Indigenous Knowledge Forum

Garuwanga: Forming a Competent Authority to protect Indigenous knowledge

Final Report

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Contents

Acknowledgements

We acknowledge and honour the Aboriginal and Torres Strait Islander Peoples of Australia, the First Peoples of this nation. We pay our respects to their Elders past and present and acknowledge them as the traditional custodians of their traditional lands, waters and knowledge.

We are grateful to those communities that have contributed to this project. We acknowledge the rights of all Indigenous peoples set out in The United Nations Declaration on the Rights of Indigenous Peoples.[1] These rights include both fundamental human rights and cultural rights. However, from an Australian perspective these statements are aspirational since it is up to the nation/state to domesticate declarations such as this and Australian governments thus far have failed to do so. This declaration is not part of Australian law. It is not binding in Australia other than where the process of customary international law applies. Notwithstanding this, our aim in this project is to uphold these rights, as an intrinsic aspect of the research and discussions.

We acknowledge the principles set out in the AIATSIS 2012 Guidelines for Ethical Research in Australian Indigenous Studies[2] (and its updates) and adhere to those principles in this work. The processes followed in developing proposals for the form of a Competent Authority in Australia seek to honour the rights of Aboriginal and Torres Strait Islander Peoples through a cooperative effort of mutual learning, respect and innovation.

We acknowledge the Australian Research Council (ARC) Linkage Scheme which provided the necessary funding to enable the Garuwanga Project to proceed.

Indigenous Knowledge Forum and the Garuwanga Research Roundtable

14 December 2022

[1] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR 61st sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) ('UNDRIP')

[2] Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Guidelines for Ethical Research in Australian Indigenous Studies (2012) (GERAIS) <http://aiatsis.gov.au/sites/default/files/docs/research-andguides/ethics/gerais.pdf>. In October 2020 AIATSIS published the Code of Ethics for Aboriginal and Torres Strait Islander Research. This document supersedes and replaces the GERAIS, however, it should be noted that the research under the Garuwanga Project was completed in 2019 under the GERAIS.

Ethics

The Garuwanga project has ethics approval from the UTS Human Research Ethics Committee (HREC) under approval number HREC ETH16-0784. The project utilises the NHMRC Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research and the AIATSIS 2012 Guidelines for Ethical Research in Australian Indigenous Studies as models for legal research and a mechanism for self-determination.

Use of the term Indigenous

Where the report refers exclusively to Aboriginal people this is because Torres Strait Islander people were not involved in the relevant activity.

In this report the term Indigenous has been used to refer to the Aboriginal and Torres Strait Islander Peoples of Australia collectively. The authors recognise the contested nature of this terminology and no disrespect is meant should this language be considered inappropriate.

Indigenous Knowledge

Defining Indigenous knowledge is challenging because of the holistic way it permeates, underpins and informs culture and spirituality, language, the land, water, and day to day life for Indigenous peoples of Australia. In an attempt to convey its scope, the Indigenous Knowledge Forum has previously employed the term Knowledge Resources, and used the following explanation for that term in the context of the Aboriginal peoples of NSW.[3]

> *Knowledge Resource(s) means bodies of knowledge held by Aboriginal Communities relating to the use, care and understanding of Country and the resources found on Country. Knowledge Resources include cultural heritage, traditional knowledge and traditional Cultural Expressions, as well as manifestations of Aboriginal sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. Knowledge [R]esources include 'law knowledge' and 'cultural knowledge' of an Aboriginal Community and knowledge of observing ecological interactions between plants, animals, medicines, foods and seasonal cycles which relate to genetic resources. Genetic resources may exhibit different properties in different locations and environments.*

In this report we consider this term 'Knowledge Resources', as one among other terms and expressions used to denote Indigenous knowledge. This is discussed later in the report (see below, section 1.2.3).

[3] UTS – Indigenous Knowledge Forum and North West Local Land Services, 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management' (White Paper, Office of Environment and Heritage, Government of New South Wales, 2013) <https://www.indigenousknowledgeforum.org/white-paper>.

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/Australian National University	Partner Investigator/ Chief Investigator
Professor Anne Poelina	Madjulla Association	Partner Investigator
Professor Natalie Stoianoff	University of Technology Sydney	Lead Chief Investigator & Chair of meeting
Emeritus 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 / Additional Investigation Team Member
Dr Ann Cahill	University of Technology Sydney	Former Research Fellow
Dr 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
Professor Gawaian Bodkin-Andrews	University of Technology Sydney/ Western Sydney University	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
Professor Daniel Robinson	University of New South Wales	Additional Investigation Team Member

Executive Summary

This document reports on the outcomes of the ARC Linkage funded project, *Garuwanga: Forming a Competent Authority to Protect Indigenous Knowledge* (the Garuwanga Project).

The Garuwanga Project employs the Nagoya Protocol[4] as the basis upon which the research seeks to explore possible options in Australia for implementing the Protocol's provisions regarding competent authorities for the protection, administration and management of Indigenous knowledge. The Nagoya Protocol came into force on 12 October 2014, and has already been ratified by 138 United Nations (UN) member states including the European Union. Implementation of the Protocol requires the establishment of national focal points and competent national authorities (which may be one and the same). Such authorities, if created as non-government organisations and/or if governed by representatives of the communities they are intended to protect, could assist Indigenous communities to achieve self-determination in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[5]

This report outlines the forms of competent authorities already established by other nations to protect Indigenous knowledge as well as the legal and governance structures already utilised by Indigenous communities in Australia to protect their knowledge and culture.

A key feature of this project is the Indigenous governance principles developed to evaluate Australian-based organisations that could provide potential models for such a competent authority. With the assistance of these principles and the outcomes of the Garuwanga Project 'on Country' consultations, the project has proposed a tiered approach for competent authorities to operate in Australia starting with the local or regional level and being supported by a reporting and standard-setting body at the national level. A national level organisation of this kind may form the Australian national competent authority as provided for under the Nagoya Protocol.

[4] *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*, opened for signature 2 February 2011 (entered into force 12 October 2014) ('Nagoya Protocol').

[5] *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, Doc No A/RES/61/295, adopted at the 107th plenary meeting, 13 September 2007 (UNDRIP).

List of Acronyms Used

ABS	Access and benefit sharing
ACH	Aboriginal Cultural Heritage
ACNC	Australian Charities and Not for Profit Commission
ACNT	Australian Council of National Trusts
AIAS	Australian Institute of Aboriginal Studies
AIATSIS	Australian Institute of Aboriginal and Torre Strait Islander Studies
ALRA	Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
ALRC	Australian Law Reform Commission
ANKAAA	The Association of Northern, Kimberley and Arnhem Land Aboriginal Artists
ARC	Australian Research Council
BDA	Biological Diversity Act
CAL	Copyright Agency Limited
CATSI Act	Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)
CBD	Convention on Biological Diversity
CEO	Chief Executive Officer
CLC	Central Land Council
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DENR	Department of Environment and Natural Environment
DGR	Deductible gift recipient
DOST	Department of Science and Technology
DSITIA	Department of Science, Information Technology, Innovation and the Arts
DTKDC	D'harawal Traditional Knowledgeholders and Descendants Circle
GERAIS	Guidelines for Ethical Research in Aboriginal and Torres Strait Islander Studies
GRAC	Gawler Ranges Aboriginal Corporation
ICC	Indigenous Cultural Communities
INDECOPI	Office of Inventions of the National Institute for the Defence of Competition and Intellectual Property

IP	Indigenous Peoples
IRCA	Indigenous Remote Communications Association
IUCN	International Union for Conservation of Nature
KLC	Kimberley Land Council
LALC	Local Aboriginal Land Council
NAILSMA	North Australian Indigenous Land and Sea Management Alliance Ltd
NBA	National Biodiversity Authority
NCIP	National Commission on Indigenous Cultural Communities/Indigenous Peoples
NGO	Non-government organisation
NSW	New South Wales
NSWALC	New South Wales Aboriginal Land Council
NSWBCT	New South Wales Biodiversity Conservation Trust
NTA	Native Title Act 1993 (Cth)
NTA	National Trusts of Australia
ORIC	Office of the Registrar of Indigenous Corporations
PBC	Prescribed Body Corporate
PO	Partner Organisation
RNTBC	Registered native title body corporate
RIBS	Remote Indigenous Broadcasting Services
RIMO	Remote Indigenous Media Organisation
SBB	State Biodiversity Board
TIEC	Tropical Indigenous Ethnobotanical Centre
UTS	University of Technology Sydney
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VNCC	Vanuatu National Cultural Council

1 Background to the Garuwanga Project

Australia has been grappling with how to protect Indigenous knowledge and culture for more than forty years.[6] Aboriginal and Torres Strait Islander knowledge matters not only to Aboriginal and Torres Strait Islander communities, but also to society at large because of its spiritual, cultural and economic significance.[7]

Indigenous communities around the world hold knowledge critical to the conservation of biological diversity and natural resource management. This is acknowledged in the *Convention on Biological Diversity 1992* (CBD),[8] in particular article 8(j). Further, it is estimated that 'traditional' medicines of these Indigenous communities are relied on by up to 80% of the world's population for primary health care[9] while approximately three quarters of the plants used in prescription medicine were originally used in such 'traditional' medicine.[10]

Consequently, the 'traditional' knowledge of Indigenous communities have been and continue to be of great value to companies engaging in pharmaceutical or agricultural research and development.[11] However, there are too many cases where such 'traditional' knowledge has been misappropriated and exploited through the practice of bio-piracy.[12] This unlawful taking of biological resources and associated Indigenous 'traditional' knowledge, often with little or no compensation to the Indigenous community, represents the continuing dispossession of these communities and can prevent them from engaging in industries based on their 'traditional' knowledge.[13]

In an effort to develop a framework that would provide protection for Aboriginal knowledge in the state of New South Wales (NSW), the Aboriginal Communities Funding Scheme of the

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[6] Natalie P Stoianoff and Alpana Roy, 'Indigenous Knowledge And Culture In Australia – The Case For Sui Generis Legislation' (2015) 41(3) *Monash University Law Review* 745.

[7] UTS – Indigenous Knowledge Forum and North West Local Land Services, 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management' (White Paper, Office of Environment and Heritage, Government of New South Wales, 2014) <https://www.indigenousknowledgeforum.org/white-paper> ('White Paper'). Further, The Constitution of NSW at s. 2(1) 'acknowledges and honours Aboriginal people as the State's first people and nations' and recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:
(a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and
(b) have made and continue to make a unique and lasting contribution to the identity of the State
(Constitution Act 1902 (NSW), s. 2(2)).

[8] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 30619 (entered into force 29 December 1993) ('CBD')

[9] Katrina Brown, 'Medicinal Plants, indigenous medicine and conservation of biodiversity in Ghana' in Timothy M Swanson (ed), *Intellectual Property Rights and Biodiversity Conservation: an interdisciplinary analysis of the values of medicinal plants* (Cambridge University Press, 1995), 201.

[10] Jack Kloppenburg Jr, 'No Hunting! Biodiversity, Indigenous Rights and Scientific Poaching' (1991) 15(3) *Cultural Survival Quarterly* 14.

[11] White Paper, n 3, 3.

[12] Ibid.

[13] Ibid. And see also, Virginia Marshall, 'Negotiating Indigenous Access and Benefit Sharing Agreements in Genetic Resources and Scientific Interest' (2013) 8/8 *Indigenous Law Bulletin* 14; Henrietta Fourmile-Marrie, 'Developing a Regime to Protect Indigenous Traditional Biodiversity-Related Knowledge' (2000) 1 *Balayi* 163, 164; Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (South End Press, 1997), 14; Katie O'Bryan, 'The Appropriation of Indigenous Ecological Knowledge: Recent Australian Developments' (2004) 1 *Macquarie Journal of International and Comparative Environmental Law* 29, 32.

Namoi Catchment Management Authority (now North West Local Land Services (NWLLS) funded the project *Recognising and Protecting Indigenous Knowledge Associated with Natural Resource Management* from the end of 2013 to October 2014. The main aims of the project were to identify key elements of a regime to recognise and protect Indigenous knowledge associated with natural resource management through consultation with Aboriginal communities in North West NSW and members of the Indigenous Knowledge Forum.[14] The result was a White Paper for the Office of Environment and Heritage recommending adoption of a *sui generis* or stand-alone legal regime protecting Aboriginal knowledge for the benefit of communities in the state of NSW. The White Paper advocated for the establishment of a 'Competent Authority' to be established to manage such a regime particularly as such an authority would be required to provide the governance framework for administering a legal regime covering the creation, maintenance and protection of community knowledge databases. In the draft legislation contained in the White Paper, the term 'Competent Authority' was defined as:

> Competent Authority means the organisation responsible for administering this Act and regulations under this Act and is independent of other authorities. The Competent Authority will include representatives of Aboriginal Communities and provides for local, regional and state administration of this Act.[15]

Regarding the Competent Authority the White Paper observed that:

> Ideally this body should be independent. 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.[16]

In 2016, the Australian Research Council (ARC) funded the three-year project, *Garuwanga: Forming a Competent Authority to protect Indigenous knowledge* (Garuwanga Project), under the ARC Linkage Scheme. This project formed a Research Roundtable (the membership of which can be found in the table on page 9 of this report) to work with Aboriginal Communities to identify, evaluate and recommend an appropriate Competent Authority legal structure recommended in the White Paper so Australia can 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*.[17] This Protocol calls for countries to put in place two main measures:

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[14] The Indigenous Knowledge Forum commenced in 2012 to understand the impact of biodiversity and intellectual property law and policy on Indigenous knowledge and biodiversity management. The Forum focuses on how the implementation and operation of relevant laws affects the rights and interests of Indigenous peoples; <https://www.indigenousknowledgeforum.org>.

[15] White Paper, n3, 61

[16] White Paper, n3, 75

[17] *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Resources* was adopted by the Conference of the Parties to the Convention on Biological Diversity at its tenth meeting on 29 October 2010 in Nagoya, Japan, entered into force on 12 October 2014.

(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 Garuwanga project has brought together Indigenous and non-Indigenous researchers to work with Aboriginal communities associated with four Aboriginal Partner Organisations (POs) to address concerns over the form, independence and funding of a Competent Authority so Indigenous knowledge and culture can be protected and shared.

1.1 Aims, Objectives and Process

The legislative 'Competent Authority' framework for recognising and protecting Aboriginal knowledge associated with natural resource management, as proposed in the White Paper, met with some concerns during the community consultations in North West NSW. Those community consultations raised questions about, and an interest in, the forms that such an authority would take, its independence from government, how it would be funded and wound up, local Aboriginal representation and engagement.[18] These are matters that are central to the questions that the Garuwanga Project sought to investigate.

One of the ways that the Garuwanga project addresses the questions raised during the community consultations for the preparation of the White Paper, was to engage Aboriginal Communities through an action research methodology within an Indigenous research paradigm. The project title itself exemplifies this; using the term 'Garuwanga' (Dharawal for Dreaming Cycle), foregrounds the project's foundation in recognition of the connection between Indigenous knowledge and the environment, thereby emphasising connection to Country. This deep and enduring connection to Country is fundamental to, and informed by, Indigenous peoples' cosmologies; and it is recognised (albeit in a piecemeal and inadequate way) in some legislation. This includes (in section 3 of) the former *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth)[19], as well as in some State constitutions. The native title process offers potential for recognition of Indigenous peoples' connections to Country, but this is problematic and limited.[20]

The Garuwanga project also investigates questions about 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 suitable for governing and administering an Indigenous knowledge protection regime.

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[18] White Paper, n3, 75.

[19] That Act ceased on 28 March 2018.

[20] On native title, see for example Katie Glaskin, 'Native title and the "bundle of rights" model: Implications for the recognition of Aboriginal relations to country' (2003) 13(1), *Anthropology Forum*: 67-88. Examining a High Court Decision on native title in Ward (*Western Australia v Ward* [2002] HCA 28), Glaskin writes "…Although native title legislation is intended to provide a legislative framework for the recognition of Aboriginal people's native title, this framework does not seem particularly compatible with the recognition of Aboriginal people's relations with country. Part of the problem stems from the extinguishment provisions in the amended legislation. However, the problem is also very much linked to the way native title has been legislatively conceived as a 'bundle of rights and interests'". p. 71.

