

IK Act, (No 6  
of 2019)  
Presentation  
to *the dti*  
Portfolio  
Committee

M Making < sure it's possible



science & innovation

Department:  
Science and Innovation  
REPUBLIC OF SOUTH AFRICA



# PRESENTATION OUTLINE

- Introduction
- The IK Bill processes
- The Focus of the IK Act
- The Focus of IPLAA
- Some Limitations of the IPLAA
- Alignment of IPLAA and IK Act and possible action points
- Conclusions

# INTRODUCTION (1/2)

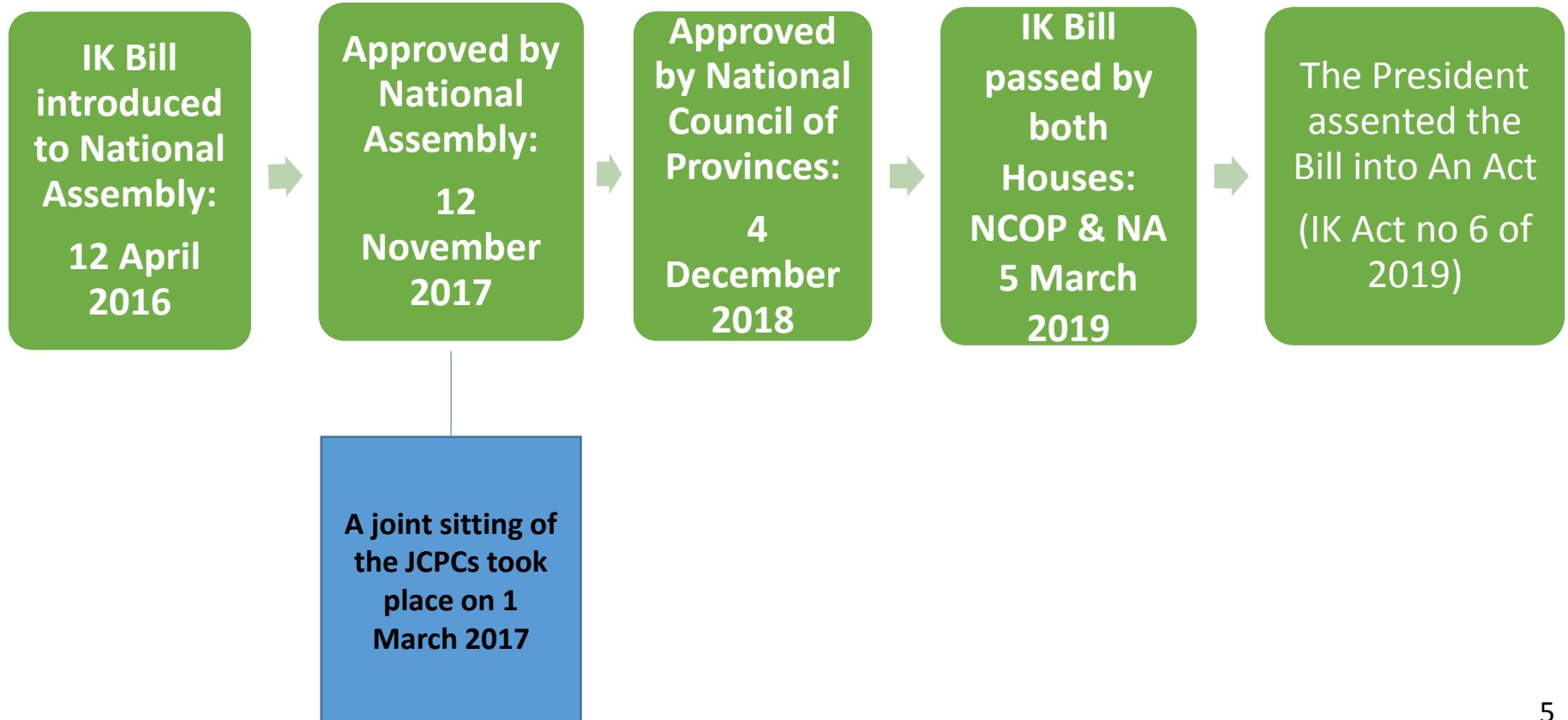
- The possible protection of IK raises a number of complex cultural, economic, social and trade-related questions;
- Fitness of Purpose for the Protection of Indigenous Knowledge;
- The effects that such protection would have on the promotion and protection of creativity and innovation as contributions to sustainable economic development, including local and rural community development;
- Protection of Indigenous Knowledge should be assessed in relation to the core policy tenets of the relevant IP Policy Systems

# INTRODUCTION (2/2)

- The protection of Indigenous Knowledge also touches upon other important policy areas. A country may wish to consider the protection of IK in relation to; (i) safeguarding and preservation of cultural heritage (ii) freedom of expression, (iii) respect for the rights, (iv) interests and claims of indigenous and other traditional communities, (v) recognition of customary laws, protocols and practices, (vi) access to knowledge and the scope of the “public domain”; addressing the challenges of multiculturalism; and, promotion of cultural diversity, including linguistic diversity, and of access to a diversity of cultural expressions;
- Protection should be practically feasible and enforceable, especially from the point of view of indigenous communities, and not create excessive administrative burdens for right holders or administrators alike; and
- It has been widely recognised that the protection of IK must be supported by the provision of appropriate technical assistance, capacity-strengthening and support for documentation where desired by communities.

