Indigenous Knowledge Governance: Developments from the Garuwanga Project

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Introduction

The protection of Indigenous knowledge and cultural expressions has become a major topic in Australian law reform in recent years. This has occurred in two streams, one which is predicated on intellectual property rights and the other from the perspective of environment and heritage regulation. The latter is grounded in Australia's obligations under the *Convention on Biological Diversity* ("CBD").[2] While the former has its impetus from Australia's engagement with the World Intellectual Property Organization ("WIPO") Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("IGC"), the IGC was established in 2000 in response to the WIPO and United Nations Environment Programme (responsible for the introduction of the CBD) jointly commissioned "study on the role of intellectual property rights in the sharing of benefits arising from the use of biological resources and associated traditional knowledge".[3] IP Australia has led the developments on the intellectual property front while the Australian states and territories have led developments on the environment and heritage front.

A. Environment and Heritage

The CBD recommends an access and benefit sharing system for not only biological or genetic resources but also traditional knowledge associated with those resources. It is in this context that federal environmental law, through the *Environment Protection and Biological Conservation Act* 1999 (Cth), established a permit system for access to biological resources from Commonwealth areas incorporating benefit sharing mechanisms.[4] While the regulations to that legislation acknowledge the potential existence of Australian Indigenous traditional knowledge associated with such biological resources, the regime does not go far enough to explicitly protect such knowledge.[5] The same failure to protect such Indigenous knowledge occurred with the establishment of the Queensland regime under the *Biodiscovery Act* 2004 (Qld).[6]

Meanwhile, the Northern Territory's *Biological Resources Act* 2006 (NT) does explicitly require benefit-sharing agreements over biological resources to include "protection for, recognition of and valuing of any indigenous people's knowledge to be used" in relation to that resource.[7] But at the same time the legislation excludes Indigenous knowledge "obtained from scientific or other public documents, or otherwise from the public domain".[8] The state of Victoria has taken a different approach by amending its *Aboriginal Heritage Act* 2006 (Vic) in 2016 to not only protect tangible examples of Aboriginal heritage but also intangible Aboriginal heritage encompassing traditional and ecological knowledge and various cultural expressions.[9] However, as with the Northern Territory legislation, "anything that is widely known to the public" is not protected.[10]

More recently, New South Wales embarked upon the development of its own Aboriginal Cultural Heritage legislation with the similar intention to protect both the tangible and intangible. Several consultations were held across the state and draft legislation was prepared: *Draft Aboriginal Cultural Heritage Bill* 2018 (NSW) ("Draft Bill").[11] This Draft Bill comes after earlier consultations in 2013/14 on the introduction of Aboriginal Cultural Heritage legislation that focussed on the tangible heritage of Aboriginal peoples in New South Wales. However, it was in October 2014 that the Indigenous Knowledge Forum finalised the White Paper for the Office of Environment and Heritage ("White Paper"), recommending adoption of a sui generis or stand-alone legal regime protecting Aboriginal knowledge for the benefit of Aboriginal communities in the state of New South Wales.[12]

The White Paper advocated for the establishment of a "Competent Authority" to manage such a regime particularly as a competent authority would be required to provide the governance framework for administering a legal regime covering the creation, maintenance and protection of community knowledge databases. Further, a competent authority would enable Australia to meet the requirements of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*[13] ("*Nagoya Protocol*")

once ratified.[14] This Protocol calls for countries to put in place two main measures:

(i) ensuring that prior informed consent of Indigenous communities is obtained for access to their traditional knowledge; and

(ii) that fair and equitable benefit-sharing mechanisms are agreed upon for the use of that knowledge, keeping in mind community laws and procedures as well as customary use and exchange.

The Draft Bill, if passed, will establish an Aboriginal Cultural Heritage Authority "to administer the legal framework, make key decisions about Aboriginal cultural heritage, provide advice and recommendations to the Minister, and develop policies, guidelines, codes of practice and methods" and be advised by local Aboriginal Cultural Heritage consultation panels. However, what our research revealed in developing the White Paper was that such a competent authority needs to be independent of government in order to have the support of Aboriginal communities. Further:

> *Community consultations highlighted concern regarding the functions of this entity being administered by one or more existing agencies and the need for the Competent Authority to include a local or regional community agency to administer the Knowledge Holder registers and provide for Community Knowledge databases. The need for confidential information to be protected was also noted as was the need to have an appeal process and a process for ensuring benefits under the control of the Competent Authority are applied and are not lost if the Authority is wound up.*[15]

The Draft Bill received further feedback through formal submissions, including by the Indigenous Knowledge Forum, which led to more consultations with targeted stakeholders at the beginning of 2019 and further refining of the Draft Bill. Those refinements have yet to be made public.

B Intellectual Property

At the beginning of 2016, IP Australia concluded a consultation asking, "How should Australia protect Indigenous Knowledge?". The 12 submissions received included the White Paper. As noted above, in that Paper we recommended the introduction of sui generis legislation for the recognition and protection of Indigenous knowledge as it relates to natural resources management but still encompassing cultural expressions.[16] What must be recognised is that, for Indigenous peoples, there is an inherent connection between Country, or traditional lands, and knowledge and that connection is an important aspect of cultural law, cultural expression and well-being. A key feature of the governance of the legal regime proposed in the White Paper was the establishment of a competent authority to administer the permit system for access to Indigenous knowledge.

The next stage in IP Australia's engagement with the question of Indigenous Knowledge was the commissioning of the report by Terri Janke titled *Indigenous Knowledge: Issues for protection and management*.[17] In that report which was published in March 2018, the need for a National Indigenous Cultural Authority "owned and managed by Indigenous people, [that] could provide infrastructure to assist build capacity and develop networks for exercising authority over Indigenous Knowledge" was emphasised and built on Terri Janke's comprehensive 2009 report, *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*. IP Australia then held a series of focus group sessions in late 2018 and a further consultation to determine a way forward based on the commissioned report by Terri Janke and IP Australia's consultation paper, *Protection of Indigenous Knowledge in the Intellectual Property System*,[18] released in September 2018. What has become apparent is that these intellectual property developments are aligned with the developments on the environment and heritage front.

