

REGIONAL
FRAMEWORK

for the

*Protection of
Traditional Knowledge
and
Expressions of Culture*

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**BACKGROUND ON THE REGIONAL FRAMEWORK
FOR THE
PROTECTION OF TRADITIONAL KNOWLEDGE
AND EXPRESSIONS OF CULTURE**

The Pacific Regional Framework comprising this Background Note, Model Law and Explanatory Memorandum, has been developed to assist Pacific Island countries and territories wishing to legally protect its Traditional Knowledge and Expressions of Culture. The framework is developed in response to calls from the region, in the face of increasing exploitation and inappropriate commercialization of their traditional knowledge and expressions of culture.

The Pacific Regional Framework has been developed in close consultation with SPC, UNESCO and Forum Pacific Island member countries and territories and the Council of Pacific Arts, which comprises the twenty – seven countries and territories which participate in the Festival of Pacific Arts. It is reflective of developments taking place at an international level such as the World Intellectual Property Organisation (WIPO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

The Model Law for the Protection of Traditional Knowledge and Expressions of Culture is a draft model law establishing a new range of statutory rights for traditional owners of traditional knowledge and expressions of culture. The model law provides a basis for Pacific Island countries wishing to enact legislation for the protection of traditional knowledge and expressions of culture.

If an individual country wishes to enact the model law, it is free to adopt and/or adapt the provisions as it sees fit in accordance with national needs, the wishes of its traditional communities, legal drafting traditions and so on. Matters of detail or implementation are left to be determined by national laws and systems.

It should be noted that the model law is to be regarded as a starting point and will continue to be modified consequent on members' experiences in enacting and administering the law and in accordance with further international developments.

The SPC and Forum Secretariat will assist members, on request, wishing to proceed with the adaptation and enactment of national legislation for the protection of Traditional Knowledge and Expressions of Culture. The SPC and the Forum Secretariat will seek legal-technical assistance from WIPO and UNESCO as appropriate on the establishment, strengthening and effective implementation of the Model Law in accordance with the SPC and Forum Secretariat, Regional Implementation Action Plan.

Recognising that the Model Law is appropriate for national protection only and given that WIPO Members at the 3rd meeting of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, held in Geneva on 13 –21 June 2002, did not support the examination of possible measures for the regional and international protection of expression of folklore, SPC and the Forum Secretariat will undertake to examine existing and future possibilities on the extra-territorial application of the Model Law.

**MODEL LAW FOR THE
PROTECTION OF TRADITIONAL KNOWLEDGE
AND EXPRESSIONS OF CULTURE**

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**MODEL LAW FOR THE
PROTECTION OF TRADITIONAL KNOWLEDGE
AND EXPRESSIONS OF CULTURE**

PART 1 – PRELIMINARY

1 Short title

This Act may be cited as the Protection of Traditional Knowledge and Expressions of Culture Act *[Enacting country to insert year of enactment]*.

2 Commencement

This Act commences on *[Enacting country to complete]*.

3 Application

(1) This Act applies to traditional knowledge and expressions of culture that:

- (a) were in existence before the commencement of this Act; or
- (b) are created on or after that commencement.

(2) This Act does not affect or apply to rights that exist immediately before the commencement of this Act, including intellectual property rights.

(3) This Act does not affect or apply to contracts, licences or other agreements entered into by traditional owners before the commencement of this Act in relation to the use of traditional knowledge or expressions of culture.

4 Definitions

In this Act, unless the contrary intention appears:

authorised user agreement means a written agreement entered into under Division 3 or 4 of Part 4.

customary use means the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of the traditional owners.

derivative work means any intellectual creation or innovation based upon or derived from traditional knowledge or expressions of culture.

derogatory treatment, in relation to traditional knowledge or expressions of culture, includes any act or omission that results in a material distortion, mutilation or alteration of the traditional knowledge or expressions of culture that is prejudicial to the honour or reputation of the traditional owners, or the integrity of the traditional knowledge or expressions of culture.

expressions of culture mean any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose, whether tangible or intangible, and, without limiting the preceding words, includes:

- (a) names, stories, chants, riddles, histories and songs in oral narratives; and

- (b) art and craft, musical instruments, sculpture, painting, carving, pottery, terra-cotta mosaic, woodwork, metalware, painting, jewellery, weaving, needlework, shell work, rugs, costumes and textiles; and
- (c) music, dances, theatre, literature, ceremonies, ritual performances and cultural practices; and
- (d) the delineated forms, parts and details of designs and visual compositions; and
- (e) architectural forms.

Minister means the Minister responsible for this Act.

moral rights are the rights mentioned in section 13.

prescribed means prescribed by the regulations made under this Act.

sacred-secret means any traditional knowledge or expressions of culture that have a secret or sacred significance according to the customary law and practices of the traditional owners concerned.

traditional cultural rights are the rights mentioned in sections 7(2) and (3).

traditional knowledge includes any knowledge that generally:

- (a) is or has been created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes; and
- (b) is or has been transmitted from generation to generation; and
- (c) is regarded as pertaining to a particular traditional group, clan or community of people in [*Enacting country*]; and
- (d) is collectively originated and held.

traditional owners of traditional knowledge or expressions of culture means:

- (a) the group, clan or community of people; or
- (b) the individual who is recognized by a group, clan or community of people as the individual;

in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community.

5 Customary use

The customary use of traditional knowledge or expressions of culture does not give rise to any criminal or civil liability under this Act.

PART 2 – TRADITIONAL CULTURAL RIGHTS

6 Holders of traditional cultural rights

The traditional owners of traditional knowledge or expressions of culture are the holders of the traditional cultural rights in the traditional knowledge or expressions of culture.

7 Meaning of traditional cultural rights

- (1) Traditional cultural rights are the rights set out in subsections (2) and (3).
- (2) The following uses of traditional knowledge or expressions of culture require the prior and informed consent of the traditional owners in accordance with section 23(1) or 25(5):
 - (a) to reproduce the traditional knowledge or expressions of culture;
 - (b) to publish the traditional knowledge or expressions of culture;
 - (c) to perform or display the traditional knowledge or expressions of culture in public;
 - (d) to broadcast the traditional knowledge or expressions of culture to the public by radio, television, satellite, cable or any other means of communication;
 - (e) to translate, adapt, arrange, transform or modify the traditional knowledge or expressions of culture;
 - (f) to fixate the traditional knowledge or expressions of culture through any process such as making a photograph, film or sound recording;
 - (g) to make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expressions of culture;
 - (h) to create derivative works;
 - (i) to make, use, offer for sale, sell, import or export traditional knowledge or expressions of culture or products derived therefrom;
 - (j) to use the traditional knowledge or expressions of culture in any other material form;

if such use is a non-customary use (whether or not of a commercial nature).
- (3) To avoid doubt, the traditional owners are entitled to use traditional knowledge or expressions of culture in the ways mentioned in subsection (2) in the exercise of their traditional cultural rights.
- (4) Subsection (2) does not apply to the use of traditional knowledge or expressions of culture for any of the following:
 - (a) face to face teaching;
 - (b) criticism or review;
 - (c) reporting news or current events;
 - (d) judicial proceedings;
 - (e) incidental use.
- (5) A user of traditional knowledge or expressions of culture mentioned in paragraphs (4)(a) to (d) must make sufficient acknowledgement of the traditional owners by mentioning them and/or the geographical place from which the traditional knowledge or expressions of culture originated.