Therefore, the **specific aims** of this project are to:

1. identify and evaluate a variety of legal structures for a Competent Authority suitable for governing and administering an Indigenous knowledge protection regime,
2. facilitate Aboriginal Community engagement in the process of such identification and evaluation, and
3. recommend an appropriate legal structure for such a Competent Authority in accordance with that engagement.

The anticipated outcome of this project is an appropriate legal structure for such a Competent Authority derived from an analysis of existing Australian Indigenous governance frameworks as well as those frameworks adopted in countries with existing Indigenous knowledge protection regimes. What is significant about this project is the grassroots approach to achieving this outcome. This project ensures that Aboriginal Communities are engaged in the choice of the most appropriate governance framework for the Competent Authority providing transparency and accountability. While the initial impetus for research into the form of the Competent Authority emerged in relation to regimes proposed for NSW, this project aims to provide a model for a federal Competent Authority 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, the determination of a Competent Authority acceptable to the beneficiaries it is meant to serve would have implications for other settler-colonial countries similar to Australia such as New Zealand, Canada and the USA.

1.1.1 Methodological Approach

This project takes the long-standing discourse on the protection of Indigenous knowledge to the next level by ensuring that those whose knowledge is intended to be protected are directly engaged in and driving the achievement of the solution. It achieves this by applying the action research methodology developed by the Lead Chief Investigator, Natalie Stoianoff, and tested in the 2014 program of research which produced the White Paper. It did so by employing a variation on the Delphi method[21] which sought the achievement of consensus among the members of the Working Party in the production of the White Paper. The working party in the Garuwanga Project has been named a Research Roundtable. This action research methodology is also adopted in the identification and evaluation of a variety of legal structures for a Competent Authority, while engaging the very communities for whose benefit the authority will be operating in the process of assessment and recommendation, in line with AIATSIS principles of ethical research.

This research is methodologically and conceptually innovative through:

a) *The use of mixed modes of research applied in a structured way*:

[21] Evgeny Guglyuvatyy and Natalie P Stoianoff, 'Applying The Delphi Method As A Research Technique In Tax Law And Policy' (2015) 30(1) *Australian Tax Forum.*

(i) commencing with a doctrinally based comparative analysis of existing protection regimes employing a competent authority for its governance

(ii) collecting data of case study examples in existence around Australia drawing upon the list of community concerns identified in the White Paper as the initial criteria for evaluating these different forms of governance;

(iii) carrying out the evaluation through the Research Roundtable (RR) employing a variation on a Group Delphi method[22] to achieve consensus for the preparation of a Discussion paper that will be presented to the Aboriginal communities being consulted via the POs;

(iv) carrying out the consultations in the form of focus group sessions; and

(v) analysing the outcome of those sessions for incorporation into the drafting of the final Report recommending the most appropriate and acceptable form of governance.

b) *The underpinning of the project by an action research methodology* which emphasises cooperative or collaborative inquiry[23] whereby all active participants are fully involved in research decisions as co-researchers[24] hence the Chief Investigators (CIs), Partner Investigators (PIs) and other members of the POs are researching together through the mechanism of the Research Roundtable (RR) and thereafter the community consultations.

c) *Applying 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 – this has proven successful under the White Paper process as a means of ensuring deeper understanding of the concerns of community, especially the knowledge-holders charged with protecting the knowledge of the community.[25]

d) *Empowering Aboriginal communities* through direct involvement in the research process and achieving community-led solutions through axiologies (ways of doing) and ontologies (ways of being), once again through the Research Roundtable (RR) and community consultation process.

e) *Further developing the model of respect, engagement and reciprocity for Aboriginal and non-Aboriginal researchers* to work together to solve a problem utilising the NHMRC *Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research* and the AIATSIS 2012 *Guidelines for Ethical Research in Australian Indigenous Studies* as models for legal research and a mechanism for self-determination.

1.1.2 Conceptual Framework

[22] Thomas Webler, Debra Levine, Horst Rakel, and Ortwin Renn, 'A Novel Approach to Reducing Uncertainty - The Group Delphi', (1991) 39 *Technological Forecasting And Social Change* 253-263.
[23] John Heron, *Co-operative Inquiry: Research into the Human Condition* (Sage, 1996).
[24] Peter Reason & Bradbury, *Handbook of Action Research* (Sage, 2nd ed, 2007).
[25] Ewa Czaykowska-Higgins, 'Research Models, Community Engagement, and Linguistic Fieldwork: Reflections on Working within Canadian Indigenous Communities' (2009) 3(1) *Language Documentation & Conservation*.

The function of the Competent Authority will be informed by the model provided in section 22, part 6 of the proposed *Protection of Aboriginal Knowledge Resources Bill 2014* recommended by the White Paper. There are a variety of legal structures suitable for a Competent Authority. These include Aboriginal and Torres Strait Islander Corporations,[26] corporations under section 57A of the *Corporations Act 2001* (Cth), incorporated and unincorporated associations, trust arrangements involving such organisations, statutory bodies and Aboriginal Land Councils. The four Partner Organisations, together with other associated Aboriginal organisations and communities, represent a range of possible legal structures to be investigated. One of the key responsibilities of the Competent Authority is to manage the database registers and how the knowledge is disclosed ensuring compliance with free, prior and informed consent of the Aboriginal[27] knowledge holders and their communities, their laws and customs. Accordingly, for such a Competent Authority to have the trust of Aboriginal communities to be protected under an Indigenous knowledge regime, it must be formed in a manner acceptable to these communities. The project has taken three years with three stages. Stage 1 was concerned with identifying the legal structures that could be utilised to frame a Competent Authority. Stage 2 focussed on evaluating these legal structures and conducting the 'on Country' consultations. Meanwhile, during Stage 3 draft reports were prepared and the third Indigenous Knowledge Forum was held to bring together the research and engage with experts from around the globe in a manner which would inform the completion of the project. Stages 1and 2 address Aims 1 and 2 of the project (see Aims above) while Stage 3 addresses Aims 2 and 3. These are explained below.

1.1.3 Methodology

This project uses an action research methodology[28] within an Indigenous research paradigm to ensure that the outcomes accord with Aboriginal law and custom. It follows the process that Chief Investigator Stoianoff and the Indigenous Knowledge Forum adopted in developing the White Paper. The Garuwanga Project takes this process to the next level, by involving representatives from a variety of Aboriginal organisations as Partner Investigators (PIs) working closely with the Chief Investigators (CIs), Research Associate and PhD student. The Working Party model adopted for the White Paper was transformed into a Research Roundtable (RR) where the PIs take on further responsibilities in the research by directly engaging their communities in the process. Each PI and corresponding PO were tasked with holding their own community meetings at each stage along the research process to ensure that their participation on the Research Roundtable (RR) is representative of their community. This is akin to having multiple Group Delphi studies taking place.

[26] *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

[27] Note that here we refer to 'Aboriginal' knowledge holders, and 'Aboriginal' communities, rather than 'Indigenous'. This reflects the fact that, for reasons explained elsewhere in this report, the research for this project was carried out by, and with, some Aboriginal communities and organisations, but not Torres Strait Islander communities and organisations. The potential legal structures, forms and organisations of competent authorities that have been suggested and discussed in this report might be applicable also to Torres Strait Islander communities, but this consideration is outside the scope of this project.

[28] Kurt Lewin, 'Action research and minority problems' (1946) 2(4) *J Soc. Issues* 34-46.

Banyadjaminga Swaag Incorporated (BSI) is an Indigenous charitable not-for-profit incorporated association represented by PI Andrews. Madjulla Association (MS) is an Indigenous charitable not-for- profit incorporated association represented by PI Poelina who was a director of Native Title Walalakoo Body Corporate in the Kimberley, during the phase of this research. D'harawal Traditional Knowledgeholders and Descendants Circle (DTKDC) is not a registered organisation but is conducted according to D'harawal traditional law and is represented by PI Bodkin. Triple BL Pty Limited (TBL) represented the interests of Nyikina Mangala Traditional Owners of the Kimberley in Western Australia in managing the Mudjala Aboriginal medicine project and was initially represented by PI Marshall, until she became CI representing the Australian National University, and later by additional investigator P. Marshall. Each of these organisations, BSI and DTKDC covering communities from South Western Sydney to the Southern Highlands of New South Wales while TBL and MA represent communities in the Kimberley, emphasise the importance of Aboriginal knowledge resources to the wellbeing of their communities and the importance of the independence of a Competent Authority charged with administering a protection regime while simultaneously being representative of the communities it is entrusted to serve. The POs illustrate the variety of demographics between Indigenous communities in Australia from the high density urban communities in Sydney to the remote communities in other parts of Australia.

The three stages of the Garuwanga Project were divided into 8 activities (see Table 1 below) commencing with a benchmarking exercise in the form of a comparative study to determine what forms of Competent Authority exist in other national jurisdictions. The RR, now comprising not only the chief and partner investigators, research associates/fellows and PhD student but in addition a number of expert investigators both Indigenous and non-Indigenous, considered the Comparative Study Report[29] and gathered further public domain data on existing legal structures utilised by a range of Aboriginal communities in Australia. To assist with the evaluation of the variety of forms of Competent Authority, the RR developed a series of governance criteria, applied those to the POs by way of a case study and then developed a Discussion Paper for distribution to the Aboriginal Communities that would participate in the consultation process (Garuwanga Project Discussion Paper[30]). Community consultations then took place in the form of focus groups and in accordance with ethics approvals (see above). The recorded consultations have been transcribed, de-identified and analysed as described in Chapter 5 of this report. Following discussion of that analysis with the members of the RR, a draft final report was produced under Activity 7. The draft final report was further discussed at the 2019 Indigenous Knowledge Forum held on 12 and 13 June 2019 (Activity 8) and the outcomes of those discussions incorporated into this final report.

[29] Evana Wright, Natalie P. Stoianoff and Fiona Martin, *Comparative Study - Garuwanga: Forming a Competent Authority to protect Indigenous knowledge* (UTS - Indigenous Knowledge Forum, 2017) (Comparative Study Report). The full report is available at: https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho

[30] Indigenous Knowledge Forum, *Garuwanga: Forming a Competent Authority to protect Indigenous knowledge – Discussion Paper*, UTS, April 2018 (Garuwanga Project Discussion Paper). The full discussion paper is available at: https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho

Table 1. Garuwanga Project Activities

Stage/Activity	Description	Timeframe
Stage 1		
Activity 1	Comparative Study Report	Year 1
Activity 2	Research Roundtable (RR) meetings for data gathering	Year 1
Stage 2		
Activity 3	RR meetings for evaluation of legal structures	Year 2
Activity 4	Drafting of Discussion Paper	Year 2
Activity 5	Community consultations	Year 2
Stage 3		
Activity 6	Transcription/Analysis of Community Consultations	Year 3
Activity 7	Report on preferred form of Competent Authority	Year 3
Activity 8	Indigenous Knowledge Forum	Year 3

1.2 The Convention on Biological Diversity and Nagoya Protocol

1.2.1 The Convention on Biological Diversity

A framework for protecting Indigenous knowledge has been developed internationally through the *United Nations Convention on Biological Diversity* (CBD).[31] Late last century, countries around the world recognised the importance of the world's biological resources to economic and social development. They also recognised growing threats to species and the environment. In response, the United Nations Environment Programme (UNEP) established a Working Group to prepare an international agreement for the conservation and sustainable use of biological diversity. The agreement needed to promote the needs of developing countries and Indigenous peoples. By 1992, this group had drafted an agreed text for the CBD. It was opened for signature at the Rio "Earth Summit".[32]
The CBD has three main objectives:

- conservation of biological diversity;

[31] United Nations Convention on Biological Diversity (website), https://www.cbd.int/traditional/
[32] United Nations Convention on Biological Diversity (website), https://www.cbd.int/history/.

- sustainable use of such biodiversity; and
- fair and equitable sharing of benefits arising out of the utilisation of genetic resources.[33]

In regard to the third objective, Article 1 states:

> the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.

As Stoianoff points out, this objective of the CBD requires all rights over the genetic resources be taken into account when determining the fair and equitable sharing of benefits arising from the use of those resources:

> The question of "all rights" requires the identification of whose rights. This would include the sovereign nations themselves, as Article 3 acknowledges, landowners and Indigenous peoples, bioprospectors, pharmaceutical or biotechnology companies or holders of intellectual property over such resources.[34]

Under the CBD, Contracting Parties are able to assert control over these genetic resources as Article 3 recognises the sovereign rights of states over their natural resources and the authority of those states to determine access to genetic resources using national legislation. Article 15 paragraph 1 specifically states such recognition:

> Recognising the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

In particular, Article 15 paragraph 7 requires that each Contracting Party "take legislative, administrative or policy measures, as appropriate" for the fair and equitable sharing of benefits "arising from the commercial and other utilisation of genetic resources with the Contracting Party providing such resources". This paragraph requires co-operation between nations in a variety of ways, but given that the party seeking the resources is likely to be a private organisation, the responsibility of establishing the measures lies with the Contracting Party providing the genetic resources.

Article 8(j) provides for the recognition of – and the equitable sharing of – benefits in relation to the use of traditional knowledge. However, the implementation of Article 8(j) is to be subject to national legislation. As for customary uses of biological resources in line with traditional practice, Article 10(c) of the CBD encourages such uses and the protection of such uses. Meanwhile, Article 18(4) requires Contracting Parties to "encourage and develop methods of cooperation for the development and use of technologies, including Indigenous and traditional technologies".

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[33] In the Convention on Biological Diversity, Article 1: Objectives

[34] Natalie P. Stoianoff, 'Navigating the Landscape of Indigenous Knowledge – A Legal Perspective' (2012) 90 *Intellectual Property Forum* 23, 27.

In addition, the CBD recognises the influence of patents and other intellectual property rights and requires at Article 16(5) "that such rights are supportive of and do not run counter to" the objectives of the CBD. Meanwhile, the developments on Article 8(j) include an emphasis on the benefit-sharing requirements in the provision. Stoianoff notes

> the concepts of prior informed consent, benefit-sharing and mutually agreed terms have been reinforced in the provisions of the CBD and been the subject of much discussion, debate and development at the Conference of the Parties to the CBD. This has resulted in the Bonn Guidelines[35] to assist with determining access and benefit sharing arrangements, and more recently, in the Nagoya Protocol, which is directed at improving legal certainty transparency and compliance with benefit-sharing mechanisms.[36]

1.2.2 The Nagoya Protocol

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity* (Nagoya Protocol) is a supplementary agreement to the CBD. It provides a legal framework for the implementation of one of the three objectives of the CBD: the fair and equitable sharing of benefits arising out of the utilisation of genetic resources. The Nagoya Protocol on access and benefit sharing (ABS) was adopted on 29 October 2010 in Nagoya, Japan and entered into force on 12 October 2014. Australia ratified the *Convention on Biological Diversity* on 18 June 1993, and signed the Nagoya Protocol in January 2012, but has yet to ratify it and implement it.[37]

The use of genetic resources may involve the use of traditional knowledge. The Nagoya Protocol explicitly recognised this link. Consequently, the Protocol attempts to address the rights in traditional knowledge associated with use of genetic resources and requires that member countries:

> take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.[38]

Australia is a signatory to the Nagoya Protocol, but as at the completion of this Report, had not yet ratified it.[39] The federal government claims to be working on how it will implement the Protocol.[40] The Department of the Environment (as it then was) stated in 2014 that the 'Government aims to develop a workable, ethical and cost-effective way to implement the Protocol in Australia. The aim is to increase certainty for both users and providers of genetic

[35] Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation, COP 6 Decision VI/24 at www.cbd.int/decision/cop/?id=7198
[36] Stoianoff 2012, above n 34, 29.
[37] See the Australian Government's Department of Agriculture, Water and the Environment for updates: https://www.awe.gov.au/science-research/australias-biological-resources/nagoya-protocol-convention-biological
[38] Nagoya Protocol, art 7.
[39] Australia signed the Nagoya Protocol on 20 January 2012. See supra n. 37.
[40] Commonwealth Government, Department of Sustainability, Environment, Water, Population and Communities 'The Nagoya Protocol in Australia'. *The Nagoya Protocol in Australia* (Canberra, 2016)..

resources and associated traditional knowledge.'[41] At the time of completing this Report the relevant Commonwealth Government department responsible for the CBD and the Nagoya Protocol is the Department of Agriculture, Sustainability, Water and Environment (this will change under the new government elected on 21 May 2022). It states on its website that 'Australia has both national legislation, through the *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC Act) and its associated regulations, and state and territory legislation in place which align with the obligations under the Nagoya Protocol.'. It also refers to 'sub-national jurisdictions of Australia', which 'have their own procedures through State and Territory legislation', and states that 'Permits for genetic resources issued by Australian jurisdictions are recognised as evidence that those resources were accessed with prior, informed consent, and on mutually agreed terms'.[42]

However, as is evident from this, progress that has been made is at best piecemeal and focuses much more on access to genetic resources than providing adequate protection for traditional or Indigenous knowledge. The Indigenous Knowledge Forum has sought to address this deficiency first through the proposals made in the 2014 White Paper for the NSW Government and now nationally through the Garuwanga Project.