The need for a National Indigenous Cultural Authority was reinforced in 2013 by the National Congress of Australia's First Peoples ("Congress") identifying various characteristics[19] whereby the Cultural Authority should be independent from government with its own legal status, board of governance, constitution and representing members. The board would be elected from its grass-roots membership base but also allow for the necessary skills-based director representation.[20] The Congress recognised a need for further research, funding and support to investigate how to best establish an Authority with the above characteristics.[21]

C Garuwanga[22] Project

In 2016, with the assistance of an Australian Research Council Linkage Grant, the project, *Garuwanga: Forming a Competent Authority to Protect Indigenous Knowledge* ("Garuwanga Project"), was born with the express purpose of investigating how best to establish such a cultural authority recognising that consideration needed to be given not only to establishing a national competent authority but also local and regional competent authorities.[23] The Garuwanga Project is about finding the best legal structure of governance for Indigenous Australians to manage their knowledge and culture and enable Australia to comply with the *Nagoya Protocol*. The objective is to provide the communities with a path to sustainable development and capacity building. To achieve this the Garuwanga Project stipulated three aims:

(1) identify and evaluate a variety of legal governance structures for a Competent Authority suitable for administering an Indigenous Knowledge protection regime;

(2) facilitate Aboriginal Community engagement in making that determination; and

(3) recommend a type of Competent Authority structure based on what is important to Aboriginal Communities and how such a Competent Authority should operate.

This article reports on the outcomes of the Garuwanga Project commencing with an outline of the study undertaken to compare nearly 70 nations with access and benefit-sharing regimes. The article explains the development of key governance principles for the evaluation of governance structures and provides a summary of the Discussion Paper that formed the basis of the "on Country" community consultations. An overview of the outcomes of those consultations is provided with a summary of project conclusions.

LAYING THE FOUNDATIONS

A What is a Competent Authority and why do we need one?

A "competent authority" is any person or organisation "that has the legally delegated or invested authority, capacity, or power to perform a designated function" or to deal with a specific matter.[24] The competent authority may take many forms and perform different functions in relation to administering a legal regime for the protection of Indigenous knowledge. The need to protect Indigenous knowledge from misuse is recognised under several international instruments.[25] The CBD and *Nagoya Protocol* discussed above are the key international instruments that give rise to the need for competent national authorities in the protection of Indigenous knowledge.

These instruments acknowledge:

- the rights of Indigenous communities to their traditional knowledge;
- that Indigenous knowledge should only be accessed with the prior, informed consent of Indigenous communities;
- that any access to Indigenous knowledge should be on mutually agreed terms; and
- with the equitable sharing of benefits from use of Indigenous knowledge.

The *Nagoya Protocol* requires each member state to designate a "competent national authority" (or authorities) and "national focal point" on access and benefit sharing in relation to genetic resources and Indigenous or traditional knowledge about those genetic resources.[26] For example, under the *Nagoya Protocol*, access to a particular plant species and the Indigenous knowledge about the medicinal benefits of that plant would need to be administered or evidenced by a competent national authority. That same authority, or even another authority, would need to be responsible for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms.[27] The national focal point has the responsibility of advising applicants seeking access to genetic resources and the Indigenous knowledge associated with those resources and liaising with the Secretariat of the Convention on Biological Diversity.[28]

It is possible for the competent national authority and the national focal point to be the same organisation.[29] Consequently, it was quite reasonable for the Indigenous Knowledge Forum to propose, in its 2014 White Paper, a competent authority to effectively perform both functions. The question then arose as to the legal structure such a competent authority would take. In answering that question, the Garuwanga Project addressed concerns over the form, independence and funding of such a Competent Authority, as well as local Indigenous representation, by facilitating Aboriginal Community engagement in identifying, evaluating and recommending an appropriate competent authority legal structure. An action research methodology was employed within an Indigenous research paradigm. This was achieved by forming a research team, referred to as the Research Roundtable (see appendix for its membership), comprising academic researchers and representatives of several interested Indigenous organisations working together under an Indigenous research paradigm encompassing epistemologies (ways of knowing) through stories, narrative and reflection, connectedness to Country, culture and spirituality in a collaborative and interdisciplinary process.

An analysis of existing Australian Indigenous governance frameworks as well as frameworks adopted in countries with existing Indigenous knowledge protection regimes was carried out to assist in the development of an appropriate legal structure for such a competent authority. Then, through Indigenous participation in the Research Roundtable and through community consultations or focus groups, the Garuwanga project has ensured Indigenous engagement in the choice of the most appropriate governance framework for the competent authority providing transparency and accountability. However, it should be noted that the scope of this project did not extend to consultations with Torres Strait Islanders. Accordingly, we can only say that the outcomes of the consultations are representative of Aboriginal views and not necessarily those of Torres Strait Islanders.

While the initial impetus for research into the form of the competent authority emerged in relation to the regime proposed for the state of New South Wales, this project provides a model for an authority for a national regime with a similar purpose. Once ratified, Australia's obligations under the *Nagoya Protocol* will be national, not just state-based, but can be rolled out state by state and territory by territory and it is recognised that the concept of such an authority could be a local or regional community agency. Further, despite the fact that a national presence is required, the structure of the competent authority should be determined with the interests and needs of Aboriginal and Torres Strait Islander Peoples

at the forefront. Considerations include providing for Indigenous community-controlled management, whether regional management is needed or desirable, and how the structure can be adapted to differing needs of different communities.