8 Material form not required

Traditional cultural rights exist in traditional knowledge and expressions of culture whether or not that traditional knowledge or those expressions of culture are in material form.

9 Duration

Traditional cultural rights continue in force in perpetuity.

10 Traditional cultural rights inalienable

Traditional cultural rights are inalienable.

11 Additional rights

The traditional cultural rights in traditional knowledge or expressions of culture are in addition to, and do not affect, any rights that may subsist under any law relating to copyright, trademarks, patents, designs or other intellectual property.

12 Derivative works

- (1) Any copyright, trademark, patent, design or other intellectual property right that exists in relation to a derivative work vests in the creator of the work or as otherwise provided by the relevant intellectual property law.
- (2) If a derivative work, traditional knowledge or expressions of culture are to be used for a commercial purpose, the authorised user agreement must:
 - (a) contain a benefit sharing arrangement providing for equitable monetary or non-monetary compensation to the traditional owners; and
 - (b) provide for identification of the traditional knowledge or expressions of culture on which the derivative work is based in an appropriate manner in connection with the exploitation of the derivative work by mentioning the traditional owners and/or the geographical place from which it originated; and
 - (c) provide that the traditional knowledge or expressions of culture in the derived work will not be subject to derogatory treatment.

PART 3 – MORAL RIGHTS**13 Meaning of moral rights**

- (1) The traditional owners of traditional knowledge or expressions of culture are the holders of the moral rights in the traditional knowledge or expressions of culture.
- (2) The moral rights of the traditional owners of traditional knowledge and expressions of culture are:
 - (a) the right of attribution of ownership in relation to their traditional knowledge and expressions of culture; and

- (b) the right not to have ownership of traditional knowledge or expressions of culture falsely attributed to them; and
 - (c) the right not to have their traditional knowledge and expressions of culture subject to derogatory treatment.
- (3) The moral rights of traditional owners in their traditional knowledge and expressions of culture exist independently of their traditional cultural rights.
 - (4) Moral rights continue in force in perpetuity and are inalienable, and cannot be waived or transferred.

PART 4 – OBTAINING PRIOR AND INFORMED CONSENT FROM TRADITIONAL OWNERS

Division 1 – General

14 Overview

This Part sets out the procedure for obtaining the prior and informed consent of the traditional owners to use their traditional knowledge or expressions of culture for a non-customary use (whether or not of a commercial nature).

Division 2 – Applications for use and identifying traditional owners

15 Application

- (1) A prospective user of traditional knowledge or expression of culture for a non-customary use (whether or not of a commercial nature) may apply to the Cultural Authority to obtain the prior and informed consent of the traditional owners to use the traditional knowledge or expressions of culture.
- (2) The application must:
 - (a) be in the prescribed form; and
 - (b) specify the way in which the applicant proposes to use the traditional knowledge or expressions of culture; and
 - (c) state clearly the purpose for which that use is intended; and
 - (d) be accompanied by the prescribed fee.
- (3) The Cultural Authority must finalise the application in accordance with this Part within [*Enacting country to insert time period*].
- (4) If the Cultural Authority does not finalise the application within the period mentioned in subsection (3), the traditional owners are deemed not to have consented to the proposed use.

16 Public notification

- (1) The Cultural Authority must:
 - (a) give a copy of the application to those persons (if any) who it is satisfied are the traditional owners of the traditional knowledge or expressions of culture to which the application relates; and
 - (b) publish a copy of the application in a newspaper having national circulation stating how interested persons may obtain a copy of the application; and
 - (c) if appropriate, broadcast details of the application on radio or television stating how interested persons may obtain a copy of the application.
- (2) Any person who claims to be a traditional owner of the traditional knowledge or expressions of culture to which the application relates must advise the Cultural Authority within 28 days after the application is published or broadcasted (whichever is the later). The advice may be given orally or in writing.
- (3) The Cultural Authority must record in writing the details of any oral or written advice given under subsection (2).

17 Identification of traditional owners

- (1) If the Cultural Authority is satisfied that it has identified all of the traditional owners it must make a written determination containing such details as to identify the traditional owners.
- (2) The Cultural Authority must:
 - (a) publish a copy of the determination in a newspaper having national circulation; and
 - (b) if appropriate, broadcast details of the determination on radio or television.

18 Uncertainty or dispute about ownership

- (1) If the Cultural Authority is not satisfied that it has identified all of the traditional owners or that there is a dispute about ownership, the Cultural Authority must refer the matter to the persons concerned to be resolved according to customary law and practice or such other means as are agreed to by the parties.
- (2) When all of the traditional owners have been identified in accordance with customary law and practice or such means as have been agreed to, the traditional owners must advise the Cultural Authority, and the Cultural Authority must make a written determination containing such details as to identify the traditional owners.
- (3) The Cultural Authority must:
 - (a) publish a copy of the determination in a newspaper having national circulation; and
 - (b) if appropriate, broadcast details of the determination on radio or television.

19 No traditional owners or no agreement about ownership

(1) If the Cultural Authority is satisfied that:

- (a) no traditional owners can be identified; or
- (b) no agreement has been reached on ownership within the period mentioned in section 15(3) after the application was made;

the Cultural Authority may, after consultation with the Minister, make a determination that the Cultural Authority is the traditional owner of the traditional knowledge or expressions of culture concerned for the purposes of this Act.

(2) If the Cultural Authority enters into an authorised user agreement, any monetary or non-monetary benefits arising under the agreement must be used for traditional cultural development purposes.

Division 3 – Authorised user agreements**20 Application to be rejected or negotiations for agreement**

(1) The traditional owners must decide whether:

- (a) to reject the application; or
- (b) to accept the application and to enter into negotiations for a written authorised user agreement in relation to the application.

(2) The traditional owners must advise the Cultural Authority of their decision. The advice may be given orally or in writing.

(3) The Cultural Authority must advise the applicant in writing of the traditional owners' decision.

21 Proposed agreement to be referred to Cultural Authority

(1) Before entering into an authorised user agreement, the traditional owners must refer the proposed agreement to the Cultural Authority for its comments on the proposed terms and conditions of the agreement.

(2) The Cultural Authority may request the applicant and the traditional owners to meet with it to discuss the proposed agreement if the Cultural Authority is, after reviewing the proposed agreement, satisfied that:

- (a) the traditional owners do not have sufficient information to make a full and informed decision about the proposed terms and conditions of the agreement; or
- (b) the proposed terms and conditions of the agreement do not adequately protect the traditional knowledge or expressions of culture of the traditional owners.

(3) The traditional owners may accept, reject or modify any comments made by the Cultural Authority in relation to the proposed agreement.