1.2.3 Indigenous Knowledge and Biological Resources

Both the CBD and the Nagoya Protocol refer to the concept of 'traditional knowledge'. This term is also the focus of much of the international literature.[43] The meaning of traditional knowledge is encapsulated in the following quotation from Wuthathi/Meriam intellectual property lawyer, Terri Janke:

> [t]raditional knowledge is the underlying knowledge which is created, acquired or inspired for traditional purposes, transmitted from one generation to another, it belongs to a clan or group, and has collective origins.[44]

The use of the word 'traditional' is 'not intended to mean unchanging or static or based in the past', rather it 'implies that the knowledge, or for that matter the cultural expression, is imbued with community social norms, customary laws and protocols, cosmology but also connection with the land, environment and location of that community in an integral sense'.[45]

The World Intellectual Property Organization (WIPO) produced a report on its fact-finding mission on intellectual property and traditional knowledge in April 2001.[46] In that report, the term 'traditional knowledge' was used to refer to

> 'tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information;

[41] Department of Environment, Government of Australia, *A Model for Implementing the Nagoya Protocol in Australia* (Canberra, 2014).
[42] See the Department's website at https://www.awe.gov.au/science-research/australias-biological-resources/nagoya-protocol-convention-biological
[43] Stoianoff 2012, above n 34, 23.
[44] Terri Janke*, Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, Terri Janke and Company Pty Ltd, 2009, p.21.
[45] Stoianoff 2012, above n 34, 24-25.
[46] *Intellectual Property Needs and Expectations of Traditional Knowledge Holders,* WIPO Report on fact-finding missions on intellectual property and traditional knowledge (1998-1999), Geneva, April 2001 (WIPO 2001 Report).

> and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields'.[47]

While recognising the constantly evolving nature of traditional knowledge, WIPO also provided a separate definition for Indigenous knowledge, namely the 'traditional knowledge' of Indigenous communities, peoples and nations.

In this report, it is recognised that defining 'Indigenous knowledge' is challenging because of the holistic way it permeates culture and spirituality, language, the land, water and day to day life for Indigenous peoples of Australia. In an attempt to convey its scope, the Indigenous Knowledge Forum has previously referred to Knowledge Resources and used the following explanation for that term in the context of the Aboriginal peoples of NSW.[48]

> *Knowledge Resource(s) means bodies of knowledge held by Aboriginal Communities relating to the use, care and understanding of Country and the resources found on Country. Knowledge Resources include cultural heritage, traditional knowledge and traditional Cultural Expressions, as well as manifestations of Aboriginal sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. Knowledge resources include 'law knowledge' and 'cultural knowledge' of an Aboriginal Community and knowledge of observing ecological interactions between plants, animals, medicines, foods and seasonal cycles which relate to genetic resources. Genetic resources may exhibit different properties in different locations and environments.*[49]

As the Garuwanga Project is predicated on the work that went into the White Paper for the Office of Environment and Heritage, the concepts described in the term 'Knowledge Resources' encapsulate the meaning intended for the term 'Indigenous knowledge' but with the expansion that the knowledge resources refer to the bodies of knowledge held by Aboriginal and Torres Strait Islander Communities.

Later in this report (see below at 5.2), the concept of Indigenous knowledge is further discussed (employing the term 'Indigenous knowledge'), with a more specific focus on the role, or potential role it has in discussions about models for competent authorities.

1.2.4 Access and Benefit Sharing

Under article 8(j) of the CBD countries must 'respect, preserve and maintain, knowledge, innovations and practices of Indigenous communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity'.[50] They must 'promote the wider use of knowledge, innovations and practices of Indigenous communities

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[47] Ibid, 25.

[48] UTS – Indigenous Knowledge Forum and North West Local Land Services, 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management' (White Paper, Office of Environment and Heritage, Government of New South Wales, 2013) <https://www.indigenousknowledgeforum.org/white-paper>

[49] Proposed *Protection of Aboriginal Knowledge Resources Bill 2014*, section 2(1), White Paper, n 3, 124.

[50] United Nations Convention on Biological Diversity 1992, Article 8(j).

with the approval and involvement of the knowledge holders and encourage the equitable sharing of benefits' arising from the utilisation of such knowledge, innovations and practices.[51]

The Nagoya Protocol[52] was developed as a supplementary agreement to the CBD to provide a framework for access and benefit-sharing. The Protocol applies to genetic resources, and traditional knowledge associated with these resources.[53] As stated above, Australia is a signatory to the Nagoya Protocol, but is yet to ratify it.

The Nagoya Protocol addresses traditional knowledge associated with genetic resources with provisions on access, benefit-sharing and compliance methods. Contracting Parties must take measures to ensure that access is based on prior informed consent, and fair and equitable benefit-sharing, keeping in mind community laws and procedures, as well as customary use and exchange.[54] The obligations under the Nagoya Protocol for signatories to it, do not include sanctions or penalties for failure to comply with these provisions.

1.2.5 Control and Management of Traditional Knowledge and Biological Resources

The difficult and complex issues of 'ownership', 'stewardship' or 'custodianship' of Indigenous knowledge and biological resources requires consideration. Concepts such as 'stewardship' are often proposed as a way of capturing the very particular way that Indigenous peoples relate to knowledge, resources and *Country*.[55] It is important to acknowledge

> [t]his long tradition of custodianship means that Indigenous Australians possess a detailed body of knowledge and practices surrounding the environment and the interconnected spiritual and cultural relationships with their land and sea estates. Indigenous peoples refer to the reciprocal relationships that are inherent to using and managing their estates and resources as 'caring for country'. Long-held traditional rights, responsibilities, and environmental practices continue to be expressed and enacted as significant obligations in contemporary Indigenous society.[56]

As discussed in section 1.2.1 above, while article 8(j) of the CBD recognises the role of Indigenous communities in relation to the conservation and sustainable use of biodiversity, article 3 of the CBD places the control and management of a nation state's biological resources in the hands of that state:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within

[51] *United Nations Convention on Biological Diversity 1992*, art 8(j).
[52] Nagoya Protocol, above n 4.
[53] United Nations Convention on Biological Diversity (website), https://www.cbd.int/abs/about/default.shtml
[54] Nagoya Protocol, art 5, 7.
[55] See generally, Anne Ross, Kathleen Pickering Sherman, Jeffrey G. Snodgrass, Henry D. Delcore & Richard Sherman, *Indigenous Peoples and the Collaborative Stewardship of Nature: Knowledge Binds and Institutional Conflicts* (Left Coast Press, 2011).
[56] Rod Kennett, Micha Jackson, Joe Morrison, and Joshua Kitchens, 'Indigenous Rights and Obligations to Manage Traditional Land and Sea Estates in North Australia: The Role of Indigenous Rangers and the I-Tracker Project', *Policy Matters* 17, 2010, 135.

> their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[57]

The Nagoya Protocol does impose an obligation on a nation state that is a party to the Protocol to 'take measures…with the aim of ensuring that the prior informed consent or approval and involvement of [I]ndigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources'.[58] As will be seen in the next section, this is addressed to some degree by Australia's federal legislation.

However, consideration must be given to UNDRIP [59] to which Australia is a signatory. While UNDRIP is not a binding international instrument, eminent scholars have argued that this Declaration reflects certain norms of customary international law.[60] Others have emphasised more the aspirational intent of UNDRIP. This is the view expressed in a 2012 report from the International Law Association's (ILA) Committee on the Rights of Indigenous Peoples. The conclusions and recommendations of that report, which resulted from the ILA's conference in Sofia, state that:

> The provisions included in the UNDRIP which do not yet correspond to customary international law nevertheless express the aspirations of the world's indigenous peoples as well as of States in their move to improve existing standards for the safeguarding of indigenous peoples' human rights.[61]

Accordingly, regard must be given to articles 24 to 29 of UNDRIP which deal with the rights of Indigenous Peoples over their traditional lands and waters. Under article 24(1), 'Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals'. Clearly, this implies control and management over the relevant biological resources. Further article 25 affirms the right of Indigenous Peoples 'to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard'. This reminds us of the custodianship of Indigenous Peoples over their lands and waters and it follows through to the rights of Indigenous Peoples to conserve and protect the environment and the productive capacity of their lands or territories and resources under article 29(1).

These rights are further reinforced in Article 26:

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[57] *Convention on Biological Diversity 1992*, Article 3.
[58] *Nagoya Protocol,* Article 6(2).
[59] UNDRIP, above n 5.
[60] See, for example: Anaya, S. J., & Wiessner, S.(2007). 'The UN declaration on the rights of indigenous peoples: Towards re-empowerment', Jurist, at https://www.jurist.org/commentary/2007/10/un-declaration-on-rights-of-indigenous-2/; Graham, L., & Wiessner, S. (2011). 'Indigenous sovereignty, culture, and international human rights law', South Atlantic Quarterly, 110, 403; and Davis, M. (2012). 'To bind or not to bind: The United Nations declaration on the rights of indigenous peoples five years on' Australian International Law Journal, 19, 17–41.
[61] Recommendation 3, p. 29 in the International Law Association Committee on the Rights of Indigenous Peoples, Final Report from the Sofia Conference, 2012.

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Articles 27 and 28 pave the way in which States are to assist with the achievement of the rights stipulated in article 26. Then, article 31(1) of UNDRIP stipulates that Indigenous Peoples' have rights to 'maintain, control, protect and develop …the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora …'. Further, at article 31(2), 'States shall take effective measures to recognize and protect the exercise of these rights' in conjunction with Indigenous Peoples.

Under Australian law effective measures could be achievable through the enactment of legislation. But Australia is a federation of states and this is why federal law may be insufficient to achieve the recognition and protection of the exercise of such Indigenous rights throughout Australia, requiring states and territories to enact similar laws to effect such recognition and protections. The following section on access and benefit sharing in relation to the use of genetic resources explores this further.

1.2.6 Australian Situation: Contexts and Challenges

Australia's progress in implementing access and benefit-sharing provisions in the CBD and the Nagoya Protocol has been subject to some examination, although there is scope for further assessments. In a 2014 report examining access and benefit sharing from an Australian perspective, Prip et al recognised the significant gap in protection under state jurisdiction and the lack of legislation in most Australian states.[62] The report further noted that existing obligations with respect to access and benefit sharing in Australia have so far yielded limited benefits.[63] Another study argues that effective implementation of ABS in Australia is impeded by the fragmentation of laws across all jurisdictions.[64] Prip et al also highlight the gap between research on a particular genetic resource, and the realisation of a commercial product as an additional impediment to Indigenous Australians being able to successfully derive benefits from permitting access to genetic resources and associated Indigenous knowledge.[65] What is disturbing is that this state of affairs has not changed as is evidenced by a 2019 survey of Australia and New Zealand ABS implementation.[66]

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[62] Christian Prip, G Kristin Rosendal, Steinar Andresen and Morten Walloe Tvedt,' The Australian ABS Framework- A Model Case for Bioprospecting?' (2014) FNI Report 1/2014, Access and Benefit Sharing: The ABS Capacity Development Initiative, pp. 26-27.
[63] Ibid.
[64] Jocelyn Bosse, 'Fragmentation of Access and Benefit Sharing Laws in Australia', (2017) ALSA Academic Law Journal, 4-19.
[65] Prip et al., above n 62, 35; see also White Paper, above n 3, 11.
[66] Charles Lawson, Fran Humphries & Michelle Rourke (2019) Legislative, administrative and policy approaches to access and benefit sharing ('ABS') genetic resources: Digital sequence information ('DSI') in New Zealand and Australian ABS laws. *Intellectual Property Forum*, 118, pp. 38-50. See also, Evana Wright, 'Protecting Traditional Knowledge: Lessons from Global Case Studies' (Edward Elgar Publishing, 2020).

Laws relating to biodiversity and to some extent access and benefit sharing can be found in a variety of specific Australian State and Commonwealth Acts. The law around access and benefit sharing in Australia is inadequate since not all states and territories have legislation in place, and those states and territories that do have legislation in place have adopted different policy approaches. This situation could be addressed by drafting additional laws to fill the gaps in the existing legislation, however, this would not overcome the complexity and confusion arising from having multiple sources of legislation.

The Commonwealth legislation dealing with access to genetic resources is the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Section 301 of the *EPBC Act* establishes a general framework for compliance and specific regulatory mechanisms on access to genetic resources. Further, section 301 states that 'the regulations may provide the control of access to biological resources in Commonwealth areas' and that the regulations may contain provisions on the equitable sharing of benefits arising from the use of biological resources; the facilitation of access; the right to deny access; the granting of access, and the terms and conditions of access. However, this framework only applies with respect to Commonwealth land and waters and Native Title land. State jurisdictions do not have the regulatory framework established for the Commonwealth.

Queensland and the Northern Territory both have legislation in place to deal with access to biological resources. Until September 2020, the *Biodiscovery Act 2004* (Qld) did not consider the use of Aboriginal/Indigenous knowledge in its access or benefit sharing provisions, whilst the *Biological Resources Act 2006 (NT)* from its inception covered both access to the biological resources and associated Indigenous knowledge. This latter Act's objects include (at section 3(2)(d)) 'recognising the special knowledge held by indigenous persons about those biological resources'. This Act, under its benefit-sharing agreement provisions, states that any such agreement must include 'protection for, recognition of and valuing of any indigenous people's knowledge to be used''.[67] The review of the Queensland *Biodiscovery Act 2004* has resulted in a number of reforms that were completed in August 2021. These include the recognition of the rights of First Nations peoples, the introduction of a set of Traditional Knowledge Guidelines and a Capacity Strengthening Toolkit, as well as the commencement of a Traditional Knowledge Code of Practice.[68] Other states have started to introduce laws and policies in regard to Indigenous knowledge. Some, such as the Victorian State Government, have sought to do this by legislating in relation to Aboriginal intangible heritage. The Victorian State Government's amendments in 2016 to the *Aboriginal Heritage Act 2006* introduce a part 5A to protect such intangible heritage. Under that regime, a permit system regulates access to such intangible heritage, but only works for Aboriginal intangible heritage that has been registered under the Act.

As mentioned, the Commonwealth law regulating access to genetic resources is the EPBC Act. Regulations under this *Act* do require those entities seeking access to genetic resources to negotiate a benefit sharing agreement that provides for 'reasonable benefit sharing arrangements, including protection for, recognition of and valuing of any Indigenous peoples'

[67] *Biological Resources Act 2006* (NT), section 29(1).
[68] For more detail see the Queensland Government Department of Environment and Science website: https://environment.des.qld.gov.au/licences-permits/plants-animals/biodiscovery/biodiscovery-act-reform

knowledge to be used' in relation to those resources.[69] There is no registration system required for such knowledge to be protectable under this Federal legislation. The EPBC Act has recently been subject to an extensive review, and this will be discussed briefly later in this report.

