



Protection of Indigenous Knowledge in the Intellectual Property System

Victorian Aboriginal Child Care Agency

April 2021

VACCA

PO Box 494, Northcote Plaza

Northcote

Victoria, 3070

Email: vacca@vacca.org



Introduction

The Victorian Aboriginal Child Care Agency (VACCA) welcomes the opportunity to provide input into Intellectual Property Australia's Indigenous Knowledge Consultation Paper. VACCA's submission seeks to advocate for the protection and promotion of Indigenous Cultural Intellectual Property (ICIP) rights.

Note on Language

- We use the term 'Aboriginal' to describe the many Aboriginal and Torres Strait Islander Peoples, Clans and Traditional Owner Groups whose traditional lands comprise what is now called Australia.
- Intellectual Property is referred to as 'IP'.
- Indigenous Cultural and Intellectual Property is referred to as 'ICIP'.
- Indigenous Knowledge is referred to as 'IK'.

About VACCA

VACCA is the lead Aboriginal child welfare organisation in Victoria. As an Aboriginal Community Controlled Organisation (ACCO), VACCA provides services to vulnerable Aboriginal children, families, and communities. VACCA's vision is Aboriginal self-determination – Live, Experience and Be. Our purpose is supporting culturally strong, safe and thriving Aboriginal communities.

VACCA's key areas of work are in service delivery, advocacy and training. VACCA works across the spectrum of prevention, early help, early intervention, targeted support and tertiary level services.

Our approach is underpinned by principles of; prevention, early intervention and therapeutic healing, premised on human rights, self-determination, promoting client voice, cultural respect and safety. VACCA delivers cultural training and develops resources for the Aboriginal community and for a range of organisations.

VACCA advocates for better outcomes for Aboriginal children, young people, families and community members, and for their right to be connected to culture. VACCA believes culturally appropriate services that support the safety and social and emotional wellbeing



(SEWB) of children, young people and families can minimise involvement in tertiary systems such as Child Protection and Youth Justice.

At VACCA we approach mental health from the perspective of Aboriginal SEWB in line with the Balit Murrup framework

“The Aboriginal concept of social and emotional wellbeing is an inclusive term that enables concepts of mental health to be recognised as part of a holistic and interconnected Aboriginal view of health which embraces social, emotional, physical, cultural and spiritual dimensions of wellbeing.”¹

Health is not just the absence of illness, it is wellbeing determined by the full range of social, emotional, physical, cultural and spiritual needs being met, and self-determination.

VACCA’s Pursuit to Protect our Cultural Knowledge

1. VACCA has been protecting and promoting the rights of Aboriginal children and families for over 40 years, however it’s only been in the past few years that we have come to understand the existing legal frameworks that support our capacity to assert our rights to protect VACCA’ cultural knowledge, otherwise known as ICIP.
2. The ongoing impact of colonisation transcends all aspects of Aboriginal peoples’ lives, including data sovereignty. Aboriginal ways of knowing and doing, including ICIP, are established by customary law and unprotected by IP law in Australia. This means that the ICIP rights of Aboriginal people are vulnerable to exploitation. Protecting and promoting ICIP in the existing IP legal framework is one way of making it clear that this is a valid knowledge space.
3. A number of years ago, VACCA renegotiated all contracts and funding agreements with the Department of Health and Human Services (DHHS), now Department of Families Fairness and Housing (DFFH), to ensure that VACCA owned our ICIP. This would give permission to DHHS/DFFH to use our ICIP, with appropriate acknowledgements, but not to change, manipulate or use the ICIP for any purpose outside of the contractual agreement.
4. Our previous contractual and funding agreements, whether with government departments, universities or mainstream Community Service Organisations, in many

¹ State of Victoria, Department of Health and Human Services, ‘Balit Murrup Aboriginal Social and Emotional Wellbeing Framework 2017-2027’, 10.



circumstances assigned the rights to the ICIP created and developed by VACCA to the other party. This was against cultural protocols and principles of data sovereignty and self-determination. VACCA is assertively working towards amending these, or negotiating new contracts.

