**PRELIMINARY SUBMISSION - MR IAN PATRICK GOSS**

**PRODUCTIVITY COMMISSION DRAFT REPORT - ABORIGINAL AND TORRES STRAIT ISLANDER ARTS AND CRAFT**

**Introduction**

1. Thank you for the opportunity to comment on the above draft report. I am making this submission as a private individual and the views expressed are mine alone. They are without prejudice to views expressed in my previous positions as the General Manager for IP Policy within IP Australia, head of the Australian delegation to the WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (folklore) (IGC), or as Chair of this Committee from 2016 to 2022.

2. In writing this submission I also recognise that I am a non-indigenous Australian and respectively apologise for any comments that misinterpret or cause offence to Australia’s First Nations Peoples.

3. I would note as this is a lengthy report I have had limited time to review the report and would appreciate the opportunity to make a more substantive submission over the next few weeks, particularly in relation to the ICIP legislation recommendation. Alternatively, I would be happy to engage directly with the Commission at their convenience.

**General Remarks**

4. Overall, I welcome the findings and many of the substantive recommendations, noting that they represent a first step in this challenging policy area. In particular:

* Recognition of the unique nature of Australia’s First Nations culture and its contribution to Australian society.
* The harms caused by misappropriation/misuse of this cultural heritage not just in terms of loss of economic value but in relation to cultural harms.
* Proposed introduction of new sui generis legislation relating to First Nations Culture and Intellectual Property (IP).
* Importantly, the report recognises the challenges in attempting to adapt western IP laws based on individual rights to a cultural perspective based on collective responsibility/custodianship and customary laws and practices. Whilst, also recognising the balance required in terms of supporting access to the intangible and tangible expressions of First Nations culture, based on free prior and informed consent.
* The need for an overarching strategic policy framework to protect Australia’s First Nations Culture.
* Recognition that a major issue relates to the operational divide in terms of a lack of funding to support First Nations communities. In particular, Arts Centres and to support the ability of First Nations communities to monitor and take legal action against misappropriation and misuse of their Traditional Knowledge and Traditional Cultural Expressions. Also, to educate, first nations communities on their rights, the wider business community and the consumer.

**Initial Specific Comments**

5. I would emphasise that these comments are based on my initial reading of the document and would welcome the Commissions perspective on the views expressed below:

***Narrow Policy Perspective***

6. The Terms of Reference for this work are narrowly defined to only one expression of an indigenous culture - arts and crafts. This is unfortunate as it fails to recognise that these arts and crafts or Traditional Cultural Expressions (TCEs) are a manifestation of an indigenous community’s traditional knowledge, which incorporates their belief systems, language and understanding of country. They are intrinsically linked and need to be considered collectively or risk significant limitations and gaps in any future policy framework, with potential for continued misappropriation of First Nations culture, in particular their Traditional Knowledge.

7. Notwithstanding my comment above I believe the draft recognises this. A view reflected in the recommendations to develop:

* a strategic policy framework for protection of First Nations Culture; and
* sui generis laws relating to First Nations Culture and IP.

8. I believe in the final report that the limitation of the Terms of Reference needs to be highlighted at the beginning of the report.

***Strategic Policy Framework***

9. Based on my own work in this area I strongly support the development of an overarching policy framework/strategy to safeguard and protect First Nations Culture. This would guide the development of ICIP legislation and non-regulatory initiatives, including addressing funding and education/awareness issues and consider the establishment of a cultural authority as proposed by Terri Janke.

10. In relation to the development of this strategy I would note that IP laws are legislated at the Federal level and Australia has significant international IP treaty obligations. As such it will be important that relevant federal IP agencies are included in the process.

11. I am assuming that this recommendation incorporates safeguarding of cultural heritage and protection of Traditional Knowledge, Traditional Cultural Expressions and Traditional Knowledge associated with Genetic Resources.

12. In relation to any strategic policy framework in this area I believe that the start point should be the UNDRIP which sets out clear obligations in relation to the rights of Indigenous Peoples. From my perspective the work of the WIPO IGC is directed at operationalising this declaration into hard or legally binding treaties, in particular, Article 31.

13. Canada has taken this approach with their recently legislated Bill C-15. This Bill provides that the Government of Canada must take all measures necessary to ensure that the laws of Canada are consistent with the UNDRIP, and must prepare and implement an action plan to achieve the objectives of the Declaration.

14. I also understand that a Joint Federal Parliamentary Committee will shortly be convened to review Australia’s implementation of the UNDRIP.

***Introduction of new Indigenous Cultural and Intellectual Property Legislation***

15. I strongly support this draft recommendation. As the draft report clearly finds Australia’s current IP regimes and related international treaties do not provide sufficient protection for Indigenous Culture, with misappropriation and other cultural harms prevalent.

16. Importantly, from my perspective this legislation would need to cover all aspects of First Nations culture including Genetic Resources and Associated TK, TK and TCEs.

17. I note a significant number of questions are raised in relation to this recommendation. Questions which require careful consideration. As I indicated in my introduction, I would welcome more time to consider these important questions and would be happy to engage further with the Commission.

18. I would further note that as reflected in the negotiations within the IGC the international work in this area has progressed significantly since the WIPO model laws were developed, including within other national jurisdictions.

19. I would finally suggest that there is merit in establishing a small, short term expert working panel to further consider these complex policy questions and bring forward recommendations for consideration by the Commission. A panel which should have practical experience in this area at a policy, legal and industry level, including knowledge Centres (museums, libraries) and importantly First Nations representatives.

