

REPUBLIC OF SOUTH AFRICA

PROTECTION OF TRADITIONAL KNOWLEDGE BILL

*(As introduced in the National Assembly (proposed section 76 Bill))
(Bill and prior notice of its introduction published in Government Gazette 36354 of 9 April 2013)
(The English text is the official text of the bill)*

(Dr W J James MP)

[PMB - 2013]

BILL

To protect traditional knowledge as a new category of intellectual property; to provide how said intellectual property rights will be protected; to determine what is eligible for traditional knowledge intellectual property right protection and the conditions for the subsistence or termination of said protection; to provide for ownership of traditional knowledge intellectual property rights; to provide for the duration, nature and scope of traditional knowledge intellectual property rights; to provide for the enforcement of traditional knowledge rights; to regulate the licensing of traditional knowledge intellectual property rights; to provide for the establishment of a National Register of traditional knowledge; to provide for the establishment of a National Council in respect of traditional knowledge; to provide for the establishment of a national trust and trust fund in respect of traditional knowledge; and to provide for the regulation of the applicability of the Bill to foreign countries; to provide for the protection of performers and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates –

“**Act**”, means the Act and any regulations issued by the Minister under it.

“**adaption**”, of a traditional work, includes-

(a) in the case of a non-dramatic work,

(i) a version of it in which it is converted into a dramatic work, or in the case of a dramatic work, a version of it which it is converted into a non-dramatic work;

(ii) a translation of the work;

(iii) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures;

(b) in the case of a musical work, any arrangement or transcription of the work;

(c) in the case of an artistic work, a transformation of the work in such a manner that the substantial features remain recognisable.

“Administrator” means the administrator of the Fund provided for in section 37.

“community proxy”, means a person that is duly delegated from time to time to represent, and to act and to own a traditional knowledge right for and on behalf of, a particular traditional community;

“copy”, in relation to a work or a design, means a reproduction or an adaptation of it.

“Copyright Act”, means the Copyright Act, No. 98 of 1978;

“Council”, means the National Council for Traditional Knowledge established in section 33;

“Designs Act”, means the Designs Act, No. 195 of 1993;

“Fund”, means the National Trust Fund for Traditional Knowledge established in section 36;

“mark”, means any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, or any combination of the foregoing;

“Minister”, means the Minister of Trade and Industry;

“originating traditional community”, means the traditional community in which an item of traditional knowledge evolved, or from which it originated;

“owner”, in respect of an item of protected traditional knowledge, shall be deemed the community proxy of the traditional community from which that item of traditional knowledge evolved or in which it has originated;

“Performers Protection Act”, means the Performers Protection Act, No. 11 of 1967;

“prescribed”, means prescribed by the Minister in terms of this Act in regulations published in the Government Gazette;

“protected article”, in respect of a protected traditional design, means any article to which the design has been applied by the originating community, or with the authority of the community proxy, or any articles which are goods of the same description as that article;

“protected traditional design”, means a traditional design referred to in section 8;

“protected traditional knowledge”, means a protected traditional work, a protected traditional design and a protected traditional mark;

“protected traditional mark”, means a traditional mark referred to in section 13;

“protected traditional work”, means a traditional work referred to in section 2;

“publish”, in relation to a traditional work or a traditional design, means issuing copies of that work or of that design to the public with the consent of the community proxy in sufficient quantities to reasonably meet the needs of the public, having regard to the nature of the work, and references to “published” and “publication” shall be construed accordingly;

“reduced to a material form”, means written down, recorded, represented in digital data or signals, or otherwise fixed in a material form;

“Register”, means the Register of Traditional Knowledge provided for in section 22;

“Registrar”, means the Registrar of Traditional knowledge provided for in section 19;

“Registration Office”, shall mean the Office for Registration of Traditional Knowledge provided for in section 18;

“reproduction”, means in relation to –

(a) a traditional work which is an artistic work, including a version produced by converting the work into a three dimensional form, or if it is in three dimensions, by converting it into two dimensional form;

(b) any traditional work, includes a reproduction made from a reproduction of that work;

(c) and reference to **“reproduce”** and **“reproducing”** shall be construed accordingly.

“Republic”, means the Republic of South Africa.