Specifically, a competent authority under the White Paper would have explicit roles and duties.[30] These are to:

(a) maintain a Confidential Register of Knowledge Holders;

(b) maintain a Public Register of Knowledge Resources and regularly update the information;

(c) maintain a Confidential Register of Knowledge Resources and regularly update the information;

(d) receive requests for determination or access in relation to Knowledge Resources;

(e) render determinations in relation to determination requests;

(f) liaise with Knowledge Holders in relation to access requests to ascertain whether access will be granted or refused;

(g) notify parties seeking access of the approval or refusal of the request;

(h) assist Indigenous Communities in negotiating Access Agreements, by request;

(i) evaluate compliance of Access Agreements;

(j) maintain a Register of Access Agreements and regularly update the information;

(k) administer shared Benefit(s) for Indigenous Communities which are derived from access to Knowledge Resources as prescribed in the regulations;

(l) monitor compliance with Access Agreements and advise Indigenous Communities of any violations;

(m) provide model(s) of agreement as a guide for Indigenous Communities;

(n) develop and monitor compliance in a Code of Ethics and Best Practices;

(o) provide training to the prescribed court or prescribed tribunal; and

(p) respond to requests by any person to search the registers it maintains to determine if any Registered Knowledge Resources exist in respect of specified subject matter.[31]

The reference to Knowledge Resources was the collective term that the White Paper gave to Indigenous knowledge and cultural expressions.

B Comparative Study

Most competent authorities around the world are government-based organisations or departments, however, during the White Paper community consultations, great concern was expressed about such institutions having any form of control over Indigenous knowledge.[32] Accordingly, what is unique about the Garuwanga Project is the proposal for a competent authority that is independent of government. In the first activity for the project a comparative study was prepared.[33] The study focussed on the following issues:

(i) the functions of the Competent Authority;

(ii) the structure of the Competent Authority including corporate structure and membership;

(iii) the funding of the Competent Authority; and

(iv) the accountability of the Competent Authority including reporting obligations.

The legislation of 69 countries with Indigenous populations were examined. A competent authority regulating access to and benefit sharing in relation to the use of Indigenous or traditional knowledge was found in the legislation of 20 of the 69 countries examined and of those 20 countries 12 regimes were of particular significance. Countries have taken very different approaches to establishing a Competent Authority for the protection of Traditional/Indigenous Knowledge including:

- using existing authorities, such as the national intellectual property office or Ministry of Environment, to act as the Competent Authority;
- establishing new bodies to regulate access and benefit sharing in relation to Traditional/Indigenous Knowledge; and
- establishing Indigenous advisory boards to support and provide advice to the national Competent Authority.

The following Table 1 demonstrates that even though the majority of national regimes utilised a government organisation as the competent authority, most of those nations had Indigenous and local community participation. Of those 12 countries only two, Cook Islands and Vanuatu, established competent authorities separate to their government.[34]

Table 1: Government and Indigenous and Local Community Involvement in Competent Authority breakdown by Country

Country	Part of Government Ministry	Government Oversight	Independent from Government	Indigenous and Local Community Participation
Brazil	X			X
Cook Islands	X		X	X
Costa Rica	X			X
Ethiopia		X		
India		X		X
Kenya	X			
Niue	X	X		X
Peru	X	X		X
Philippines	X			X
South Africa	X			X
Vanuatu		X	X	X
Zambia	X			

Meanwhile, reports were prepared on the governance structures utilised by each Partner Organisation and other organisations represented in the Research Roundtable. These reports were expanded during the course of the first 18 months of the project and incorporated in the ensuing Discussion Paper. In the Research Roundtable discussions that followed, it was evident that in order to properly evaluate these governance structures a more detailed set of evaluation criteria were required than originally anticipated. At the conceptual stage of the project the criteria for analysis of the various governance structures were:

(i) suitability to the domestic legal and regulatory context;

(ii) expectations of the functions and powers of competent authority to be established under the White Paper; and

(iii) most importantly, those Aboriginal laws and customs considered relevant by the Aboriginal partner investigators, and other Aboriginal members of the Research Roundtable.

However, the Research Roundtable determined it was necessary to identify first what constituted good governance from an Indigenous perspective. To this end a report was then prepared for consideration by the Research Roundtable in the formulation of a set of governance principles to be applied to the different legal forms of governance already in operation through different organisations operating in Australia.

C Governance Principles

Dodson and Smith considered governance for sustainable development of Indigenous Australian communities and defined governance as:

> *the processes, structures and institutions (formal and informal) through which a group, community or society makes decisions, distributes and exercises authority and power, determines strategic goals, organises corporate, group and individual behaviour, develops rules and assigns responsibility.*[35]

As to what constitutes good governance, consideration was given to the common principles identified by the United Nations Development Programme ("UNDP") as underpinning good governance, namely:

(a) participation in decision-making processed by all interested parties;

(b) operation in accordance with the rule of law;

(c) transparency in decision-making and other processes;

(d) responsiveness to all stakeholders;

(e) consensus oriented in the best interests of the group;

(f) equity toward all stakeholders;

(g) effectiveness and efficiency in the use of resources;

(h) accountability to stakeholders and the public; and

(i) broad and long-term strategic vision.[36]

From an Australian governmental perspective there are two examples of good governance principles that were considered relevant to the Garuwanga Project: Australian Public Service Commission "Building Better Governance" Guide[37] and the "Good Governance Guide" produced for Local Government in the state of Victoria.[38] In both examples much of the UNDP principles are included with some notable differences as made clear from the table below: Table 2.