In the absence of Australia's ratification of the Nagoya Protocol, Australian biodiscovery entities are unable to obtain an International Certificate of Compliance (ICC), thus limiting their capacity to collaborate internationally, and their access to important markets. Various state governments are moving to align their state legislation with the Nagoya Protocol's requirements, including creating regulatory frameworks that require proof of prior informed consent and reasonable benefit sharing arrangements with Indigenous land owners before authorisation to collect and use native biological material is given.[70] While this would be an important step toward ratification of the Nagoya Protocol, it does not necessarily deal with the way associated Indigenous knowledge is accessed and protected. However, IP Australia, the national government instrumentality that administers Australia's registrable forms of intellectual property, has been conducting inquiries into the protection of Indigenous knowledge in Australia for almost a decade and has recently sought submissions on the establishment of stand alone legislation to achieve that goal: see Ninti One Limited, 'Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge', IP Australia, 5 October 2022.

[69] Although this regulation only provides for such arrangements when the use of Indigenous knowledge is for commercial purposes. See Environment Protection and Biodiversity Conservation Regulations 2000, Regulation 8A.08.

[70] Queensland Government 2018, Pathways to reform: Biodiscovery Act 2004: Options Paper, <https://environment.des.qld.gov.au/licences-permits/plants-animals/documents/biodiscovery-reform-options-paper.pdf>

2 Competent Authority

In 2009, Terri Janke proposed an independent National Indigenous Cultural Authority,[71] as the appropriate form of a Competent Authority. This approach was reinforced in 2013 by the National Congress of Australia's First Peoples espousing such a concept and identifying various characteristics[72] whereby the Authority should be independent from government with its own legal status, board of governance, constitution and representative members. The Board would be elected from its grass-roots membership base but also allow for the necessary skills-based director representation.[73] The Congress recognised a need for further research, funding and support to investigate how to best establish an Authority with the above characteristics.[74] The proposal for a National Indigenous Cultural Authority by Janke has been supported and taken up in discussions by the Australia Council for the Arts.[75]. The proposal has some merit for further examination in the context of this project's inquiry into a Competent Authority for regulating Indigenous knowledge and bio-resources, However, the National Indigenous Cultural Authority of Janke's scheme is focused more squarely on the arts-related aspects of Indigenous culture (but we acknowledge that these are intricately inter-connected with biodiversity-knowledge).

The White Paper[76] confirmed the need for such research, including into (a) development of a comprehensive set of regulations; (b) work on the form and nature of the Competent Authority and its governance processes; (c) the way the Indigenous knowledge databases are to be formed and managed; and (d) the administration processes for access and benefit-sharing including guidance on mutually beneficial terms. Community consultations carried out in preparation of the White Paper confirmed support for an entity to administer the proposed regime, and reinforced the importance its independence.[77] The consultations emphasised 'concern regarding the functions of this entity being administered by one or more existing agencies' while acknowledging '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'.[78] Consultations also noted a 'need for confidential information to be protected', that 'an appeal process' be established as well as 'a

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[71] Terri Janke, *Beyond guarding ground: a vision for a National Indigenous Cultural Authority*, Terri Janke and Co Pty Ltd, Sydney, 2009. Note that Terri Janke had originally recommended this in her report *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel & Company, Sydney, 1999.

[72] National Congress of Australia's First Peoples, The Call for a National Indigenous Cultural Authority, 2013. Note that the Federal Government withdrew funding this organisation in 2013, and it eventually ceased its operations in 2019.

[73] Ibid, 7.

[74] Ibid, 8.

[75] See Australian Government, Australia Council for the Arts, *A Proposed National Indigenous Arts and Cultural Authority – Public Discussion Paper*, 8 October 2018. In this report and elsewhere, Janke's original idea for a National Indigenous Cultural Authority is now referred to as a National Indigenous Arts and Cultural Authority. This reinforces the way that discussion on this concept is very much more focused on arts based Indigenous culture (what is referred to by the World Intellectual Property Organisation (WIPO) as 'arts and cultural expressions'), rather than on biodiversity related Indigenous knowledge and practices.

[76] White Paper, n3.

[77] Ibid, 75.

[78] Ibid.

process for ensuring benefits under the control of the Competent Authority are applied and are not lost if the Authority is wound up'.[79] The Garuwanga Project addresses these matters in the course of refining a proposal which overcomes current community mistrust of government based organisations and the failings of past Indigenous bodies to be able to fulfil community expectations. But first, in this chapter, the concept of a Competent Authority is explored.

2.1 The Legal Concept of Competent Authority and its Application

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.[80] 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. Two key international instruments are the *Convention on Biological Diversity 1992* and the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization 2010* (ABS).

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 Authority (or Competent Authorities) and national focal point on access and benefit sharing in relation to genetic resources and Indigenous or traditional knowledge about those genetic resources.[81] 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 national Competent 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.[82] The national focal point has the responsibility for 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.[83] It is possible for the Competent Authority and the national focal point to be the same organisation.[84]

[79] Ibid.
[80] European Commission, *Commission Staff Working Document Impact Assessment*, Brussels, 12.3.2018 SWD (2018) 54 final, 3.
[81] Article 13.2 Nagoya Protocol.
[82] Article 13.2 Nagoya Protocol.
[83] Article 13.1 Nagoya Protocol.
[84] Article 13.3 Nagoya Protocol.

2.2 Purpose, Functions and Roles of Competent Authorities

The Garuwanga Project adopts the concept of Competent Authority as provided in the Nagoya Protocol. To comply with the Nagoya Protocol member states are required to establish a Competent Authority to govern and administer a legal framework that:

(i) ensures prior informed consent of Indigenous communities is obtained prior to access to their traditional knowledge, and
(ii) establishes fair and equitable benefit-sharing mechanisms for use of Indigenous Knowledge.[85]

Further, the characteristics espoused by the National Congress of Australia's First Peoples (see above) align with the outcomes of the community consultations reported in the White Paper, which in turn, took the broad purposes of the Nagoya Protocol and developed them into specific roles and /or duties.[86] After noting that the Competent Authority is to be independent and comprising local, regional and state level administrations, the White Paper went on to list those specific duties, namely:

(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 Aboriginal 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 Aboriginal Communities which are derived from access to Knowledge Resources as prescribed in the regulations;
(l) monitor compliance with Access Agreements and advise Aboriginal Communities of any violations;
(m) provide model(s) of agreement as a guide for Aboriginal Communities;
(n) develop and monitor compliance in a Code of Ethics and Best Practices;
(o) provide training to the prescribed court or prescribed tribunal;
(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.[87]

[85] Nagoya Protocol, arts 7, 13. See also, Evana Wright, Natalie P. Stoianoff and Fiona Martin, *Comparative Study - Garuwanga: Forming a Competent Authority to protect Indigenous knowledge* (UTS - Indigenous Knowledge Forum, 2017).
[86] White Paper, n 3, 75.
[87] Ibid.

3 Comparative Study

The Garuwanga Project has carried out a comparative study of Competent Authorities that exist in other countries to identify existing legal and policy models and analyse the nature of the Competent Authorities and their suitability to the domestic legal and regulatory context (Comparative Study Report).[88] The study considered:

- *the functions of the Competent Authority*
- *the structure of the Competent Authority including corporate structure and membership*
- *the funding of the Competent Authority*
- *the accountability of the Competent Authority including reporting obligations.*[89]

This chapter explores the Comparative Study Report, identifying those countries with Competent Authority regimes that might be useful in developing Australia's response to the establishment of a Competent Authority for the protection of Indigenous knowledge. Further, this chapter draws conclusions from that analysis that will inform the structure and operation best suited to the Australian context.

3.1 Overview of the Comparative Study

Existing regimes have taken very different approaches to establishing a Competent Authority for the protection of traditional knowledge. Some countries have used existing authorities, such as the national intellectual property office or Ministry of Environment, to act as the Competent Authority. Other countries have established entirely new bodies to regulate access and benefit sharing in relation to traditional knowledge. In addition, some countries have established Indigenous advisory boards to support and provide advice to the national Competent Authority. The analysis identified the approaches adopted by the following countries to be of interest: Brazil, Cook Islands, Costa Rica, Ethiopia, India, Kenya, Niue, Peru, Philippines, South Africa, Vanuatu and Zambia. Key features of their systems are summarised in Table 2 and Table 3 below. These 12 countries in our analysis, illustrated, in varying ways, show elements of having established a Competent Authority-like entity at the national level, as shown in Tables 2 and 3 below. It should be borne in mind when considering these countries' legislative regimes relevant to forming a Competent Authority that they all differ too in their status as fully independent nations, a factor that has major implications in terms of the formation of a national Competent Authority by a country.[90]

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[88] Evana Wright, Natalie P. Stoianoff and Fiona Martin, *Comparative Study - Garuwanga: Forming a Competent Authority to protect Indigenous knowledge* (UTS - Indigenous Knowledge Forum, 2017) (Comparative Study Report). The full report is available at: https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho

[89] Ibid.

[90] It should be noted that of these countries, although the Cook Islands and Niue are regarded by some nations as being sovereign, self-governing entities, neither is a member of the United Nations or a fully independent country, as they are in 'free association' with New Zealand. In this context, New Zealand handles all of their defence and foreign affairs matters.

Table 2: Number of Competent Authorities and whether the Authority is an Existing or New Body breakdown by Country

Country	Number of Competent Authorities	Existing Authority	New Authority
Brazil	1		X
Cook Islands	3 tiers	X	X
Costa Rica	1		X
Ethiopia	1		X
India	3 tiers		X
Kenya	4 tiers	X	
Niue	2		X
Peru	2	X	X
Philippines	1		X
South Africa	3		X
Vanuatu	2	X	X
Zambia	2	X	

Table 3: 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			

Examples of Competent Authorities that may be particularly useful are those from the Cook Islands, India, Peru and Vanuatu. These are discussed in more detail here.

3.2 Cook Islands

In the Cook Islands, there are three levels of decision maker/Competent Authority under the *Traditional Knowledge Act 2013* (Cook Islands):

1. Are Korero, who are authorised to make decisions in relation to traditional knowledge of a traditional community.

2. The Secretary of Cultural Development.

3. Traditional Knowledge Advisory Committee.

The Are Korero have authority to review and verify applications for registration of traditional knowledge.[91] The Are Korero also has authority to register traditional knowledge on the register, on behalf of the traditional community concerned, [92] to resolve disputes, submit applications to the Executive Officer of the island, [93] review statements of opposition and make a decision as to registration,[94] consider requests for relief and make recommendations as to remedies.[95]

The Secretary of Cultural Development is responsible for accepting applications for registration and maintaining the register and sub-registers of traditional knowledge[96] and any other registers considered necessary for the purposes of the *Traditional Knowledge Act*.[97]

The Traditional Knowledge Advisory Committee is responsible for advising the Minister and Cabinet on the operation of the Ministry in achieving the traditionally based outcomes under the Act.[98] The Traditional Knowledge Advisory Committee is made up of one member appointed by each Are Korero.[99]

3.3 India

The *Biological Diversity Act 2002* (BDA) establishes a three-tiered framework for the protection of biological resources and associated knowledge with competent authorities established at the national, state and local level supported by various Committees and Advisory Groups.

At a national level the National Biodiversity Authority (NBA) is responsible for:

- regulating access to biological resources by Foreign and Non-Resident Indian Users;[100]
- granting approvals for the transfer of research results to Foreign and Non-Resident Indian Users;[101]
- regulating the transfer of biological resources or associated knowledge that has been accessed following earlier approval of the NBA to a third party;[102]

[91] *Traditional Knowledge Act 2013* ss 19(1), 20.
[92] Ibid s 15 (i) if the creator and every customary successor of any traditional knowledge are dead or unidentifiable or (ii) if no application to register traditional knowledge has been filed within two years of commencement of the Act.
[93] Who must then file the application with the Secretary of Cultural Development and except for Are Korero of a Vaka of Rarotonga who may file with the Secretary directly. (See *Traditional Knowledge Act 2013* s 22)
[94] *Traditional Knowledge Act 2013* s 31.
[95] Ibid ss 36, 39.
[96] Ibid ss 56(a), 56(b).
[97] Ibid s 56(c).
[98] Ibid s 63.
[99] Ibid s 64.
[100] *Biological Diversity Act 2002* (India) s 3(1).
[101] Ibid s 4.
[102] Ibid s 20.

- approving applications for intellectual property rights over inventions based on Indian biological resources and associated knowledge;[103]
- opposing grant of intellectual property rights overseas over biological resources or associated knowledge from India;[104]
- ensuring the 'equitable sharing of benefits arising out of the accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto';[105]
- providing advice to the Central government on matters relating to the conservation and sustainable use of bio-diversity and fair and equitable sharing of benefits arising from the use of biological resources and associated knowledge;[106]
- coordinating the activities of and providing advice and technical assistance to the State Biodiversity Boards;[107]
- commissioning studies and research on biodiversity conservation and benefit sharing;[108]
- communicating the importance of biodiversity conservation and benefit sharing;[109]
- publishing information on approvals granted under the *Biological Diversity Act*;[110] and
- consult with the Biodiversity Management Committee when making a decision about biological resources or associated knowledge within their territory[111].

The NBA is a body corporate with perpetual succession and the power to hold and dispose of property, enter into contracts and to sue and be sued. [112]

The NBA comprises a chairperson and 10 ex-officio members appointed by the Central Government and 5 non-official members.[113] The Chairperson must be an 'eminent person' with experience in conservation and sustainable use of biodiversity and is appointed as the Chief Executive of the NBA.[114] The NBA must appoint a Secretary who is responsible for organising and maintaining records of the meetings of the NBA.[115]

Each State of India must establish a State Biodiversity Board under State legislation.[116] Each State Biodiversity Board is a body corporate, with perpetual succession and common seal and the ability to hold and dispose of property, enter into contracts, to sue and be sued.[117]

The State Biodiversity Boards are responsible for:

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[103] Ibid s 6(1).
[104] Ibid s 18(4).
[105] Ibid s 21.
[106] Ibid s 18(3)(a), Biological Diversity Rules 2004 (India) r 12(ii).
[107] Biological Diversity Rules r 12(iii) – (iv)
[108] Ibid r 12(v), 12(vii)
[109] Ibid r 12(viii).
[110] *Biological Diversity Act 2002* (India) s 19(4).
[111] Ibid s 41(2).
[112] Ibid s 8(2).
[113] Ibid s 8(4).
[114] Ibid ss (8)(4)(a), 10.
[115] *Biological Diversity Rules 2004* (India) r 9.
[116] Except for the Union Territories. See *Biological Diversity Act 2002* (India) ss 22(1), 22(2).
[117] *Biological Diversity Act 2002* (India) s 22(3).

- regulating access to biological resources and associated knowledge by Indian citizens and companies for commercial utilisation or bio-survey and bio-utilisation;[118]
- establishing State Biodiversity Rules regulating the activities of the State Biodiversity Board;
- advising the State Government on matters relating to biodiversity conservation, sustainable use and benefit sharing;[119] and
- consulting with the Biodiversity Management Committee when making a decision about biological resources or associated knowledge within their territory.[120]

The Chair of a State Biodiversity Board must be an 'eminent person having adequate knowledge and experience in conservation and sustainable use of biological diversity and in matters relating to equitable sharing of benefits'.[121] The Chair is also the Chief Executive Officer and is appointed by the State Government.[122] The State Biodiversity Board shall also include 5 ex-officio members to represent the State Government Departments (s 22(4)) and 5 expert members (s 22(4)).

The State Biodiversity Board may also establish Committees as necessary to implement the obligations of the State Biodiversity Board under the BDA.[123]

At the local level, each local body is required to establish a Biodiversity Management Committee to promote the 'conservation, sustainable use and documentation of biological diversity.' [124]

A Biodiversity Management Committee is to be established for each local area (as defined in the Act). Currently there are 62,502 Biodiversity Management Committees established across India.[125] Each Biodiversity Management Committee is responsible for:

- ensuring the 'preservation of habitats, conservation of land races, folk varieties and cultivars, domesticated stocks and breeds of animals and micro-organisms and chronicling of knowledge related to biological diversity';[126]
- preparing the People's Biodiversity Register for their region in consultation with local people;[127]
- maintaining a register documenting access granted, details of the biological resources and associated knowledge and any fees imposed or collected and benefit sharing; and
- providing advice of matters that are referred to the Biodiversity Management Committee by the National Biodiversity Authority or State Biodiversity Board.[128]

[118] Ibid ss 7, 23(b).
[119] Ibid s 23(a).
[120] Ibid s 41(2).
[121] Ibid s 22(4)(a).
[122] Ibid.
[123] Ibid ss 25, 13.
[124] Ibid s 41(1).
[125] National Biodiversity Authority, *Biodiversity Management Committees* (17 July 2017) <http://nbaindia.org/content/20/35/1/bmc.html>.
[126] *Biological Diversity Act 2002* (India) s 41(1).
[127] *Biological Diversity Rules 2004* (India) r 22(6).
[128] Ibid r 22(7).