# PARLIAMENTARY PROCESS LEADING TO THE IK ACT

## No 6 of 2019



## DSI POSITION

1. A joint sitting of the JCPCs took place on 1 March 2017. The purpose of the joint sitting was to allow *the dti* an opportunity to present and comment on, the two pieces of legislations, namely the IPLAA and the IK Bill; and
2. The JCPCs subsequently, wrote letters dated 6 March 2017, to the Ministers of Science and Technology and Trade and Industry requesting them to establish a Technical Team. The PC on Science and Technology PC indicated its preference that the DST coordinate the technical team.

## ISSUES EMERGING FROM ON THE ALIGNMENT OF THE TWO LEGISLATION (1/2)

The following issues emerged from the meeting regarding the alignment of the different pieces of legislation between the DST and ***the dti***:

- i. Can the IPLAA and IK Bill co-exist? Practical explanations and examples of what would be required to effect this should be provided.
- ii. How would the structures established by IPLAA (IK Council, Trust Fund, and Database) link and co-ordinate with the structures proposed to be established by the IK Bill (NIKSO, IK Register, Office of the Curator , the Advisory Panel)?

## ISSUES RAISED FOR THE TASK TEAM (2/2)

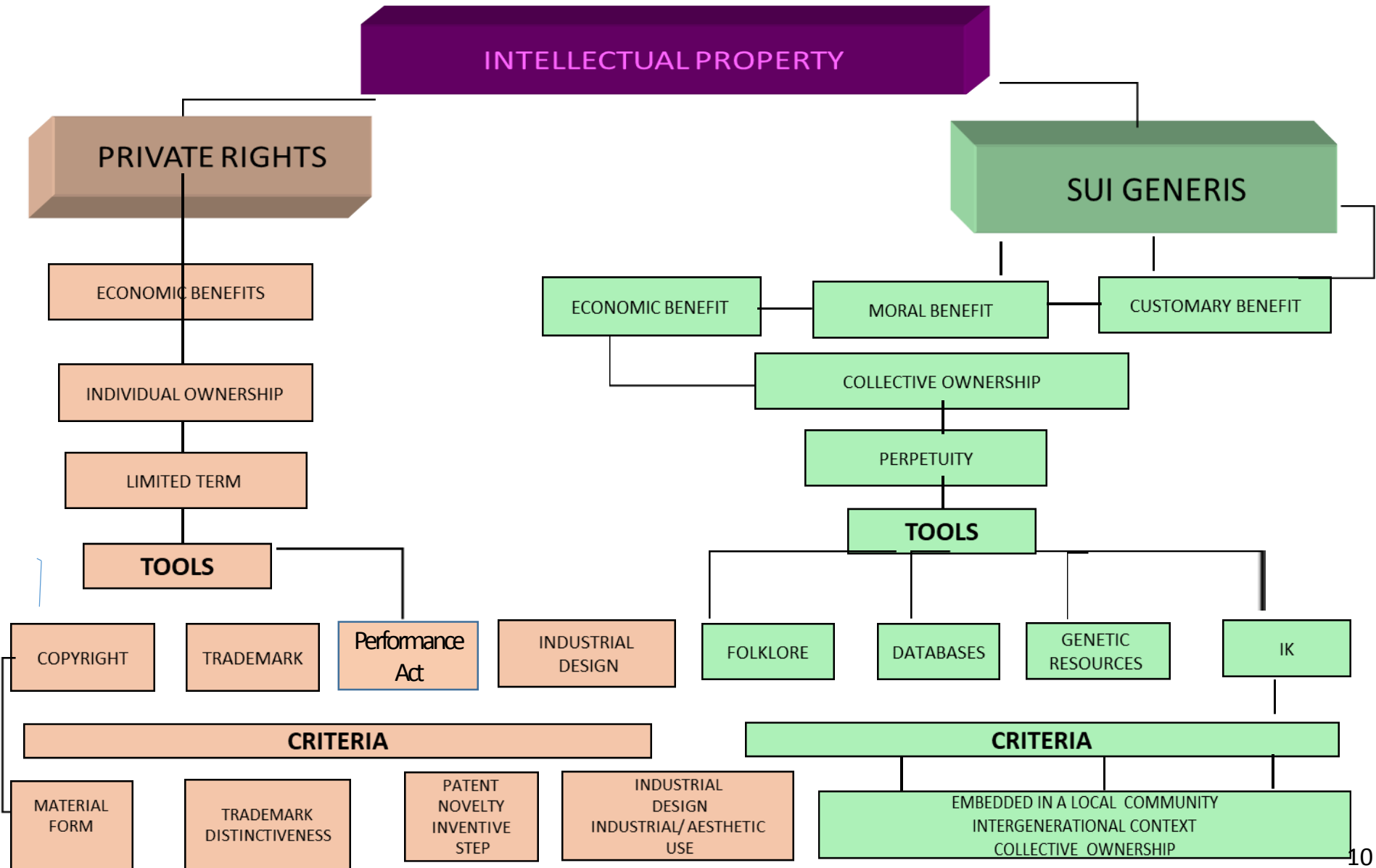
- i. The specification and functionality of the national database envisaged under section 28 (c) of IPLAA.
- ii. The necessity and/or validity of protecting the commercialisation of IK through the Intellectual Property Rights (IPR) protection, as the patent legislation for the promotion of IK has barely been used.
- iii. The process of registering derivatives from IK and how the existing IK would be protected.
- iv. The commercialisation of IK without acquiring IPRs.
- v. The registration of IK not associated with an indigenous biological resource.
- vi. The transboundary nature of IK.