22 Terms and conditions

An authorised user agreement should include terms and conditions about the following:

- (a) sharing of financial and other benefits arising from the use of the traditional knowledge or expressions of culture;
- (b) compensation, fees, royalties or other payments for the use;
- (c) whether the use will be exclusive or non-exclusive;
- (d) duration of the use to be allowed and rights of renewal;
- (e) disclosure requirements in relation to the use;
- (f) the possible sharing by the traditional owners of any intellectual property rights arising from the use of the traditional knowledge or expressions of culture;
- (g) access arrangements for the traditional owners;
- (h) education and training requirements for the applicant;
- (i) controls on publication;
- (j) specify whether the rights arising under the agreement can be assigned;
- (k) choice of law in relation to disputes under the agreement;
- (l) respect for moral rights of the traditional owners.

23 Authorised user agreement and prior and informed consent

- (1) If a prospective user and the traditional owners enter into an authorised user agreement, the traditional owners are deemed to have given their prior and informed consent to the proposed use.
- (2) The traditional owners must advise the Cultural Authority and forward to it a copy of the final agreement.
- (3) The Cultural Authority is to keep a register of authorised user agreements. The register is to be in such form and contain such information as the Cultural Authority determines.

24 No authorised user agreement reached

- (1) If the traditional owners and the applicant cannot agree on the terms and conditions of an agreement in relation to the application, the traditional owners must advise the Cultural Authority. The advice may be given orally or in writing.
- (2) The Cultural Authority must advise the applicant in writing that the traditional owners have rejected the proposed authorised user agreement.
- (3) The Cultural Authority must record in writing the details of any oral or written advice given under subsection (1).

Division 4 – Applications not made under this Part**25 Procedure for applications**

- (1) Nothing prevents a prospective user of traditional knowledge or expressions of culture from obtaining the prior and informed consent of the traditional owners without applying to the Cultural Authority under section 15.
- (2) The prospective user must advise the Cultural Authority that the prospective user has sought the prior and informed consent of the traditional owners.
- (3) The prospective user must provide the Cultural Authority with a copy of the proposed authorised user agreement between the prospective user and the traditional owners for comment, and advice about other prospective traditional owners.
- (4) The prospective user must provide a copy of the signed authorised user agreement to the Cultural Authority to be entered in the register (refer subsection 23(3)) within 28 days after the agreement comes into force.
- (5) If a prospective user and the traditional owners enter into an authorised user agreement, the traditional owners are deemed to have given their prior and informed consent to the proposed use.
- (6) The prospective user cannot contract out of the obligation under subsection (3). If a copy is not provided under subsection (3), the authorised user agreement is null and void.

PART 5 – ENFORCEMENT**Division 1 – Offences****26 Offence in relation to traditional cultural rights**

If:

- (a) a person makes a non-customary use of traditional knowledge or an expressions of culture (whether or not such use is of a commercial nature); and
- (b) the traditional owners have not given their prior and informed consent to that use;

the person is guilty of an offence punishable on conviction by a fine not exceeding an amount equivalent to *[Enacting country to determine]* or a term of imprisonment not exceeding *[Enacting country to determine]* years, or both.

27 Offence in relation to moral rights

If:

- (a) a person does an act or makes an omission in relation to traditional knowledge or an expression of culture that is inconsistent with the moral rights of the traditional owners of that traditional knowledge or expression of culture; and

- (b) the traditional owners have not given their prior and informed consent to the act or omission;

the person is guilty of an offence punishable on conviction by a fine not exceeding an amount equivalent to *[Enacting country to determine]* or a term of imprisonment not exceeding *[Enacting country to determine]* years, or both.

28 Offence in relation to sacred-secret material

If a person uses sacred-secret traditional knowledge or an expression of culture other than in accordance with a customary use, the person is guilty of an offence punishable on conviction by a fine not exceeding an amount equivalent to *[Enacting country to determine]* or a term of imprisonment not exceeding *[Enacting country to determine]* years, or both.

29 Offences in relation to importation and exportation

- (1) If:

- (a) a person imports an article or other thing into *[Enacting country]* that relates to traditional knowledge or expressions of culture of that country; and
- (b) the person knew, or ought reasonably to have known, that the article or thing would have contravened the traditional cultural rights or the moral rights of the traditional owners had it been created in *[Enacting country]*;

the person is guilty of an offence punishable on conviction by a fine not exceeding an amount equivalent to *[Enacting country to determine]* or a term of imprisonment not exceeding *[Enacting country to determine]* years, or both.

- (2) If:

- (a) a person exports traditional knowledge or an expression of culture and the export is a non-customary use (whether or not such use is of a commercial nature); and
- (b) the traditional owners have not given their prior and informed consent to the export of the traditional knowledge or expressions of culture;

the person is guilty of an offence punishable on conviction by a fine not exceeding an amount equivalent to *[Enacting country to determine]* or a term of imprisonment not exceeding *[Enacting country to determine]* years, or both.

Division 2 – Civil actions

30 Civil claims

- (1) If:

- (a) a person makes a non-customary use of traditional knowledge or an expression of culture (whether or not such use is of a commercial nature); and
- (b) the traditional owners have not given their prior and informed consent to that use;

the traditional owners may institute proceedings against the person in the [] Court seeking all or any of the relief set out in section 31.

- (2) If:
- (a) a person does an act or makes an omission in relation to traditional knowledge or an expression of culture that is inconsistent with the moral rights of the traditional owners of that traditional knowledge or expression of culture; and
 - (b) the traditional owners have not given their prior and informed consent to the act or omission;

the traditional owner may institute proceedings against the person in the [] Court seeking all or any of the relief set out in section 31.

31 Remedies

- (1) The [] Court may grant all or any of the following in relation to proceeding instituted under section 30:
- (a) an injunction;
 - (b) damages for loss resulting from the unauthorised use;
 - (c) a declaration that the traditional cultural rights of the traditional owners have been contravened;
 - (d) an order that the defendant make a public apology for the contravention;
 - (e) an order that any false attribution of ownership, or derogatory treatment, of the traditional knowledge or expression of culture cease or be reversed;
 - (f) an order for an account for profits;
 - (g) an order for the seizure of any object made, imported or exported contrary to this Act;
 - (h) such other orders as the Court considers appropriate in the circumstances.
- (2) The [] Court in deciding what relief is to be granted may take into account all or any of the following:
- (a) whether the defendant was aware or ought reasonably to have been aware of the traditional cultural rights and moral rights of the traditional owners;
 - (b) the effect on the honour or reputation of the traditional owners resulting from the unauthorised use;
 - (c) any thing done by the defendant to mitigate the effects of the unauthorised use;
 - (d) any cost or difficulty that may have been associated with identifying the traditional owners;

- (e) any cost or difficulty in ceasing or reversing any false attribution of ownership, or derogatory treatment, of the traditional knowledge or expression of culture;
- (f) whether the parties have undertaken any other action to resolve the dispute.

Division 3 – Defences and other matters

32 Defences

It is a defence to an offence against section 26 or 27, or an action under subsection 30(1) or (2), if a determination has been published under section 17 and the traditional owners specified in that determination have given their prior and informed consent to the use in question.