“standard licence fee”, means a licence in respect of an item of traditional knowledge provided for in section 39.

“Trade Marks Act”, means the Trade Marks Act, No. 194 of 1993.

“traditional community”, means a natural, indigenous and homogenous grouping of people that have a common language and customs, which exists in the Republic within an organised structure, and is generally recognised as having a separate and individual character.

“traditional design”, means any design applied to any article, whether for the pattern or the shape or the configuration thereof, or for any two or more of those purposes, and by whatever means it is applied, having features which appeal to and are judged solely by the eye, irrespective of the aesthetic quality, which evolved in, or originated from, a

traditional community, and in respect of which no individual maker is known.

“traditional design right”, means the rights in respect of a protected traditional design provided for in section 9.

“traditional knowledge”, means a traditional work, a traditional design and a traditional mark.

“traditional knowledge right” means a traditional work right, a traditional design right and a traditional mark right.

“traditional mark”, means –

- (a) a certificate trade mark as described in section 42(1) of the Trade Marks Act;
 - (b) a collective mark as described in section 43(1) of the Trade Marks Acts;
 - (c) a trade mark as defined in section 2 of the Trade Marks Act;
- which evolved in, or originated from, a traditional community

“traditional mark right”, means the right in respect of a protected traditional mark provided for in section 14.

“traditional work”, means a literary, musical or artistic work as defined in section 1 of the Copyright Act, which evolved in, or originated from, a traditional community, and in respect of which no individual maker is known.

“traditional work right”, means a right in respect of a protected traditional work provided for in section 3.

CHAPTER 1

PROTECTION OF TRADITIONAL WORKS

Conditions for protection

2. In order to qualify for protection under this Act, a traditional work shall be-
 - (a) reduced to a material form;
 - (b) thus reduced by or on behalf of the originating traditional community; and
 - (c) recognised as being derived from, and characteristic of, that community by persons outside that community.

Traditional work right

3. (1) The right in and to a protected traditional work comprises the exclusive doing, or to authorise the doing of, any of the following acts in the Republic in relation to the work or a substantial part thereof;
- (a) reproducing it in any manner or form;
 - (b) publishing it if it was hitherto unpublished;
 - (c) performing it in public;
 - (d) broadcasting it;
 - (e) causing it to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;
 - (f) making an adaptation of it;
 - (g) doing in relation to an adaptation of the work without any of the acts specified in relation to the work in paragraphs (b) to (e) inclusive;
 - (h) in regard to a copy of the work made without the authority of the copyright owner,
 - (i) selling or letting it for hire or by way of trade offering or exposing it for sale or hire;
 - (ii) importing it into the Republic otherwise than for the private or domestic use of the importer;
 - (iii) distributing it for purposes of trade;
 - (iv) distributing it for any other purposes to such an extent that the owner of the right is prejudicially affected.
- (2) The traditional work right shall be infringed by any person, not being the owner of that right, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act detailed in sub-section 1, if to his knowledge the work in relation to which the act is performed is a protected traditional work and his performance of the act in question was without the authority of the owner of the traditional work right.

General exceptions from the protection of traditional works

4. (1) The right in a protected traditional work, insofar as it consists of a literary work or a musical work, shall not be infringed by performing any act described in sections 12 and 14 of the Copyright Act, which sections shall apply mutatis mutandis to literary and musical works that are protected traditional works as they apply to literary and musical works in those sections.
- (2) The right in a protected traditional work, insofar as it consists of an artistic work, shall not be infringed by performing the act described in section 15 of the Copyright Act, which section shall apply mutatis mutandis to artistic works, which are protected traditional works as they apply to artistic works in that section.
- (3) The traditional work right shall not be infringed by the performance of any act by a member of the originating community which is in accordance with the customs and traditional practice of that community.

Duration of traditional work right

5. (1) The duration of the traditional work right shall, in the case of a published traditional work, be a period of 50 years from the date of its first publication, or the date on which the act came into operation, whichever is the later.
- (2) The duration of the traditional work right shall, in the case of an unpublished traditional work, be indefinite.

Protection of performance of traditional work

6. A performer's performance of a traditional work shall be protected under the Performers Protection Act, and the definition of 'literary and artistic works' in section 1 of that Act shall be deemed to include a traditional work.