Table 2: Comparison of Good Governance Principles

Common Principles underpinning Good Governance (UNDP, 1997)	Good Governance Guide for Local Government (Municipal Association of Victoria et al 2012)	'Building Better Governance' Guide (Australian Public Service Commission 2007)
Accountability	Accountability: Obligation to report, explain and be responsible for decisions and the consequences of such decisions.	Accountability — being answerable for decisions and having meaningful mechanisms in place to ensure the agency adheres to all applicable standards
Transparency	Transparency: Decision making processes should be clear and easy to understand.	Transparency/openness — having clear roles and responsibilities and clear procedures for making decisions and exercising power
		Integrity — acting impartially, ethically and in the interests of the agency, and not misusing information acquired through a position of trust
Rule of Law	Follows the Rule of Law: Decisions and actions are consistent with relevant legislation, regulations or policies.	
Responsiveness	Responsive: The organisation responds to needs of stakeholders 'while balancing competing interests in a timely, appropriate and responsive manner.'	
Equitable	Equitable and inclusive: Decisions are made taking into consideration the interests of all stakeholders and all stakeholders have an opportunity to participate in the process.	
Effectiveness & efficiency	Effective and efficient: Processes should be followed and decisions made in a manner that makes 'the best use of the available people, resources and time to ensure the best possible results.'	Efficiency — ensuring the best use of resources to further the aims of the organisation, with a commitment to evidence-based strategies for improvement
Participation	Participatory: Decision making processes should allow for participation by all parties that are interested in or affected by a decision.	Stewardship — using every opportunity to enhance the value of the public assets and institutions that have been entrusted to care
		Leadership — achieving an agency-wide commitment to good governance through leadership from the top.
Broad and long-term strategic vision		

What is interesting about the comparison in Table 2 is that the principles of good governance acknowledged by the Local Government groups closely reflect those espoused by the UNDP and are reflective of a grass-roots approach to governance. Meanwhile, the differences in the principles highlighted by the Australian Public Service Commission reflect a top-down approach to governance emphasising a paternalistic view of governance. Smith and Bauman note that internationally the concept of good governance has "become synonymous with western democratic, neo-liberal ideas of what is supposed to constitute 'good' governance".[39] The term has tended to apply to the way in which an organisation complies with "regulations, financial accountability issues, and technical standards of measurement".[40] Clearly further research was required in order to identify principles of good governance that would be acceptable for the establishment and operation of a competent authority.

To this analysis was added an exploration of recent research on Indigenous governance. As a guide for Indigenous communities and organisations, the Australian Indigenous Governance Institute established an online Indigenous Governance Toolkit.[41] With a focus on effective or legitimate governance, the toolkit provides resources on various aspects of governance, including: understanding governance; culture and governance; leadership; rules and policies; management and staff; nation building and development. This is important as "achieving effective and legitimate governance can be particularly challenging because it involves working across Indigenous and western ways of governing, and trying to negotiate the demands of both".[42] The Toolkit references the significant research under the Indigenous Community Governance Project carried out by the Centre for Aboriginal Economic Policy Research at Australian National University. That project documented that Indigenous Australians across the country used similar culture-based principles to design their governing arrangements.[43]

Smith and Bauman point out that in the context of Indigenous governance:

> *Governance … operates in both formal and informal settings and in a range of contexts both within and across Indigenous groups, and in their interactions with governments and the private sector.*[44]

Finding a way for cultural practices to be part of governance strategies was shown to be important for Aboriginal and Torres Strait Islander people "to harness the strength and resilience of cultural roots in ways that are credible and workable today".[45] In this context Smith and Bauman observe:

> *At the same time, the intercultural authorising environments in which groups, communities and particularly organisations have to operate today are realities. For Aboriginal and Torres Strait Islander peoples, the challenge lies in how to achieve a balance in their governance arrangements between interrelated cultural, social and economic priorities and the other forces of 'western' governance acting upon them. The important thing in making decisions about such issues is that it all takes time — time to talk, consult, and get feedback from people; time to experiment and learn from mistakes, and time to change and adapt as all societies do.*[46]

Specifically, the work of Hunt et al from the Centre for Aboriginal Economic Policy Research identified the following principles:

> *networked governance models; nodal networks and gendered realms of leadership; governance systems arising out of locally dispersed regionalism and 'bottom-up' federalism; subsidiarity and mutual responsibility as the bases for clarification and distribution of roles, powers and decision making across social groups and networks; cultural geographies of governance; and an emphasis on internal relationships and shared connections as the foundation for determining the 'self' in self-governance, group membership and representation.*[47]

The culmination of these differing yet similar sets of governance principles led the Research Roundtable of the Garuwanga Project to consider formulating a set of governance principles that would assist in the identification and evaluation of the most appropriate legal structure for the Competent Authority. The principles build on those espoused in the Indigenous Governance Toolkit and provide the necessary criteria for developing the Competent Authority under the Garuwanga Project. The following principles were identified at the Garuwanga Research Roundtable meeting on 16 October 2018:

- Relationships/Networks
- Trust/Confidence
- Independence from government
- Community participation
- Guarantees/Confidentiality
- Transparency/Accountability
- Facilitation
- Advocacy
- Communication
- Reciprocity.

An explanation for each of these principles can be found in the Discussion Paper for the Garuwanga Project and is reproduced in the following box with endnotes omitted. The aim was to develop a set of culturally appropriate governance principles against which a variety of already existing governance structures could be evaluated in order to identify the most suitable structure for the Competent Authority. In so doing, these governance principles effectively define a model of governance that might be acceptable to Indigenous Australians more generally. As to whether a particular legal structure is more suitable to achieve such a governance model was the purpose of preparing a Discussion Paper and carrying out the focus group community consultations.

Box 1: Suggested Model of Governance, Garuwanga: Forming a Competent Authority to protect Indigenous knowledge – Discussion Paper[48]

Relationships/Networks
Relationships are critical to establishing group membership and determining who has authority to make decisions. A Competent Authority must recognise the different kinds of relationships and communities relevant to Aboriginal and Torres Strait Islander peoples including geographic communities, dispersed communities of identity and communities of interest. Key to this is establishing a framework for relationships with other organisations or institutions particularly within larger representative frameworks. A Competent Authority must value and recognise the "extensive networks and overlapping relationships, strong extended family ties, multiple ties to 'country' and valued cultural identities."

