Hon Warren Entsch MP
Chair, Joint Standing Committee on Northern Australia
PO Box 6021
Parliament house
CANBERRA
Canberra ACT 2600

31 July 2020

Inquiry into the destruction of Aboriginal heritage sites at Juukan Gorge

The Arts Law Centre of Australia (**Arts Law**) welcomes the opportunity to contribute to the Joint Standing Committee on Northern Australia's inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia.

In particular, we make submissions in relation to paragraph (g) of the Terms of Reference of the Joint Standing Committee, being:

> *" the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage (**ACH**) in each of the Australian jurisdictions."*

Our submissions focus on the protection of Indigenous Cultural and Intellectual Property (ICIP) (as defined below) as an aspect of intangible ACH under state and federal laws.

Who are we?

Arts Law is a not-for-profit national community legal centre for the arts, actively protecting the rights of artists since 1983. Our dedicated service for Aboriginal and Torres Strait Islander artists, Artists in the Black (**AITB**), was established in 2004, providing targeted legal services for Aboriginal and Torres Strait Islander artists and arts organisations across Australia. Arts Law is in the unique position of having consulted with and advised Aboriginal and Torres Strait Islander communities throughout Australia. Much of that advice has focused on ways of securing protection for Indigenous cultural heritage as expressed through Indigenous art, music and performance.

Arts Law has been active in this area for over 15 years and has made a number of submissions to government on Indigenous Cultural and Intellectual Property (**ICIP**), including to the Productivity Commission's *Draft Report on Intellectual Property Arrangements* in 2016, and the House of

Representatives Standing Committee on Indigenous Affairs Inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia. We have also made representations to the Attorney-General and the Minister for Indigenous Affairs. There have been other inquiries into these issues including the 1981 *Report of the Working Party into the Protection of Aboriginal Folklore*, the Federal Government's *Issues Paper, Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* in 1994,[1] and discussions about an Indigenous Communal Moral Rights Bill (2003).[2] No legislative protection or enforceable rights have resulted from any of these previous inquiries.

Arts Law has consistently participated internationally in this space since 2007 through its observer status at the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.[3] Arts Law recognises that the issue of Indigenous intellectual and cultural rights is a global one, and that the world is watching Australia for leadership in this area. It is important to take necessary action to protect Australia's unique culture and empower its First Peoples, and to set a positive example for other nations in the protection of Indigenous cultures worldwide.

Over the lifetime of the AITB project, Arts Law has assisted Aboriginal and Torres Strait Islander artists with their legal queries thousands of times. During 2019, Arts Law advised Aboriginal or Torres Strait Islander artists and arts organisations 911 times. In most instances, the advice sought by these artists and their organisations relates to the protection of their copyright, moral rights and cultural heritage. Through our outreach to over 100 Aboriginal and Torres Strait Islander communities, Arts Law has consulted with Aboriginal and Torres Strait Islander artists in metropolitan, regional and remote areas across Australia.

Indigenous Cultural and Intellectual Property (ICIP)

ICIP refers to the inherent rights of Indigenous people to maintain, control, protect and develop their traditional cultural heritage, including their arts. ICIP encapsulates knowledge that is unique to Aboriginal and Torres Strait Islander Peoples and includes both tangible and intangible cultural property, and cultural expressions such as stories, dance, languages, symbols, crafts and cosmology.

Arts Law considers ICIP to be a crucial component of intangible ACH, which is afforded almost no protection under the current framework of state and federal laws in Australia. Pointedly, there is currently no legal right of ownership of ICIP capable of enforcement within the Australian legal system (except to the limited extent of native title and existing legislation concerning areas and objects).

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[1] Released by the Minister for Justice, the Hon. Duncan Kerr, the Minister for Communications and the Arts, the Hon. Michael Lee, and the Minister for Aboriginal and Torres Strait Islander Affairs, the Hon. Robert Tickner. See Catherine Hawkins, 'Stopping the Rip-offs: Protecting Aboriginal and Torres Strait Islander cultural expression' (1995) 20(1) *Alternative Law Journal* 7 <http://www.austlii.edu.au/au/journals/AltLawJl/1995/4.pdf>.

[2] See discussion in Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27(3) *UNSW Law Journal* 585 <http://www.unswlawjournal.unsw.edu.au/sites/default/files/34_anderson_2004.pdf>.

[3] For further information about IGC work see http://www.wipo.int/tk/en/igc/

The need for national sui generis legislation that facilitates automatic recognition of ICIP

Arts Law is strongly of the view that the proper recognition and protection of ICIP is an issue of national and international significance and can only be achieved through the introduction of comprehensive sui generis legislation at the federal level, which mandates the automatic recognition of ICIP without the requirement for registration. Arts Law considers that within this legislative framework, ICIP must be recognised as an automatic right vested in the Aboriginal and Torres Strait Islander community with ownership of the relevant traditional knowledge.

Arts Law believes that adequate protection of ICIP can only be achieved by separate sui generis legislation which enshrines the automatic recognition of ICIP for the following reasons:

- ICIP covers a broader range of creative, intellectual and cultural concepts than those protected under the existing copyright, designs and patent laws. It should be dealt with in one piece of legislation and any attempt to deal with it solely in the context of, say, copyright or land law will be artificial and incomplete;

- ICIP is an intergenerational right which evolves and develops overtime, and which is fundamentally different from traditional constructs of intellectual property in that it is a communal right, albeit with individual custodians;

- Any attempt to deal with ICIP within the context of pre-existing laws prefaced on western understandings of intellectual property and cultural heritage will therefore be artificial and incomplete; and

- Aboriginal and Torres Strait Islander communities, and by extension ICIP, traverse state borders. A piecemeal approach whereby only aspects of ICIP registered under state-based Aboriginal cultural heritage legislation is protected is therefore problematic and well below the rights envisaged in Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**).

We set out below proposed features of such sui generis federal legislation:

Arts Law opposes any registration system for intangible Aboriginal Cultural Heritage

In this regard, we refer to our previous submissions on the New South Wales Aboriginal Cultural Heritage Bill 2018[4] (**Draft Bill**) dated 20 April 2018, attached as **Appendix 1** to these submissions. The Draft Bill proposes a system of registration to deal with intangible ACH. As previously raised in those submissions, we emphasise that Arts Law is strongly opposed to any scheme that requires Aboriginal or Torres Strait Islander people (or groups) to register their traditional knowledge before being able to protect it.