Lapsing of traditional work right

7. The traditional work right shall lapse and cease to have any force or effect in the event that a person who is a member of the originating community pursues a claim of copyright infringement in respect of that work under the Copyright Act with the consent of the community proxy.

CHAPTER 2

PROTECTION OF TRADITIONAL DESIGNS

Conditions for protection

8. In order to qualify for protection under this Act, a traditional design shall be –
 - (a) reduced to a material form;
 - (b) thus reduced by or on behalf of the originating traditional community; and
 - (c) recognised as being derived from, and characteristic of, that community by persons outside that community.

Traditional design right

- 9
 - (1) The right in and to a traditional design comprises the exclusive right to exclude other persons from making, importing, using or disposing of, any article embodying the protected design; or a design not substantially different from the protected design; provided that the design of such article is a copy of the protected design.
 - (2) The traditional design shall be infringed by any person, not being the owner of that right, who, without the licence of such owner, does or causes any other person to do, in the republic, any act detailed in sub-section 1 if to his knowledge the design in relation to which the act is performed is a protected traditional design and his performance of the act in question was without the authority of the owner of the traditional design right.

General exceptions from protection of traditional designs

10. (1) The disposing of an article embodying a protected traditional design by or with the authority of the owner of the traditional design right shall give the purchaser the right to use and dispose of that article.
- (2) The traditional design right shall not be infringed by a person who makes an article embodying the protected design right, or a design not substantially different from it, for private purposes or for the sole purpose of evaluation, analysis, research or teaching.
- (3) The traditional design right shall not be infringed by the performance of any act by a member of the originating community which is in accordance with the customs and traditional practice of that community.

Duration of traditional design right

11. (1) The duration of the traditional design right shall, in the case of a published traditional design, be a period of 15 years from the date of its first publication, or the date on which the act came into operation, whichever is later.
- (2) The duration of the traditional design right shall, in the case of an unpublished traditional design, be indefinite.

Lapsing of traditional design right

12. The traditional design right shall lapse and cease to have any force or effect in the event that the traditional design is registered as a design under the Designs Act by or with the authority of the owner.

CHAPTER 3

PROTECTION OF TRADITIONAL MARKS

Conditions for protection

- 13 In order to qualify for protection under this Act, a traditional mark shall be –

- (a) represented graphically
- (b) thus represented by or on behalf of the originating traditional community; and
- (c) recognised as being derived from, and characteristic of, that community by persons outside that community.

Traditional mark right

14. (1) Subject to section 17, the right in and to a protected traditional mark comprises the exclusive right to register that mark as a certification mark, a collective mark, or a trade mark under the Trade Marks Act and it shall be deemed to be eligible for registration as such under the Trade Marks Act by the owner thereof, subject to the provisions of that Act.
- (2) A protected traditional mark shall be deemed to be a mark falling within section 10(12) of the Trade Marks Act, and to be a mark open to objection when sought to be registered by any other party besides the owner of that protected traditional mark, or someone acting on his authority.

Duration of traditional mark right

15. Subject to section 16, the traditional mark right shall endure indefinitely.

Lapsing of traditional mark right

16. The right conferred upon a protected traditional work in this Act shall lapse and cease to have any force or effect in the event that the traditional mark is registered as a certification mark, collective mark, or a trade mark under the Trade Marks Act by or with the authority of the owner.

Effect on common law

17. (1) Subject to sub-section (2), for the purposes of the common law relating to passing-off and unlawful competition, a protected traditional mark shall be deemed to be well-known and to enjoy a repute amongst a substantial number of persons.

- (2) In proceedings for passing-off or unlawful competition in which reliance is placed on sub-section (1), the plaintiff must show that the defendant knew at the time of the commission of the act that is the subject matter of the claim that the protected traditional mark was a protected traditional mark and that the act in question was committed without the authority of the owner.

CHAPTER 4

REGISTER OF TRADITIONAL KNOWLEDGE

Establishment of registration Office for Traditional Knowledge

18. The Registration Office for Traditional Knowledge is hereby established.

Registrar of Traditional Knowledge

19. (1) There shall be an officer for the Republic styled the Registrar of Traditional Knowledge, who shall be appointed subject to the laws governing the public service and who shall, subject to the directions of the Minister, have the chief control of the Registration office.
- (2) The Registrar may delegate any of the powers and entrust any of the duties assigned to him by this Act, to any officer in the public service.