# OUTCOMES OF THE MEETING

- Fitness of purpose
  - ✓ Does IPLAA serve the purpose above;
  - ✓ Does the IK Act serve the purpose above;
  - ✓ How does the NEMBA fit in? and
  - ✓ Is the Department of Arts and Culture with the creative industries linked to the IP management?
- What about the fitness of the of the Tools and Institutional Arrangements.
- Coordinating of the new protection for IK with existing IP and other systems.
- Is it possible to string together a value chain?

# DIFFERENCE BETWEEN IPR AND SUI GENERIS



## SCOPE OF THE IK ACT

The Scope of the IK Act goes beyond the Intellectual Property Protection as it provides for:

- The protection, promotion, development and management of indigenous knowledge;
- The establishment and functions of the National Indigenous Knowledge Systems Office;
- The management of rights of indigenous knowledge communities;
- The establishment and functions of the Advisory Panel on indigenous knowledge;
- Access and conditions of access to knowledge of indigenous communities;
- The recognition of prior learning;
- The facilitation and coordination of indigenous knowledge-based innovation; and
- Matters incidental thereto.

## FOCUS OF THE ACT

The IK Act addresses the following concerns:

- Bio piracy
- Misappropriation
- Promotes registration of Indigenous Knowledge
- Recognises prior learning of practitioners
- Benefit sharing for communities
- Facilitates research and development
- Creates mechanisms for dispute resolution for the communities

# PROVISIONS OF THE IK ACT (1/15)

## Protection of Indigenous Knowledge

### Clause 9:

- Provides for the subject matter under protection, within the meaning of section 25 of the Constitution. In addition, the sub-clause provides for indigenous knowledge as property vests in the relevant indigenous community.

### Clause 10:

- Provides for the duration of protection of the subject matter which will persist for as long as the eligibility criteria set out in clause 11, are met.

# PROVISIONS OF THE IK ACT (2/15)

## Protection of Indigenous Knowledge

### Clause 11:

- Delineates the eligibility criteria for protection of the subject matter, namely, indigenous knowledge which has been passed on from generation to generation within an indigenous community, has been developed within an indigenous community, and is associated with the cultural and social identity of that indigenous community.

### Clause 12:

- Affirms custodianship of indigenous knowledge eligible for protection vests in the trustee of that indigenous community, who holds the indigenous knowledge in trust on behalf of the indigenous community and responsible for and accountable to the indigenous community for the protection of their rights.

# PROVISIONS OF THE IK ACT (3/15)

## Protection of Indigenous Knowledge

### Clause 13:

- Provides for indigenous communities holding indigenous knowledge to have the exclusive right to any benefits arising from its commercial use, be acknowledged as its source, and limit any unauthorised use of the indigenous knowledge.

## PROVISIONS OF THE IK ACT (4/15)

- Provides for the subject matter under protection, within the meaning of section 25 of the Constitution as property.
- Provides for indigenous knowledge as property vested in the relevant indigenous community.
- Introduces a Trustee as a representative custodian of the IK
- Provides for the duration of protection of the subject matter in perpetuity as long as the eligibility criteria set out in clause 11, are met.
- Eligibility criteria of subject: Indigenous knowledge
- Custodianship and ownership by the community
- Exclusive rights to any benefits, acknowledgement to limit unauthorised use of IK



# PROVISIONS OF THE ACT (5/15)

## Clause 4 : Establishment of NIKSO

- NIKSO is hereby established within the Department of Science and Innovation as a Special Service Delivery Unit .

## Clause 7: Establishment of Advisory Panel

- The Minister may establish an Advisory Panel consisting of a minimum of five, but no more than ten, members on specific matters relating to the objects of this Act.
- The Advisory Panel must be broadly representative of the—
  - (a) different relevant government departments;
  - (b) indigenous knowledge practitioners;
  - (c) industry; and
  - (d) specialists in the discipline of practice,

# PROVISIONS OF THE ACT (6/15)

## Clause 14: Recognition of Prior Learning

- Outlines the purpose of the accreditation of assessors, and sets out an application process.

## Clause 15: Certification of IK Practitioners

- Provides for persons wishing to register their designations as an indigenous knowledge practitioner and be so certified and recorded in the Register of Designations

# PROVISIONS OF THE ACT (7/15)

## **Clause 17: Registration office**

- Provides for the establishment of a Registration Office for indigenous knowledge.

## **Clause 18: Curator**

- Provides for the appointment of a Curator of indigenous knowledge who will be responsible for the control of the Registration Office.

## **Clause 19: Registration Maintenance**

- Provides for the creation and maintenance of a system of registration of indigenous knowledge by NIKSO

# PROVISIONS OF THE ACT (8/15)

## **Clause 20: Registration of IK**

- Provides for a trustee to apply to the Curator for the registration of indigenous knowledge. Under this sub-clause the Curator may approve or deny the application subject to any conditions or limitations, or reject the application if it does not meet the criteria set out in Clause 11.