Arts Law's position is that intangible ACH rights should apply automatically by virtue of their existence, an exact reflection of the way copyright is currently determined. If a person writes a song, or produces an artwork, copyright exists automatically upon the creation. It is our view that ICIP should be recognised the same way. Any requirement to register a songline or story in order to

[4] See Arts Law's *Submission in Response to the New South Wales Aboriginal and Cultural Heritage Bill (2018) Public Consultation* (2018).

create rights is antithetical to this principle. A community's right to control and exploit its cultural heritage should not depend on whether such ACH is registered.

Further, it is impractical and unreasonable to expect Aboriginal people and communities to register more than 60,000 years of cultural heritage. Such heritage does not exist in registrable "chunks". It cannot be divided into separate items. It is a multi-layered, complex web of story, knowledge, belief and culture. Traditional knowledge can also take on various adaptations across different communities and a story or songline can exist within the culture of more than one group.

This is especially concerning if a registration system is implemented at a state level, because while it is possible that multiple owners of intangible ACH could be registered, it will be difficult for state-based legislation to properly deal with aspects of ACH that extend across state borders.

Arts Law is also concerned that the creation of a register of intangible ACH requires the disclosure of ICIP which might be sacred or vulnerable to misuse by those with access to the register (i.e. the ACH Authority or other persons), even if the register is restricted-access. This will be culturally inappropriate (and damaging) in many situations.

Arts Law opposes decision-making power in relation to ACH being vested in an ACH authority or Minister

The Standing Committee on Indigenous Affairs recommended that the Australian Government begins a consultation process to develop stand-alone legislation protecting ICIP, including traditional knowledge and cultural expressions.[5] As part of the its recommendation, the Standing Committee on Indigenous Affairs supported the establishment of a National Indigenous Arts and Cultural Authority (**NIACA**). The feasibility of a NIACA is currently being explored by the Australia Council for the Arts.[6]

Arts Law endorses the recommendation that the Australian Government begins developing a stand-alone legislation to protect ICIP and supports the establishment of a NIACA to help develop and implement ICIP rights. We are firmly of the view, however, that any institution that is established should not have a role in determining ICIP rights or require the registration of ICIP.

In particular, we refer to our previous submissions in relation to the Draft Bill in relation to the establishment of an ACH authority to make decisions in the context of an intangible ACH registration system. The owner of any Indigenous Knowledge (**IK**) is the community or group it comes from. They are the only people that can ethically approve or reject the use of its cultural knowledge. An ACH authority or panel, no matter how it is appointed, will consist of people from different communities and, under this proposal, will have ultimate decision-making as to whether an item of IK can be registered. This is not culturally appropriate, or even realistic, in this context.

[5]Standing Committee on Indigenous Affairs, House of Representatives, *Report on the impact of inauthentic art and craft in the style of first nations peoples* (2018) 76.
[6]See Australian Council for the Arts 'A proposed National Indigenous Arts and Cultural Authority (NIACA)' (Public discussion paper, 8 October 2018).

We also note that the Draft Bill included responsibilities for the Minister responsible for the ACH Act to make declarations of ACH, based on the ACH's recommendations. On this point, Arts Law agrees with the submissions made by the Environmental Defender's Office (**EDO**) on the Draft Bill, which argues that the Draft Bill affords the Minister too much discretion in relation to pivotal decisions, in that the Minister's discretion is absolute, there are no binding criteria to consider, and unlike other decisions there is no timeframe for the Minister to make a declaration (despite the fact that without clear accountability, cultural heritage nominations could take years to process). Furthermore, under the Draft Bill, there are no merit appeal rights if Aboriginal people are not satisfied with the Minister's decision. While the Draft Bill protects Aboriginal objects, ancestral remains and Aboriginal places currently listed against harm, anything else is ultimately subject to the Minister's discretion.

This detracts from the object of the Bill in terms of giving Aboriginal people genuine control over their cultural heritage (and by extension, ICIP). Arts Law endorses the EDO's recommendation in its submission that *"Best practice laws would also afford due process, procedural fairness and equity for landowners and Aboriginal people".*

The above concern is particularly relevant in light of the fact Rio Tinto received ministerial consent to destroy the Juukan Gorge caves pursuant to the *Aboriginal Heritage Act 1972* (WA).

Free, prior and informed consent of Aboriginal communities

We submit that any sui generis ICIP legislation should have regard to:

(a) articles 8, 17 and 18 of the *Convention on Biological Diversity* relating to the use of traditional knowledge (which refer to state obligations to implement procedural (participatory) rights as well as benefit-sharing); and

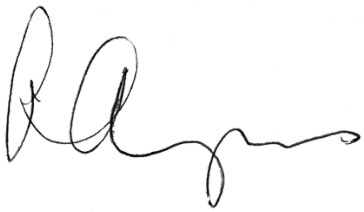
(b) the principles set out in the UNDRIP and in particular, Australia's obligations as a party to the UNDRIP under Article 31 to secure the rights of Indigenous peoples to "*maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures*."

We refer to the submissions of Environmental Justice Australia (**EJA**) in relation to the second independent 10-year review of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) dated 20 April 2020 and submit that the submissions of the EJA in relation to the EPBC Act also apply in relation to any sui generis ICIP legislation, such that:

- any sui generis ICIP legislation needs to incorporate the concept of 'free, prior and informed consent' (**FPIC**) of Aboriginal communities in relation to decision-making in relation to ICIP; and
- FPIC is a 'reserved' right regardless as to whether other forms of legal rights or interests, such as recognised through title, agreement or allocation, are available to an Aboriginal community.

The green light given to Rio Tinto to blast the Juukan Gorge caves under state legislation speaks volumes about how far away Australia is from meeting its obligations under the UNDRIP. National sui generis legislation that mandates the automatic vesting of ICIP rights would represent a substantial step towards fulfilling these obligations.

Yours sincerely



Robyn Ayres
Chief Executive Officer

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Appendix 1

Arts Laws' submissions on the proposed New South Wales Aboriginal Cultural Heritage Bill dated 20 April 2018

NSW Office of Environment and Heritage
PO Box A290
Sydney South NSW 1232

20 April 2018

Dear Secretariat,

Arts Law's Submission on the proposed New South Wales Aboriginal Cultural Heritage Bill

The Arts Law Centre of Australia (**Arts Law**) welcomes the opportunity to contribute to the public consultation on the proposed Aboriginal Cultural Heritage Bill 2018 (the **Bill**).