Seal of Registration Office

20. There shall be a seal of the registration Office and the impression of the seal shall be judicially noticed.

Unauthorised person not to act in registration matters

21. The Registrar shall permit an agent to do on behalf of the person for whom he is an agent, any act in connection with registration under this Act or any proceeding relating thereto.

Register of Traditional Knowledge

22. (1) There shall be kept at the Registration office a register in which shall be entered -
- (a) the names and addresses of applicants for the registration of protected traditional knowledge and of persons to whom registration has been granted;
 - (b) such other particulars as may be prescribed.
- (2) The Register shall be divided into separate sections for the registration of, respectively, protected traditional works, protected traditional designs and protected traditional marks.
- (3) Registrations of protected traditional knowledge may be allocated by the registrar into prescribed classes.
- (4) The Registrar shall maintain at the registration office such indexes in relation to particulars entered in the register in terms of sub-section(1) as may be prescribed.
- (5) The Register may take the form of an electronic database or such other form as may be deemed by the Registrar to be appropriate.

Inspection of Register

23. Subject to provisions of this Act, the Register or any documents lodged at the registration office shall, on payment of the prescribed fee be open to inspection by the public during the prescribed hours.

Register to furnish information from Register on Request

24. The Registrar shall, at the request of any person and on payment of the prescribed fee, furnish copies of any documents lodged at the registration office, or particulars from the Register, or furnish a certificate in respect thereof.

Application for Registration

- 25 (1) Any person claiming to be the owner of an item of traditional knowledge, and who is desirous of registering it, shall apply to the Registrar in the prescribed manner for registration thereof and the application shall be accompanied by the prescribed fee.
- (2) Subject to the provisions of this Act, the Registrar may approve the application and register the subject matter absolutely or subject to such amendments, modifications, conditions or limitations, if any, as he may deem fit.

Refusal of Application

26. If it appears to the Registrar that an application was not made in the prescribed manner, he shall refuse the application.

Registration

27. (1) As soon as practicable after the registration of an item of traditional knowledge the Registrar shall-
- (a) notify the registrant and issue to the registrant a certificate of registration in the prescribed form and sealed with the seal of office; and
 - (b) cause to be published in the Patent Journal in the prescribed form a notice of such registration.

Register as evidence

- 28 The Register shall be prima facie evidence of any matters directed or authorised by this Act to be inserted in it.

Certificates of Registrar to be prima facie evidence

29. (1) A certificate purporting to be under the hand of the Registrar as to any entry, matter or thing that he is authorised by this Act to make or do, shall be prima facie

evidence of the entry having been made and of the contents thereof and of the matter or thing having been done or left undone.

(2)Printed or written copies or extracts purporting to be copies of or extracts from the Register, or any document relating to a traditional knowledge right and kept in the Registration Office, and certified by the Registrar and sealed with the seal of office, shall be admitted as evidence in all courts and proceedings without further proof or production of the original.

Register to be constructive notice

30. (1) In any proceedings with regard to the alleged infringement of an intellectual property right it shall be presumed-
- (a) that every party to those proceedings had knowledge of the particulars entered in the Register of Traditional Knowledge from the date of the advertisement of that registration in the Patent Journal; and
 - (b) that the person who is alleged to have done an act which infringes the relevant intellectual property right, or a common law right in terms of section 17, did that act without the required authority, unless the contrary is proved.

Rectification of Register

31. (1) The Registrar may order the Register to be rectified by the making, amendment or deletion of an entry therein, and such order may be made either upon a request in the prescribed manner, or without such request; provided that where the Registrar intends to make an order otherwise than upon a request, he shall give notice of his intention to do so to the registrant and to any other person who appears to him to be concerned, and shall give such registrant or other person an opportunity of being heard before proceeding with the rectification.
- (2)The Registrar shall rectify an entry in the Register in accordance with any finding or judgment of the court in respect of that entry.
- (3)If, in any proceedings for the infringement of a traditional knowledge right, it appears to the court that the registration of an item of traditional knowledge is incorrect in any

respect, the court may order that the registration shall be rectified so as to eliminate the cause of the incorrectness.