Trust/Confidence
Aboriginal and Torres Strait Islander communities must have confidence in the activities and decision-making processes of the Competent Authority. This includes incorporating customary decision-making processes into the operations of the Competent Authority.

Independence from government
The Competent Authority should support decision making by Aboriginal and Torres Strait Islander peoples. This raises questions as to the independence of the Competent Authority from government. If a Competent Authority was established subject to legislation, consideration must be given to whether membership is appointed independently or determined by government, and whether the Competent Authority is an independent agency, autonomous body or a government department.

Community participation
The Competent Authority must provide for participation in decision making processes by members of the relevant Aboriginal or Torres Strait Islander community, either directly or through representative organisations.

Guarantees/Confidentiality
Information must be kept in confidence from third parties. This may involve restricting the sharing with or transfer of information to a group of people (for example, based on gender or other status).

Transparency/Accountability
Decision-making processes must be understood and made clear to the public. The organisation must report to the public and to stakeholders on activities and decision-making processes. This includes accountability both to the government or public as well as to members of Aboriginal and Torres Strait Islander communities.

Facilitation
Engaging in activities on behalf of, or in support of, interested stakeholders. In this case, the Competent Authority should engage in activities on behalf of Aboriginal and Torres Strait Islander communities.

Advocacy
Engages in activities as an influencer in international, regional, national and/or local level. This may include attending conferences relevant to protection of traditional knowledge, engaging in lobbying activities with government, engaging with third party stakeholders including research institutions and industry.

Communication
Engages in various communication activities including:

- education and capacity building with Aboriginal and Torres Strait Islander communities to raise awareness of rights and how to enforce them; and
- awareness raising activities to communicate to the public the importance of protecting traditional knowledge and obligations to comply with various requirements under international treaties.

Reciprocity
Engages in practice of mutual recognition and exchange of rights and interests. Reciprocity refers to "shared responsibility and obligation [and] is based on … diverse kinship networks" and "extends to the care of the land, animals and country and involve sharing benefits from the air, land and sea, redistribution of income, and sharing food and housing".

The Garuwanga Research Roundtable also recognises the importance of a "grass-roots" approach in the care of traditional knowledge.

DISCUSSION AND CONSULTATION

A Discussion Paper

The Discussion Paper sets out the different steps taken by the Research Roundtable in carrying out the Garuwanga Project. It provides the key results of the Comparative Study and identifies the key features of available Australian legal structures. Using those key features, the Discussion Paper goes on to examine a range of examples of legal entities established for the benefit of Indigenous Australians. Commencing with incorporated entities, the Discussion Paper reviews the range of incorporated structures available under Australian law, such as: the proprietary company, public company limited by shares, pubic company limited by guarantee, incorporated associations, and Aboriginal and Torres Strait Islander Corporations also known as prescribed bodies corporate created for common law native title holders to hold or manage native title. The examination covers governance structure, membership, key legislation and winding up of the entity.

The Discussion Paper goes on to analyse registered co-operatives and independent statutory bodies. Differing forms of Aboriginal Land Councils in operation across Australia are examined, and then, after briefly exploring the role of the equitable construct of a trust, the key governance principles identified and developed by the Research Roundtable are outlined and applied to the Partner Organisations that form the case studies for the Garuwanga Project.[49]

All four organisations met the governance principles in their own way but all with respectful regard for Aboriginal law, culture and traditions. This was able to be achieved while three of the organisations were required to comply with the abstract constructs of incorporation under federal and state laws of Australia, despite their grounding in colonial-based law. A wide range of examples of legal entities established for the benefit of Aboriginal and Torres Strait Islander Peoples were reviewed in the Discussion Paper but a full analysis has yet to be conducted in the light of the governance principles. However, the case studies reported in the Discussion Paper provide encouraging results in this regard, emphasising that no matter the legal structure adopted under Australian law, the governance principles can still apply.

The Discussion Paper finished with a series of questions centred around the three project criteria for analysis of the various governance structures. During the course of the project those criteria were revised as follows:

- suitability to the domestic legal and regulatory context;
- expectations of the functions and powers of competent authority; and
- ensuring a Competent Authority reflects Aboriginal and Torres Strait Islander customary laws, and cultural protocols.

The discussion questions were developed to help determine what type of Competent Authority would suit the needs of Indigenous communities to protect Indigenous knowledge in Australia. The questions were designed to facilitate discussion for the engagement of Aboriginal and Torres Strait Islander Peoples in community consultations.

B Consultations

Consultations and discussions took place with Aboriginal communities and organisations in urban, rural and remote locations including Broome and the West Kimberley in Western Australia, as well as Sydney and the Southern Highlands/South Coast in New South Wales. Accordingly, the limitation of the results of these consultations is that they may not reflect the views and opinions of Torres Strait Islander communities. Informed consent was obtained for all community consultations. Consent processes were carried out in compliance with University of Technology Sydney ("UTS") ethics approval processes and principles. For these consultations, free, prior informed consent was sought, and obtained from all participants either in written form, or verbally as a group.

Under the criteria of ensuring a competent authority reflects Aboriginal and Torres Strait Islander customary laws, and cultural protocols, the following questions were utilised:

- What do you consider to be the most important features for a Competent Authority?
- What existing organisations do you think provide effective models for Aboriginal and Torres Strait Islander interests?
- What existing organisations do you think provide ineffective models for Aboriginal and Torres Strait Islander interests?
- How should local competent authorities ("LCAs") be formed?
- Should all employees, officers and councillors be Aboriginal or Torres Strait Islander people?

