing Agreement should be imposed on the patent holder.
- Where there is subsequent identification of a "deliberate" failure of disclosure, the patent should be cancelled and transferred to the relevant Traditional Owners.
- The Traditional Owners are represented by the TORI who asserts the collectively managed TEK and ICIP.
- A First Nations Cultural Heritage Council should be established to advise IP Australia on these matters.

If such provisions are implemented upon signing of the WIPO Treaty, Traditional Owners would be able to better protect, manage and build upon their cultural heritage for future generations.

[9] Ibid WIPO Treaty, Article 6.2-.3, 5.