Certification of validity

32. (1) If, in any of the proceedings relating to an item of traditional knowledge, the court finds that the registration of that traditional knowledge is valid, it may certify to that effect.

(2) If, in any subsequent proceedings, the validity of that registration is unsuccessfully attacked by any party, that party shall, unless the court otherwise directs, pay to the other party his full costs, charges and expenses as between attorney and client, so far as that registration is concerned.

CHAPTER 5

NATIONAL COUNCIL FOR TRADITIONAL KNOWLEDGE

Establishment of National Council for Traditional Knowledge

33. A National Council for Traditional Knowledge is hereby established.

Composition of Council

34. (1) The Council shall consist of not more than 12 members appointed by the Minister and selected among those nominated by the National House of Traditional Leaders a Provincial House of Traditional Leaders and other affected or interested body or entity identified in the regulations;

(2) The Minister shall designate one of the members of the council as the Chairperson of the Council;

(3) In appointing the members of the Council, the Minister may consult –

(a) the Minister responsible for Arts and Culture;

(b) organised local government;

(c) any other relevant body or institution;

(4) The Council shall –

- (a) be broadly representative of the different cultures within the Republic; and
- (b) at all times have as members
 - (i) at least two persons with extensive knowledge in, and patronage of, traditional cultures and the value of traditional communities
 - (ii) at least two persons with extensive knowledge in, and patronage of, artistic, literary, and musical works and the performing arts; and
 - (iii) at least two members with extensive knowledge of the law of intellectual property.
- (5) The members of the Council shall be appointed on such terms and conditions, including remuneration, as may be determined by the Minister in consultation with the Minister of Finance.
- (6) A member of the Council shall hold office for a period of three years and may be reappointed upon expiry of that period for a further period of three years.
- (7) At least five members of the Council ought at all times to be reappointed members of the Council.
- (8) The Minister may, subject to the Promotion of the Administration and Administrative Justice Act, 2000 (Act No. 3 of 2000), remove a member of the Council for –
 - (a) non performance;
 - (b) serious misconduct; or
 - (c) conduct that undermines the integrity or objectives of the Council
- (9) Subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), the Minister may dissolve the Council –
 - (a) if the Council fails to perform its functions in an effective and efficient manner; and
 - (b) on the grounds of mismanagement.
- (10)
 - (a) When the Minister dissolves the Council in terms of sub-section (9), the Minister may appoint an interim body for the continued governance and control of the affairs of the Council on such conditions as the Minister may determine;
 - (b) such a body shall not be appointed for a period exceeding six months, or until a new Council is appointed in terms of sub-section 4, whichever is shorter.

Functions and Powers of Council

35. (1) The Council shall –

- (a) advise the Minister of any matter concerning traditional knowledge;
- (b) advise the Registrar on any matter regarding the registration of traditional knowledge;
- (c) perform such further functions as may be provided for in the –
 - (i) Copyright Act;
 - (ii) Trade Marks Act; and
 - (iii) Designs Act;
- (d) carry out such tasks as may be assigned to it from time to time by the Minister;
- (e) undertake the promotion and preservation of traditional knowledge and in particular the commercial exploitation of such traditional knowledge for the purposes of generating income.

(2) The Council may –

- (a) appoint any persons to assist it with the performance of any specific act, task or assignment, or to investigate any matter relating to its function;
- (b) constitute and maintain such committees as it may deem necessary
- (c) appoint as members of the committees any of its members and any other persons for such periods of time as it may determine;
- (d) refer to any such committee any tasks or matters as may be necessary or expedient to enable the Council to carry out its functions; and
- (e) supervise and control the administration of the Fund and the delegation of any of the functions of the Administrator of the Fund to a private organisation.

(3) The Minister may, in consultation with the Minister of Finance, prescribe the tariff of fees payable for –

- (a) any work performed or services rendered by any person at the specific request or instruction of the Council
- (b) access by any person to the results of, or other information, or in connection with, any research performed or information collected by the Council.