5. VACCA still needs to renegotiate ownership of our ICIP with the Department of Justice and Community Safety (DJCS), currently this is being done on a case by case basis.
6. VACCA has engaged the services of Terri Janke and Company, an Indigenous law firm that specialises in Indigenous Cultural and Intellectual Property, to develop our own IP Management Plan. The IP Management Plan identifies a range of ways we can protect and manage the IP and ICIP we create, develop and use. The IP Management Plan covers copyright, trademarks, domain names, websites and social media, merchandising, confidential information and privacy, ICIP and contracts including with employers, contractors and funders.
7. The IP Management Plan ensures we have strategies in place to comply with IP and other related laws, that respect and recognise ICIP and act on misuse of ICIP.

VACCA's Response to the Indigenous Knowledge Consultation Paper

8. VACCA acknowledges that we are not an expert organisation on the subject matter of IP. Our submission responds to the broad themes of the Indigenous Knowledge Consultation Paper.

The proposed Indigenous Advisory Panel

9. VACCA supports the establishment of a body to ensure that Aboriginal peoples have a voice around ICIP with IP Australia. VACCA contends however that this body needs to have regulatory powers to enforce breaches. This would centralise accreditation, authenticity, compliance and complaints for ICIP issues.
10. It is our recommendation that this body consists of an elected body of Aboriginal people with proven expertise in ICIP, and IK.
11. Elected members should be consulted on all IP applications that seek to use IK to ensure Aboriginal voices are central in decision-making. Members should engage with community and ACCOs to safeguard against the following:
 - Offensive use of Aboriginal language
 - Appropriation of Aboriginal language
 - The commercialisation of Aboriginal language without consent.



12. VACCA contends that Terri Janke's summation of around the impact of cultural misappropriation is critical as part of these considerations,

The commercialisation of Indigenous intellectual and cultural property has often been done without respect for Indigenous cultures, without consent or legal Indigenous control and without sharing of benefits with Indigenous communities. Indigenous cultural heritage has often been distorted for commercial interests. This in turn is leading to its erosion.²

13. It is therefore critical that where free prior and informed consent, as per Article 31 the *United Nations Declaration on the Rights of Indigenous Peoples*, has been obtained from Traditional Owners.

14. VACCA supports a diverse membership of Aboriginal peoples from different communities and Country to ensure that the body is reflective and respectful of diverse cultural knowledge and understandings. Where an application concerns one particular community, VACCA recommends that formal advice is sought from the Traditional Owners of that area.

VACCA supports an enhanced approach to trademark and design applications

15. It is crucial that IK owners benefit from, and consent to, the use of their IK. VACCA supports an enhanced approach to trademark and design applications that strengthens the rights of IK owners and protects against misuse of IK.

16. VACCA is concerned about the tension between trademarking IK and commodifying Aboriginal culture, language and knowledge. The concern is that ICIP could be trademarked without the involvement, consent or recognition of Aboriginal peoples.

17. Traditional Owners and community organisations should be able to trademark their ICIP to prevent other individuals or institutions from using it for commercial gain. Approval should only be granted to applications seeking to use IK, where free prior and informed consent, has been obtained from Traditional Owners.

18. Applications seeking to use IK should obtain written consent from the appropriate Traditional Owners. VACCA supports the introduction of evidence requirements to show consent was obtained. The Panel should be engaged to assess the evidence of each

² Terri Janke, (1999) 'Respecting Indigenous Cultural And Intellectual Property Rights', *University of New South Wales Law Journal* (22(2), [1].



application seeking to use IK. Where consent is not obtained by the appropriate Traditional Owners, the application should be rejected.