Public Consultation

Arts Law is concerned with the very short public consultation period since the release of the draft Bill (11 September 2017 to 20 April 2018), especially given that the development of this Bill has taken over four years. There needs to be ample time allocated to public consultations to be certain that all stakeholders are given the chance to understand what is proposed and to have their voices heard. It is unclear who was approached to give their input or to attend the public information sessions.

Arts Law representatives attended the Penrith workshop on 12 March 2018. There was very limited information provided and all feedback was within the framework of pre-organised activities that did not allow for free and open discussion. Whenever open discussion was engaged in, it was time-limited and the day progressed very quickly without the opportunity for real engagement. There were a small number of Aboriginal people present which raises the question of what engagement has been attempted with Aboriginal communities and organisations. From the information provided it does not appear that there has been specific engagement with Aboriginal people and communities. It is imperative that extensive consultation is completed before the Bill is to be put to the Parliament. There must also be a genuine effort to amend the Bill in line with feedback received during such engagement.

Intangible Aboriginal Cultural Heritage

During the Penrith workshop, there was little information offered regarding the introduction of intangible Aboriginal Cultural Heritage (ACH), and no feedback sought on this type of ACH. This is very concerning given that it is probably the largest change proposed in this Bill.

From the definition proposed, Arts Law considers intangible ACH to be the same concept as Indigenous Cultural and Intellectual Property (ICIP). It is Arts Law's view that the protection of such

traditional knowledge is more appropriately addressed within the Intellectual Property framework and requires the establishment of a comprehensive sui generis legal framework at a national level designed to recognise and protect Indigenous cultural heritage.[1]

We understand that the OEH wishes to steer clear of any overlap with Intellectual Property law, however no details on how this is to be achieved has been offered. We also understand that the OEH has modelled this draft Bill on the Victorian *Aboriginal Heritage Act* 2006. This legislation was introduced without consulting renowned experts in ICIP or intangible ACH. Arts Law considers this legislation extremely problematic for the same reasons outlined in this submission.

Registration system incompatible with intangible Aboriginal Cultural Heritage

Arts Law is strongly opposed to any scheme that requires Aboriginal or Torres Strait Islander people (or groups) to register their traditional knowledge before being able to protect it. We have been working in this area for over a decade and have made submissions to other government inquiries in this area at a federal level[2] and international level[3]. It is our position that intangible ACH rights should apply automatically by nature of its existence, in the same way copyright is determined. If a person writes a song, or produces an artwork, copyright exists automatically upon the creation. It is our view that ICIP should be recognised the same way. A requirement to register a songline or story in order to create rights is antithetical to this principle. A community's right to control and exploit its cultural heritage should not depend on whether such ACH is registered.

Further, it is impractical and unreasonable to expect Aboriginal people and communities to register all 60,000 years (plus) of cultural heritage. Such heritage does not exist in registrable "chunks". It cannot be divided into separate items. It is a multi-layered, complex web of story, knowledge, belief and culture. Traditional knowledge can also take on various adaptations across different communities. How will the registration system deal with a situation where a story or songline exists within the culture of more than one group?

Whilst we understand that Aboriginal people would not be compelled to register ACH under this proposal, the practical effect would be that there is no recourse for a person or group in the event that their ACH is used commercially without permission, unless that ACH has been registered.

Impracticality of registration system for intangible Aboriginal Cultural Heritage

Arts Law is also concerned that the creation of a register of intangible ACH requires the disclosure of ICIP which might be sacred or vulnerable to misuse by those with access to the register (ie. the ACH Authority, Local ACH Consultation Panels and other persons), even if the register is restricted-access. This will be culturally inappropriate (and damaging) in many situations.

We are also concerned that there may be potential or actual conflicts of interest within the committee itself. It is not clear as to what happens in a situation where more than one group claim ownership over an item of ACH, or a group wishes to challenge the registration of an item.

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[1] See attached to this submission, Arts Law's *Submission in Response to the Indigenous Heritage Law Reform Discussion Paper* (2009).
[2] Ibid.
[3] See attached to this submission, Arts Law's *Submission to the UNHR Special Rapporteur on the impact of intellectual property regimes on the enjoyment of right to science and culture, as enshrined in particular in article 15 of the International Covenant on Economic, Social and Cultural Rights* (2014).

Similarly, the registration of intangible ACH is conditional upon the ACH Authority being satisfied under section 36(2)(a) that the heritage "is not widely known to the public and should be protected from unauthorised commercial use." Why should the ACH be "not widely known to the public"? Does this mean that important ACH that has become widely known is not deserving of protection? This seems to be a completely inappropriate and inherently disrespectful proposition. Additionally, the requirement that the ACH Authority should be satisfied that the heritage "should be protected from unauthorised commercial use" suggests that there is some intangible ACH that should not be protected from such use. There is no explanation or justification for this provision and it is not clear what would make heritage undeserving of protection from unauthorised commercial use.

Broader implications of establishment of a regime to recognise ACH rights

The proper recognition and protection of ACH is an issue of both national and international significance. Most recently it has been raised by the House of Representatives inquiry into the proliferation of inauthentic Indigenous arts and crafts.[4] As noted above, Australia needs a legislative scheme which protects ACH and fulfils our obligations under Article 31 of the *Declaration of the Rights of Indigenous Peoples*. We note that this is also an issue being considered by the World Intellectual Property Organisation's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC).

The owner of any ACH is the community or group it comes from. They are the only people that can ethically approve or reject the use of its cultural heritage. An ACH Authority, no matter how it is appointed, will consist of people from different communities and, under this proposal, will have ultimate decision-making as to whether an item of intangible ACH can be registered. This is not culturally appropriate, or even realistic, in this context.

The Bill in its final form should enshrine automatic recognition of intangible ACH, without the requirement for registration. Intangible ACH should be recognised as an automatic right vested in the Aboriginal community with ownership of the relevant cultural heritage over generations.

Yours sincerely

Robyn Ayres

Chief Executive Officer

4 https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft

16 December 2009

Indigenous Heritage
Law Reform
Heritage Division
Department of the Environment, Water, Heritage and the Arts
GPO Box 787
CANBERRA ACT 2601

By mail and to atsihpa@environment.gov.au

Submission in Response to the Indigenous Heritage Law Reform Discussion Paper

The Arts Law Centre of Australia (**Arts Law**) through the Artists in the Black (**AITB**) service has provided targeted legal services to Indigenous artists and their organisations and communities for the last six years. Much of that advice has focussed on ways of securing effective protection of Indigenous cultural heritage as expressed through Indigenous art, music and performance given the acknowledged deficiencies in the current level of legal protection for Indigenous cultural heritage.