## **Clause 21: Inspection of Register**

- Provides for the Curator to make the Register available for inspection to the public. However, documents relating to the registration of indigenous knowledge may only be made available, if the person seeking access enters into a prescribed non-disclosure agreement.

# PROVISIONS OF THE ACT (9/15)

## **Clause 22: Certificate**

- Provides for a certificate issued by the Curator, in respect of any record, as evidence of the content.

## **Clause 23: Register as Notice**

- Provides for the Register to be a constructive notice in any proceedings regarding the rights registered in respect of indigenous knowledge.

# PROVISIONS OF THE ACT (10/15)

## **Clause 24: Amendment of Register**

- Provides for an interested person applying to amend the Register in the prescribed manner, upon application and after granting the indigenous community an opportunity to make representations in response to the application the Curator must amend the Register. In addition, an entry in the Register must be amended in accordance with any finding by a court.

## **Clause 25: Commercial Utilisation**

- Provides for the facilitation and coordination by NIKSO of all indigenous knowledge activities, which relate to the commercial utilisation of indigenous knowledge products, services and processes.

# PROVISIONS OF THE ACT (11/15)

## Clause 26: License Application

- Affords opportunities for any person who intends to use indigenous knowledge for commercial purposes to apply in the prescribed manner for a license authorising the use of that indigenous knowledge; and
- Enter into a license agreement with the trustee of the relevant indigenous community for the use of that indigenous knowledge.
- In addition, the sub-clause provides for exceptions and limitation relating to access to the indigenous knowledge including acknowledgement by users of indigenous knowledge or the geographical location from which the indigenous resources originated.

### Clause 27 Dispute Resolution Committee

- The Minister may appoint members of the Dispute Resolution Committee to resolve any dispute arising from this Act on a case by case basis.
- In resolving a dispute, the Dispute Resolution Committee must consider customary laws which may have a bearing on the subject matter of the dispute.
- The Dispute Resolution Committee may, as a sanction recommend to NIKSO the cancelling, suspending or revoking of the license.



# PROVISIONS OF THE ACT (13/15)

## **Clause 29: Transnational arrangements**

- Sets out the process and conditions for the protection of indigenous knowledge resources originating from foreign jurisdictions and in instances where indigenous knowledge originates in one or more indigenous communities in foreign jurisdictions.

## **Clause 30: Multiple claims for IK**

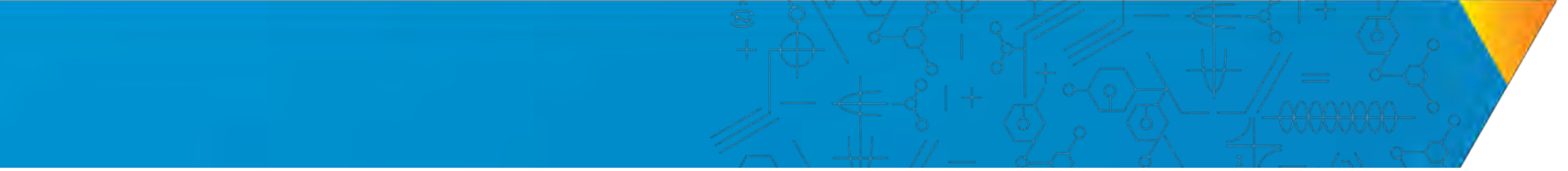
- Provides for multiple claims to indigenous knowledge. In this context, any remuneration payable under a benefit sharing agreement must be apportioned equally among the trustees.

## Clause 33: Transitional arrangements

- An indigenous community wishing to register indigenous knowledge already in existence at the time of commencement of this Act, must register such indigenous knowledge in terms of this Act.
- Any continued use of indigenous knowledge, after the commencement of this Act, must be regulated in terms of a license agreement between the trustee of the relevant indigenous community and the potential license holder, entered into within 12 months from the date of commencement of this Act.

## PROVISIONS OF THE ACT (15/15)

- This Act does not alter or detract from any right in respect of any statute or the common law.
- Compliance with any procedures or requirements laid down in this Act does not constitute compliance with any procedures or requirements imposed in any other Act.
- Regulations on this Act are currently being developed.



# The Focus of Intellectual Property Laws Amendment Act, No 28 of 2013 (IPLAA)

## SCOPE OF THE PROTECTION PROVIDED BY IPLAA (1/2)

To provide for the recognition and protection of *certain manifestations of indigenous knowledge* as *a species of intellectual property*; to this end to amend certain laws so as to provide for the protection of *relevant manifestations of indigenous knowledge* as a species of intellectual property:

- *the Performers' Protection Act, 1967* to provide for the recognition and protection of performances of traditional works;
- *the Copyright Act, 1978*, to provide for the recognition and protection of indigenous works; to provide for the establishment of a National Council in respect of indigenous knowledge; to provide for National Databases for recording indigenous knowledge and to provide for the recording of indigenous works; and to provide for the establishment of a National Trust Fund for Indigenous Knowledge;
- *the Trade Marks Act, 1993*, to provide for the recognition of indigenous terms and expressions and for the registration of such terms and expressions as trade marks;

## SCOPE OF THE PROTECTION PROVIDED BY IPLAA (2/2)

- **the Designs Act, 1993**, to provide for the recognition and registration of indigenous designs; to create for this purpose a further part of the designs register; to introduce statutory provisions to provide for the establishment of a National Council in respect of indigenous knowledge, a National Database for the recording of indigenous knowledge and a National Trust and Trust Fund for purposes of indigenous knowledge; and
- to provide for matters incidental thereto.