19. There should be no threshold for approval where ‘reasonable steps to obtain consent’ were undertaken.

VACCA supports a requirement to declare the source of IK in new innovations

20. For too long Aboriginal ways of knowing and doing have not been treated with respect or held to the same regard as other academic pursuits. This has created barriers when ‘evidence based’ research is needed, or ‘evidence based’ programs are funded that are not culturally appropriate, culturally safe or as effective when working with community. Aboriginal ways of knowing and doing need to be prioritised and protected.
21. VACCA encourages transparency and recognition of IK owners and supports disclosure of the use of IK in new innovations. Ethical and transparent practices should require the source of IK to be declared and publicly acknowledged. This is a key aspect of data sovereignty. The source of IK needs to be assertively built into new agreements, contracts and Memoranda of Understanding.
22. VACCA is developing our own Aboriginal evidence base so that we can tell our stories and helps ensure we have control of our data that relates to the children and families we work with. This will help improve our practice, support progress towards Aboriginal data sovereignty and continue to advocate for the rights of Aboriginal children, young people and families.
23. VACCA seeks to dismantle unconscious bias and honour and protect ICIP from further colonising Aboriginal peoples. Introducing a requirement to declare the source of IK in new innovations is a step in the right direction.
24. This is in line with Priority Reform Four of the National Agreement on Closing the Gap – shared access to data and information at a regional level. This Priority Reform clearly identifies the need for ACCOs to have equal access to data so there is an Aboriginal evidence base that can be utilized in designing, implementing and evaluating policies and programs. Transparent data will also allow for greater accountability across sectors.
25. There needs to be appropriate guidance and models of governance embedded into practice that protect ICIP.



VACCA supports the promotion of authenticity labelling

26. VACCA is committed to purchasing and promoting Aboriginal owned products. We support changes to the labelling of Aboriginal products to allow consumers to make informed, transparent and ethical choices when purchasing products.
27. Kinaway and Supply Nation provide business support to Aboriginal creators and suppliers. VACCA endorses these companies as model examples of promoting and supporting verified Aboriginal owned companies.
28. VACCA notes that Aboriginal organisations can seek registration under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). Advice, support and training services are available to Aboriginal organisations registered under the CATSI Act.
29. The proposed ICIP regulatory body must have the powers and authority to enforce breaches of IK appropriation.

Other Comments and Considerations

30. Training and education should be provided to all workplaces who use, create and develop ICIP. VACCA understands the importance of protection against the infringement and misuse of ICIP. All staff, in all workplaces should be aware of ICIP and IP issues.
31. VACCA contends that all levels of government must include in their IP policies an acknowledgment of ICIP rights and a commitment to uphold these aligned to cultural protocols. As an example, the Victorian Government's *Whole of Victorian Government Intellectual Property Policy*³ makes no mention of IK or ICIP. A statement of adherence to ICIP principles and protocols should also be included in all government frameworks and agreements such as *Wungurilwil Gagapduir Aboriginal Children and Families Agreement*⁴,

Recommendations

VACCA makes the following recommendations for IP Australia to undertake in conjunction with the development of a regulatory ICIP body:

³ State of Victoria, Department of Treasury and Finance, (2012) *Whole of Victorian Government Intellectual Property Policy: Intent and Principles*.

⁴ State of Victoria, Department of Health and Human Services (2018) *Wungurilwil Gagapduir Aboriginal Children and Families Agreement*.



1. To develop a national standard that ICIP remains with Traditional Owners and ACCOs.
2. For all levels of government to update their IP policies to ensure that they acknowledge, promote and adhere to ICIP principles.
3. To develop and promote cultural protocols about the appropriate use of Aboriginal languages, words and IK more broadly. These protocols should be legally enforceable.
4. To ensure that free, prior and informed consent must be sought from the appropriate Traditional Owners as a threshold of consent for approval to use IK for commercial use.
5. For funding and resources to be provided to develop and implement education and training to community about their rights and responsibilities around IK, ICIP and more broadly IP.

We welcome the opportunity to discuss these recommendations further and work together to ensure that that ICIP is protected.

For Further Information

For further information, please contact Sarah Gafforini, Director Office of the CEO.

sarahg@vacca.org | 0427 621 421