Arts Law has considered the Discussion Paper in the context of the legal issues affecting Indigenous artists in communities throughout remote, regional and urban Australia, and across all art forms.

The Discussion Paper considers the reform of existing legislative arrangements as they apply to traditional areas and objects. Our overriding response is that laws restricted to a focus on 'places' or 'things' can only provide a very limited, piecemeal and unsatisfactory protection which fails to recognize the true nature of Australian Indigenous cultural heritage and is inconsistent with notions of cultural heritage at international law.

Recent developments at international law make clear that notions of cultural heritage encompass language, stories, spiritual knowledge, ancestral remains, medical and scientific traditions, music, literature and performance traditions as well as sacred places and objects. Arts Law believes that the reform of existing cultural heritage laws should be undertaken hand in hand with the Government's commitment to the implementation of Article 31 of the *Declaration on the Rights of Indigenous People* and its ongoing participation in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (**IGC**) which is looking at the development of an international instrument to protect Indigenous cultural heritage.

Arts Law supports the establishment of a comprehensive legal framework designed to recognise and protect Indigenous cultural heritage (sometimes referred to as Indigenous Cultural and Intellectual Property or ICIP). Such an objective requires reform on a holistic level well beyond that contemplated by the Discussion Paper. The Paper provides a useful starting point for discussion but should, we respectfully suggest, be used as a stepping stone to more comprehensive reform.

There is currently no general legal right of community cultural heritage which would support a right to a royalty, no legal obligation to respect traditional knowledge which could be the basis for mandatory standards of third party conduct using or affecting such knowledge and no legal right of ownership of Indigenous cultural heritage capable of enforcement by the Australian legal system (except to the limited extent of native title and existing legislation concerning areas and objects).

These are all matters to be addressed by legislation implementing Australia's obligations under Article 31 of the *Declaration on the Rights of Indigenous People* to "take effective measures to recognise and protect the exercise of … rights" to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.

Why sui generis legislation is needed

Arts Law believes that adequate protection can only effectively be achieved by separate *sui generis* legislation for the following reasons:

- Indigenous cultural heritage covers a broader range of creative and intellectual and cultural concepts than those protected under the existing heritage and intellectual property laws. It should be dealt with in one piece of legislation and any attempt to deal with it solely in the context of, say, copyright or land law will be artificial and incomplete;
- Indigenous cultural heritage is fundamentally different from traditional legal constructs of property in that it is a communal not individual right albeit with individual custodians;
- Indigenous cultural heritage is an intergenerational right which does not lend itself to traditional approaches involving set periods of time;
- Indigenous cultural heritage evolves and develops over time unlike traditional property rights which focus on fixing a point in time at which the property which is protected is defined;
- Indigenous cultural heritage stands beside existing intellectual property rights – it is not an extension of them as it is not concerned with individual originality or novelty which is the basis for all existing intellectual property rights, whether copyright, design or patents;

Alternatives

Arts Law believes that the alternatives which have been canvassed for the protection of Indigenous cultural heritage[1] and believes each of those alternatives has shortcomings:

[1] For example see the recent article by McKay, Erin, *Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach*, UNSW Law Journal 2009, vol 32(1)

- Reform of existing cultural heritage legislation is limited to a focus on places and things – it does not address the fundamental premise of what constitutes cultural heritage but relies on a flawed assumption that a focus on areas and objects gets most of the way.
- Amending the *Copyright Act* – this is inadequate for many of the reasons set out above. ICIP is far broader than the types of artistic and creative expression covered in the Copyright Act. The notions of individual authorship and originality at the heart of the Act are fundamentally inconsistent with notions of traditional knowledge;
- Treaty – agreement at international level is not enough to create protection at a domestic level. Parties to treaties and conventions must still implement the obligations under the treaty by enacting domestic legislation;
- Customary law – it is true that many Indigenous communities generally rely on customary law among themselves. However the difficulty for Indigenous communities is invariably seeking respect and protection for cultural heritage by non-Indigenous parties who are not bound by traditional or customary laws. While traditional laws can be recognized by the common law, the native title experience shows that this can be deeply complex and costly and still necessitates the enactment of legislation anyway. Further, unlike native title, the existing case law suggests that the common law of Australia may not recognise traditional laws relating to cultural heritage;
- Protocols – the existing protocols of the Australia Council and other arts organisations on Indigenous cultural expression are thoughtful and comprehensive but rely on good will of third parties choosing to meet the best practice standards contained in those protocols. While expanding those protocols to cover a wider range of cultural heritage material is useful, the difficulty with all protocols is that, absent the force of legislation, they are not binding and provide no enforcement avenue against those who chose to disregard them;
- Private law and contract – Arts Law has successfully campaigned for wider use of ICIP clauses protecting ICIP in contracts. However, this is still a band aid solution to address the lack of relevant legislative protection. Again it relies on the agreement of contracting parties and is seldom adopted where the Indigenous community or individual is in a poor bargaining position. It provides no protection or redress against third parties who are not in a contractual relationship or who refuse to agree to such clauses. Relying on the occasional use of such clauses in private contractual arrangements does not constitute compliance with the Australian government's obligations under the Article 31 of the *Declaration on the Rights of Indigenous People*.

Please do not hesitate to contact me if you require further information.

Yours sincerely

Delwyn Everard

Senior Solicitor

Submission to the UNHR Special Rapporteur on the impact of intellectual property regimes on the enjoyment of right to science and culture, as enshrined in particular in article 15 of the International Covenant on Economic, Social and Cultural Rights

Executive Director: Robyn Ayres

15 September 2014

THE ARTS LAW CENTRE OF AUSTRALIA

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts. Arts Law provides expert legal advice, publications, education and advocacy services each year to over 2,500 Australian artists and arts organisations operating across the arts and entertainment industries.

