

WORLD INTELLECTUAL PROPERTY ORGANISATION

INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND
GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE
24th SESSION

PANEL PRESENTATION

Indigenous Peoples' Perspectives on

'... the right to maintain, control, protect and develop their intellectual property over... traditional knowledge...'

(Article 31, UN Declaration on the Rights of Indigenous Peoples)"

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DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Let me commence my presentation by examining the words of Article 31 of the Declaration. The article is deliberately crafted to emphasise the detail of the right of Indigenous Peoples to control their cultural heritage. It speaks of the right to maintain ... control ... protect ... and develop.

Article 31

- 1 Indigenous peoples have the right 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, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
- 2 In conjunction with indigenous peoples, **States shall take effective measures** to recognize and protect the exercise of these rights.

When we look elsewhere for the human right standard which applies to culture we find a different approach such as seen in the Universal Declaration on Human Rights. In Article 27 of the UDHR we see that the right to culture is expressed as "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits" and "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

We understand that under the UDHR that **every individual** has the right to culture, but the UDHR (and the drafters of the UDHR at the time) makes an assumption that the combined or collective interests of peoples serves to define what is the culture. It is these same interests

which address the important matters to maintain the culture, to control the culture, to protect the culture and to develop the culture. For the most part we assume 'the State' is the institution of the peoples to manage these rights.

To consider the same matter from another perspective if we take Article 31 of the Declaration and replace "Indigenous Peoples" with the words "All peoples" then we have what could be easily recognised and called a self-evident statement; i.e.

"All peoples have the right to **maintain, control, protect and develop** their cultural heritage, traditional knowledge and traditional cultural expressions, etc. All peoples have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."

[So move along please! There is nothing to be seen here!]

So we know that the Declaration on the Rights of Indigenous Peoples introduces no new rights into the international human rights system. What the Declaration achieves is to identify how the collective interests of peoples to human rights should be articulated. The other key achievement of this Declaration is that it focusses particularly upon the rights which Indigenous Peoples have been historically denied and which continue to this day to result in inequality, denial and oppression of the peoples in a dominant and transplanted major society.

Article 31 also contains a second paragraph. (I remind you that these paragraphs as seen in Article 31(2) appear at the insistence of States.) Uncommon to declarations and more likely to be seen in treaties the second paragraph calls upon States to take an action; in this case to 'take effective measures to recognize and protect the exercise of these rights'. We can deduce that at the time of drafting States has deliberate intention to define the obligations of States in relation to the rights of Indigenous Peoples. [Can you tell me what your State's position was?]

Before moving away from the text of the Declaration I want to bring attention also to the fact there are 20 preambular paragraphs and articles in the Declaration which have direct relevance to the cultural heritage and cultural development of Indigenous Peoples. I will just mention two of these as follows.

Article 29(1)

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

PP 6

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

WORK OF THE IGC TO CONCLUDE AN INTERNATIONAL INSTRUMENT ON TK

I was fortunate to participate in the drafting of the UN Declaration on the Rights of Indigenous Peoples since 1996 and remained intensely involved throughout the ultimate negotiations which were not concluded until mere days before the UN General Assembly adopted the Declaration on 13 September 2007.

I can verify that Article 31, addressing property rights, was the last article to be introduced and agreed upon in the drafting stages. By the time it was introduced the World Intellectual Property Organisation (WIPO) was already well underway with the meetings of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore.

The debate at the time was whether the rights of Indigenous Peoples to intellectual property interests were to be addressed in the Declaration or in the instruments being developed under the auspices of the Convention on Biological Diversity or in the WIPO. Indigenous Peoples delegations were insistent that the Declaration be the instrument to define the right.

If we follow the progress of the IGC meetings since 2000 we might notice that the endorsement of the Declaration in 2007 signalled a shift or adjustment in the context this WIPO instrument is being drafted. This adjustment may not be easily discernable but marks the transition of Indigenous claims to rights pursued at the international level, from being 'ambitious' to 'absolute'.

As UN Special Rapporteur on the rights of Indigenous Peoples, Jim Anaya, pointed out in his panel presentation during the last session the Declaration on the Rights of Indigenous Peoples is not a sudden addition of special rights for Indigenous Peoples but a confirmation of rights which have been progressively incorporated in international norms and laws over an extended period of time. (I am not going to repeat in my presentation the excellent information provided to you by the UN Special Rapporteur in February, but I fully support his paper and recommend that you do revisit it as context for presentations from this panel on Article 31 of the Declaration.)

Understanding the significance of 13 September 2007, we might see that the adoption of the Declaration signalled the beginning of Indigenous Peoples' campaign for their rights to be formally acknowledged across the range of international authorities and instruments. There are many examples to confirm this dynamic, eg in CBD, World Bank, FAO, ILO, UNESCO.