***Definition of Authentic Aboriginal and Torres Strait Islander Visual Arts and Crafts.***

20. Critically, the definition of authentic Aboriginal and Torres Strait Islander Visual Arts is fundamental to defining the scope of this draft report. It will also aid in ensuring any future ICIP legislation has legal certainty.

21. I note the proposed definition and that it appears to be supported by a number of First Nations stakeholders. However, I have some concerns that it is inconsistent with descriptions of authentic Aboriginal and Torres Strait Islander Visual Arts and Craft in the draft report. In particular, a connection to a First Nations culture and community. In essence it focuses on the artist and does not include the traditional community whose TK is the inspiration for the work. Knowledge which is often under the custodianship of the community, and which may include secret and sacred knowledge.

22. As I previously indicated to the Committee, from my perspective the visual art and/or craft should at a minimum be (1) produced by a First Nations artist and (2) have a clear link with a First Nations traditional community. In essence it should incorporate an expression of that community’s cultural knowledge, noting from my international perspective a traditional visual art and/craft is a manifestation of a traditional community’s traditional knowledge. For example you could include in your definition words such as (example only):

*“…it is a unique product of and/or directly linked with the cultural identity and cultural heritage of a specific Aboriginal and/or Torres Strait islanders nation, clan and/or community.”*

23. By adding this clarification, I believe it better balances the interests of the right holders, business, and the consumer. Additionally, it will provide greater legal certainty in relation to any future mandatory labelling approach and future ICIP legislation. Additionally, I am concerned that current definition will not address the issue of misappropriation of a First Nations Traditional Knowledge.

24. Whilst understanding the limits of the Reports Terms of Reference I believe that a more relevant term when discussing traditional visual arts and crafts is Traditional Cultural Expressions (TCEs). This term is becoming more widely used internationally and is consistent with the UNDRIP. I would also note that IGC has almost reached consensus for the definition for TCEs and the criteria for protection of TCEs.

***Work of the IGC***

25. I note in the report some commentary regarding the work of this Committee. The report has included a comment from a single participant (observer or delegate??) to the IGC. This view from my perspective does not represent the significant progress made in the work of the committee, particularly since negotiations commenced in 2010. Also, it potentially undermines in the eyes of First Nations Stakeholders and government policy makers the work of this Committee.

26. Multi-lateral treaties are challenging particularly when we are attempting to progress three binding treaties that potentially impact 193 member states and challenge longstanding IP policy positions/treaties across the full spectrum of IP regimes and involve morale and economic rights. As you note in the report there are currently three draft instruments. I would note that Australia was a prime architect of these draft instruments and initiated the breakthrough which resulted in the commencement of text-based negotiations in 2010.

27. I would also highlight a significant breakthrough was recently achieved in the work of this Committee. As I advised to the Commission previously, as the Chair of the IGC, in 2019 I drafted under my own authority a Chairs Text on Genetic Resources and associated Traditional Knowledge. During the hiatus in formal meetings during COVID I consulted informally with member states and key stakeholders, and the indigenous caucus. This was an attempt to bring this subject matter to a conclusion. This effort bore fruit at the 2022 WIPO General Assembly, with the General Assembly, by consensus, agreeing to convene a Diplomatic Conference to conclude an international legal instrument based on this text. Importantly this outcome shifts the dynamics of the work of the committee which had been limited by a view of many members that nothing should be agreed until everything is agreed.

28. In relation to the Traditional Cultural Expressions text I would also note that significant progress has been made towards reaching consensus on core issues, including definition of the subject matter (TCEs), objectives, eligibility criteria for protection and unpacking the scope of protection. I have included in this submission my Chairs Note to IGC 40 which discusses core issues and incorporates textual proposals relating to these issues for both TK and TCEs, which member states requested I produce. This work remains relevant as this was the last time TK and TCEs were discussed.

30. I would finally note that whilst the TK and TCE texts are still a work in progress that the texts, related papers/studies produced by the Committee and its Secretariat and related data bases, represent a significant body of knowledge in relation to the protection of TK and TCEs. This knowledge includes policy approaches of member states, including domestic legislation and identifies key gaps in relation to current IP protection. This work from my perspective would have significant utility in the development of any future strategic policy framework and resulting ICIP legislation.

***Mandatory Labelling Inauthentic* *Aboriginal and Torres Strait Islander Visual Arts and******Crafts***

31. I note the innovative approach to the vexed labelling issue. Also, that First Nations Communities experience of labelling initiatives have been relatively negative. Obviously for any labelling initiative to be successful it will require by-in from First Nations communities, in particular Art Centres.

32. My initial reaction to the proposal was it was an innovative idea, noting the resistance of First Nations Communities to a labelling scheme. Then I started to consider how it would work in practice, both in legal terms and operationally. Also, how would consumers and businesses relate to such an approach.

33. Whilst I believe the proposed approach has some merit, I would also reflect that the failures of previous authenticity labelling schemes were not the high level policy intent but the implementation of the schemes. A lack of community engagement, funding, and education programs. The question is would addressing these deficiencies result in a better outcome in relation to any authenticity labelling scheme. Clearly it would need to be a simple approach such as the wool mark, which would still enable Art Communities to establish their own distinctive brands/trademarks or even establishing their own Certification Trade Mark.

34. As this is a key recommendation of the draft report I believe there is merit in analysing this issue further and perhaps the Committee could establish another small working group to look at the different approaches with representatives from Arts Centres, consumer groups, related business stakeholders and federal government policy makers, including IP Australia.

Mr Ian Patrick Goss

29 August 2022

**Attachment:**

WIPO/GRTKF/IC/40 - Chairs Information Note