33 Other mechanisms to resolve disputes

Nothing in this Part prevents the traditional owner or the other person concerned from attempting to resolve a dispute using all or any of the following:

- (a) mediation;
- (b) alternative dispute resolution procedures;
- (c) customary law and practices.

34 Other rights of action and remedies

This Part does not affect any rights of action or other remedies, whether civil or criminal, provided for under other Acts or laws.

PART 6 –TRANSITIONAL ARRANGEMENTS

35 Procedure for transitional arrangements

- (1) Subject to subsections 3(2) and (3), this section applies to a person if, immediately before the commencement of this Act, the person was making a non-customary use of traditional knowledge or an expression of culture.
- (2) The provisions of this Act do not apply to the person during the period of 60 days (“the application period”) starting on the commencement of this Act.
- (3) During the application period, the person must apply under Part 4 to the Cultural Authority to obtain prior and informed consent from the traditional owners to continue to use the traditional knowledge or expression of culture.
- (4) If the person does not apply to the Cultural Authority in accordance with subsection (3), the Act applies to the person on and after the end of the application period.
- (5) If a person has applied to the Cultural Authority in accordance with subsection (3), the Act continues not to apply to the person until the traditional owners reject the application or enter into an authorised user agreement with the person, whichever first occurs.

PART 7 – CULTURAL AUTHORITY**36 Designation of Cultural Authority**

The Minister may designate an existing [*or new*] body to perform the functions of the Cultural Authority in section 37.

37 Functions of the Cultural Authority

The functions of the Cultural Authority may include the following:

- (a) to receive and process applications under Part 4;
- (b) to monitor compliance with authorised user agreements and to advise traditional owners of any breaches of such agreements;
- (c) to develop standard terms and conditions for authorised user agreements;
- (d) to provide training and education programs for traditional owners and users of traditional knowledge or expressions of culture;
- (e) to develop a Code of Ethics in relation to use of traditional knowledge and expressions of culture;
- (f) to issue advisory guidelines for the purposes of this Act;
- (g) to liaise with regional bodies in relation to matters under this Act;
- (h) to maintain a record of traditional owners and/or knowledge and expressions of culture;
- (i) if requested to do so to provide guidance on the meaning of customary use in specific cases;
- (j) such other functions as are conferred on it by this Act.

PART 8 – MISCELLANEOUS**38 Regulations**

The Minister may make regulations prescribing all matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

39 Recognition of other laws

In accordance with reciprocal arrangements, this Act may provide the same protection to traditional knowledge and expressions of culture originating in other countries or territories as is provided to traditional knowledge and expressions of culture originating in the [Enacting country].

**EXPLANATORY MEMORANDUM
FOR THE
MODEL LAW FOR THE
PROTECTION OF TRADITIONAL KNOWLEDGE
AND EXPRESSIONS OF CULTURE**

Introduction

The *Model Law for the Protection of Traditional Knowledge and Expressions of Culture* is a draft model law establishing a new range of statutory rights for traditional owners of traditional knowledge and expressions of culture. The model law provides a basis for Pacific Island countries wishing to enact legislation for the protection of traditional knowledge and expressions of culture.

If an individual country wishes to enact the model law, it is free to adopt and/or adapt the provisions as it sees fit in accordance with national needs, the wishes of its traditional communities, legal drafting traditions and so on. Matters of detail or implementation are left to be determined by national laws and systems.

For example, the rights created in the model law are termed ‘traditional cultural rights’ but enacting countries may choose another term to describe the rights, as they consider appropriate. The notes on the clauses below also indicate other legal and policy issues an enacting country might want to consider if enacting the model law. These notes are not intended to be exhaustive of the issues that might require consideration by an enacting country.

It should be noted that the model law is to be regarded as a starting point and will continue to be modified consequent on members’ experiences in enacting and administering the law and in accordance with further international developments.

National laws that enact the model law could also be read with and complemented by cultural heritage legislation.

Outline of model law

The policy objective of the model law is to protect the rights of traditional owners in their traditional knowledge and expressions of culture and permit tradition-based creativity and innovation, including commercialisation thereof, subject to prior and informed consent and benefit-sharing. The model law also reflects the policy that it should complement and not undermine intellectual property rights.

The development of the model law has been guided by responding to a range of questions posed in the document *Elements of a sui generis system for the protection of traditional knowledge* created by the World Intellectual Property Organisation for consideration by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. These questions include: what is the policy objective of the protection?; what is the subject matter?; who owns the rights?; what are the rights? how are the rights administered and enforced? how are the rights lost or how do they expire etc. These questions are relevant to the development of any effective legal system for the protection of property rights, and not just to the particular approach taken in this model law.

The approach taken in the model law is to create new rights in traditional knowledge and expressions of culture which previously might have been regarded, for the purposes of intellectual property law, as part of the public domain. The rights created by the model law essentially fall into two categories: traditional cultural rights and moral rights. The existence of these rights do not depend upon registration or other formalities.

Traditional cultural rights grant traditional owners exclusive rights in respect of a range of uses of traditional knowledge and expressions of culture that are of a non-customary nature, irrespective of whether they are for commercial or non-commercial purposes. This includes the use of traditional knowledge and cultural expressions for the making of new creations and innovations based thereon ('derivative works').

The moral rights created for traditional owners are the right of attribution, the right against false attribution and the right against derogatory treatment in respect of traditional knowledge and expressions of culture.

The model law establishes procedures whereby consent can be obtained for the non-customary use of traditional knowledge and cultural expressions, including the making of derivative works. If a derivative work is created, the intellectual property rights in the work vest in the creator, or as otherwise provided for by intellectual property rights. In other words, intellectual property rights are fully respected, and the model makes it clear that the rights it creates are in addition to and do not affect intellectual property rights. However, should a derivative work or traditional knowledge and cultural expressions be used for commercial purposes, the user must share benefits with the traditional owners, provide acknowledgement of the source of the traditional knowledge or expressions of culture and respect the traditional owners' moral rights.

The model law provides two avenues by which a prospective user of traditional knowledge or expressions of culture for non-customary purposes can seek the prior and informed consent of the traditional owners for the use of the traditional knowledge or expressions of culture. These avenues are:

- applying to a 'Cultural Authority' which has functions in relation to identifying traditional owners and acting as a liaison between prospective users and traditional owners; or
- dealing directly with the traditional owners.

In both cases, the prior and informed consent of the traditional owners is to be evidenced by an 'authorised user agreement'. And in both cases, the Cultural Authority has a role in providing advice to traditional owners about the terms and conditions of authorised user agreements and maintaining a record of finalised authorised user agreements.

The model law also creates offences and civil actions for contraventions of traditional cultural rights and moral rights.

NOTES ON CLAUSES

Part 1 – Preliminary

Clause 1 - Short title

This clause provides that the short title of this Act is the *Protection of Traditional Knowledge and Expressions of Culture [enacting country to insert year of enactment]*. The date is left blank for insertion by the enacting country.

Clause 2 - Commencement

This clause provides for the commencement of the Act. The commencement date will depend on the relevant law of the enacting country.