While the responses to these questions have been analysed in a separate report, there was little deviation from the presumptions underpinning the earlier research which led to the development of the White Paper in 2014. In the process of developing the White Paper consultations were held with Aboriginal communities in north-western New South Wales, the Gamilaroi Peoples. Despite being in remote rural country, their viewpoints coincided with those expressed by the more urban based Aboriginal communities around Sydney and the South Coast of New South Wales. This would seem to indicate the impact of a shared past given that New South Wales was first to be settled by British colonists and hence the Aboriginal peoples of New South Wales were the first Indigenous communities in Australia to be impacted by colonisation and to be dispossessed of their lands and waters. Meanwhile, the First Peoples of the Kimberley in Western

Australia were one of the last to experience colonisation and have also taken much greater steps toward self-determination through the establishment of an independent Land Council, multiple native title land claims and establishment of a variety of cultural organisations.

When considering the expectations of the functions and powers of the Competent Authority, the participants in the community consultations were asked to consider:

- Should there be a single national competent authority ("NCA")?
- Should a NCA carry out the duties of the NCA and the national focal point?

While there was overall recognition that a national body would be required for international reporting purposes under the *Nagoya Protocol*, discussions centred upon the need for local or regional control. This is in keeping with *Empowered Peoples Design Report*[50] which emphasises the importance of widely sharing powers and responsibilities "among individuals, families and communities at the local, subregional and regional levels".[51] That Report further notes that current practices of "placing nearly all responsibility with central governments disempowers Indigenous people and impedes development", and so to reverse this impact and provide the means for empowerment, governments must share or relinquish "certain powers and responsibilities and [support] Indigenous people with resources and capability building to assume these powers and responsibilities".[52]

On the issue of the suitability of the structure and operation of a Competent Authority to Australian legal and regulatory contexts, the following questions were discussed:

- What form do you think the Competent Authority should take? (for example, an Aboriginal Corporation, statutory body, charitable trust, and how many tiers: local, regional, national?)
- How should decision-making within the Competent Authority operate taking into account that the Competent Authority needs to meet criteria under the *Nagoya Protocol*?
- Should the national registrars for men's business and women's business databases and registries be able to delegate authority to others in the Competent Authority?

Here again the responses to these questions have been analysed in a separate paper but the Discussion Paper does provide a variety of options for consideration. What is apparent is the importance of "cultural fit" in recognition that Indigenous communities across Australia are different with different needs, expectations and cultural protocols. The Australian Institute of Family Studies emphasised that, in order to facilitate trusting relationships, an organisation must:

> *..work with existing Indigenous leaders and organisational structures established in the community;… seek feedback from both Indigenous peak bodies and community members.*[53]

Further, to strengthen governance capacity of Indigenous communities, Tsey et al suggest that "community ownership" is required for Indigenous empowerment to flourish and that:

> *[o]rganisational capacity strengthening for good governance can take many forms. Governance capacity is greatly strengthened when Indigenous people create their own rules, policies, guidelines, procedures, codes and so forth, and design the local mechanisms to enforce those rules and hold their own leaders accountable ...*[54]

OUTCOMES

A Analysis of the Consultations

Transcripts were prepared from the recorded consultations and then the consultations and participants were de-identified in accordance with the ethics protocols in place. The analysis focussed on responses addressing any of the discussion questions relating to each of the evaluation criteria. Themes were developed through identifying common and unique perspectives, labelling these with keywords used by the participants as initial codes, reviewing the codes to identify potential themes followed by reviewing and refining the emerging themes. Emerging themes were tested against the data to confirm that key insights had been captured. In some instances, community views were articulated through direct comments. In other instances, attitudes were implied through direct responses on other issues and context. However, this coding approach was then superseded by an approach focusing more on interpretation of text, discourse and language, as this was found to be more suitable for the kinds of research data yielded by the consultations.

Four major themes with several sub-themes emerged from the analysis. The first major theme focussed on understanding what is Indigenous knowledge. That understanding can differ from one community to the next which reinforces that it is for Aboriginal and Torres Strait Islander Peoples themselves to define what they mean by their Indigenous knowledge.[55] Indigenous communities hold bodies of knowledge relating to the lands, and natural resources for which they are the traditional custodians. Indigenous Knowledge is intricately connected to, and permeates place, identity, being and cosmology.[56] There is no sharp separation between this knowledge, and all the other aspects of Indigenous peoples' material and spiritual lives.[57]

The second major theme addressed the need for a single national competent authority and while it was considered desirable to avoid unnecessary duplications, allegiance to a local or regional authority was evident with the intention that such a local or regional body would engage with a national

body that has clearly defined and limited functions. Sub-themes that were addressed included the legal structure for such a national competent authority and the operations of the national competent authority. The consultations revealed the need for the national competent authority to have a clearly defined purpose and strong relationships with the community and other organisations. The need for the national competent authority to be led and run by Indigenous Australians was emphasised and is consistent with self-determination and Indigenous rights, as articulated, for example, in the *United Nations Declaration on the Rights of Indigenous Peoples*. The role of the individual in the community was considered as well as the need for the national competent authority to be independent from government. Meanwhile, it was also recognised that the national competent authority needs to be long lasting and securely funded and have a key role in capacity-building at both the community and individual organisational levels. The need for sound governance was made clear with endorsement of principles along the lines of the Garuwanga governance principles described above. The national competent authority needs to facilitate regional/local competent authority operations and have appropriate decision-making protocols.