Each Biodiversity Management Committee is made up of the Chair and 6 members nominated by the local body.[129] There are quotas for participation: 1/3 members should be women and not less than 18% of members should be members of a Scheduled Caste or Scheduled Tribe.[130]

The NBA may appoint Expert Committees to assist in the 'efficient discharge of its duties and the performance of its functions'.[131] The Expert Committee on Access and Benefit Sharing is responsible for reviewing applications received by the National Biodiversity Authority and making recommendations as to whether access to biological resources and associated knowledge should be granted and on what terms including benefit sharing. The Expert Committee on ABS is currently made up of 31 members including the Chairman and Co-Chair and includes representatives from government ministries, the national IP office, State Biodiversity Boards, universities and research institutes. [132]

3.4 Peru

There are two Peruvian Competent Authorities dealing with access to biological resources and Indigenous knowledge. The first is established under *Law No. 28216 on the Protection of Access to Peruvian Biological Diversity and Collective Knowledge of Indigenous Peoples.* This Competent Authority is the National Anti-Biopiracy Commission. The purpose of the National Anti-Biopiracy Commission is to protect Peruvian biological resources and collective knowledge from acts of biopiracy.

The National Anti-Biopiracy Commission is required to:

- establish and maintain a register of Peruvian biological resources and traditional knowledge;[133]
- identify patent applications or granted patents in Peru and overseas that relate to Peruvian biological resources or collective knowledge and carry out evaluations of such patents;[134]
- determine whether it is appropriate to lodge an objection or application for revocation on the grounds that the patent does not meet the requirements of novelty and inventive step and pursue these actions where appropriate;[135]
- maintain relationship with foreign intellectual property offices;[136] and

[129] Ibid r 22(2).
[130] Ibid r 22(3).
[131] *Biological Diversity Act 2002* (India) s 13.
[132] National Biodiversity Authority, *Office Order: Reconstitution of Expert Committee on Access and Benefit Sharing – for evaluation of ABS applications received by the NDA – reg*, NBA/Tech/EC/9/8/15/17-18 <http://nbaindia.org/uploaded/pdf/OO_EC_ABS_2017.pdf>.
[133] *Law No. 28216 on the Protection of Access to Peruvian Biological Diversity and Collective Knowledge of Indigenous Peoples* art 4(a).
[134] Ibid arts 4(c), (d).
[135] Ibid arts 4(e), (f).
[136] Ibid art 4(g).

- raise awareness of biopiracy and formulate policy statements and proposals on preventing biopiracy.[137]

The Commission is made up of representatives from various government ministries, national agencies, universities and two representatives of civil society (currently representing the Peruvian Society of Environmental Law and the Peruvian Institute of Natural Products).

The second Peruvian Competent Authority for the protection of Indigenous knowledge is established Law No. 27811 of 24 July 2002, introducing a *Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources.*

The Competent Authority for the purpose of Law 27811 is the Office of Inventions and New Technology of the National Institute for the Defence of Competition and Intellectual Property (INDECOPI). INDECOPI is an existing body and was established in 1992 under the Office of the Prime Minister and is responsible, among other functions, for administering the grant and protection of intellectual property.

In relation to Law 27811, INDECOPI is responsible for maintaining the two national registers of traditional knowledge: National Public Register of Collective Knowledge of Indigenous Peoples and National Confidential Register of Collective Knowledge of Indigenous Peoples.[138] It is also responsible for:

- assessing in consultation with the Indigenous Knowledge Protection Board whether license contracts entered into under Law 27811 between representatives of Indigenous communities and parties seeking access to collective knowledge are valid;[139]
- maintaining a register of licenses for the use of collective knowledge;[140] and
- hearing and resolving disputes relating to the protection of traditional knowledge.[141]

Law 27811 provides for the establishment of an Indigenous Knowledge Protection Board to oversee and monitor the implementation of the regime under Law 27811.[142] The Indigenous Knowledge Protection Board is responsible for: reviewing and providing an opinion on the validity of license contracts entered into under Law 27811;[143] providing advice and assistance to representative organisations of Indigenous communities upon request;[144] and providing support to INDECOPI and the Administrative Committee of the Fund for the Development of Indigenous Peoples.[145]

The Indigenous Knowledge Protection Board is comprised of five members with experience in the protection of collective knowledge[146] appointed by the National Commission for the

[137] Ibid arts 4(h), (i).
[138] *Law No. 27811 of 24 July 2002, introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources* arts 15, 64.
[139] Ibid art 64.
[140] Ibid art 64.
[141] Ibid arts 47 – 62.
[142] Ibid arts 65, 66(a).
[143] Ibid art 66(c).
[144] Ibid art 66(d).
[145] Ibid art 66(b).
[146] Ibid art 65.

Andean, Amazonian and Afro-Peruvian Peoples and representative organisations of Indigenous communities.

3.5 Vanuatu

There are two different approaches to the question of a Competent Authority in Vanuatu. The first arises under the *Copyright and Related Rights Act* No. 42 of 2000 (*Copyright Act*). This Act makes the following provisions regarding offences 'in relation to expressions of Indigenous culture':

> 41 (1) If a person does an act of a kind mentioned in subsection 8(1) or 23(1) in relation to an expression of indigenous culture (for example, reproduces an indigenous carving) and the person:
>
> is not one of the custom owners of the expression; or
>
> has not been sanctioned or authorised by the custom owners to do the act in relation to the expression … [147]

Within this Vanuatu Copyright Act, there are provisions relating to an entity that can be considered to be a Competent Authority. This is known as the Vanuatu National Cultural Council (VNCC), which was established under the *Vanuatu National Cultural Council Act 1985.* The VNCC is a body corporate with perpetual succession and a common seal and the ability to sue and be sued in its own name.[148]

In the context of the *Copyright Act*, the functions of the VNCC as a Competent Authority are to:

- authorise acts in relation to expressions of culture;[149]
- institute proceedings, on request, on behalf of custom owners of expression for infringement; [150] and
- institute proceedings as if it were the owner of the copyright or other right in the event that the custom owners cannot be identified or there is a dispute about ownership.[151]

The VNCC may issue written guidelines for the purpose of sections 41-42 dealing with offences in relation to expressions of Indigenous culture.[152]

The VNCC comprises [153] a director and six members appointed by the Minister responsible for cultural affairs representing the Ministry responsible for Cultural Affairs, the National Council of Chiefs, the National Council of Women, the Vanuatu Cultural Centre and two

[147] Ibid., section 41(1). Note that this Act refers to 'custom owners', as distinct from the more commonly found expression 'customary owners'.
[148] *Vanuatu National Cultural Council Act 1985* s 2.
[149] *Copyright and Related Rights Act 2000* s 41(2)(e).
[150] Ibid s 42(3).
[151] Ibid s 42(4).
[152] Ibid s 42(9).
[153] *Vanuatu National Council Act 1985* s 3(1).

persons with 'relevant experience in matters relating to museums, public libraries or archives.'

The second approach is that adopted under patent and design registration laws.

The *Patents Act No. 2 of 2003* has specific provisions governing the registration of patents involving traditional knowledge. Where a patent application involves 'indigenous knowledge' this must be referred to the National Council of Chiefs.[154] The Registrar may only grant a patent that is 'based on, arose out of, or incorporates indigenous knowledge' where the custom owners have given prior informed consent and the applicant and custom owners have entered into an agreement for the sharing of benefits.[155] However, in accordance with s 47(3) of the Act, the Registrar may grant the patent without the prior informed consent of the custom owners if the Registrar is, after consultation with the National Council of Chiefs, satisfied that:

(a) the custom owners cannot be identified; or

(b) there is a dispute about ownership of the indigenous knowledge concerned.

In such a case, the Registrar must not grant the patent unless the applicant and the National Council of Chiefs have entered into an agreement on the payment by the applicant to the National Council of Chiefs of an equitable share of the benefits from exploiting the patent.

Any payments made to the National Council of Chiefs as an equitable share of benefits must be used for the purposes of 'indigenous cultural development'.[156]

The *Designs Act No. 3 of 2003* regulates the registration of designs with specific reference to registration of a design involving 'indigenous knowledge'. Where an application for registration of a design involves 'indigenous knowledge', it must be referred to the National Council of Chiefs.[157] The Registrar may only register a design that is based on, arose out of, or incorporates Indigenous knowledge where the custom owners have given prior informed consent and the applicant and custom owners have entered into an agreement for the sharing of benefits.[158] However, in accordance with section 62(3), the Registrar may register the design without the prior informed consent of the custom owners if the Registrar is, after consultation with the National Council of Chiefs, satisfied that:

(a) the custom owners cannot be identified; or

(b) there is a dispute about ownership of the indigenous knowledge concerned.

Under the Act, the Registrar must not register the design unless the applicant and the National Council of Chiefs have entered into an agreement on the payment by the applicant to the National Council of Chiefs of an equitable share of the benefits from exploiting the patent. Any payments made to the National Council of Chiefs as an equitable share of benefits must be used for the purposes of 'indigenous cultural development'.[159]

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[154] *Patents Act 2003* s 47(1).
[155] Ibid s 47(2).
[156] Ibid s 47(5).
[157] *Designs Act 2003* s 62(1).
[158] Ibid s 62(2).
[159] Ibid s 62(5).

3.6 Analysis

The survey establishes that the Cook Islands and Vanuatu are '[t]he only two countries that have made significant attempts to incorporate traditional community involvement in the decision-making process for protection of traditional knowledge'.[160] In designing traditional knowledge protection systems, these two nations demonstrate how traditional knowledge holders can be given a significant voice in the decision-making process. These are examples of legal pluralism but there has been some criticism requiring empirical research to determine if the processes are effective.[161] One of those criticisms revolves around the difficulty of access to these regimes by Pacific Islanders who live outside their national jurisdiction. This also reinforces the failings of national regimes to protect against those operating outside the jurisdiction, even where the nation state is a party to the Nagoya Protocol like Vanuatu. How does legislation, which is restricted in its operation to the jurisdiction in which it is enacted, protect traditional knowledge against misappropriation by others overseas? This question is one for consideration in the future as in Australia we are still trying to establish adequate protections for Indigenous knowledge within our borders as a first step. Legal transplantation may be the solution for Australia.[162] As Martin et al conclude,

> [d]espite the differences between the jurisdictions under consideration, the experience of Vanuatu and the Cook Islands may be used to inform the design and implementation of a Competent Authority for the protection of traditional knowledge in Australia.[163]

Since the comparative study was undertaken, Vanuatu has introduced *sui generis* or stand-alone legislation for the protection of traditional knowledge and expressions of culture: *Protection of Traditional Knowledge and Expressions of Culture Act No. 21 of 2019 Vanuatu*. This legislation establishes The Traditional Knowledge and Expressions of Culture Authority under section 13 of the *Act* with members of the Authority being appointed by the Minister responsible for Intellectual Property. These members are the CEO of the Malvatumauri Council of Chiefs, Director of the Vanuatu Cultural Centre, Director of the Department of Environment, representative of the Vanuatu Intellectual Property Office and representative of the Vanuatu Handicraft Association (section 13(2)). The Authority has effectively overtaken the role of the National Council of Chiefs in relation to determinations

[160] Fiona Martin, Ann Cahill, Evana Wright & Natalie Stoianoff, 'An international approach to establishing a Competent Authority to manage and protect traditional knowledge', *Alternative Law Journal,* 2019, Vol. 44(1), 44, 54.

[161] See generally, Miranda Forsyth, 'Legal pluralism: The regulation of traditional medicine in the Cook Islands', in Peter Drahos (ed.), *Regulatory Theory: Foundations And Applications*, ANU ePress, 2017 Canberra, Australia, pp. 233-246pp.

[162] For literature supporting the use of legal transplants, even where there are significant differences between the jurisdictions under consideration, see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974); George Mousourakis, 'Transplanting Legal Models Across Culturally Diverse Societies: A Comparative Law Perspective' (2010) 57 *Osaka University Law Review* 87.

[163] Fiona Martin, Ann Cahill, Evana Wright & Natalie Stoianoff, 'An international approach to establishing a Competent Authority to manage and protect traditional knowledge', *Alternative Law Journal,* 2019, Vol. 44(1), 44, 54.

of applications regarding other forms of intellectual property utilising traditional knowledge, expressions of culture or associated biological or genetic materials (section 14).

4 Governance Frameworks

In this chapter, the Report provides an overview of the existing legal structures under Australian law including a consideration of examples of existing organisations both Indigenous and non-Indigenous. There is a focus on governance principles and the application of those principles to the Partner Organisations as case studies for how the governance principles (set out in section 4.3) operate under different legal and cultural frameworks. This Report also considers the potential different tiers of governance and how those principles might apply to competent authorities at different levels.

4.1 Existing legal structures under Australian law

Australian law provides for several legal structures that could be used to constitute a Competent Authority. Table 4 below details different existing Australian corporate and other legal structures, and their key features. There are others that are used in Australia – but for various reasons these other options are not available to us. This Report does not recommend any particular structure.

4.1.1 Incorporated entities

The following provides a brief definition of incorporated structures detailed in Table 4.

Proprietary company: a company limited by shares with a maximum of 50 non-employee shareholders.

Public company limited by shares: a company where the liability of its members is limited to the nominal amount of their shares. It is larger than a proprietary company and is subject to higher levels of public regulation than a proprietary company.

Public company limited by guarantee: a company that has no share capital. Members guarantee a fixed amount to be contributed to the company when it is wound up.

Incorporated associations: a group formed to undertake particular activities set out in the association's rules. An association is eligible for incorporation under the *Associations Incorporation Act 2015* if it has at least 6 members with voting rights, does not distribute funds to its members and is formed for an approved purpose.

Aboriginal and Torres Strait Islander corporations: Corporations that can be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) and can operate anywhere in Australia. Fifty-one per cent of members must be Indigenous. These corporations do not have shares and have members as opposed to shareholders. Prescribed Bodies Corporate (PBC) under the *Native Title Act 1993* (Cth) (NTA) must be CATSI corporations.

4.1.2 Registered co-operatives

A co-operative is a democratic organisation, owned and controlled by its members for a common benefit. Their regulation was only state-based until the introduction of a national registration system in 2014 under the *Co-operatives National Law* which requires operation under a set of co-operative principles[164] and objects[165] under the Law. A registered cooperative is one that has complied with the requirements for and successfully applied to be registered and can take two forms. A 'distributing' co-operative[166] is able to distribute any surplus to its members, while a 'non-distributing' co-operative[167] uses the surplus to support activities of the co-operative.[168] The co-operative must have a board[169] and at least one primary activity specified in its rules. Upon registration it becomes a corporation under the *Co-operatives National Law*[170] with all the attributes of a legal person, has perpetual succession, is able to sue and be sued and may have a common seal.[171] Co-operatives have been utilised in primary industries and taxi industries, and in the Aboriginal art sector.[172]

4.1.3 Prescribed Bodies Corporate (PBCs)

Prescribed Bodies Corporate (PBCs) are Aboriginal and Torres Strait Islander Corporations created for common law native title holders to hold or manage native title. PBCs must have the words 'registered native title body corporate' or 'RNTBC' in their name and must be registered with ORIC (the Office of Registrar of Indigenous Corporations) as required by the NTA.