About our clients

Our clients reside in metropolitan centres and in regional, rural and remote parts of Australia. They are from all Australian states and territories. Our client base is multi-cultural, Indigenous and non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists. Each year Arts Law provides legal advice and other services to approximately 2,500 artists and arts organisations. Typically copyright issues comprise about 60% of all problems about which we provide advice.[1]

Our essential approach to copyright reform issues

As an independent organisation giving legal advice to copyright users, copyright owners and creators across Australia, Arts Law is in a unique position to comment on the balance between competing interest groups when considering proposed amendments to the *Copyright Act 1968* (Cth) (**Copyright Act**). Our perspective here is in keeping with our 'artists first' policy. That policy is implemented in our protocols as to circumstances in which Arts Law will provide advice or may decline to provide advice. That is, Arts Law's policy is to advise on matters that relate to, or affect the rights of individual artists. In situations where there is the potential for conflict between the interests of individual artists and those of arts organisations and other entities, Arts Law will normally not advise those arts organisations and other entities so as to avoid conflict with the 'artists first' policy.

Arts Law advocates for artists to be rewarded for their creative work so that they can practise their art and craft professionally. We also support fair and reasonable access to copyright material. We believe that balance is crucial in fostering creativity and is essential for the intellectual and cultural development of society.

The Arts Law welcomes the opportunity to provide this submission to the Special Rapporteur on the impact of intellectual property regimes on the rights to science and culture. In this submission, we will focus on the right of the rights of indigenous peoples and local communities to enjoy and access their cultural heritage.

[1] 1,487 of the 2,444 legal advice files in 2013 included copyright as one of the areas Arts Law advised on (Arts Law Annual Report 2013, p. 20).

Arts Law supports the submission of the Australian Copyright Council

Arts Law agrees with the submission of the Australian Copyright Council to the Special Rapporteur. The following paragraphs from the submission of the Australian Copyright Council also reflect the values of Arts Law:

> *"We believe in the values copyright laws protect: creative expression and a thriving, diverse, sustainable, creative Australian culture. A society's culture flourishes when its creators are secure in their right to benefit from their creative work and when access to those creative works is easy, legal and affordable. Copyright effectively and efficiently enables this balance between protection and access."*
>
> *"In our view, "access to culture" is most meaningful where it refers to the ability to connect with content of cultural, social and educational significance or value."*

Protection of 'Indigenous Knowledge' or 'Indigenous Cultural and Intellectual Property' (ICIP)

Arts Law provides an Indigenous arts law service - *Artists in the Black* (AITB)[2] and provides information and advice to Aboriginal and Torres Strait Islander artists and community arts centres including via the *Solid Arts* website.[3] The aim of AITB is to increase access to legal advice and information about arts law issues for Indigenous artists and communities. We therefore feel we are in a unique position to address the concerns of Aboriginal and Torres Strait Islander artists and community arts centres as to the adequacy of protocols to manage 'Indigenous Knowledge' or 'Indigenous Cultural and Intellectual Property' (ICIP) and the potential for better protection to be achieved through reform of the existing IP legislation of Australia.

In the request for submissions the Special Rapporteur expressed an interest in learning more about the concrete obstacles met by artists, authors and creators to benefit from the protection of the moral and material interests resulting from literary or artistic production of which he or she is the author. To meet this request for specific examples of obstacles, Arts Law provides to the Special Rapporteur a copy of a submission made on 14 June 2012 to *IP Australia*, which administers Australia's intellectual property rights system.[4] In this submission Arts Law provided some examples of situations in which the assistance of Arts Law has been requested and in which the provision of effective help to Aboriginal and Torres Strait Islander artists is hampered by the existing IP regimes.

FURTHER INFORMATION

Please contact Robyn Ayres if you would like us to expand on any aspect of this submission, verbally or in writing. Arts Law can be contacted at artslaw@artslaw.com.au or on +61 (02) 9356 2566.

Yours faithfully,

Robyn Ayres
Executive Director
Arts Law Centre of Australia

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[2] http://www.aitb.com.au/

[3] http://www.solidarts.com.au/

[4] http://www.ipaustralia.gov.au/

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WIPO
WORLD
INTELLECTUAL PROPERTY
ORGANIZATION

WIPO/GRTKF/IC/34/8
ORIGINAL: ENGLISH
DATE: JUNE 15, 2017

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

Thirty-Fourth Session
Geneva, June 12 to 16, 2017

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: DRAFT ARTICLES

Document prepared by the Secretariat

1. At the Thirty-Fourth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which is taking place from June 12 to 16, 2017, the Committee developed, on the basis of document WIPO/GRTKF/IC/34/6, a further text, "The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2". The Committee decided that this text, as at the close of Agenda Item 7, on June 15, 2017, be considered by the Committee under Agenda Item 8 (Taking Stock of Progress and Making a Recommendation to the General Assembly), in accordance with the Committee's mandate for 2016-2017 and the work program for 2017, as contained in document WO/GA/47/19. The present document is made available for consideration by the Thirty-Fourth Session of the IGC, as a working document under Agenda Item 8.

2. The text "The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2", as developed during the Thirty-Fourth Session of the Committee, is annexed to the present document.

3. *The Committee is invited to review the document contained in the Annex, in accordance with its 2016-2017 mandate, its work program for 2017 and the decision on agenda item 7 during its Thirty-Fourth Session referred to above.*

[Annex follows]

The Protection of Traditional Cultural Expressions: Draft Articles

Facilitators' Rev. 2 (June 15, 2017)

[PRINCIPLES/PREAMBLE/INTRODUCTION]

[1. [Recognizing]/[to recognize] that the cultural heritage of Indigenous [Peoples], [local communities] [and nations] / beneficiaries has intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values.

2. [Being]/[to be] guided by the aspirations [and expectations] expressed directly by Indigenous [Peoples], [local communities] [and nations] / beneficiaries, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such [peoples], communities [and nations] / beneficiaries.

3. [Acknowledging]/[to acknowledge] that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit Indigenous [Peoples], [local communities] [and nations] / beneficiaries, as well as all humanity.

4. [Recognizing]/[to recognize] the importance of promoting respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the Indigenous [Peoples], [local communities] [and nations] / beneficiaries that preserve and maintain expressions of these cultures and folklore.

5. [Respecting]/[to respect] the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities.

6. [Contributing]/[to contribute] to the promotion and protection of the diversity of traditional cultural expressions, [and the rights of beneficiaries over their traditional cultural expressions].

7. [Recognizing]/[to recognize] the importance of protection, preservation and safeguarding the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of Indigenous [Peoples], [local communities] [and nations] / beneficiaries, and for the benefit of humanity in general.

8. [Recognizing]/[to recognize] the importance of enhancing certainty, transparency, mutual respect and understanding in relations between Indigenous [Peoples], [local communities] [and nations] / beneficiaries, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.]