CHAPTER 6

NATIONAL TRUST FUND FOR TRADITIONAL KNOWLEDGE

Establishment of Fund

36. A fund to be known as the National Trust Fund of Traditional Knowledge is hereby established.

Administration and operation of Fund

37. (1) The Minister, after consultation with the Minister of Finance, shall appoint the Administrator of the Fund who shall

- (a) be chosen from seven candidates recommended by the National Assembly and selected on the basis of his or her experience and qualification of finance, accounting, and asset management;
- (b) be remunerated on the basis of a Deputy Director General in a public service
- (c) administer the Fund subject to the directives of the Treasury;
- (d) have the power to open and maintain one or more bank accounts with such subdivision and indexes as directed by the Treasury or as it may be prescribed

(2) The proceeds of all license fees paid in respect of the use of any item of the traditional knowledge shall be deposited in the Fund.

(3) After deduction of the prescribed administration fee, the Administrator shall pay the proceeds arising out of the use of a particular item of the traditional knowledge to the community proxy of the originating community in respect of that item of traditional knowledge within a reasonable period.

(4) The Administrator shall maintain proper accounts in respect of the administration of the fund and the fund shall be subject to the prescribed annual audit.

- (5) The Administrator shall submit an annual report to the Council in respect of the operation of the fund in the prescribed manner and form.
- (6) The Administrator may delegate the operation and the administration of the fund to a private body, subject to the approval of the Council, and subject to such conditions and terms as he may consider appropriate.
- (7) Any private body appointed by the Administrator in terms of sub-section (6) shall for the duration of its appointment have the powers and duties conferred upon the Administrator in respect of the fund in this Act.
- (8) Notwithstanding a delegation of the Administrators functions in terms of sub-section (6), the Administrator shall remain fully responsible for the operation and administration of the Fund.

CHAPTER 7

GENERAL

Ownership and transmission of traditional knowledge right

38. (1) Ownership of the traditional knowledge right shall vest in a representative capacity in the person designated from time to time as the community proxy of the originating community, and, subject to sub-section (2), it shall not be transmissible by assignment or operation of law.
- (2) In the event that the identity of the community proxy should change from time to time in accordance with the rules and practices of the originating traditional community, the ownership of the traditional knowledge right will pass automatically to the new incumbent of the position, who shall hold it in a representative capacity.
- (3) The traditional work right and the traditional design right may be licensed and any such licence may be limited so as to apply to some only of the Acts comprised within the right , or to a part of the term of the right, or to a specified geographical area.

(4) Subject to sub-section (6), a licence to do an act which is comprised in the traditional work right or the traditional design right may be written or oral, or may be inferred from conduct, and it may be revoked at any time.

(5) Where the doing of anything is authorised by a licence, and it is within the times, including any implied terms, of the licence for the licensee to authorise it, it shall for the purpose of this Act be deemed to be done with the licence of the grantor and of every person, upon whom the licence is binding.

(6) Unless otherwise stipulated by the owner of a traditional knowledge right, any licence granted under a traditional knowledge shall be subject to payment by the licensee of the standard licence fee.

(7) A community proxy may be vested with the ownership of copyright under the Copyright Act and a registered design under the Design Act, and in this event, notwithstanding any provision to the contrary in the Copyright Act and the Designs Act, the provision of the section shall apply mutatis mutandis to the ownership and licensing of such right as it applies to the traditional knowledge right.

Standard Licence Fee

39. (1) Where payment of the standard licence fee is required, it shall be paid to the Fund in the prescribed manner.

(2) Payment of the standard licence fee shall be effected by giving the prescribed notice to the administrator of the Fund and to the owner of the right in question, accompanied by the appropriated payment to the administrator.

(3) The Minister shall prescribe the amount of the standard licence fee, and may vary it from time to time, in the exercise of his discretion, after consultation with the interested parties.

(4) An Act in respect of which the standard licence fee has been paid to the Fund shall be deemed to have been done with the authority of the relevant traditional knowledge right owner.

Action by owner traditional knowledge right for infringement

40. (1) Subject to the provisions of this Act, infringements of the traditional knowledge right shall be actionable at the suit of the owner of that right, and in any action for such an infringement shall be entitled to relief by way of -
- (a) an interdict,
 - (b) delivery of any infringing article, or any article or product of which the infringing article forms an inseparable part;
 - (c) damages; and
 - (d) in lieu of damages, at the option of the plaintiff, the standard licence fee payable in respect of the infringing conduct
- (2) The owner may delegate his right of action in respect of infringement of the traditional knowledge right to the prescribed state agency in the manner prescribed , and in this event the prescribed state agency shall be vested with the same powers and rights of enforcement as the owner of traditional knowledge right.
- (3) All payment of money realised in terms of subsection(1)(c) or (d) in proceedings brought by the prescribed state agency for the infringement of the traditional knowledge right shall be paid into the Fund and shall be deemed to be a licence fee paid in respect of the subject matter of the right that is enforced.