PBCs have obligations under the NTA such as the requirement to consult with and obtain consent from native title holders in relation to any decisions which surrender or affect native title rights and interests.[173]

PBCs must have a board of directors, a contact person and a rule book that is consistent with the NTA.[174]

PBCs are registered with the Office of the Registrar of Indigenous Corporations (ORIC) as small, medium or large bodies corporate depending on their income. All PBCs are required to lodge an annual general report with ORIC that includes the names and addresses of members and directors as well as contact and document access information, the number of employees,

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[164] *Co-operatives National Law 2014*, s. 10.
[165] *Co-operatives National Law 2014*, s. 3.
[166] *Co-operatives National Law 2014*, s. 18. Such a co-operative must have a share capital and comply with the rules on membership.
[167] *Co-operatives National Law 2014*, s. 19. Such a co-operative may or may not have share capital and is prohibited from distributing surplus to its members except upon winding up to the nominal value of shares (if any).
[168] John Gooley, Michael Zammit, Matthew Dicker, David Russell, *Corporations and Associations Law: Principles and issues* (LexisNexis, 6th Ed, 2015) 252.
[169] *Co-operatives National Law 2014*, s. 172.
[170] *Co-operatives National Law 2014*, s. 28.
[171] *Co-operatives National Law* 2014, s. 38.
[172] John Gooley, Michael Zammit, Matthew Dicker, David Russell, *Corporations and Associations Law: Principles and issues* (LexisNexis, 6th Ed, 2015) 251.
[173] AIATSIS, *Prescribed Bodies Corporate, Overview* <http://aiatsis.gov.au/research/research-themes/native-title-and-traditional-ownership/prescribed-bodies-corporate>.
[174] http://www.oric.gov.au/.

and the value of the corporation's assets and income. Large corporations and corporations with income over the specified threshold must also lodge audited financial reports and directors' reports.[175]

4.1.4 Independent Statutory Authorities

A statutory authority is a body that is set up by specific (enabling) legislation that authorises the body to enact legislation known as Regulations or Rules on behalf of the government. The delegation of power by government to the Statutory Authority is intended to provide legal efficiency, better allocation of resources, transparency and accountability. Federal statutory authorities are established under the *Commonwealth Authorities and Companies Act 1997*.

There are also statutory corporations, which are companies created by specific legislation, typically to pursue a commercial activity on behalf of the government, but separate from government operations to provide for profitability, decision-making independence and political non-interference. A statutory corporation may have to comply with wider regulatory conditions than regular corporate entities.[176]

These structures may provide some measure of independence from government but are not entirely independent as they often have, for example, some ministerial oversight or other reporting requirements.

Factors for determining that an entity is part of government rather than independent from government appear to be the level of control of the entity by the government and whether it is engaged in activities that voluntarily do a public good. Relevant considerations include how the powers of the relevant Minister are exercised, the ability of the entity to make by-laws and to impose penalties for breaches of the by-laws it makes, how closely government monitors the activities of the entity and the level of involvement of government in the entity's policy and decision making.[177] The following examples include Indigenous and non-Indigenous statutory authorities.

4.1.4.1 AIATSIS

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is a research, collections and publishing organisation established as a statutory authority under the *Public Governance, Performance and Accountability Act 2013*. It operates under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth). Until 2018 the AIATSIS was within the portfolio of the Department of Education and Training, and is now part of the Department of the Prime Minister and Cabinet with the responsible minister being the Minister for Indigenous Australians. The 2018 Prime Minister's Report on Closing the Gap drew attention to the role of the AIATSIS, stating that this body 'continued

[175] http://www.oric.gov.au/.

[176] Christos Mantziaris, 'Research Paper 7 1998-99: Ministerial Directions to Statutory Corporations', Parliament of Australia, Law and Bills Digest Group, 8 November 1998; see also <https://www.quora.com/What-is-the-difference-between-a-statutory-agency-statutory-authority-and-statutory-corporation-in-Australia>.

[177] *Metropolitan Fire Brigades Board* v *Commissioner of Taxation* (1990) 27 FCR 279; Fiona Martin, *Income Tax, Native Title and Mining Payments* (2014) Wolters Kluwer) [3.5.1.1]; Matthew Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 *Sydney Law Review* 559.

its commitment to preserving and strengthening Indigenous knowledge, heritage and culture through the national collection, research and publishing'.[178]

The Institute is governed by a Council of 9 members, four of whom are elected from amongst AIATSIS members, and five appointed by the Minister. The Council is responsible for ensuring performance across all of AIATSIS' functions and setting its policies. The Council also appoints a CEO, who is responsible for the operations and performance of the organisation as directed by the Council. This responsibility is carried out with the assistance of a Senior Executive Board including a Chief Executive Officer, Chief Operating Officer and Executive Directors for collection services, partnerships and engagement, and research and education.[179]

4.1.4.2 National Native Title Tribunal[180]

The National Native Title Tribunal (NNTT) is an independent body established under the *Native Title Act* 1993 (Cth) (NTA) to resolve native title determination applications. The NNTT comprises a President and Members appointed by the Governor General to carry out its activities. There is also a Native Title Registrar and a Deputy President and Deputy Registrar may also be appointed. The NNTT has offices in Perth, Melbourne, Sydney, Brisbane and Cairns staffed by experts in various specialties relating to native title. The NNTT staff are employed under the *Public Service Act 1999.* Its operations are governed by the *Public Governance, Performance and Accountability Act 2013* (Cth).

The structure and function of the NNTT has continued to change since its establishment. These changes have included adjustments to the number of Members and staff.

As part of the 2012–13 Budget, the Australian Government announced a range of institutional reforms that included changes to the NNTT. Under the new arrangements the administration of the NNTT was transferred to the Federal Court of Australia. The Court is now responsible for the NNTT's corporate functions and also for the mediation of claims. [181] The NNTT is also now no longer a prescribed agency under the *Financial Management and Accountability Act* 1997 (Cth), but remains an independent and separate entity.[182]

4.1.4.3 Independent Commission Against Corruption (NSW) (ICAC)

The Independent Commission Against Corruption (ICAC) was established under the *Independent Commission Against Corruption Act 1998* (NSW) to:

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[178] Australian Government. Department of Prime Minister and Cabinet. Closing the Gap: Prime Minister's Report, 2018, p. 26.

[179] AIATSIS, *Governance and Structure* < https://aiatsis.gov.au/about/who-we-are/governance-and-structure>.

[180] *The National Native Title Tribunal 1994–2017*; <http://www.nntt.gov.au>.

[181] Federal Court of Australia, Annual Report 2012-213, p.14; see also https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201213/CourtReforms

[182] Ibid.

(a) promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:

(i) investigate, expose and prevent corruption involving or affecting public authorities and public officials, and

(ii) educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and

(b) confer on the Commission special powers to inquire into allegations of corruption.[183]

ICAC is an independent authority[184] and is not responsible to a Government Minister, however ICAC is accountable through the following mechanisms:[185]

- NSW Parliament Joint Committee on ICAC
- Inspector of ICAC
- Accounting to the NSW Treasury and Auditor General
- Reporting to the NSW Attorney General
- Compliance with relevant laws relating to freedom of information and privacy
- Annual reporting requirements.

ICAC is led by a Chief Commissioner and two other Commissioners. There are four key divisions, each of which are led by an Executive Director: Investigation Division; Legal Division; Corruption Prevention Division; and Corporate Services Division.

ICAC is funded by the NSW Government through appropriations and other grants.

4.1.4.4 University structures

Australian universities are self-accrediting institutions each with their own establishing legislation. By way of example, reference is made to the *University of Western Australia Act 1911*. This Act established the University of Western Australia as a body corporate. The university structure established under this Act provides for a Senate, Convocation, staff and students. The Senate is the governing authority of the University. The University has a Chancellor and a Vice Chancellor. The Act imposes record keeping requirements on the University. As a statutory authority under the *Financial Management Act* (WA) 2006, the University of Western Australia reports to the State Minister for Education.[186]

Under section 8 of the Act the Senate which includes members appointed by the Governor of Western Australia, a member of the non-academic salaried staff, a member of the academic staff, the Chancellor ex officio, the Chair of the Academic Board, the Vice-Chancellor

[183] *Independent Commission Against Corruption Act 1988* (NSW) s 2A.
[184] Independent Commission Against Corruption, *Accountability mechanisms* <http://www.icac.nsw.gov.au/about-the-icac/independence-accountability/accountability>.
[185] Independent Commission Against Corruption, *Accountability mechanisms* <http://www.icac.nsw.gov.au/about-the-icac/independence-accountability/accountability>.
[186] The University of Western Australia Annual Report 2020.

ex officio, 2 students, 2 members of Convocation, and not more than 5 members co-opted by the Senate.

At least 2 of the members of the Senate must have financial expertise and at least one must have commercial expertise. At least 4 members must be graduates of the University.

Sections 13-16 empower the Senate to control and manage the affairs and concerns of the University including all real and personal property, and academic activities of the University. The Senate has authority to make by-laws and regulations securing and enforcing the management, good government, and discipline of the University.

Section 27 establishes the Vice-Chancellor as the executive officer of the University.

Section 17 provides for Convocation's role in processing Senate statutes.

The Student Guild is a body corporate established under s 28. Any student of the university is eligible to be a member of the Student Guild. The Student Guild is an organised association of students for the furthering of their common interests and is the recognised means of communication between students and the governing authority of the University.

There is no provision for winding up the University. Section 3 of the Act provides:

> *There shall be from henceforth for ever in the State of Western Australia a University to be called "The University of Western Australia" with such faculties as the Statutes of the University may from time to time prescribe*.

4.1.5 Aboriginal Land Councils

The right of Aboriginal and Torres Strait Islander peoples to hold the rights to their traditional lands and to determine what happens on those lands is embodied in a number of Commonwealth and state legislative instruments.[187] This is implemented through a system in which multiple tiers of land council organisations carry out the will and represent the interests of the traditional owners. The following are examples.

4.1.5.1 New South Wales Aboriginal Land Council

New South Wales Aboriginal Land Council (NSWALC) is a statutory corporation established under the New South Wales *Aboriginal Land Rights Act 1983*.[188] NSWALC operates as a network with a head office, five zone offices and 120 Local Aboriginal Land Councils (LALCs) governed by elected Boards. Every four years, voting members of LALCs elect a Councillor to represent their region.

NSWALC negotiates land rights for Aboriginal people in NSW, in conjunction with LALCs. NSWALC also works to establish commercial enterprises and benefit schemes for Aboriginal communities and manages traditional sites and cultural materials within NSW.

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[187] For example: *Aboriginal Land Rights (Northern Territory) Act 1976*; *Aboriginal Land Rights Act 1983 (NSW)*; *Aboriginal Land Act 1991 (Qld)*; *Aboriginal Land Act 1995 (Tas)*; *Aboriginal Lands Act 1991 (Vic).*

[188] New South Wales Aboriginal Land Council, *Our Organisation* <http://alc.org.au/about-nswalc/our-organisation.aspx>.

NSWALC administers the NSWALC Account and Mining Royalties Account, grants funds to pay the administrative costs and expenses of LALCs, oversees agreements proposed by LALCs to allow mining or mineral exploration on Aboriginal land, engages in dispute resolution, makes grants, lends money and invests money on behalf of Aboriginal people and oversees LALC compliance with establishment and keeping of accounts and the preparation and submission of budgets and financial reports.

NSWALC has an administrative arm headed by a Chief Executive Officer with delegated authority of the Council to assume responsibility for all aspects of the day-to-day operation of the Council's affairs.

A NSWALC Statutory Investment Fund was established under the NSW *Aboriginal Land Rights Act (1983)* to provide for guaranteed funding for the operations of the NSWALC for a period of 15 years. Funds were a percentage of NSW non-residential Land Tax. Since 1998, NSWALC and the land council network have been self-supporting.[189]

NSWALC's elected arm consists of 9 Councillors, one for each region,[190] elected for a four-year term by voting members of Local Aboriginal Land Councils. The Council in turn elects a Chairperson and Deputy Chairperson.

Councillors direct and control the affairs of the Council, participate in the allocation of the Council's resources for the benefit of Aboriginal people, participate in the creation and review of the Council's policies and objectives, review the performance of the Council, represent the interests and respond to the concerns of LALC members, and facilitate communication between the LALC members and the NSWALC.[191]

4.1.5.2 Local Aboriginal Land Councils (LALCs)

Part 5 of the New South Wales *Aboriginal Land Rights Act* 1983 (ALRA 1983) establishes LALC areas and the constitution of a LALC for each such area as a body corporate.

Section 52 of the Act sets out the functions of LALCs. These include an extensive list of activities relating to land acquisition, use and management; protecting the interests of its members, their culture and heritage; to prepare and implement a community, land and business plan, including the investment of any assets of the Council; and facilitate business enterprises including by establishing, acquiring, operating or managing business enterprises.

A LALC may be permitted to provide community benefits under community benefits schemes, and provide, acquire, construct, upgrade or extend residential accommodation for Aboriginal persons in its area.

A LALC is required to have rules under section 52F of the ALRA 1983. These can be the model rules set out in the ALRA 1983, or the LALC may prepare its own rules and submit

[189] New South Wales Aboriginal Land Council, *Our Organisation* <http://alc.org.au/about-nswalc/our-organisation.aspx>.
[190] The regions are Central Region, Mid North Coast Region, Northern Region, North Coast Region, North Western Region, South Coast Region, Sydney and Newcastle Region, Western Region, Wiradjuri Region
[191] New South Wales Aboriginal Land Council, *Our Organisation* <http://alc.org.au/about-nswalc/our-organisation.aspx>.

them to the Registrar for approval. The rules may, with the approval of the Registrar, be amended, repealed or replaced from time to time.

Under Division 2 of Part 5, the members of the LALC are the adult Aboriginal persons who are listed on the LALC membership roll for that area. The chief executive officer of a LALC must prepare and maintain a membership roll. An Aboriginal person may be a member of more than one LALC. However, a person is entitled to voting rights in relation to one LALC only at any one time.

A LALC may delegate functions of the Council with respect to the acquisition of land and any function required to be exercised by voting members of the Council to its Board.

Under Division 3 of Part 5, each LALC must have a Board consisting of 5 to 10 members elected at every fourth annual meeting by LALC members. The Board must have an elected Chair and Deputy Chair. The Board is required to:

- direct and control the affairs of the Council;
- facilitate communication between the Council's members and the New South Wales Aboriginal Land Council;
- review the performance of the Council in the exercise of its functions and the achievement of its objectives; and
- enter into short-term residential tenancy agreements in relation to land vested in the Council and to manage or terminate such agreements.

On the winding up of a LALC, all or part of the assets, rights and liabilities may be transferred to another specified Aboriginal Land Council. On the day an order dissolving a LALC takes effect, the Council ceases to exist and the Board members of the Council cease to hold office.

4.1.5.3 Central Land Council

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRNTA) establishes land councils within the Northern Territory. The land councils are bodies corporate.

The Central Land Council (CLC) is established under the ALRNTA and also has functions under the *Native Title Act 1993* (Cth) and the *Pastoral Land Act 1992* (NT). The CLC represents Aboriginal people in Central Australia and supports them to manage their land and promote their rights. The term Central Australia here, in the context of the CLC, refers specifically to the southern part of Australia's Northern Territory. Within this region, the CLC's Aboriginal constituents, who comprise more than fifteen different language groups, are dispersed across nine-sub regions, constituting an area of 770,000 square kilometres.[192]

The CLC has a council of 90 elected Aboriginal representatives from the nine regions. The council elects an eleven-member executive comprising a Chair, Deputy Chair and a representative from each of the nine regions.

The executive appoints a Director who is responsible for the day to day running of the CLC. Its operations are carried out by general and section managers and employed staff.

[192] See the CLC website https://www.clc.org.au/who-we-are/

The Chair and the Director are an accountable authority responsible for ensuring that the CLC fulfils obligations and duties attached to receiving public funds and resources in accordance with the *Public Governance, Performance and Accountability* Act (PGPA Act).[193]

4.1.5.4 Kimberley Land Council (KLC)

The Kimberley Land Council (KLC) was formed in 1978 as a land rights organisation. It is now the peak Aboriginal organisation, and the Native Title Representative Body (NTRB) for the region.[194] The KLC is incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and operates under the *Native Title Act 1993* (Cth).