Clause 3 - Application

Clause 3(1) provides that the Act applies to traditional knowledge and expressions of culture that were in existence before the commencement of the Act, as well as traditional knowledge and expressions of culture that are created on or after the commencement of the Act.

Clause 3(2) provides that the Act does not affect or apply to rights that exist immediately before the commencement of the Act, including intellectual property rights. This clause, however, does not prevent a person who holds rights in respect of traditional knowledge or expressions of culture which came into effect prior to the commencement of the Act, from subsequently transferring those rights by contract or entering into benefit sharing contractual arrangements etc, even retrospectively, with the traditional owners.

Clause 3(2) implements a policy position that the Act does not have retrospective application. It is matter for an enacting country to determine whether it is appropriate to provide for the retrospective application of the Act.

Clause 3(3) provides that the Act does not affect or apply to contracts, licences or other agreements entered into by traditional owners before the commencement of the Act in relation to the use of traditional knowledge or expressions of culture.

Clause 4 - Definitions

This clause defines various terms used in the Act.

Clause 5 - Customary use

This clause provides that customary use of traditional knowledge or expressions of culture does not give rise to any criminal or civil liability under the Act. Customary use, as defined by clause 4, means the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of the traditional owners. In other words, the Act does not regulate the use of traditional knowledge or expressions of culture where they are used in accordance with customary laws and practices.

Part 2 – Traditional cultural rights

Clause 6 - Holders of traditional cultural rights

This clause confers traditional cultural rights on owners of traditional knowledge or expressions of culture. Enacting countries may use a different term to describe the rights established by the Act if so desired.

Traditional owners of traditional knowledge or expressions of culture, as defined in Clause 4, are:

- (a) the group, clan or community of people; or
- (b) the individual who is recognised by a group, clan or community of people as the individual;

in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community.

Traditional knowledge, as defined in clause 4, includes any knowledge that generally:

- is or has been created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes;
- is or has been transmitted from generation to generation;
- is regarded as pertaining to a particular traditional group, clan or community of people in [Enacting country]; and
- is collectively originated and held.

Expressions of culture, as defined in clause 4, is any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose, whether tangible or intangible. A non-exhaustive list of examples of expression of culture includes:

- names, stories, chants, riddles, histories and songs in oral narratives;
- art and craft, musical instruments, sculpture, painting, carving, pottery, terra-cotta mosaic, woodwork, metalware, painting, jewelry, weaving, needlework, shell work, rugs, costumes and textiles;
- music, dances, theatre, literature, ceremonies, ritual performances and cultural practices;
- the delineated forms, parts and details of designs and visual compositions; and
- architectural forms.

Clause 7 - Meaning of traditional cultural rights

This clause describes what traditional cultural rights are. Traditional cultural rights essentially comprise two rights:

- the right of traditional owners to give their prior and informed consent (or not) to a range of non-customary uses of their traditional knowledge or expressions of culture (clause 7(2)); and
- the right of traditional owners to use their traditional knowledge or expressions of culture in the ways listed in clause 7(2) in the exercise of their traditional cultural rights (clause 7(3)).

Clause 7(2) lists the types of uses of traditional knowledge or expressions of culture for which the prior and informed consent of traditional owners is required, when the use is non-customary. The process for obtaining prior and informed consent of traditional owners is set out in Part 4 of the Act. Non-customary use of traditional knowledge or expressions of culture means use which is not in accordance with the customary laws or practices of the traditional owners. A non-customary use may be for a commercial or non-commercial purpose.

A person must obtain the prior and informed consent of traditional owners if he or she wishes to use, in a non-customary way, traditional knowledge or expressions of culture in one or more of the following ways:

- reproducing the traditional knowledge or expressions of culture. For example, copying a motif onto a T-shirt;
- publishing the traditional knowledge or expressions of culture. For example, transcribing a story in an information brochure for distribution to the public;
- performing or displaying the traditional knowledge or expressions of culture in public. For example, displaying drawings in an exhibition, or performing a dance or a play;
- broadcasting the traditional knowledge or expressions of culture to the public by radio, television, satellite, cable or any other means of communication. For example, broadcasting a live performance of a ceremony;
- translating, adapting, arranging, transforming or modifying the traditional knowledge or expressions of culture. For example, adapting a story into a play;
- fixating the traditional knowledge or expressions of culture through any process such as making a photograph, film or sound recording. For example, making a sound recording of music;
- making traditional knowledge or expressions of culture available online or electronically transmitting it to the public. For example, putting photographs of paintings on the internet;
- creating derivative works. For example, creating an artwork based upon or derived from traditional art. See also the discussion of clause 12 below;
- making, using, offering for sale, selling, importing or exporting traditional knowledge or expressions of culture or products derived therefrom. For example, exporting T-shirts bearing a motif; and
- using the traditional knowledge or expressions of culture in any other material form.

As provided by clause 5, a person who uses traditional knowledge or expressions of culture in accordance with customary laws and practices does not need to obtain the prior and informed consent of the traditional owners in the manner set out by the Act. Of course, the person may still need to obtain permission under the customary laws or practices followed by that person. For example, a person who intends to perform a dance in accordance with his or her custom does not need to follow the process set out in Part 4 for obtaining the prior and informed consent of the traditional owners of the dance. However, if the person intends to perform the dance in a non-customary way, for example performing the dance in non-customary costumes and with non-customary music, the person must obtain the prior and informed consent of the traditional owners as set out in Part 4. The person would need to obtain this consent whether or not the non-customary performance of the dance was for a commercial purpose.

Clause 7(4) provides that traditional cultural rights do not apply to specific non-customary uses of traditional knowledge or expressions of culture. These specific non-customary uses are:

- face to face teaching;
- criticism or review;
- reporting news or current events;
- judicial proceedings; and
- incidental use.

An example of incidental use of traditional knowledge or expressions of culture would be where a person takes a photograph of another person which incidentally includes in the background the image of a sculpture which is an expression of culture.

Clause 7(5) provides that a person who uses traditional knowledge or expressions of culture in the ways listed in clause 7(4) must make sufficient acknowledgement of the traditional owners by mentioning them and/or the geographical place from which the traditional knowledge or expressions of culture originated. For example, a teacher who is presenting traditional knowledge information to his or her class is not required to obtain the prior and informed consent of the traditional owners. However, the teacher must make sufficient acknowledgement of the traditional owners when presenting that information to the class.

The list of exceptions is only an example of areas of activity which may be exempted from the exercise of traditional cultural rights. Exceptions may be varied, added or deleted according to an enacting country's view as to what areas of activity are appropriate for exemption. For example, the provision for face-to face teaching may require further qualification or definition in view of the particular teaching practices, such as teaching via video-conferencing, which occur in the enacting country.

Clause 8 - Material form not required

This clause provides that traditional cultural rights exist in traditional knowledge and expressions of culture whether or not that traditional knowledge or those expressions of traditional culture are in material form. For example, traditional cultural rights may exist in relation to a song, whether or not that song has been written down or recorded.

Clause 9 - Duration

This clause provides that traditional cultural rights continue in force in perpetuity, that is, they do not expire.