# PROVISIONS OF THE IPLAA (1/11)

Nature of Amendments to the Performance Protection Act 1967:

1. Amendments to the definitions to include:
  - i. artistic works; and
  - ii. Cinematograph.
2. Extending definition of “Collecting Society”.
3. Changing definition of fixations to facilitate reproduction or/and performance.

# PROVISIONS OF THE IPLAA ACT (2/11)

New Elements on IP Amendments to the Performance Protection Act 1967:

1. Confers a right (traditional works) to an individual as in section 2 (2).
2. Accreditation of institutions for adjudication to include customary dispute resolution mechanism.
3. Provision of Council for IK as Council for Performance of Traditional Works.
4. Provision of Council for IK as Authority.
5. Provision of Regulations.



## PROVISIONS OF THE IPLAA (3/11)

2. Nature of Amendments to the Copyright Act 1978
3. Section 3 deals with amendments to Section 1 dealing with:
  - (a) addition to the definition of “author”;
  - (b) definition of Collecting Society;
  - (c) definition of Commission and Community protocol;
  - (d) Provides a definition for National Council for IK;
  - (e) Definition of National Database for IK and derivative indigenous Work;
  - (f) More definitions - the National Trust Fund for IK – indigenous community- Indigenous Cultural Expressions and indigenous work;
  - (g) Insertion of traditional work;
  - (h) Defines National Trust of IK;
  - (i) Insert reproduction in literary or musical and artistic work
  - (j) Introduces definition of traditional work; and
  - (k) Definition of work.

# PROVISIONS OF THE IPLAA (4/11)

## INSERTION OF CHAPTER 2A: COPYRIGHT IN TRADITIONAL WORKS AS SUBSTANTIVE CHANGE

### 28B Defines Tradition Work Eligible for copyright

28B (1) Subject to the provisions of this Act, traditional works shall be eligible for copyright.

28B (2) Notwithstanding section 2(2), a traditional work shall not be eligible for copyright unless it has been written down, recorded, represented in digital data or signals, or otherwise reduced to a material form;

or is capable of substantiation from the collective memory of the relevant indigenous community.

# PROVISIONS OF THE IPLAA (5/11)

28 B (3) Copyright shall be conferred on a traditional work only if—

- (a) the traditional work *is a derivative indigenous work* and was created on or after the date of commencement of the Intellectual Property Laws Amendment Act, 2013, and the indigenous community from which the work, or a substantial part thereof originated, is or was an indigenous community when the work was created; or
- (b) the traditional work is an indigenous work.

28 B (4) *No right in a derivative indigenous work provided for in the Intellectual Property Laws Amendment Act, 2013*, shall be eligible for registration unless—

- (a) prior informed consent has been obtained from the relevant authority or indigenous community;
- (b) disclosure of the indigenous cultural expressions or knowledge have been made to the Commission; and
- (c) a benefit-sharing agreement between the applicant and the relevant authority or indigenous community has been concluded.

# PROVISIONS OF THE IPLAA (6/11)

## 28 C: National Database

- 28 C (1) There shall be kept in the prescribed manner, at the offices of the registrars of patents, copyright, trade marks and designs, databases for indigenous knowledge as part of existing intellectual property registers, where applicable.
  - 28 C (5) The databases may be kept in an electronic format, and *shall be open for inspection by the public* during office hours, upon payment of the prescribed fee.
  - 28 C (14) A recording as contemplated in this section shall serve as Prima facie proof of the existence of the manifestation of indigenous cultural expressions or knowledge and the veracity of the information recorded, *but shall not give rise to any rights other than expressly provided in this Act* or in the Performers' Protection Act, 1967 (Act No. 11 of 1967), the Trade Marks Act, 1993 (Act No. 194 of 1993), or the Designs Act, 1993 (Act No.195 of 1993).
- 28 D (2&3) *Ownership is vested in the (i) Author and (ii) the National Trust established by section 28 I.*
- 28 E (1&) *The nature of copyright in traditional works Clauses: (a-m).*

# PROVISIONS OF THE IPLAA (7/11)

28F Term of Protection to traditional works:

1. Derivative works for 50 years from the end of the year in which the work was published/communicated to the public.
2. 50 years from the date of the death of the author or all authors concerned.
3. In perpetuity in an indigenous work referred to in Section 28b (3)(b).

“Indigenous work” *means a literary, artistic or musical work* with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and *which literary, artistic or musical work is regarded as part of the heritage of such indigenous community.*

# PROVISIONS OF THE IPLAA (8/11)

1. 28G General Exceptions regarding protection of TW
  - Provision of 28G (7) is very generous as to allow all the TW to be used without prior consent of the right holders/owner on the basis of portions or excerpts are reasonable.
2. 28H Royalties and benefits to the owner of copyright
  1. Terms for payment of royalties and benefits;
  2. Determination of amounts of royalties and benefits;
  3. Role of the Council; and
  4. Owners of copyright in a derivate indigenous knowledge to pay a royalty or benefit.
3. 28I Establishment of National Trust
  - Responsible for promotion and preservation of TCE's;
  - Commercialisation, facilitation of capacity building; and
  - Assist indigenous communities in application of the Act.