KLC is a Public Benevolent Institution (PBI). As a Public Benevolent Institution (PBI), it is also a charity and a deductible gift recipient (DGR) - donations to it are tax deductible to the donor, although the financials do not disclose any donations.

A PBI is a uniquely Australian status for not-for-profits (NFPs). They are NFPs that target relieving poverty or necessitous circumstances. They developed as a type of charity, for very complicated legal historical reasons. As a PBI they are exempt from income tax but are liable for GST - although there are some concessions.

4.1.6 Trusts

A trust exists where a person or company (the trustee) owes a fiduciary duty to deal with property under their control for the benefit of other persons (the beneficiaries). In a charitable trust, the fiduciary obligations of the trustee must be for charitable purposes and there are no specific beneficiaries.[195]

A trust is not a separate legal entity, so that there is no separate trust entity which owes duties or takes actions.[196] The trustee is the legal owner of the trust property, and it is the trustee that can sue and be sued.

A trust may be created in a variety of ways including orally, under a will (testamentary) and constructively, but in most commercial/family cases it is created in writing through a trust deed. This is referred to as an express trust.

Unlike a company, a trust can only exist for a limited period. This is because trusts are subject to what is referred to as the rule against perpetuities. In most cases the life span of a trust will be approximately 80 years.[197]

There are various types of express trusts. The most common are bare trusts, fixed trusts and discretionary trusts. A bare trust arises where a person or company holds a particular item of property as a nominee for one or more specifically identified beneficiaries. The trustee has no

[193] Governance of the Central Land Council-a guide to being a Council member 2016.
[194] See the KLC website https://www.klc.org.au/about-the-klc.
[195] *FCT v Bruton Holdings Pty Ltd (in liq)* [2010] FCA 978.
[196] *FCT v Bamford; Bamford v FCT* [2010] HCA 10 [18].
[197] *Stein v Sybmore Holdings* 2006 ATC 4741.

active duties to perform beyond conveying the trust property to the absolutely and indefeasibly entitled beneficiary when the trustee is instructed to do so by the beneficiary.[198]

A fixed trust occurs where the beneficiaries' shares in the trust estate are predetermined or fixed by the trust deed. For example, the deed states that the income and capital of the trust shall be paid to each of three named beneficiaries in equal shares.[199]

Discretionary trusts are usually used in family situations. A discretionary trust arises where the trustee has discretion to choose the share or amount of income or capital that any one or more potential beneficiaries are to receive in a particular income year. The beneficiaries have no rights to trust income or property; they only have the right to ask that the trustee administer the trust in accordance with the law.[200]

[198] *Kafataris v FCT* [2008] FCA 1454 [58].
[199] *Commission of Taxation v Vegners* 89 ATC 5274; *Colonial First State Investments Ltd v FCT* [2011] FCA 16.
[200] *Commissioner of Stamp Duties v Livingstone* [1965] AC 694.

Table 4: Forms of Corporate Bodies

	Proprietary Company	**Public Company limited by Shares**	**Public Company limited by Guarantee**	**Incorporated Association**	**Registered Co-operative**	**CATSI Corporation**
Management structure	Board of Directors 1+ directors	Board of Directors 3+ directors 1 secretary	Board of Directors 3 - 12 directors 1 secretary	Management committee in most states; 3+ committee members	Board of directors 3+ directors	Board of Directors 3 -12 directors
Area of operation	Australia-wide	Australia-wide	Australia-wide	state of registration	Australia wide	Australia-wide
Administration	ASIC	ASIC	ASIC	Fair Trading	Fair Trading	ORIC (3)
Legislation	*Corporations Act 2001* (Cth)	*Corporations Act 2001* (Cth)	*Corporations Act 2001* (Cth)	*Associations Incorporation Act 2009* (NSW) or equivalent in other States	*Co-Operatives National Law* (**CNL**) (Uniform State-based legislation).	*Corporations (Aboriginal and Torres Strait Islanders) Act 2006* (Cth) + regulations
Members	1 + No more than 50 non-employee shareholders	1 +	1 +	5 +	5+	5 + 51% must be indigenous
Limitation on trading	Nil	Nil	Nil	Depends on Fair Trading policy	Nil	Nil
Personal offers of shares/equity	Yes	Yes	No	No.	Co-op with share capital only (individuals taking up shares must become "active" members)	No
Public offers of shares/equity	Yes – subject to maximum	Yes	No	No	Yes, but difficult	No
Charity registration and tax concessions	Rarely granted.	Rarely granted.	Needs appropriate purpose and provisions in Constitution	Needs appropriate purpose and provisions in Constitution.	Co-ops without shares with appropriate purpose and provisions in Constitution.	Needs appropriate purpose and visions in Constitution

4.2 Existing Legal Organisations and Structures

Drawing on previous work by the Garuwanga Project,[201] this section looks at a selected range of legal entities established for the benefit of Aboriginal and Torres Strait Islander peoples. We have already considered above, land councils, and the ways they range in structure and governance.

4.2.1 Indigenous Remote Communications Association (IRCA)[202]

The Indigenous Remote Communications Association (IRCA) is an Aboriginal organisation registered with ORIC, incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act). Established in 2001, IRCA is a peak body for Aboriginal and Torres Strait Islander broadcasting, media and communications. It is a charitable organisation, that has and a deductible gift recipient (DGR) status.

Governance structure

The IRCA Constitution allows for up to nine board members at least half of whom must be from remote areas. Directors must be Aboriginal and/or Torres Strait Islander people. There is also provision for up to an additional three Board appointed positions to provide particular expertise. The Board includes a male and female chairperson. Directors are elected under a Diversity policy and Skills and Experience matrix.

Membership

Ordinary Membership is open to not-for-profit, Aboriginal and Torres Strait Islander Corporations that hold a broadcasting licence or have a commitment to meeting the broadcasting and/or media and communications needs of the Aboriginal and Torres Strait Islander persons in their community or region. It is also open to remote Indigenous Media Organisations (RIMOs) and Remote Indigenous Broadcasting Services (RIBS), and any other organisation approved by the Board.

Associate Membership is open to Aboriginal and Torres Strait Islander natural persons who are at least 18 years of age and who have a commitment to one or more of the Objects of the Association as defined by the organisation's Constitution. Associate Membership is also open to Aboriginal and Torres Strait Islander not-for-profit organisations who have a commitment to one or more of the Objects of the Association; and any other person or organisation approved by the Board.

Affiliate Membership is open to non-Aboriginal and Torres Strait Islander natural persons who are at least eighteen years of age and who have a commitment to one or more of the Objects of the Association as defined in the organisation's Constitution. Affiliate Membership is also open to non-Aboriginal and Torres Strait Islander not-for-profit organisations that have a commitment to one or more of the Objects of the Association; and any other person or organisation approved by the Board.

[201] See Garuwanga Discussion Paper pages 26 – 32.

[202] <https://irca.net.au>; IRCA 2016/2017 Annual report; IRCA consolidated rule book available on ORIC website.

Friends Membership is open to natural persons who are at least 18 years of age who have a commitment to one or more of the Objects of the Association; organisations who have a commitment to one or more of the Objects of the Association; and any other person or organisation approved by the Board. [203]

Relevant Legislation
Corporations (Aboriginal and Torres Strait Islander) Act 2006. (CATSI Act).[204]
Australian Charities and Not-for-Profits Commission Act 2012 (Cth). (ACNC Act).

Winding up
As the IRCA is a registered charity, if it is wound up, its residual assets are to be transferred to another organisation with charitable purposes and rules prohibiting the distribution of its assets and income to its members.[205]

4.2.2 The Association of Northern, Kimberley and Arnhem Aboriginal Artists (ANKAAA)[206]

ANKAAA incorporated under the CATSI Act. It is the peak advocacy and support agency for Aboriginal artists working individually and through remote art centres in Arnhem Land, Darwin/Katherine, the Kimberley and the Tiwi Islands. It is also a charity.

ANKAAA works with its members and Art Centres by:

- *Consultation* (listening to members)
- *Advocacy & Lobbying* (talking up for members and Art Centres; protecting artists' rights)
- *Resourcing and supporting* (helping and giving information)
- *Training* (teaching)
- *Referral and networking* (putting members in touch with each other and other organisations and resources)
- *Marketing and Promotion* (telling people about Art Centres and artists)

Governance structure
ANKAAA is led by a board of up to twelve directors who are elected every two years with three representatives from each of ANKAAA's four regions. There must be a minimum of six directors. A Stand-in Director is also elected for each region. The directors elect the office bearers of the corporation: chairperson, vice chairperson, treasurer and minute secretary. A majority of directors of the corporation must be Aboriginal or Torres Strait Islander persons.[207]

The directors can appoint non-member directors selected for their independence or skills in financial management, corporate governance, accounting, law or a field relating to the corporation's activities, or both. The chief executive officer may be a director but cannot chair the directors' meetings.

[203] Constitution of IRCA.
[204] Constitution of IRCA.
[205] Constitution of IRCA.
[206] <http://ankaaa.org.au>.
[207] THE RULE BOOK Arnhem Northern and Kimberley Artists Aboriginal Corporation – ANKA ICN 1076

Membership
Members must be at least eighteen years of age and be an Aboriginal or Torres Strait Islander person who is eligible for membership of an Art Centre and who normally resides in the area of the Corporation. Members are Indigenous representatives of incorporated Art Centres affiliated with a Local Community Government Council, and Indigenous artists who are not members of an Incorporated Art Centre.[208]

Relevant Legislation
Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act).[209]
Australian Charities and Not-for-Profits Commission (ACNC) Act 2012 (Cth).

Winding up
The winding up of the corporation must be in accordance with the CATSI Act. If ANKAAA is wound up residual assets are to be transferred to another organisation with charitable purposes and which has rules prohibiting the distribution of its assets and income to its members.[210]

4.2.3 Winanga-Li Aboriginal Child and Family Centre, Gunnedah

Winanga-Li is a not for profit incorporated association and a charity that was established in 2013. It provides services in family support, disability support, health services and education.

Governance structure
There is a Board comprising up to seven Directors elected from the association members. At least five of the directors must be Aboriginal persons and no more than 2 directors may be non-Aboriginal persons. The Board elects a Chairperson and Deputy Chairperson. There is also provision for appointment of a secretary, public officer and treasurer and a CEO. At least the secretary and public officer must be Aboriginal persons.[211]

Membership

Membership is open to Aboriginal persons aged 18 years and older from the local Aboriginal community and non-Aboriginal Gunnedah community members aged 18 years and older.[212]

Relevant Legislation
Associations Incorporation Act 2009
Australian Charities and Not-for-Profits Commission (ACNC) Act 2012 (Cth)

Winding up
If Winanga-Li is wound up residual assets are to be transferred to another organisation with charitable purposes and which has rules prohibiting the distribution of its assets and income to its members.[213]

[208] THE RULE BOOK Arnhem Northern and Kimberley Artists Aboriginal Corporation – ANKA ICN 1076
[209] THE RULE BOOK Arnhem Northern and Kimberley Artists Aboriginal Corporation – ANKA ICN 1076
[210] THE RULE BOOK Arnhem Northern and Kimberley Artists Aboriginal Corporation – ANKA ICN 1076
[211] Winanga-Li Aboriginal Child and Family Centre Constitution 2013.
[212] Winanga-Li Aboriginal Child and Family Centre Constitution 2013.
[213] Winanga-Li Aboriginal Child and Family Centre Constitution 2013.

4.2.4 Papunya Tula Artists Pty Limited[214]

Utilising a private company structure, Papunya Tula Artists Pty Ltd is owned and operated by traditional Aboriginal people from the Western Desert of the Luritja/Pintupi language groups. It was established in 1972. 'The aim of the company is to promote individual artists, to provide economic development for the communities to which they belong and assist in the maintenance of a rich cultural heritage.'[215]

There are 49 shareholders and the company represents approximately 120 artists.

Relevant Legislation

Corporations Act 2001 (Cth).

4.2.5 North Australian Indigenous Land and Sea Management Alliance Ltd (NAILSMA)

The North Australian Indigenous Land and Sea Management Alliance Ltd (NAILSMA) was established to assist Indigenous land and sea managers and owners across northern Australia.

Governance structure
NAILSMA is a public company limited by guarantee, and is a charity.[216] There is a maximum of 10 and no less than 5 directors.

The members may by resolution at an annual general meeting appoint four independent directors to the Board who are able to contribute relevant skills and experience to the Board, including one director who shall be appointed as the independent chair of the company.

The Board may appoint Advisory Committees to advise the Board from time to time on any matters considered by the Board to be relevant to promoting the objects and purposes of NAILSMA.

Membership
The original members of NAILSMA were the Northern Land Council; Balkanu Cape York Development Corporation Pty Ltd; and Carpentaria Land Council Aboriginal Corporation Pty Ltd.

At the time of completing this report, the only member of NAILSMA is the Northern Land Council.[217]

Relevant Legislation
Corporations Act 2001
Australian charities and NFP Commission Act

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[214] Papunya Tula Artists Pty Ltd, *History*, <http://papunyatula.com.au/history/>.
[215] Ibid.
[216] Australian Charities and Not-for-profit Commission, *Find a Charity*, <https://www.acnc.gov.au/ACNC/FindCharity/QuickSearch/ACNC/OnlineProcessors/Online_register/Search_the_Register.aspx?noleft=1>.
[217] NAILSMA, About Us, <https://nailsma.org.au/about-us>.

IUCN Member organisation
NAILSMA is a Member organisation of the global conservation body, IUCN (International Union for Conservation of Nature) and is the first Indigenous-led Australian organisation to become a member.

IUCN helps identify solutions to pressing conservation and development challenges. In becoming an IUCN Member, NAILSMA committed support to the IUCN Mission: To influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable.[218]

4.2.6 Gawler Ranges Aboriginal Corporation (GRAC)

The GRAC is a native title PBC incorporated under the CATSI Act, consistent with the NTA and *Native Title (Prescribed Bodies Corporate) Regulations* 1999 (Cth). The native title lands the GRAC holds, as described in a 2011 consent determination, is an area of approximately 34,000 square kilometres in the Gawler Ranges area and Lake Gardiner National Park in South Australia.[219] The Gawler Ranges native title consent determination recognises the non-exclusive native title rights to access, hunt, fish, camp gather and use the natural resources, undertake cultural activities, conduct ceremonies and meetings, and protect places of cultural and religious significance.[220]

The constitution and other documents for GRAC state that it is a charity, but there is no registration with the Australian Charities and Not for Profit Commission (ACNC).

Governance structure
A Board of Directors is elected by the members of the GRAC at the annual general meeting. Between 7 and 9 people are chosen by the general membership to lead and manage the affairs of the organisation.[221]

Membership
The native title holders for the Gawler Ranges native title determination area.

Relevant Legislation
CATSI Act
Native Title Act 1993 (Cth)

4.2.7 Garuwanga Partner Organisations

This section sets out brief details of each of the Partner Organisations represented by the Partner Investigators on the Garuwanga ARC Linkage Project. Further details on each Partner Organisation are set out in section 4.4 of this Report.

[218] NAILSMA, Our History < https://nailsma.org.au/about-us/iucn-member>.
[219] *McNamara on behalf of the Gawler Ranges People v State of South Australia*, consent determination 2011.
[220] AIATSIS, *Gawler Ranges Aboriginal Corporation*, <http://nativetitle.org.au/profiles/profile_sa_gawlerranges.html>.
[221] GRAC, Rule Book 8 April 2016, [11].

4.2.7.1 D'harawal Traditional Knowledgeholders and Descendants Circle (DTKDC)

DTDKC is an unincorporated, unregistered Aboriginal organisation focussed on advancing the status of Aboriginal individuals and families and associated cultural knowledge throughout the D'harawal language region. There are twenty-five senior knowledgeholders, associated acolytes and numerous extended family groupings operating throughout the region covering the area between Sydney and Nowra and from the eastern coast to the Wollondilly/Hawkesbury River systems. The Circle operates in accordance with customary law. Gatherings only occur upon request and funding of activities is auspiced through other Aboriginal organisations or with partnering agencies or businesses.