The model law does not currently contain any provisions about how traditional cultural rights or moral rights (see Part 3) are to be dealt with when a traditional owner dies. This is mainly due to an assumption that the death of a traditional owner does not affect the existence of traditional knowledge or expressions of culture or customary rights in relation to the traditional knowledge or expressions of culture. However, depending on particular customary practices etc, an enacting country may consider specifying what happens to traditional cultural rights and moral rights following the death of a traditional owner. For example, a clause may be inserted to provide that the traditional cultural rights and moral rights of a traditional owner who has died are to be dealt with in accordance with the customary laws and practices of the traditional owners.

Clause 10 - Traditional cultural rights inalienable

This clause provides that traditional cultural rights are inalienable, that is, they cannot be sold or otherwise transferred.

Clause 11 - Additional rights

This clause provides that traditional cultural rights are in addition to, and do not affect, any rights that may subsist under any law relating to copyright, trademarks, patents, designs or other intellectual property. For example, a song may be an expression of culture and so traditional cultural rights will arise in relation to the song, that is, the traditional owners will have the right to consent (or not) to non-customary uses of the song. The existence of the traditional cultural rights will not prevent or affect the actual or potential subsistence of copyright in the song (if the song meets the subsistence requirements of the relevant jurisdiction's copyright law). This clause implements the policy that the new rights established by the model law supplement and do not override intellectual property rights.

Clause 12 - Derivative works

This clause deals with rights in relation to derivative works. The clause also deals with the use of traditional knowledge, expressions of culture and derivative works for a commercial purpose. As defined in clause 4, derivative works are any intellectual creation or innovation that is based upon or derived from traditional knowledge or expressions of culture.

Pursuant to clause 7(2)(h), a person who wishes to create a derivative work must seek the prior and informed consent of the traditional owners to use their traditional knowledge or expressions of culture in the derivative work.

Clause 12(1) provides that the intellectual property rights in a derivative work vest in the creator of the work, or as otherwise provided by the relevant intellectual property laws. (For example, intellectual property laws generally provide that an employer is the owner of intellectual property rights arising from material created by the employees of the employer in the course of their employment). By way of example, an artist who paints a picture which is based upon a community's particular design will own the copyright in the painting he or she creates. However, the traditional owners will continue to hold traditional cultural rights in respect of the pre-existing expression of culture from which the picture was derived.

Clause 12(2) provides that where traditional owners have given their prior and informed consent to the making of a derivative work for a commercial purpose or to the use of traditional knowledge or expressions of culture for a commercial purpose, the user must:

- share benefits with the traditional owners. The benefits can be monetary and/or non-monetary;
- provide for the appropriate identification of the traditional owners of the traditional knowledge or expressions of culture on which the derivative work is based; and
- ensure that the traditional knowledge and expressions of culture in the derivative work will not be subject to derogatory treatment.

Part 3 – Moral Rights

Clause 13 - Meaning of moral rights

This clause confers moral rights on traditional owners in relation to their traditional knowledge or expressions of culture.

Clause 13(2) sets out the moral rights of traditional owners. They are:

- the right of attribution of ownership in relation to the traditional knowledge and expressions of culture. In other words, traditional owners have the right to be named as the owners of their traditional knowledge and expressions of culture;
- the right not to have ownership of traditional knowledge or expressions of culture falsely attributed to them. In other words, traditional owners have the right to not be named as the owners of traditional knowledge and expressions of culture which they do not own; and

- the right not to have the traditional knowledge and expressions of culture subject to derogatory treatment. (In the context of moral rights for copyright creators, some jurisdictions term this right the ‘right of integrity’.) As defined in clause 4, derogatory treatment in relation to traditional knowledge or expressions of culture means any act or omission that results in a material distortion, mutilation or alteration of the traditional knowledge or expressions of culture that is prejudicial to the honour or reputation of the traditional owners.

Clause 13(3) provides that the moral rights of traditional owners exist independently of their traditional cultural rights. As such, moral rights exist irrespective of whether or not a person uses the traditional knowledge or expressions of culture in one of the ways listed in clause 7(2). Furthermore, moral rights are not subject to the exceptions listed in clause 7(4).

Clause 13(4) provides that moral rights continue in force in perpetuity and are inalienable, and cannot be waived or transferred. In other words, moral rights do not expire, and cannot be sold or otherwise transferred.

Part 4 – Obtaining prior and informed consent from traditional owners

Part 4 provides two avenues by which a prospective user of traditional knowledge or expressions of culture for non-customary purposes can seek the prior and informed consent of the traditional owners. The prospective user may:

- apply to the Cultural Authority who then identifies the relevant traditional owners and liaises between the prospective user and the traditional owners; or
- deal directly with the traditional owners

In both cases, the prior and informed consent of the traditional owners is to be evidenced in the form of an ‘authorised user agreement’.

Division 1 - General

Clause 14 - Overview

This clause explains that Part 4 sets out the procedure for obtaining the prior and informed consent of traditional owners to use their traditional knowledge or expressions of culture for a non-customary purpose, whether it is of a commercial or non-commercial nature.

Division 2 – Applications for use and identifying traditional owners

Clause 15 - Application

This clause provides that a person who wishes to use traditional knowledge or expressions of culture for a non-customary use may apply to the ‘Cultural Authority’ to obtain the prior and informed consent of the traditional owners. The Cultural Authority is discussed further in the notes on Part 7.

Clause 15(2) provides mandatory requirements for the making of an application. An application must:

- be in the prescribed form;
- specify the way in which the applicant proposes to use the traditional knowledge or expression of culture;
- state clearly the purpose for which that use is intended; and
- be accompanied by the prescribed fee.

The enacting country will need to make regulations to prescribe the form of the application and the amount of the application fee.

Clause 15(3) provides that the Cultural Authority must finalise the application in accordance with Part 4 within a specified time. The time is left blank for insertion by the enacting country.

Clause 15(4) provides that if the Cultural Authority does not finalise the application within the specified time, the traditional owners are deemed not to have consented to the proposed use.

Clause 16 - Public notification

This clause describes what steps the Cultural Authority must take upon receipt of an application, to ensure that interested persons are informed of the application.

Clause 16(1) provides that the Cultural Authority must:

- give a copy of the application to those persons (if any) who it is satisfied are the traditional owners of the traditional knowledge or expressions of culture to which the application relates; and
- publish a copy of the application in a nationally circulated newspaper and if appropriate, broadcast details of the application on radio or television. Whether publishing or broadcasting, the Cultural Authority must specify how interested persons can obtain a copy of the application.

A person who claims to be a traditional owner must, pursuant to clause 16(2), advise the Cultural Authority within 28 days after the application is published or broadcast. This advice can be given either orally or in writing. The Cultural Authority must then record this advice in writing (clause 16(3)).

Clause 17 - Identification of traditional owners

This clause provides that if the Cultural Authority is satisfied that it has identified all of the traditional owners, it must make a written determination containing such details as would identify the traditional owners.

Clause 17(2) requires the Cultural Authority to publish a copy of this determination in a nationally circulated newspaper and, if appropriate, broadcast details of the determination on radio or television.