Having presented this scenario it is, in my view, just not feasible nor wise for this Inter-Governmental Committee to conclude its drafting of an international instrument on the protection of Intellectual Property and GRTKF without due acknowledgement of and attention to Indigenous Peoples self-determination.

While there may still be concern within this forum to recognising Indigenous Peoples as 'peoples' or to concede that the right of self-determination includes autonomy and control, the alternative to 'recognition' is just simply unacceptable. Much effort has been expended, and in no small way through these panel presentations, to increase awareness and understanding in the WIPO IGC of the revised status of Indigenous Peoples and their right to own their intellectual property. To fail to understand the importance of these matters is to err completely.

In 2013, it is now time for this IGC to look to conclude its work, to embrace the realisation that Indigenous populations are holders of property rights, to accept that Indigenous Peoples can and will exercise their right to self-determination, and to conceive an international instrument that will not be rejected by the Indigenous Peoples.

In my most recent reading of the three draft documents, on TCEs, TK and GR, I continue to detect a reservation in those documents against control by Indigenous Peoples and a bias towards unilateral States' roles and responsibilities in procedures. Therefore I would like to devote the rest of my presentation to actions we are taking in Australia, as the Aboriginal and Torres Strait Islander peoples, to realise self-determination on matters of Intellectual Property rights.

OUR CULTURE, OUR FUTURE

My narrative begins in 1997 when a comprehensive national report was released by the then Aboriginal and Torres Strait Islander Commission (ATSIC) entitled 'Our Culture, Our Future'. I was one of the contributors at the time to that report.

This report found, inter alia, that the existing intellectual property laws in Australia were inadequate in recognising and protecting Indigenous Cultural and Intellectual Property rights. It noted the fact that notions of intellectual property by non-Indigenous interests are quite different from Indigenous values. The report recommended that Indigenous Peoples be better informed about intellectual property laws and how these impact on their cultural obligations. The report also concluded there was a need for greater protection for Indigenous heritage, particularly in relation to communal rights, and the protection of sacred/secret material.

The two most relevant and significant recommendations from that report were:

- that a national indigenous cultural authority be established
- that a *sui generis* legislative framework should be arranged to protect Indigenous Cultural and Intellectual Property Rights, including ecological knowledge.

It was clear then, over fifteen years ago, that protection of the cultural heritage of the Aboriginal and Torres Strait Islander peoples and the protection of the Intellectual Property rights was not possible without recognition of the existence of Indigenous systems and the roles they played.

The report specified:

"Indigenous laws for dealing with Indigenous cultural and Intellectual Property already exist, and have existed and developed over thousands of years. The feedback shows Indigenous people already live by a set of laws which govern how they can use, deal and disseminate Indigenous cultural knowledge."

The report concluded that a national structure is required to preserve, enable and enhance the operation of the Indigenous juridical system. It noted that the existing national laws, in place to address intellectual property, were insufficient to deal with the complexity and nature of the interests of the Aboriginal and Torres Strait Islander peoples.

To accommodate the distinct nature of the intellectual property of the Aboriginal and Torres Strait Islander peoples it was necessary, according to the report, to accept there were two systems - parallel systems - of law in operation. Most importantly it was necessary for the national legal system to recognise that the Aboriginal and Torres Strait Islander laws were in place and working.

However this is not to say the Aboriginal and Torres Strait Islander laws were not vulnerable or were able to survive into the future without the appropriate support. As we can appreciate the Indigenous laws are easily overridden and decimated by the dominant society and value system. Therefore it was deemed also necessary to ensure that Aboriginal and Torres Strait Islander control over their cultural heritage and intellectual property be supported through a national structure.

The report concluded that "a holistic, realistic and culturally appropriate approach should be taken to resolving the problem, an approach that allows Indigenous people the autonomy to develop — within the various local, regional and national power structures — mechanisms which maintain and strengthen their cultures and ensure that they have something to pass on to future generations."

It recommended that Aboriginal and Torres Strait Islander peoples should work together towards solving and monitoring the various problems and should form national and international networks to share knowledge and experience. Adequate funding and infrastructure is required. It also recommended that an independent National Indigenous Cultural Authority be established and controlled by Indigenous people to protect Indigenous Cultural and Intellectual Property Rights.

Regrettably the new government at the time ignored the report and its recommendations, and for many of the intervening years no attention has been given to the Indigenous perspectives provided through that authoritative report. In particular discussion on the establishment of a *sui generis* legal framework has not progressed and the operation of two systems of law in Australia remains as incomprehensible now to the State as it did then.

CBD - NAGOYA PROTOCOL

In 2011 the Parties to the Convention on Biological Diversity concluded the Nagoya Protocol, a treaty under the Convention to give effect to the provisions on "Access and Benefit Sharing" under article 10(c) of the Convention.

The negotiation of this protocol was at the time arduous and complex. There was a large gulf between the positions of many State Parties and Indigenous Peoples. For example, the drafting group, as for this IGC, had great difficulty accepting the terminology of "Indigenous Peoples" and the accompanying tenet that Indigenous Peoples had specific rights to autonomy and governance that undermined the political stance of the States.