The third major theme focussed on regional or local authorities. Communities consulted in this project favour the concept of subsidiarity with decision-making residing with regional bodies or the local community where possible. The traditional owners are the custodians with authority to speak for their country. Consequently, it must be these custodians who make decisions that affect that country. In this way, the form of the regional and/or local competent authority is for each community to decide and also raises the question of the scope of the community being served by the local or regional competent authority. This last point relates to the fact that often in urbanised communities there may be a mix of traditional owners and community from other Aboriginal nations. In many instances, the traditional owners may be in the minority. This calls for consideration of whether all Aboriginal people should have the right to participate in the access and benefit sharing arrangements and negotiations under the control of the local competent authority or whether only traditional owners should have that right. That then colours the attitudes to the following issues of who is part of the governance of the regional and/or local authority and how they are appointed to that role, and what will be the decision-making processes employed. The relationship between the regional/local authority and the national competent authority was visited again with participants in the consultations expressing a view that regional and/or local competent authorities should not be subordinate to a national competent authority but, rather, supported by the national competent authority.

The fourth theme considered the issue of the registrar in a competent authority. The registrar for the national competent authority would have responsibility for the databases held by the authority and would likely have a role in dispute resolution, among other roles to be determined. In this project, the need for two registrars was identified in the White Paper: a female registrar to administer the database of women's knowledge, and a male registrar to administer the database of men's knowledge.[58] This proposal was responded to favourably overall with a proviso that different communities might have differing views. Further, one of the communities expressed concern about the potential of delegated authority and how the registrars would oversee the actions of their delegates if appointed.

There was an overarching theme that became apparent in the analysis of the four main themes and discussions during the Research Roundtable meetings in this regard. A "reconciling" between Indigenous and Western laws emerged in this project as an important consideration. This reconciliation between different legal systems lies at the heart of the ensuing discussion on options for a competent legal authority to control and regulate access to, and benefit sharing for Indigenous biodiversity and traditional knowledge:

> *The issue of protecting traditional knowledge and genetic resources is a textbook example of a legal problem in a world of hybrid legal spaces where a single problem, act or actor is regulated by multiple legal regimes.*[59]

The text of the *Nagoya Protocol,* in particular Article 12(1), provides for the recognition of Indigenous community protocols and customary laws thereby encouraging Western and Indigenous laws to come together.

In the Garuwanga Project's considerations as to what form a competent authority might take, an important point is that it should be founded in Indigenous law, custom and epistemologies. As we have seen, one of the Project's research questions in the Discussion Paper and the consultations was around the idea that competent authorities should "reflect Aboriginal customary laws and cultural protocols". Former Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma points out that Indigenous Australians are often governed by two systems of law – the Aboriginal customary law framework, and the Australian legal justice framework – so the challenge is to create an interface between the two justice systems so that one supports the other.[60] Further, it is important to acknowledge that the Australian legal system cannot exclusively support Indigenous justice in communities where customary law practices endure.[61]

B Models and Approaches for Competent Authorities

The outcomes of the Garuwanga Project are many not the least of which is the development of a set of governance principles against which Indigenous knowledge governance systems could be benchmarked. What the analysis of the consultations has shown is the inadequacy of a single

governing authority to meet the needs of Australian Indigenous communities. This does not detract from the need to have a national body that meets Australia's obligations under the *Nagoya Protocol* once ratified, but how such a body is established and how it interacts with Indigenous Australia requires careful consideration. Accordingly, a suggested approach has emerged whereby a multi-tiered structure of competent authorities could be established. This recognises the need for a regional or local competent authority to ensure the associated communities have control over the authority's operations and thereby is truly representative of those communities. This includes the ability for those communities to determine the form and legal structure such a local or regional competent authority would take.

This leads to the question as to whether different "layers" of competent authority (national, regional, local) would have the same, or similar functions, or different ones that complement each other. In relation to the national competent authority, one consistent view was that such a peak body should operate only as a servicing body to the other bodies, not as a decision-making body. The national competent authority needs to facilitate for, not to govern over, regional/local competent authorities. This is an important view about relationality that again reflects an Indigenous worldview. This idea of "relationality" articulates a consciousness in Indigenous worldviews about the ways in which things – people, animals, plants and places – are interconnected and interdependent.[62] And so the need to determine the set of functions that each tier of competent authority has is an important element of how the tiers of competent authority interact and engage with each other.

In relation to regional or local competent authorities the consultations indicate:

- the form of the local competent authority is for each community to decide;
- the scope of community served will need to be negotiated for each local competent authority, taking into account the differing demographics between communities;
- who sits on the local authority and how they are appointed to that role will need to be negotiated for each local competent authority;
- the local competent authorities ought to be independent of the national competent authority and are not subordinate to it;
- local competent authorities should be supported by the national competent authority; and
- a grass roots approach to decision making is favoured by Indigenous communities so it is important that decisions relating to a community's knowledge are made by the community.

Meanwhile, the features of a national competent authority that have emerged from the Garuwanga Project include the following elements:

- a single body to perform the tasks of both national competent authority and national focal point;
- long lasting;
- independent from government;
- securely funded;
- Aboriginal and Torres Strait Islander controlled and managed as far as possible;
- sound governance in accordance with the Garuwanga principles;
- a clearly defined purpose and relationship to the community as well as to other organisations;
- serve to strengthen capacity for Aboriginal and Torres Strait Islander peoples;
- facilitate local competent authority operations; and
- have appropriate decision-making protocols.

While its legal structure is less important than its function and purpose, it is important to consider what structures might be feasible to achieve the above features of a national competent authority. The Discussion Paper provided numerous alternatives of legal structures and examples of existing organisations. The consultations did not yield a consensus view about what kind of legal structure should be developed for competent authorities but there was consensus that government agencies or authorities should be avoided. This would exclude organisations such as the Australian Institute of Aboriginal and Torres Strait Islander Studies ("AIATSIS") or a government company like the Australian Securities and Investments Commission ("ASIC"). But, as Janke suggested in 2009, "it could be a company limited by guarantee, a not for profit company. It must have the power to raise money and invest."[63] Janke went on to give the example of the National Indigenous Television Inc. ("NITV"). At the time, NITV was an independent legal entity relying on government funding to operate. However, in 2012 it was subsumed into the Special Broadcasting Service ("SBS"), yet another statutory body.