# PROVISIONS OF THE IPLAA (9/11)

1. 28I (3) Establishment of National Trust Fund for Indigenous Knowledge
  - Fund may be divided in whole or in part into separate sub-funds;
  - All income derived by the Fund shall be the National Trust monies;
  - The Commission shall be responsible for the administration of the National Trust; and
  - Indigenous communities legal entities business or other enterprise obliged to pay fees, royalties and benefits only once to the Fund.

# PROVISIONS OF THE IPLAA (10/11)

## 28J Assignment and Licenses

- (1) Assignment to (a) collecting society (b) a duly representative of the indigenous community.
- (2) Transfer of copyright vested in a representative of an indigenous community.
- (3) Upon death of a last living member of such an indigenous community such a copyright shall be transferred to the National Trust.

28K Disputes provides for Commission to accredit institutions to adjudicate disputes and should consider customary dispute resolution mechanisms.

Accredited institution to serve an order as if it was an order of the High court.



## PROVISIONS OF THE IPLAA (11/11)

- 28L (1) Minister shall establish the National Council for Indigenous Knowledge
- (2) Consultation with government departments, traditional leaders and healers, academia, indigenous communities.
- (3) Removal of a member of the council.
- (4) Functions of Council with broad functions .
- 28N Compliance with international agreements.

# TRADE MARK AMENDMENTS

## Section 7

### Nature of Amendments to the Trade Mark Act 1993

1. Amendments to the definitions from sub-clauses (a) to (h).
2. Insertion of Part XIIA in Act 194 of 1993.
3. Amendments of 43 from A to K follows the same mode of principles as in 28A to N on copyright.

# AMENDMENT TO THE DESIGN ACT 1993

## Nature of Amendments to the Design Act of 1993

1. Amendments to the definitions from sub-clauses (a) to (i).
2. Section 12. Insertion of sections 53 (A to L) in Act 195 of 1993.
3. Section 13. Amendment of section 54 of 195 of 1993 on finances.
4. Section 14 Insertion 54A in act 195 of 1993.



SOME LIMITATION OF FOCUSSED ON  
SOME SPECIES OF CONVENTIONAL  
INTELLECTUAL PROTECTION OF  
INDIGENOUS KNOWLEDGE

# GAPS IN CONVERSIONAL IP SPECIES SELECTED TO PROTECT INDIGENOUS KNOWLEDGE

## 1. Copyright limitations

In order to be protected by copyright, a certain level of originality is necessary. Also, the holder of right is basically presumed to be an individual, and although there are systems of joint ownership of copyright or copyright owned by legal entities, it is not presumed that a community directly becomes a copyright holder. There is no indication that Performance of TCEs can be subject to protection by neighbouring rights, even if the performed TCEs itself does not qualify as a copyrighted work.

## 2. Trademarks limitations

The advantage of this protection is that it makes no novelty requirement and that it can be renewed without limitation, *but protection relates only to actual or intended use for certain categories of products or services.*

*A trademark right is aimed at protecting signs used for goods and services by entrepreneur but not as cultural expressions such as TCEs.*

# GAPS IN CONVERSIONAL IP SPECIES SELECTED TO PROTECT INDIGENOUS KNOWLEDGE

## 3. Designs Act

The laws on *industrial designs* provide protection for certain expressions of folklore such as graphical marks on any surface and three-dimensional forms. *However, the novelty and originality criteria, ownership and the limited duration of protection are difficult to reconcile with the nature of cultural expressions.*

## 4. Performance Protection Act

A reference to folklore exists only in the international WIPO Performances and Phonograms Treaty (WPPT) of December 20, 1996, where a performer is defined as the person who acts, sings, declaims, etc. ... literary or artistic works or expressions of folklore.



**EXTENT OF COMPLEMENTARIY AND  
CONTRADICTIONS BETWEEN THE IK  
ACT of 2019 AND THE IPLAA ACT,  
No 28, of 2013 AND WAY FORWARD**

# EXTENT OF COMPLEMENTARIY AND CONTRADITIONS BETWEEN THE IK ACT of 2019 AND THE IPLAA ACT, 2013 AND WAY FORWARD

No.	DESCRIPTION	IPLAA	IK ACT	POSSIBLE RESOLUTION
1.	Policy Alignment	Aligns with IKS Policy (2004) on development of IP regime but does not align with Policy in relation to sui generis protection and use of Indigenous Knowledge and traditional works.	The Act uses “indigenous” throughout the text, Aligns with the South African Intellectual Property Policy	Need for legal certainty
		The Act does not claim to be aligned to any international obligations and treaties except the Berne Convention.	Consistent with the negotiations at the WIPO’s IGC, Nagoya Protocol, International treaty for Plant Genetic Resources for Food and Agriculture, The AU Farmer Breeders Rights	
	Definitions in the legislation	Provides precedence in legal terms .	Utilised definitions provided for in IPLAA.	Building Legal certainty