Moral rights

41. (1) Where any work, design, or mark is, or is derived from, an item of protected traditional knowledge, the owner of the traditional knowledge right shall have the unlimited right to claim that is such a work, design or mark, and to require acknowledgement thereof, and to object to any distortion, mutilation or other modification thereof where such action is, or would be, prejudicial to the honour or public esteem of the originating traditional community.
- (2) Any infringement of the provision of this section shall be treated as an infringement of copyright under chapter 2 of the Copyright Act, and for the purposes of the provision of the said chapter, the owner of the traditional knowledge rights shall be deemed to be the

owner of the copyright in question and the protected traditional knowledge shall be deemed to be a work in which copy right subsists.

Restricting importation of companies

42. The provision of section 28 of the Copyright Act shall apply mutatis mutandis to traditional works and traditional designs as it applies to work protected by copyright and for the purposes of that section traditional works and traditional designs shall be deemed to be works protected by copyright.

Retrospective operation and savings

43. (1) This Act shall apply in relation to an item of traditional knowledge which came into being before the commencement of this Act as it applies in relation to such item coming into being thereafter, provided that no act performed by any person prior to the commencement of this Act shall be an infringement of a traditional knowledge right.

(2) In the event that a person performs an act prior to the commencement of this Act which, had this Act been in operation at the time, would have constituted an infringement of a traditional knowledge right, and that act gives rise to further acts of an ongoing nature which, after the commencement of this Act, would constitute infringement of a traditional knowledge right, such ongoing acts shall not constitute infringement of a traditional knowledge right for as long as they continue to be carried out in the ordinary course in a bona fida manner.

(3) Nothing in this Act shall affect any right of the State or of any person deriving title from the State to sell, use or otherwise deal with articles forfeited under the laws relating to customs and excise, including any article forfeited by virtue of this Act.

(4) The provisions of this Act shall not derogate from any rule of law relating to confidential or privileged information, unlawful competition or personality rights.

Application of Act to foreign countries

44. (1) The Minister may by notice in the Government Gazette provide that any provision of this Act specified in the notice shall in the case of any country so specified

apply to traditional knowledge emanating from a traditional community in that country as it applies to traditional knowledge emanating from a traditional community in the Republic.

(2) No notice shall be issued under this section in respect of a country which is not a party to a convention relating to traditional knowledge to which the Republic is also a party, unless the Minister is satisfied that, in respect of the class of traditional knowledge to which the notice relates, provision has been made, or will be made, under the laws of that country whereby adequate protection will be given to owners of traditional knowledge under this Act.

Regulations

45. The Minister may make regulations –

- (a) as to any matter required or permitted by this Act to be prescribed by regulation;
- (b) providing for the composition, administration and operation of the Fund, including the keeping and preservation of any records and accounts, and any other matter that it may be necessary or expedient to regulate for the proper and efficient functioning of the Fund;
- (c) providing for the conduct, administration and operation of the Register, including the keeping and preservation of any records, and, with the concurrence of the Minister of State Expenditure, prescribing the matters in respect of which fees shall be payable, and the tariff of such fees;
- (d) prescribing the contents of any application, notice or form provided for in this Act;
- (e) providing for the conduct, administration and operation of the Council, including the keeping and preservation of any records, and any other matter that it may be necessary or expedient to regulate for the proper and efficient functioning of the Council;
- (f) providing for forms, procedures and rules regulating payment of the standard licence fee into the Fund.

Short Title and Commencement

46 This Act shall be known as the Protection of Traditional Knowledge Act of 2013, and shall come into force on its publication in the *Gazette*.

**MEMORANDUM ON THE OBJECTIVES OF THE
PROTECTION OF INDIGENOUS KNOWLEDGE BILL OF 2013**

1. BACKGROUND

There is general recognition that traditional knowledge is meritorious of legal recognition and protection. The way to achieve this that is both most legally sound and respectful of the people concerned is to regulate the subject matter through a dedicated Bill.