9. [[Acknowledging]/[to acknowledge] that the protection of traditional cultural expressions should contribute toward the promotion of innovation and to the transfer and dissemination of knowledge to the mutual advantage of holders and users of traditional cultural expressions and in a manner conducive to social and economic welfare and to a balance of rights and obligations.]

10. [[Recognizing]/[to recognize] the value of a vibrant public domain and the body of knowledge that is available for all to use, and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain.]

11. [To promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange [based on mutually agreed terms which are fair and equitable [and subject to the free prior informed consent and approval and involvement of] Indigenous [Peoples], [local communities] and [nations/beneficiaries.]]

12. [To [secure/recognize] rights [already acquired by third parties] and [secure/provide for] legal certainty [and a rich and accessible public domain].]

13. [Nothing in this [instrument] may be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future.]

[ARTICLE 1

POLICY OBJECTIVES

Alt 1

This instrument should aim to:

1.1 Provide beneficiaries with the means to:

(a) prevent the misappropriation and misuse/offensive and derogatory use/unauthorized use of their traditional cultural expressions;

(b) control ways in which their traditional cultural expressions are used beyond the traditional and customary context, as necessary;

(c) promote the equitable compensation/sharing of benefits arising from their use with free prior informed consent or approval and involvement/fair and equitable compensation, as necessary; and

(d) encourage and protect tradition-based creation and innovation.

Option

(d) encourage and protect creation and innovation.

1.2 Aid in the prevention of the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.

Alt 2

This instrument should aim to:

(a) [prevent the [misuse]/[unlawful appropriation] of protected traditional cultural expressions];

(b) encourage creation and innovation;

(c) promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange;

(d) secure/recognize rights already acquired by third parties and secure/provide for legal certainty and a rich and accessible public domain; and

(e) [aid in the prevention of the erroneous grant [or assertion] of intellectual property rights over traditional cultural expressions.]

Alt 3

The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, [and to recognize][recognizing] the rights of [beneficiaries] [indigenous [peoples] and local communities].

Alt 4

The objective of this instrument is to prevent misappropriation, misuse, or offensive use of, and to protect, traditional cultural expressions, and to recognize the rights of indigenous [peoples] and local communities.]

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[ARTICLE 2

USE OF TERMS

For the purposes of this instrument:

Traditional cultural expression means any form of [artistic and literary], [*other* creative, and spiritual,] [creative and literary or artistic] expression, tangible or intangible, or a combination thereof, such as actions[1], materials[2], music and sound[3], verbal[4] and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms],that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; that are the unique product of and/or directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities; and that are transmitted from generation to generation, whether consecutively or not. Traditional cultural expressions may be dynamic and evolving.

Alternative

Traditional cultural expressions comprise the various dynamic forms which are created, expressed, or manifested in traditional cultures and are integral to the collective cultural and social identities of the indigenous local communities and other beneficiaries.

[Public domain refers, for the purposes of this instrument, to tangible and intangible materials that, by their nature, are not or may not be protected by established intellectual property rights or related forms of protection by the legislation in the country where the use of such material is carried out. This could, for example, be the case where the subject matter in question does not fill the prerequisite for intellectual property protection at the national level or, as the case may be, where the term of any previous protection has expired.]

Alternative

Public domain means the public domain as defined by national law**.**

[Publicly available means [subject matter]/[traditional knowledge] that has lost its distinctive association with any indigenous community and that as such has become generic or stock knowledge, notwithstanding that its historic origin may be known to the public.]

[["Use"]/["Utilization"] means

(a) where the traditional cultural expression is included in a product:

(i) the manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or

[1] [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]
[2] [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]
[3] [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]
[4] [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

(ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.

(b) where the traditional cultural expression is included in a process:

(i) making use of the process beyond the traditional context; or

(ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or

(c) the use of traditional cultural expression in research and development leading to profit-making or commercial purposes.]]

[ARTICLE 3

[ELIGIBILITY CRITERIA FOR [PROTECTION]/[SAFEGUARDING]]/[SUBJECT MATTER OF [THE INSTRUMENT]/[PROTECTION]]

Alt 1

This instrument applies to traditional cultural expressions.

Alt 2

The subject matter of [protection]/[this instrument] is traditional cultural expressions:

(a) that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities;

(b) that are the unique product of, and directly linked with, the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities;

(c) that are transmitted from generation to generation, whether consecutively or not;

(d) that have been used for a term as has been determined by each [Member State]/[Contracting Party] but not less than 50 years/or a period of five generation; and

(e) that are the result of creative and literary or artistic intellectual activity.

Alt 3

This instrument applies to traditional cultural expressions. In order to be eligible for protection under this instrument, traditional cultural expressions must be distinctively associated with the cultural heritage of beneficiaries as defined in Article 4, and be created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation, and which may be dynamic and evolving.]

[ARTICLE 4

BENEFICIARIES OF [PROTECTION]/[SAFEGUARDING]

Alt 1

Beneficiaries of this instrument are indigenous [peoples] and local communities who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions.

Alt 2

The beneficiaries of this instrument are indigenous [peoples], local communities, [and]/[and where there is no notion of indigenous [peoples]], other beneficiaries as may be determined under national law.

Alt 3

The beneficiaries of this instrument are indigenous [peoples], local communities, and other beneficiaries as may be determined under national law.

Alt 4

The beneficiaries of this instrument are indigenous [peoples], as well as local communities and other beneficiaries, as may be determined by national law, [who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions].]

[ARTICLE 5

SCOPE OF [PROTECTION]/[SAFEGUARDING]

Alt 1

5.1 [Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.

5.2 Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.

Alt 2

5.1 Member States should/shall protect the economic and moral rights and interests of beneficiaries in secret and/or sacred traditional cultural expressions as defined in this instrument, as appropriate and in accordance with national law, and where applicable, customary laws. In particular, beneficiaries shall enjoy the exclusive rights of authorizing the use of such traditional cultural expressions.

5.2 Where the subject matter is still held, maintained, and used in a collective context, but made publicly accessible without the authorization of the beneficiaries, Member States should/shall provide administrative, legislative, and/or policy measures, as appropriate, to protect against false, misleading, or offensive uses of such traditional cultural expressions, to provide a right to attribution, and to provide for appropriate usages of their traditional cultural expressions. In addition, where such traditional cultural expressions have been made available to the public without the authorization of the beneficiaries and are commercially exploited, Member States should/shall use best endeavors to facilitate remuneration, as appropriate.