The determination may subsequently be used as a defence by a person in respect of certain offences or civil actions under the Act. This defence is discussed further in the notes on clause 32.

Clause 18 - Uncertainty or dispute about ownership

This clause deals with situations where there is uncertainty or a dispute about the ownership of traditional knowledge or expressions of culture.

Clause 18(1) provides that where the Cultural Authority is not satisfied that it has identified all of the traditional owners or where there is a dispute about ownership, it must refer the matter to the parties concerned to resolve the matter according to customary law and practice or such other means as is agreed to by the parties.

Once the traditional owners have been identified in accordance with customary law or practice or such means as have been agreed to, clause 18(2) requires the traditional owners to advise the Cultural Authority. The Cultural Authority must then make a written determination containing such details as to identify the traditional owners.

Clause 18(3) requires the Cultural Authority to publish a copy of this determination in a nationally circulated newspaper and, if appropriate, broadcast details of the determination on radio or television.

Clause 19 - No traditional owners or no agreement about ownership

This clause deals with situations where traditional owners cannot be identified or where agreement on traditional owners cannot be reached.

Clause 19(1) enables the Cultural Authority to make a determination that the Cultural Authority is, for the purposes of the Act, the owner of the traditional knowledge or expressions of culture concerned if it is satisfied that:

- no traditional owners can be identified; or
- no agreement about ownership has been reached within a certain time period, ie the time specified in clause 15(3).

Such a determination can only be made following consultation with the Minister responsible for the administration of the Act.

If the Cultural Authority subsequently enters into an authorised user agreement with the applicant, clause 19(2) provides that any resulting benefits, either monetary or non-monetary, must be used for traditional cultural development purposes.

Clause 19 represents a particular policy position, ie that the State can assume ownership of traditional knowledge or expressions of culture in certain situations, which may not be appropriate in some countries. It is a matter for the enacting country to determine the most appropriate way of dealing with applications for use of traditional knowledge or expressions of culture where its owners cannot be identified or where its ownership cannot be clarified.

Division 3 – Authorised user agreements

This division deals with the processing of an application once the issue of ownership of traditional knowledge or expressions of culture has been dealt with under Division 2.

Clause 20 - Application to be rejected or negotiations for agreement

This clause provides that traditional owners must either:

- reject the application to use their traditional knowledge or expressions of culture; or
- accept the application and enter into negotiations for a written ‘authorised user agreement’. The requirements of an authorised user agreement are set out in clause 22.

Clause 20(2) requires the traditional owners to notify the Cultural Authority of their decision, either orally or in writing. The Cultural Authority must then advise the applicant in writing of that decision (clause 20(3)).

Clause 21 - Proposed agreement to be referred to Cultural Authority

This clause describes what the traditional owners must do before entering into an authorised user agreement. The clause provides a mechanism for ensuring that traditional owners do not enter into a proposed authorised user agreement that may not be in their interests.

Clause 21(1) provides that traditional owners must refer a proposed authorised user agreement to the Cultural Authority for its comment on the proposed terms and conditions of the agreement.

Clause 21(2) enables the Cultural Authority to request a meeting between the applicant and the traditional owners to discuss the proposed agreement if the Cultural Authority is satisfied that:

- the traditional owners do not have sufficient information to make a full and informed decision about the proposal; or
- the proposed terms and conditions do not adequately protect the traditional knowledge and expressions of culture of the traditional owners.

The model law recognises that it is the prerogative of traditional owners to make a final determination on the proposed agreement and, accordingly, clause 23(3) provides that the traditional owners may accept, reject or modify any comments made by the Cultural Authority in relation to the proposed agreement.

Clause 22 - Terms and conditions

This clause sets out a list of terms and conditions which should be included in an authorised user agreement.

Clause 23 - Authorised user agreement and prior and informed consent

Clause 23(1) provides that if a prospective user and the traditional owners enter into an authorised user agreement the traditional owners are deemed to have given their prior and informed consent to the proposed use.

Clause 23(2) provides that the traditional owners must advise the Cultural Authority and provide it with a copy of the final agreement. Clause 23(3) requires the Cultural Authority to keep a register of final authorised user agreements. The form and content of the register is a matter for the Cultural Authority to determine. The register ensures that there is a record of authorised use. The register may also assist in future identification of the ownership of traditional knowledge and expressions of culture.

Clause 24 - No authorised user agreement reached

This clause deals with situations where the applicant and traditional owners cannot reach agreement on the terms of an authorised user agreement.

Clause 24(1) provides that the traditional owners must advise the Cultural Authority, either orally or in writing, if they cannot agree on the terms and conditions of a proposed authorised user agreement. Clause 24(3) requires the Cultural Authority to record this advice in writing. The Cultural Authority must also advise the applicant in writing that the traditional owners have rejected the proposed authorised user agreement (clause 24(2)).

Division 4 – Applications not made under this Part

Clause 25 - Procedure for applications

Clause 25(1) makes it clear that a prospective user can directly contact the relevant traditional owners to obtain their prior and informed consent without applying to the Cultural Authority. However, the clause also provides a role for the Cultural Authority in such situations, so as to ensure that the Cultural Authority is informed of all proposals for use of traditional knowledge or expressions of culture made under the Act and to provide certain safeguards for traditional owners.

Where a prospective user deals directly with traditional owners, he or she must:

- advise the Cultural Authority that he or she has sought the prior and informed consent of the traditional owners;
- provide the Cultural Authority with a copy of the authorised user agreement between the prospective user and the traditional owners for comment and advice about other traditional owners. This requirement cannot be contracted out of. Furthermore, if a copy of the agreement is not provided to the Cultural Authority, clause 25(6) renders the agreement null and void; and
- provide the Cultural Authority with a copy of the signed authorised user agreement, for entry in the register within 28 days after the agreement comes into force.

Clause 25(5) provides that traditional owners are deemed to have given their prior and informed consent to the proposed use if they enter into an authorised user agreement with a prospective user.

Part 5 – Enforcement

Division 1 – Offences

This Division creates certain offences in relation to the use of traditional knowledge and expressions of culture. The clauses leave blank the maximum amount of the fines and the maximum terms of imprisonment for insertion by the enacting country.

Clause 26 - Offence in relation to traditional cultural rights

This clause creates an offence where a person uses traditional knowledge or expressions of culture in a non-customary way without the prior and informed consent of the traditional owners. The offence is punishable on conviction by a fine and/or imprisonment.

A defence to this offence is provided in clause 32.

Clause 27 - Offence in relation to moral rights

This clause creates an offence where a person either acts or makes an omission that is inconsistent with the moral rights of the traditional owners in relation to traditional knowledge or expressions of culture. The act or omission must have been done without the prior and informed consent of the traditional owners. The offence is punishable on conviction by a fine and/or imprisonment.

A defence to this offence is provided in clause 32.