In 2004 Cabinet approved the adoption of the policy on Indigenous Knowledge Systems (the IKS Policy). Pursuant to the adoption of the IKS Policy the Department of Trade and Industry, formulated a policy document on the commercialization and protection of Indigenous Knowledge (IK). This policy sought to recognize and protect IK as a form of intellectual property, and to enable and promote the commercial exploitation of IK for the benefit of the indigenous communities from which the IK originated.

The creation of an appropriate legal framework for the recognition and protection of IK and of appropriate structures and mechanisms to enable the commercialization of IK is best obtained with a dedicated piece of legislation. This follows the precedents created when new intellectual property right protection was legislated in respect to information technology and computer programs. Dedicated legislation is also necessary because the required legislative protection of IK is novel in nature and different in purpose and scope from other forms of existing intellectual property rights, making it inappropriate to insert or interface IK within the existent intellectual property legislative dispensation or try to integrate the protection of IK into the existing laws. The World Intellectual Property Organization has recommended this approach to South Africa.

The Protection of Traditional Knowledge Bill, 2013 (the Bill) seeks to implement the IKP policy in a manner which is easy to reference, implement and apply and can be easily understood and applied within and by the intended communities and their legal

representatives and leaders, without having to make references to the entire complex and voluminous body of intellectual properties laws.

2. OBJECTIVES OF THE BILL

The Bill intends to achieve the following objectives, namely to—

- (a) provide legislative mechanisms to protect the different species of indigenous knowledge;
- (b) recognize indigenous knowledge by defining indigenous knowledge systems components;
- (c) protect traditional knowledge as a new category of intellectual property and provide how said intellectual property rights will be protected;
- (d) determine what is eligible for traditional knowledge intellectual property right protection and the conditions for the subsistence or termination of said protection;
- (e) provide for ownership of traditional knowledge intellectual property rights;
- (f) provide for the duration, nature and scope of traditional knowledge intellectual property rights;
- (g) provide for the enforcement of traditional knowledge rights;
- (h) regulate the licensing of traditional knowledge intellectual property rights;
- (i) provide for the establishment of a National Register of traditional knowledge;
- (j) provide for the establishment of a National Council in respect of traditional knowledge to facilitate the commercialization of indigenous knowledge and the application of income generated to the benefit of indigenous communities;
- (k) provide for the establishment of a national trust and trust fund in respect of traditional knowledge;
- (l) provide for the regulation of the applicability of the Bill to foreign countries;
and
- (m) provide for the protection of performers.

The proposed legislation seeks to give effect to the Government's policy to recognize and afford protection to indigenous knowledge as a national heritage and asset, and to ensure that indigenous communities benefit from such recognition and protection, and from the commercialization of this asset.

The proposed legislation will also place the Republic amongst the leading countries as what concerns the recognition and protection of indigenous values.

3. CONSTITUTIONAL IMPLICATIONS

None

4. BODIES AND ORGANISATIONS CONSULTED

In formulating the IKS Policy the Government, which this Bill implements, consulted the following bodies and organizations

- . Departments of Science and Technology, Foreign Affairs, Agriculture, Environmental Affairs and Tourism, Arts and Culture and Health;
- . Science councils, including the Medical Research Council;
- . Universities, including the Universities of Cape Town and Venda;
- . Provincial Governments, including the Limpopo Department of Environment and Tourism;
- . Standing Advisory Committee on Intellectual Property Rights;
- . A professional reference team consisting of eminent people in the area of IP and TK;
- . Traditional Leaders in KZN and North West Provinces; and
- . Universities of Durban Westville, Fort Hare and North West.

5. FINANCIAL IMPLICATIONS

The additional funding required for the establishment of the structures and functions provided for in this Bill is lower than any other known and published proposal aimed at implementing the IKS Policy.

6. PARLIAMENTARY PROCEDURE

We are of the opinion that the Bill must be dealt with in accordance with the procedure prescribed by section 76 of the Constitution since it deals, inter alia, with matters relating to customs of traditional communities.

We are of the opinion that it is necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains provisions pertaining to customs of traditional communities.