5.3 Where the subject matter is not protected under 5.1 or 5.2 Member States should/shall use best endeavors to protect the integrity of the subject matter in consultation with beneficiaries where applicable.

Alt 3

Option1

5.1 Where the protected traditional cultural expression is [sacred], [secret] or [otherwise known only] [closely held] within indigenous [peoples] or local communities, Member States should/shall:

(a) provide legal, policy and/or administrative measures, as appropriate and in accordance with national law that allow beneficiaries to:

i. [create,] maintain, control and develop said protected traditional cultural expressions;

ii. [discourage] prevent the unauthorized disclosure and fixation and prevent the unlawful use of secret protected traditional cultural expressions;

iii. [authorize or deny the access to and use/[utilization] of said protected traditional cultural expressions based on free prior and informed consent or approval and involvement and mutually agreed terms;]

iv. protect against any [false or misleading] uses of protected traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and

v. [prevent] prohibit use or modification which distorts or mutilates a protected traditional cultural expression or that otherwise diminishes its cultural significance to the beneficiary.

(b) encourage users [to]:

i. attribute said protected traditional cultural expressions to the beneficiaries;

ii. use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions]; and

iii. use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions.

5.2 [Where the protected traditional cultural expression is still [held], [maintained], used [and]/[or] developed by indigenous [peoples] or local communities, and is/are publicly available [but neither widely known, [sacred], nor [secret]], Member States should/shall encourage that users]/[provide legal, policy and/or administrative measures, as appropriate and in accordance with national law to encourage users [to]]:

(a) attribute and acknowledge the beneficiaries as the source of the protected traditional cultural expressions, unless the beneficiaries decide otherwise, or the protected traditional cultural expressions is not attributable to a specific indigenous people or local community[; and][.]

(b) use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions;

(c) [use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions[; and][.]]

(d) [refrain from any [false or misleading uses] of protected traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

5.3 [Where the protected traditional cultural expressions is/are [publicly available, widely known [and in the public domain]] [not covered under Paragraphs 1 or 2], [and]/or protected under national law, Member States should/shall encourage users of said protected traditional cultural expressions [to], in accordance with national law:

(a) attribute said protected traditional cultural expressions to the beneficiaries;

(b) use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiary [as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions;

(c) [protect against any [false or misleading] uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries[;]] [and]

(d) where applicable, deposit any user fee into the fund constituted by such Member State.]

Option 2

5.1 Member States should/shall safeguard the economic and moral interests of the beneficiaries concerning their protected traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.

5.2 Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.

5.3 Protection/safeguarding under this instrument(s) does not extend to uses of protected traditional cultural expressions: (1) for archival, uses by museums, preservation, research and scholarly uses, and cultural exchanges; and (2) to create literary, artistic, and creative works that are inspired by, borrowed from, derived from, or adapted from protected traditional cultural expressions.]

[ARTICLE 6

ADMINISTRATION OF [RIGHTS]/[INTERESTS]

Alt 1

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, to administer, in close consultation with the beneficiaries, where applicable, the rights/interests provided for by this instrument.

6.2 [The identity of any authority established or designated under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]

Alt 2

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, with the explicit consent of/in conjunction with the beneficiaries, to administer the rights/interests provided for by this [instrument].

6.2 [The identity of any authority established or designated under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]]

[ARTICLE 7

EXCEPTIONS AND LIMITATIONS

Alt 1

In complying with the obligations set forth in this instrument, Member States may in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries, [and the customary law of indigenous [peoples] and local communities,] nor unduly prejudice the implementation of this instrument.

Alt 2

In implementing this instrument, Member States may adopt exceptions and limitations as may be determined under national legislation including incorporated customary law.

1. To the extent that any act would be permitted under national law for works protected by copyright, signs and symbols protected by trademark law, or subject matter otherwise protected by intellectual property law, such acts [shall/should] not be prohibited by the protection of TCEs.

2. Regardless of whether such acts are already permitted under paragraph (1), Member States [shall/should] [may] have exceptions[, such as] for:

   (a) learning teaching and research;
   (b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;
   (c) the creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional cultural expressions.

3. A Member State may provide for exceptions and limitations other than those permitted under paragraph (2).

4. A Member State shall/should provide for exceptions and limitations in cases of incidental use/utilization/inclusion of a protected traditional cultural expression in another work or another subject matter, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.

Alt 3

In [complying with the obligations set forth in]/[implementing] this instrument, Member States may in special cases, adopt exceptions and limitations, provided such exceptions and limitations shall not unreasonably prejudice the legitimate interests of beneficiaries, taking account of the legitimate interests of third parties.

Alt 4

General Exceptions

7.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations and exceptions under national law [in consultation with the beneficiaries] [with the involvement of beneficiaries][, provided that the use of [protected] traditional cultural expressions:

(a) [acknowledges the beneficiaries, where possible;]

(b) [is not offensive or derogatory to the beneficiaries;]

(c) [is compatible with fair use/dealing/practice;]

(d) [does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and]

(e) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]

Alternative

7.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions under national law [, provided that [those limitations or exceptions]:

(a) are limited to certain special cases;

(b) [do not [conflict] with the normal [utilization] of the traditional cultural expressions by the beneficiaries;]

(c) [do not unreasonably prejudice the legitimate interests of the beneficiaries;]

(d) [ensure that the [use] of traditional cultural expressions:

i. is not offensive or derogatory to the beneficiaries;

ii. acknowledges the beneficiaries, where possible;] and

iii. [is compatible with fair practice.]]]

[End of Alternative]

7.2 [When there is reasonable apprehension of irreparable harm related to [sacred] and [secret] traditional cultural expressions, [Member States]/[Contracting Parties] [may]/[should]/[shall] not establish exceptions and limitations.]

Specific Exceptions

7.3 [[Subject to the limitations in Paragraph 1,]/[In addition,] [Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions, in accordance with national law or, as appropriate, of the [holders]/[owners] of the original work:

(a) [for learning, teaching and research, in accordance with nationally established protocols, except when it results in profit-making or commercial purposes;]

(b) [for preservation, [display], research and presentation in archives, libraries, museums or other cultural institutions recognized by national law, for non-commercial cultural heritage or other purposes in the public interest;]

(c) [for the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

[This provision [should]/[shall] not apply to [protected] traditional cultural expressions described in Article 5.1.]]