Meanwhile, in 2018, the Australia Council prepared a public Discussion Paper and commenced a series of consultations proposing a National Indigenous Arts and Cultural Authority ("NIACA"). Such an organisation would be established "to protect, maintain, strengthen and amplify the arts and cultures of Australia's First Nations peoples – through rights, economies, resilience, sovereignty."[64] The aim is to choose a legal structure that enables such a body to be established as a national not-for-profit organisation.[65] The NIACA Discussion Paper identified similar legal structures reviewed in the Garuwanga Project, namely: a statutory authority, a company limited by guarantee, an Aboriginal and Torres Strait Islander Corporation and a proprietary

company.[66] However, only companies limited by guarantee and Aboriginal and Torres Strait Islander Corporations can register for tax concessions with the Australian Charities and Not-for-profits Commission.[67]

As the Garuwanga Project Discussion Paper revealed, organisations capable of meeting the Garuwanga governance principles ranged from unincorporated to incorporated organisations. A potential model for the establishment of a national or even a regional competent authority might be a trust arrangement which has a charitable purpose, an Aboriginal and Torres Strait Islander Corporation as trustee, and beneficiaries being either regional competent authorities which have their own trust arrangements or, in the case of a regional competent authority, the Prescribed Bodies Corporate or other organisations of the communities in that region. While such cascading trust arrangements can be complicated, they offer a workable independence from government provided they are able to attract the necessary funding to operate.

CONCLUSION

This article has reported on the governance models and approaches proposed by the Garuwanga Project for the establishment of a competent authority to protect Indigenous knowledge and culture in Australia while complying with the *Nagoya Protocol*. Through an extensive comparative study, detailed analysis of the range of legal structures available for the establishment of an independent competent authority under Australian law, and a series of focus group consultations across a range of Indigenous Australian communities, the Garuwanga Project has demonstrated the importance of Indigenous empowerment. Central to Indigenous empowerment is the embedding of culture and cultural practices as the bedrock of Indigenous governance. Cultural practices can have a central role in Indigenous governance by "harness[ing] the strength and resilience of cultural roots in ways that are credible and workable today".[68] This is why it was important for the Garuwanga Project to consider the development of relevant governance principles against which potential models for a competent authority could be assessed as:

> *[f]or Aboriginal and Torres Strait Islander peoples, the challenge lies in how to achieve a balance in their governance arrangements between interrelated cultural, social and economic priorities and the other forces of 'western' governance acting upon them.*[69]

In this way governance capacity is strengthened enabling communities to define their "own needs and then [design] and [control] the response"[70] and thereby achieve self-determination.

1 Professor & Director, Intellectual Property Program, Faculty of Law, University of Technology Sydney.

2 *Convention on Biological Diversity*, opened for signature 5 June 1992 and entered into force 29 December 1993.

3 WO/GA/26/6, WIPO General Assembly, Twenty-Sixth (12th Extraordinary) Session, Geneva, 25 September to 3 October 2000, Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 2.

4 *Environment Protection and Biological Conservation Act* 1999 (Cth) section 301.

5 *Environment Protection and Biodiversity Conservation Regulations* 2000 (Cth).

6 This flaw has been noted in the recent review of the Act and progress is being made toward formal recognition and protection of Indigenous knowledge associated with biological resources.

7 *Biological Resources Act* 2006 (NT) section 29(1).

8 *Biological Resources Act* 2006 (NT) section 29(2).

9 *Aboriginal Heritage Act* 2006 (Vic) Part 5A.

10 *Aboriginal Heritage Act* 2006 (Vic) section 79B(2).

11 Office of Environment and Heritage, *Draft Aboriginal Cultural Heritage Bill* 2018 (NSW) <https://www.environment.nsw.gov.au/research-and-publications/publications-search/draft-aboriginal-cultural-heritage-bill-2018>.

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28 *Nagoya Protocol* article 13.1.

29 *Nagoya Protocol* article 13.3.

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70 Australian Institute of Family Studies.

APPENDIX: Garuwanga Project Research Roundtable Membership

Name	Organisation	Role
Uncle Gavin Andrews	Banyadjaminga Swaag Incorporated	Partner Investigator
Aunty Frances Bodkin	D'harawal Traditional Knowledgeholders and Descendants Circle	Partner Investigator
Dr Virginia Marshall	Triple BL Pty Ltd/ANU	Partner/Chief Investigator
Dr Anne Poelina	Madjulla Association	Partner Investigator
Professor Natalie Stoianoff	University of Technology Sydney	Lead Chief Investigator & Chair, Research Roundtable
Professor Fiona Martin	University of New South Wales	Chief Investigator
Professor Andrew Mowbray	University of Technology Sydney	Chief Investigator
Dr Michael Davis	University of Technology Sydney	Research Fellow
Dr Evana Wright	University of Technology Sydney	Former Research Fellow/ now Additional Investigation Team Member
Dr Ann Cahill	University of Technology Sydney	Former Research Fellow
Neva Collings	University of Technology Sydney	Garuwanga PhD Student
Paul Marshall	Triple BL Pty Ltd	Additional Investigation Team Member
Ian Perdrisat	Madjulla Association	Additional Investigation Team Member
Associate Professor Gawaian Bodkin-Andrews	University of Technology Sydney	Additional Investigation Team Member
Dr Marie Geissler	University of Wollongong	Additional Investigation Team Member
Associate Professor Alexandra George	University of New South Wales	Additional Investigation Team Member
Professor Bradford Morse	Thompson Rivers University	Additional Investigation Team Member
Associate Professor Daniel Robinson	University of New South Wales	Additional Investigation Team Member