While trying to defy these principles, the States were otherwise compelled by the workings of article 10(c) which requires the 'Contracting Parties' to protect and encourage "customary use of biological resources in accordance with traditional cultural practices", and by article 8(j) which obliges Parties to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities". Thankfully the protocol did ultimately acknowledge the Declaration on the Rights of Indigenous Peoples, and affirmed that nothing in the Protocol extinguishes existing rights of 'Indigenous and local communities'.

Australia has now signed the Nagoya Protocol but is yet to ratify it. Our representation to the Government of Australia on this Protocol has not been able to establish how or when the Nagoya Protocol is to be implemented. For us it is a critical issue as the Protocol sets standards and requirements for the protection of the Traditional Knowledge of the Aboriginal and Torres Strait Islander peoples, including the identification or establishment of mechanisms necessary to authenticate or authorise the use of Traditional Knowledge. In the absence of any major direct engagement between the Government of Australia and my organisation - the National Congress of Australia's First Peoples - to apply the provisions of the Nagoya Protocol we have returned to the previous work undertaken by the Aboriginal and Torres Strait Islander peoples to address the protection of Traditional Knowledge and associated systems.

Late last year we submitted to the Government, in the 'new initiatives' process leading up to the 2013 National Budget announcements, a priority proposal to ultimately set in place a 'National Indigenous Cultural Authority'. Our proposal sought assistance to develop a 'business plan' that might identify the role, structural requirements and resource needs of such a national authority.

NATIONAL INDIGENOUS CULTURAL AUTHORITY

Renowned Aboriginal and Torres Strait Islander lawyer, Terri Janke, has authored a publication on the establishment of a national indigenous cultural authority entitled "Beyond Guarding Ground". Congress has commissioned Ms Janke to progress the concept in the ranks of government and community, with particular attention to the recent interests under the Nagoya Protocol and the WIPO IGC on GRTKF.

In her published works Ms Janke identifies that such an authority arises out of a number of rights that Aboriginal and Torres Strait Islander people have identified as priority and in need of intention. These rights, first compiled in the "Our Culture, Our Future" report include:

- Right to **own and control** Indigenous Cultural and Intellectual property
- Right to **define** what constitutes Indigenous Cultural and Intellectual property
- Right to **control** the commercial use and to benefit commercially
- Right to full and proper **attribution**
- Right to be recognised as the primary **guardians and interpreters** of their cultures
- Right to **protect sacred** and significant sites/symbols/objects
- Right to **prevent derogatory, offensive and fallacious use**
- Right to **maintain secrecy**
- Right to **have a say** in preservation and care
- Right to **control use** of traditional knowledge

As we can witness these rights, rights independently articulated by the Aboriginal and Torres Strait Islander peoples themselves, are in the same ballpark as covered in the WIPO IGCs documents.

Ms Janke's return to these issues, since 1997, has been prompted by developments such as the adoption of the Declaration, the completion of the Nagoya Protocol, and the work of the WIPO IGC.

Beyond Guarding Ground sets out the legitimate and critically important needs that Aboriginal and Torres Strait Islander peoples have to maintain and control their cultural interests including intellectual property interests.

The first and foremost need is to have an authority that will be concerned with the realisation and management of rights. This most obvious requirement cannot be underestimated. Article 31 of the Declaration is specific in referring to the right to 'maintain, control, protect and develop' the cultural heritage and intellectual property. In the State these widespread and deeply integrated responsibilities are carried out through a myriad of cultural, bureaucratic and legal institutions, laws, procedures and programs. Yet for Indigenous Peoples, most of whom around the world remain deprived of equal treatment in national agendas these responsibilities are unaddressed or under-resourced.

The next matter is 'cultural maintenance', and the next is 'representation' in the interface with the dominant society and investors in Aboriginal and Torres Strait Islander cultural heritage.

The list goes on to include the infrastructure of a *sui generis* legal framework, establishment of protocols including the exercise of 'Free, Prior and Informed Consent', requirements for registers and databases, templates for legal contracts and agreements, dispute resolution and maintenance of collective rights.

We have no confidence that an arrangement will be made with the Government of Australia for the establishment of a national indigenous cultural authority but we are convinced that some vision and planning is now necessary.

CONCLUDING COMMENT

'Experimental' structures and treaties designed by States for Indigenous Peoples without due regard for the ultimate responsibilities held by the Indigenous Peoples will, in the longer term fail. In the short term much damage and loss can occur to the Indigenous Peoples themselves. Personally I have seen bad procedure, enshrined in legislation, result in adverse outcomes which frustrate the interface with Indigenous Peoples and lead to negative rather than positive outcomes.

With these words I encourage the IGC to think of success, and how it is to be achieved in the protection of the GRTKF of Indigenous Peoples.

Thank you.