7.4 [Regardless of whether such acts are already permitted under Paragraph 1, the following [should]/[shall] be permitted:

(a) [the use of traditional cultural expressions in cultural institutions recognized under the appropriate national law, archives, libraries and museums, for non-commercial cultural heritage or other purposes in the public interest, including for preservation, [display], research and presentation;]

(b) the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

(c) [the use/utilization of a traditional cultural expression [legally] derived from sources other than the beneficiaries; and]

(d) [the use/utilization of a traditional cultural expression known [through lawful means] outside of the beneficiaries' community.]]

7.5 [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law, for works protected by [intellectual property rights [including]]/[copyright, or signs and symbols protected by trademark, or inventions protected by patents or utility models and designs protected by industrial design rights, such act [should]/[shall] not be prohibited by the protection of traditional cultural expressions].]

[ARTICLE 8]

[TERM OF [PROTECTION]/[SAFEGUARDING]

Option 1

8.1 [Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional cultural expressions in accordance with [this [instrument]/[[which may] [should]/[shall] last as long as the traditional cultural expressions fulfill/satisfy the [criteria of eligibility for protection] according to this [instrument], and in consultation with beneficiaries.]]

8.2 [Member States]/[Contracting Parties] may determine that the protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong, [should]/[shall] last indefinitely.

Option 2

8.1 [Member States]/[Contracting Parties] shall protect the subject matter identified in this [instrument] as long as the beneficiaries of protection continue to enjoy the scope of protection in Article 3.

Option 3

8.1 [[Member States]/[Contracting Parties] may determine that the term of protection of traditional cultural expressions, at least as regards their economic aspects, [should]/[shall] be limited.]]

[ARTICLE 9]

FORMALITIES

Option 1

9.1 [As a general principle,] [Member States]/[Contracting Parties] [should]/[shall] not subject the protection of traditional cultural expressions to any formality.

Option 2

9.1 [[Member States]/[Contracting Parties] [may] require formalities for the protection of traditional cultural expressions.]

9.2 Notwithstanding Paragraph 1, a [Member State]/[Contracting Party] may not subject the protection of secret traditional cultural expressions to any formality.

[ARTICLE 10

[SANCTIONS, REMEDIES AND EXERCISE OF [RIGHTS]/[INTERESTS]]

Alt 1

Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures, to address violations of the rights contained in this instrument.

Alt 2

10.1 Member States shall, [in conjunction with indigenous [peoples],] put in place accessible, appropriate, effective, [dissuasive,] and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument. Indigenous [peoples] should have the right to initiate enforcement on their own behalf and shall not be required to demonstrate proof of economic harm.

10.2 If a violation of the rights protected by this instrument is determined pursuant to paragraph 10.1, the sanctions shall include civil and criminal enforcement measures as appropriate. Remedies may include restorative justice measures, [such as repatriation,] according to the nature and effect of the infringement.

Alt 3

Member States should undertake to adopt appropriate, effective and proportionate legal and/or administrative measures, in accordance with their legal systems, to ensure the application of this instrument.

Alt 4

Member States/Contracting Parties should/shall provide, in accordance with national law, the necessary legal, policy or administrative measures to prevent willful or negligent harm to the interests of the beneficiaries.]

[ARTICLE 11]

[TRANSITIONAL MEASURES

11.1 This [instrument] [should]/[shall] apply to all traditional cultural expressions which, at the time of the [instrument] coming into effect/force, fulfill the criteria set out in this [instrument].

11.2 *Option 1* [[Member States]/[Contracting Parties] [should]/[shall] secure the rights acquired by third parties under national law prior to the entry into effect/force of this [instrument]].

11.2 *Option 2* Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect/force of this [instrument] and which would not be permitted or which would be otherwise regulated by the [instrument], [[should]/[shall] be brought into conformity with the [instrument] within a reasonable period of time after its entry into effect/force, subject to Paragraph 3]/[[should]/[shall] be allowed to continue].

11.3 With respect to traditional cultural expressions that have special significance for the beneficiaries and which have been taken outside of the control of such beneficiaries, these beneficiaries [should]/[shall] have the right to recover such traditional cultural expressions.]

[ARTICLE 12]

[RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS

12.1 [Member States]/[Contracting Parties] [should]/[shall] implement this [instrument] in a manner [mutually supportive] of [other] [existing] international agreements.]

[12.2 Nothing in this instrument may/shall be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future, as well as the rights of indigenous [peoples] enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

12.3 In case of legal conflict, the rights of the indigenous [peoples] included in the aforementioned Declaration shall prevail and all interpretations shall be guided by the provisions of said Declaration.]

[ARTICLE 13]

[NATIONAL TREATMENT

Each [Member State]/[Contracting Party] [should]/[shall] accord to beneficiaries that are nationals of other [Member States]/[Contracting Parties] treatment no less favourable than that it accords to beneficiaries that are its own nationals with regard to the protection provided for under this [instrument].]

[ALTERNATIVES TO ARTICLES 8, 9, 10, 11 and 13
NO SUCH PROVISIONS]

[ARTICLE 14]

[TRANSBOUNDARY COOPERATION

In instances where [protected] traditional cultural expressions are located in territories of different [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] co-operate in addressing instances of transboundary [protected] traditional cultural expressions.], with the involvement of indigenous [peoples] and local communities concerned, where applicable, with a view to implementing this [instrument].]

ARTICLE 15

[CAPACITY BUILDING AND AWARENESS RAISING

15.1 [Member States]/[Contracting Parties] [should]/[shall] cooperate in the capacity building and strengthening of human resources, in particular, those of the beneficiaries, and the development of institutional capacities, to effectively implement the [instrument].

15.2 [Member States]/[Contracting Parties] [should]/[shall] provide the necessary resources for indigenous [peoples] and local communities and join forces with them to develop capacity-building projects within indigenous [peoples] and local communities, focused on the development of appropriate mechanisms and methodologies, such as new electronic and didactical material which are culturally adequate, and have been developed with the full participation and effective participation of indigenous [peoples] and local communities and their organizations.

15.3 [In this context, [Member States]/[Contracting Parties] [should]/[shall] provide for the full participation of the beneficiaries and other relevant stakeholders, including non-government organizations and the private sector.]

15.4 [Member States]/[Contracting Parties] [should]/[shall] take measures to raise awareness of the [instrument,] and in particular educate users and holders of traditional cultural expressions of their obligations under this instrument.]

[End of Annex and of document]