Clause 28 - Offence in relation to sacred-secret material

This clause creates an offence where a person uses ‘sacred-secret’ traditional knowledge or expressions of culture in a non-customary way. ‘Sacred-secret’, as defined by clause 4, means any traditional knowledge or expressions of culture that have a secret or sacred significance according to the customary laws and practices of the traditional owners concerned. The offence is punishable on conviction by a fine and/or imprisonment.

Clause 29 - Offences in relation to importation and exportation

Clause 29(1) creates an offence where:

- (a) a person imports into the enacting country an article or other thing that relates to traditional knowledge or expression of culture of that country;

and

- (b) the person knew, or ought reasonably to have known, that the item would have contravened the traditional cultural or moral rights of the traditional owners had it been created in the enacting country.

For example, it would be an offence for a person to import from country ‘B’ into country ‘A’ T-shirts bearing a motif, being an expression of culture from ‘A’, if the person knew or ought reasonably to have known that, had the T-shirts been made in ‘A’, the reproduction of the motif would have required the prior and informed consent of the traditional owners under the Act.

Clause 29(2) creates an offence where a person exports, without the prior and informed consent of the traditional owners, traditional knowledge or expressions of culture and the export is a non-customary use.

The offences created by clause 29(1) and 29(2) are punishable on conviction by a fine and/or imprisonment.

Division 2 – Civil actions

This Division sets out the civil claims which may be instituted by traditional owners in respect of breaches of their traditional cultural rights and moral rights and the available remedies. The clauses leave blank the name of the court in which the claim may be instituted for insertion by the enacting country.

Clause 30 - Civil claims

Clause 30(1) provides that traditional owners may institute court proceedings against a person who makes a non-customary use of their traditional knowledge or expressions of culture where the traditional owners have not given their prior and informed consent to that use.

Clause 30(2) provides that traditional owners may institute court proceedings against a person who does an act or makes an omission in relation to traditional knowledge or expressions of culture that is inconsistent with the owners’ moral rights and without the prior and informed consent of the owners.

In each case, traditional owners may seek all or any of the relief set out in clause 31. A defence to both types of claim is provided in clause 32.

Clause 31 - Remedies

This clause sets out the range of remedies that a court may grant in relation to civil proceedings for contravention of traditional cultural rights or moral rights. These remedies include injunctions, damages for loss resulting from unauthorised use and declarations that the traditional cultural rights of the traditional owners have been contravened.

Clause 31(2) sets out a list of factors which the court may take into account in deciding the appropriate relief. As such, this clause provides a court flexibility in deciding the most appropriate remedy or remedies taking into account the particular circumstances of a case, including the nature of any unauthorised use and its subsequent effect, the costs involved and any actions taken by the defendant to mitigate any negative effects of the contravening acts or omissions. For example, in relation to contraventions of moral rights, a public apology by the defendant to the traditional owners may, in some circumstances, be a more appropriate and meaningful remedy than an award of damages.

Division 3 – Defences and other matters

Clause 32 - Defences

This clause provides a defence to criminal offences under clauses 26 or 27 and civil actions under clauses 30(1) or 30(2). It is a defence if a determination has been published under clause 17 and the traditional owners specified in that determination have given their prior and informed consent to the use in question. The determination is that made by the Cultural Authority which identifies and contains the details of all the traditional owners in respect of traditional knowledge or expressions of culture for which an application by a prospective user has been made.

For example, traditional owner ‘A’ may initiate proceedings against a person pursuant to clause 30(1), alleging that the person has used an expression of culture owned by ‘A’ without its prior and informed consent. If the person had applied to the Cultural Authority under Part 4 and received a determination stating that the expression of culture was owned by traditional owners ‘B’ and ‘C’ and if the person had subsequently obtained the prior and informed consent of ‘B’ and ‘C’, the person could accordingly plead that determination by way of defence against the claim by ‘A’.

Clause 33 - Other mechanisms to resolve disputes

Clause 33 provides that nothing in Part 5 prevents the traditional owner or the other party concerned from attempting to resolve a dispute using mechanisms other than court proceedings. The clause refers specifically to mediation, alternative dispute resolution procedures and customary law and practices. This clause recognises that there are appropriate and effective means for resolving a dispute outside of the court process.

Clause 34 - Other rights of action and remedies

This clause provides that Part 5 does not affect any rights of action or other remedies, whether civil or criminal, provided for under other Acts or laws. This clause makes clear that the offences and rights of action created by the Act are in addition to other offences and rights of action that might arise in respect of dealings with traditional knowledge and expressions of culture. For example, traditional owners could also sue for breach of contract if a person breached the terms of an authorised user agreement which he or she had entered into with the traditional owners.

Part 6 – Transitional arrangements

Clause 35 - Procedure for transitional arrangements

This clause deals with the situation of a person who is making a non-customary use of traditional knowledge or an expression of culture at the time the Act commences.

Clause 35(2) provides that the Act does not apply to the person during the period of 60 days following the commencement of the Act. The 60 day period is termed the ‘application period’. Clause 35(3) requires the person who wants to continue to use traditional knowledge or an expression of culture in a non-customary way to apply to the Cultural Authority within the application period to obtain the prior and informed consent of the traditional owners.

If the person does not apply to the Cultural Authority, clause 35(4) provides that the Act applies to the person on and after the end of the application period. If the person has applied to the Cultural Authority, clause 35(5) provides that the Act will not apply to the person until either the traditional owners reject the application or enter into an authorised user agreement with the person.

Part 7 – Cultural Authority

Part 7 deals with the Cultural Authority which is the body referred to in Part 4. The model law does not include provisions for creating a new statutory body as enacting countries may have existing legislation that they can use to form a new statutory body or to assign an existing body if needed.

Clause 36 – Designation of Cultural Authority

This clause empowers the Minister responsible for the Act to designate an existing or new body to perform the functions of the Cultural Authority. It is a decision for the enacting country whether to establish a new statutory body or use an existing body as its Cultural Authority.

Clause 37 – Functions of the Cultural Authority

Clause 37 sets out possible functions of the Cultural Authority. Enacting countries are able to adopt, adapt or amend the list of functions to suit their particular circumstances.

Part 8 – Miscellaneous

Clause 38 - Regulations

This clause provides that the Minister responsible for the Act may make regulations as required or permitted by the Act for carrying out or giving effect to the Act. For example, regulations are necessary to prescribe the form of the application which prospective users submit to the Cultural Authority and the amount of the fee to accompany the application.

Clause 39 - Recognition of other laws

This clause provides that, in accordance with reciprocal arrangements, the Act may provide the same protection to traditional knowledge and expressions of culture which originate in other countries as is provided to traditional knowledge and expressions of culture originating in the enacting country.

In other words, country ‘A’ may enter into a reciprocal arrangement with country ‘B’ whereby ‘A’ agrees to extend the same protection to traditional knowledge and expressions of culture originating from ‘B’ (but present in ‘A’) as is provided by the Act to traditional knowledge and expressions of culture originating in ‘A’, and vice versa. For example, under such an arrangement, an expression of culture, such as a sculpture, which was brought from ‘B’ into ‘A’ for an exhibition, would be protected while in ‘A’ in the same way as a sculpture, being an expression of culture of ‘A’, is protected under the Act in ‘A’.