# EXTENT OF COMPLEMENTARIY AND CONTRADITIONS BETWEEN THE IK ACT of 2019 AND THE IPLAA ACT, 2013 AND WAY FORWARD

N o.	DESCRIPTION	IPLAA	IK ACT	POSSIBLE RESOLUTION
1.	SCOPE OF PROTECTION	<i>certain manifestations of indigenous knowledge as a species of intellectual property limited to 4 areas.</i>	Covers all areas of indigenous knowledge.	Legislation should be comprehensive and cover all aspects of the protection of IK.
		Covers largely one type of indigenous knowledge in relation to indigenous cultural expressions including marks and designs.	Covers indigenous functional knowledge, indigenous cultural expressions and genetic resources associated with IK.	Legislation should be comprehensive.
		Fragmentation of and treatment of traditional works and indigenous knowledge.	Holistic approach covering the entire subject matter of indigenous Knowledge.	Legislation should address all the areas to be protected.
		Defensive protection	Positive and	Requires both

# EXTENT OF COMPLEMENTARIY AND CONTRADITIONS BETWEEN THE IK ACT of 2019 AND THE IPLAA ACT, 2013 AND WAY FORWARD

N o.	DESCRIPTION	IPLAA	IK ACT	POSSIBLE RESOLUTION
1.	SPECIES OF INTELLECTUAL PROPERTY	Performance Act Copyright Trade Marks Design Law.	Sui Generis Protection that covers all species of intellectual property.	Legislation should be comprehensive and cover all aspects of the protection of IK.
		IP Act requires the reduction of IK to material form for it to qualify for protection.	IK as property as per section 25 of the Constitution.	Indigenous knowledge to be protected on its own terms as property.
	Ownership of IK	The Act makes provision for IPRs to result in (i) private ownership of indigenous knowledge by persons who are not associated with the community which has developed the knowledge (ii) Representatives of Indigenous Communities, and (iii) the State as in the National Trust.	Custodian of IK vests with the Trustee nominated by a community protocol, it is vested with the communities that pass it on from generation to generation, that developed it, maintains and is associated with their identity.	Custodianship of Indigenous Knowledge must be vested with those who created and maintained/s it and the is associated with their identity. Derivative works must acknowledge the custodians.

# EXTENT OF COMPLEMENTARIY AND CONTRADITIONS BETWEEN THE IK ACT of 2019 AND THE IPLAA ACT, 2013 AND WAY FORWARD

N o.	DESCRIP TION	IPLAA	IK ACT	POSSIBLE RESOLUTION
		<p>The IP Act provides protection for third party users of the IK, <b>it does not grant</b> a right to communities to provide access or deny access to their knowledge.</p>	<p>IK Act introduces <b>new rights</b> that allow indigenous communities to grant or deny access to their knowledge.</p>	<p>Affirmation of the right to deny or allow access to the knowledge.</p>
		<p>The IP Act only affords commercial incentives to IK residing in <b>the dti</b> database which is publicly accessible.</p>	<p>IK Act accords both non-commercial (including moral rights) and commercial incentives both in a publicly accessible and confidential IK database.</p>	<p>Broaden the scope of protection for the socio-economic and sustainable development.</p>

# EXTENT OF COMPLEMENTARIY AND CONTRADITIONS BETWEEN THE IK ACT of 2019 AND THE IPLAA ACT, 2013 AND WAY FORWARD

N o.	DESCRIPTION	IPLAA	IK ACT	POSSIBLE RESOLUTION
1.	Prior informed Consent, Disclosure and Benefit sharing Agreements.	Required at the stage of granting rights.	Required at the stage of accessing indigenous knowledge.	Required from the stage of access to IK through the granting rights, licensing and benefit sharing.
	Research development and incubation.	No provision is made in the Act.	Promote partnership for innovation and product development, etc.	IK Act covers all stages of development of products and services from community to the markets.
	Exceptions and limitations.	Too broad and based on copyright principles.	Tiered, tight and pertinent to the nature of the subject matter.	The Exceptions and Limitations should not allow for evading befit sharing and acknowledgement of the indigenous communities.

# EXTENT OF COMPLEMENTARIY AND CONTRADITIONS BETWEEN THE IK ACT of 2019 AND THE IPLAA ACT, 2013 AND WAY FORWARD

N o.	DESCRIPTIO N	IPLAA	IK ACT	POSSIBLE RESOLUTION
1.	Databases and registration of IK	Provides for databases and registers for Traditional Works, trade marks and Design Law.	Provides for Registration of all species of Indigenous Knowledge.	Databases should go beyond registering for IP purposes commensurate with the developmental aims.
		The databases and registers are for the defensive protection of limited IP species.	Covers the defensive protection, positive protection (as in innovation) and for preservation i.e. preserving IK against loss; saving IK for future generations of the original community and ensuring fair and appropriate terms when making IK available more widely.	Databases are for both positive and defensive Protection and many other functions including non-monetary goals.

# EXTENT OF COMPLEMENTARIY AND CONTRADITIONS BETWEEN THE IK ACT of 2019 AND THE IPLAA ACT, 2013 AND WAY FORWARD

N o.	DESCRIPTIO N	IPLAA	IK ACT	POSSIBLE RESOLUTION
1.	Databases and registration of IK.	Open Access to Databases could place content in public domain. The Act allows for restricted access to sacred IK.	Restricted access to the databases with tiered controls allowing for enforcement of ABS protocols from the start.	Systemic approach that protects Indigenous Knowledge as property and does not make it vulnerable to exploitation without benefit
		The Commission as the custodian and Administrator of Databases.	NIKSO through NIKMAS as administrator and coordinator.	There is need to prime one institution for the management of Databases owing to complex purposes.
		The responsibility lies with registrars of patents, copyright, trade marks and Designs.	The Curator is responsible for all the registration and management of databased.	Combine into one Office with capacity and expertise to make the platform for all government stakeholders.

# EXTENT OF COMPLEMENTARIY AND CONTRADITIONS BETWEEN THE IK ACT of 2019 AND THE IPLAA ACT, 2013 AND WAY FORWARD

No	DESCRIPTION	IPLAA	IK ACT	POSSIBLE RESOLUTION
	Delegation of responsibility on maintenance of D/B.	The registrars of patents, copyright, trade marks and Design may delegate the maintenance.	The curator is the sole person responsible for all matters pertaining access, security and development.	To streamline and focus in one office to for fitness of purpose. Create a One Stop Shop concept as in BioPanza.
	Community Protocols	Requirement Commission to assist communities.	Requirement NIKSO to assist communities.	Agreement
		Commission to decide what should be kept as confidential and allow the community to determine what is sacred.	All recorded materials is considered to be confidential and protocols to access such information is already in place.	The role of the indigenous communities as custodians of IK is central.
	Status of	Does not rise to any	Recording rises to a right to	A right similar to

# EXTENT OF COMPLEMENTARIY AND CONTRADITIONS BETWEEN THE IK ACT of 2019 AND THE IPLAA ACT, 2013 AND WAY FORWARD

No.	DESCRIPTION	IPLAA	IK ACT	POSSIBLE RESOLUTION
	<b>Institutional Arrangements</b>	The Commission (CIPC) has host institution for the implementation of the Act.	NIKSO as the implementation agent and Authority/ focal point for IKS in the Country.	The role of the Commission is limited to IP matters whereas NIKSO has an interdepartmental mandate and scope of the work.
		Commission to accredit institutions to adjudicate disputes.	Minister may appoint members of the Dispute resolution Committee.	A streamlined process that would include experts on IP and IK to constitute a Dispute Resolution Committee.
		The Commission receives all disclosures from the users and Knowledge holders.	NIKSO receives and to administer all disclosures.	



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No.	DESCRIPTION	IPLAA	IK ACT	POSSIBLE RESOLUTION
	<b>Institutional Arrangements</b>	Responsible for Administration of the Council, National Trust and the National Fund.	Responsible for the Administration of the Ministerial advisory Committee, Coordination of commercialisation.	
	<b>Institutional Arrangements</b>	The National Council for Indigenous Knowledge.	Advisory Panel	
		Advisory role to the Minister on matters pertaining IP on patents, Trade Marks, Designs Act and Performance protection Act of 1967.	Expert and Strategic advice on the promotion, protection, development and management of IK.	

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No.	DESCRIPTION	IPLAA	IK ACT	POSSIBLE RESOLUTION
	Institutional Arrangements	Grants access to research and information performed by the Council.	No performer of research.	Council should not be performer of any management tasks.
		Provides advice to the Minister.	Provides expert and strategic advice.	
		National Trust for Indigenous Knowledge in respect of indigenous cultural expressions.	No similar institution exists.	The government should establish one Trust to manage the monies from all income from IK activities and not only from IP management.
		The National Trust Fund	No provision. Trustees to establish community trusts.	Consolidate all income generation from IK into one fund

# EXTENT OF COMPLEMENTARIY AND CONTRADITIONS BETWEEN THE IK ACT of 2019 AND THE IPLAA ACT, 2013 AND WAY FORWARD

No.	DESCRIPTION	IPLAA	IK ACT	POSSIBLE RESOLUTION
	Commercialisation of Indigenous Knowledge.	Provides for payment of royalties and benefits.	License Agreements and payment of benefits a matter of the agreement between licensee and the representative of the indigenous community.	A value chain for product development, commercialisation, services and processes for the entire sector be established to optimize benefits to the communities and development in the nation.
		Sets out conditions for assignment that could result in the National Trust owning the copyright.	NIKSO proposes to hold rights and benefits of orphaned works as custodian on behalf of the indigenous communities.	

# CONCLUSIONS

1. Government does not have the luxury of discord in its approach to the protection of indigenous knowledge.
2. The concept of the protection of Indigenous Knowledge is wider than Intellectual Property.
3. A consortia and cooperative government approach as in Operational Phakisa is needed in the emerging sector of Indigenous knowledge.
4. A value chain approach with everyone on board should be charted as soon as possible.
5. Consolidation of government assets such as databases to the benefit of every stakeholders is possible.
6. The question is no longer whether the IPLAA or the IK Act can co-exist, it is how the NEMBA, the Traditional Health Practitioners Act, IPLAA and the IK Act can create a viable sector for the provision of indigenous knowledge services, products and processes for the benefit of communities and the nation at large.
7. The involved government department should sign a cooperative agreement to assist with a streamlined regulatory environment that is easier for all parties.
8. A possible way of involving the National Treasury to assist with all aspects relating to the royalties and benefits, licensing agreements, National Funds, National Trusts etc.

**Dankie**

**Ha khensa**

**Re a leboga**

**Ro livhuwa**

**Siyabonga**

**Siyathokoza**

**Thank you  
Enkosi**



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