4.2.7.2 Banyadjaminga SWAAG Incorporated

Banyadjaminga SWAAG Incorporated is an Aboriginal organisation in Elderslie NSW that is focused on advancing the status of Aboriginal individuals and families and associated cultural knowledge. It is a not-for-profit organisation with membership from the Aboriginal community. Volunteers from the organisation provide a range of crucial intermediary advocacy and support services between often marginalised community members and government bodies, helping to foster a more egalitarian and tolerant society. The organisation has forty-five members and numerous volunteers (around thirty individuals) operating in South Western Sydney including Picton. There is an Executive Board of ten members and governance is in accordance with the model rules of the *Associations Incorporation Act* (NSW) 2009. Funding for our activities varies annually and is derived from volunteer contributions, periodic fundraising and grants from various sources.

4.2.7.3 Triple BL Pty Ltd

Triple BL Pty Ltd is a 50% Aboriginal owned and managed private company. It was registered as a proprietary company in 2002 under the *Corporations Act 2001* (Cth) and registered as an Indigenous company with Supply Nation in 2016. The company trades as Triple BL Legal and Triple BL Consulting. The focus of Triple BL Consulting spans capacity building, community development and sustainable natural resource management including project scoping, planning and design, resourcing, delivery and reporting. The focus of Triple BL Legal work spans Intellectual Property, Traditional Knowledge, and commercial law, including Benefit Sharing Agreements, Collaboration Agreements, Shareholder Agreements and Contracts.

4.2.7.4 Madjulla Inc.

Madjulla Association, known as Madjulla Inc. is an Indigenous not for profit organisation and charity with cultural, education, research, training and evaluation expertise, located in the Kimberley region of Western Australia. It is a registered charity and endorsed as a Deductible Gift Recipient. It is incorporated under the *Association Incorporation Act 2015* (Cth). The Executive Committee consists of three Indigenous people who are multi-disciplinary and hold undergraduate and postgraduate qualifications in health, education, science and the arts. The organisation has 30 members and represents three communities in the region. Membership is open to Aboriginal people. Madjulla Inc. has broad national experience in

consulting and designing intervention strategies to engage a range of partnerships with emphasis on building the capacity of individuals, families and communities towards actioning sustainable community cultural, social and economic development.

4.3 Governance Principles

Mick Dodson and Diane Smith have 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*.[222]

In this section we consider some general aspects of governance, and in particular, Indigenous governance. The section focuses on the principles for governance that have been developed through the Garuwanga Project.

4.3.1 What is good governance?

There are several widely accepted common principles that underpin good governance. The United Nations Development Programme has identified the following concepts:[223]

- Participation: Decision making processes allow for participation by all interested parties, either directly or through representative organisations. This element is 'built on freedom of association and speech, as well as on the capacity to participate constructively.'
- Rule of Law: The organisation operates in accordance with relevant law and laws are 'fair and enforced impartially'.
- Transparency: The decision-making processes and other aspects of the organisation must be accessible to all stakeholders and sufficient information must be made available to facilitate understanding and monitoring.
- Responsiveness: The organisation and its associated processes must serve the interests of all stakeholders.
- Consensus orientation: 'Good governance should mediate differing interests in order to reach broad consensus on the best interests of the group and, where possible, on policies and procedures.'
- Equity: All stakeholders should have 'equal opportunity to maintain or improve their well-being.'
- Effectiveness and efficiency: Organisations should make the best use of resources in fulfilling their obligations.

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[222] Michael Dodson and Diane Smith, *Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities*, (ANU Press, 2003).

[223] United Nations Development Programme (UNDP), *Governance for Sustainable Human Development*, 1997 cited in International Fund for Agricultural Development, *Good Governance: An Overview,* Doc No EB 99/67/INF.4 (22 August 1999) 5-6.

- Accountability: Organisations must report to the public and other stakeholders on decision making processes.
- Strategic vision: Broad and long-term perspective with an 'understanding of the historical, cultural and social complexities in which that perspective is grounded.'

4.3.2 Indigenous Governance

The Australian Indigenous Governance Institute's Indigenous Governance Toolkit[224] includes resources relating to: understanding governance; culture and governance; leadership; rules and policies; management and staff; nation building and development. Among many elements, this Toolkit discusses the connections between Indigenous governance and culture, describing this in terms of networks, as follows:

> Indigenous governance is a networked form of governance. It is based on thick pathways and layers of relationships and connections between people, places and things, past, present and future. These relationships create an elaborate web - a kind of bottom-up federalism where rights and interests, decision-making powers, leadership roles, responsibilities and accountabilities are spread across different cross-cutting social layers and cultural geographies… For networked governance models to be effective they need to have clearly identified and agreed layers of shared:
>
> - power and authority
> - decision-making processes
> - roles and responsibilities
> - mutual accountability [225]

The focus of the Toolkit is on the concept of effective or legitimate governance as distinct from good governance.[226] This approach is supported by research from the Indigenous Community Governance Project carried out by the Centre for Aboriginal Economic Policy Research at ANU. That project identified the following common Indigenous principles of governance:

- 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.[227]

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[224] Indigenous Governance Toolkit <http://toolkit.aigi.com.au>.

[225] Indigenous Governance Toolkit, *Indigenous governance and culture,* <http://toolkit.aigi.com.au/toolkit/2-1-indigenous-governance- and-culture>.

[226] Indigenous Governance Toolkit, *The important parts of governance* <http://toolkit.aigi.com.au/toolkit/1-1-indigenous-governance-2>.

[227] Janet Hunt, Diane Smith, Stephanie Garling and Will Sanders, *Contested Governance: Culture, power and institutions in Indigenous Australia* (ANU Press, 2008) 21.

4.3.3 Suggested model of governance

The Garuwanga Research Roundtable suggested some governance principles to inform appropriate legal structures for a Competent Authority.

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.'[228]

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

[228] Indigenous Governance Toolkit, *1.2 Indigenous governance* <http://toolkit.aigi.com.au/toolkit/1-2-community-governance>

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;
- 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 'extend 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'.[229]

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

4.4 Applying the Garuwanga Governance Principles to the Partner Organisations

The Garuwanga project team Partner Investigators represent different Indigenous organisations and they have shared how these organisations address each of the governance criteria below. These organisations have been briefly described above (based on information provided by the appropriate Project PIs associated with each particular organisation) above in Section 4.2.7.

4.4.1 D'harawal Traditional Knowledgeholders and Descendants Circle (DTKDC)

Relationships/Networks: DTKDC is unincorporated and unregistered. Membership of the circle is by invitation only and must be approved by the circle. The membership structure is non-hierarchical with a convenor appointed for each meeting. The Circle has relationships with Banyadjaminga Swaag Incorporated.

[229] NHMRC 2006:9 as quoted in Alison Laycock, Diane Walker, Nea Harrison and Jenny Brands, *Researching Indigenous Health: A practical guide for researchers* - Chapter 2: Principles in Indigenous health research (The Lowitja Institute, 2011) 33 < https://www.lowitja.org.au/sites/default/files/docs/researchers-guide/23-42-chapter2.pdf>.

Trust/Confidence: Trust and confidence are critical to the Circle. Decisions are made by consensus.

Independence from government: The Circle is completely independent from government.

Community participation: The Circle is the community and decisions are made by members of the community.

Guarantees/Confidentiality: This depends on the particular issue involved. The Circle supports individuals and no formal records are maintained.

Transparency/Accountability: Decision making processes are understood by members of the Circle.

Facilitation: The purpose of the Circle is facilitation. The Circle also facilitates approaches by philanthropic organisations however the Circle does not hold funds received.

Advocacy: The Circle engages in focused advocacy on culturally specific and local issues.

Communication: The Circle engages in outreach and education activities mainly within the Sydney region with some engagement across NSW.

Reciprocity: Practice of recognition is through the Circle. Recognised by the Circle then total acceptance.[230]

4.4.2 Banyadjaminga Swaag Incorporated

Relationships/Networks: Registered Aboriginal Corporation under the NSW Association Act. Banyadjaminga Swaag is a not for profit organisation with membership from the Aboriginal community. Meetings are informal with issues discussed.

Trust/Confidence: Decision making is by consensus – either unanimous or agree not to interfere if don't agree.

Independence from government: Completely independent from government**.**

Community participation: Banyadjaminga Swaag is made up of community members (approximately forty to fifty members) with a Board elected by members.

Guarantees/Confidentiality: The Board of Directors keeps knowledge confidential within the Board.

Transparency/Accountability: Board proceedings and decision-making process within the Board are understood by members of the Board but are not reported publicly except generally in the Annual General Meeting. There is no financial reporting. Annual Reports are prepared containing minimal detail and submitted to the NSW Associations Register.

Facilitation: Banyadjaminga Swaag functions to facilitate activities on behalf of, or in support of, interested stakeholders.

Advocacy: Banyadjaminga Swaag engages in local level advocacy.

[230] Contributed by Aunty Fran Bodkin

Communication: Engages in communication activities and outreach within South Western Sydney including with local government and third parties (Aboriginal organisations).

Reciprocity: "Practice of recognition – recognised by organisation then total acceptance".[231]

4.4.3 Triple BL Pty Ltd

Relationships/Networks: Triple BL Pty Ltd was primarily established to facilitate the delivery of services to Aboriginal communities, companies and individuals. The directors of Triple BL Pty Ltd, have extensive networks with Aboriginal Traditional Owners, senior elders, senior law men and law women, Aboriginal organisations and leaders, and Aboriginal community support workers across Australia spanning over thirty years. Strong relationships have been developed underpinned by principles of cultural sensitivity, respectful engagement and professionalism.

Trust/Confidence: The directors of Triple BL Pty Ltd exercise sensitivity towards Aboriginal culture, traditions, languages, laws, practices, and organisational and governance arrangements. They hold the trust and confidence of the Aboriginal organisations, elders and communities with which they work. Dr Virginia Marshall is a Wiradjuri Nyemba woman who has worked extensively with Aboriginal Land Councils and representative bodies, Aboriginal health and welfare agencies, Aboriginal Elders and communities across NSW and Australia. For example, Dr Marshall was Inaugural Executive Officer of the NSW Aboriginal Water Trust. Paul Marshall has worked with Aboriginal people for over 30 years, from a role as CEO of the Kimberley Land Council in the mid-1980s, to writing the award-winning Kimberley Aboriginal oral history '*Raparapa'* (published 1989) to an on-going role managing various TK & NRM projects on behalf of Kimberley Aboriginal communities.

Independence from government: Triple BL Pty Ltd is a proprietary company registered in NSW and is independent from government.

Community participation: Triple BL Pty Ltd has a strong track record of delivering pro bono services to Aboriginal communities, organisations and senior elders.

Guarantees/Confidentiality: Triple BL Pty Ltd has a long track record of respecting Aboriginal laws and traditions and honouring the confidentiality of sensitive information received in the course of consultancy and contract work, whether it is culturally-sensitive information or commercial-in-confidence information. Triple BL Legal guarantees client confidentiality as required under legal practice ethical standards.

Transparency/Accountability: Triple BL Pty Ltd provides professional services in a transparent and accountable manner. As an incorporated legal practice registered with the Law Society of NSW Triple BL Legal operates under Professional Standards Legislation and legal practice guidelines. Triple BL Consulting operations are in line with the transparency and accountability requirements set out in the grant agreements it manages on behalf of Aboriginal communities and organisations.

[231] Contributed by Uncle Gavin Andrews

Facilitation: The directors of Triple BL Pty Ltd have extensive experience with project and meeting facilitation and NFP sector governance at local, regional, state and national levels, including to support Indigenous organisations and business operators.

Advocacy: Triple BL Pty Ltd through its legal and consulting services provides advocacy on a range of Aboriginal rights and interests, and international for as such as the UN Permanent Forum and the Expert Mechanism Rights of Indigenous Peoples.

Dr Marshall holds seven degrees, has served on the Indigenous Issues Committee of the Law Society of NSW (2012-16) playing a key role in drafting numerous submissions to government on issues affecting Aboriginal people; served on the Australian Government's 'Family and Children Roundtable' (2011-13) as nominee of the National Aboriginal and Torres Strait Islander Women's Alliance, a member of the Australian Human Rights Commission's Indigenous Property Rights Roundtable and a member of the National Centre for Aboriginal Studies Experts Panel. Dr Marshall was Senior Legal Officer on the Australian Law Reform Commission's Inquiry into Family Violence and Commonwealth Laws (2010-11) drafting the chapter on Income Management and is a leading expert in Aboriginal water rights and interests.

Mr Marshall is a PhD Scholar with the Australian National University, holds a Master's degree in Environmental Science and over 25 years as a Landcare advocate and practitioner at local, regional, state and national levels. He represented Queensland on the board and Advisory Committee of Landcare Australia (2006-09) and in 2014 was entered on the Landcare Australia register as a 'Landcare hero'.

Communication: The directors of Triple BL Pty Ltd maintain standards and requirements under the ASIC.

Reciprocity: As an Aboriginal managed and focussed company, Triple BL Pty Ltd recognises Aboriginal cultural protocols relating to reciprocity, making every effort to maintain fairness and goodwill and consider reciprocity obligations.[232]

4.4.4 Madjulla Inc.

Relationships/Networks: Madjulla Inc. takes its name from a special and sacred plant known as *Barringtonia Acutangula* plant which has a deep relationship and meaning not just to Nyikina people but all of the traditional owners who use this plant and live along the Martuwarra Fitzroy River. Madjulla Inc. partners with WAC and other RNTBCs, governments, Indigenous individuals, organisations and communities, university researchers and academics, philanthropic agencies, private enterprise and registered training providers to broker locally targeted programs and services. Madjulla Inc. has cultural and professional relationships with Nyikina Inc. and Balginjirr Aboriginal Community. Madjulla Inc. has a wide range of professional networks in Australia and globally. International networks include Agadea Morocco, Redstone Oklahoma, Montpellier science group, Southampton University UK and UNESCO officials interested in First Nation's understanding regarding climate change.

[232] Contributed by Dr Virginia Marshall and Paul Marshall.

Trust/Confidence: The annual general meeting reports to the members and chooses 6 governing committee members who meet quarterly. Madjulla Inc. has adopted a Code of Conduct to promote trust and confidence among the organisation's membership.

Independence from government: Madjulla Inc. is a not for profit, non-government organisation and registered charity. It is managed by an independent Indigenous governing committee and registered by the Western Australian Councils and Associations Act.

Community participation: Madjulla Inc. is an Indigenous community agency. Most members are related through extended family so that communication occurs through informal familial networks. Social cohesion is encouraged through inclusive activities to promote a sense of connection and belonging. Examples of activities include Nyikina language courses, youth development programs and building construction projects. Madjulla Inc. also provides help to elders to visit their homelands to celebrate and share their kinship relationships through their connection to the spirit of 'country'.

Transparency/Accountability: The preparation of financial accounts and annual reports is provided on a fee for services basis from a private bookkeeper and auditor. A governing committee is selected by and reports to the members at the annual general meeting. The Managing Director manages the day-to-day operations of Madjulla Inc. on a voluntary basis including brokering opportunities and challenges for a wide range of community, university and industry partners in project management, delivery and evaluation and the management and reporting of funding.

Facilitation: Madjulla Inc. is a cultural broker into alternative and innovative Indigenous community cultural and economic development, Indigenous knowledge, the environment and rivers, natural resource management, mining and agricultural industries. Madjulla Inc. partners with researchers and WAC to protect and manage our traditional knowledge for establishing new economies including bio-prospecting, walking trails, a vocational college and cultural tourism activities with international agencies.

Advocacy: Madjulla Inc. performs a range of advocacy roles at a range of levels. For example, we conduct community development workshops in remote Aboriginal communities, write submissions to governments and independent inquiries particularly focused on Indigenous governance, health, education and myriad of influences on wellbeing.

Madjulla Inc. participates in national academic and government research partnership management committees in Indigenous knowledge and wider regional and Indigenous matters. Madjulla Inc. has provided a great deal of advocacy to governments on behalf of Indigenous communities to establish projects and supported them until they became sustainable.

Communication: Madjulla Inc. keeps members, other local people and those outside of the region informed using informal networks, local and national media, committee representation and conference presentations as well as publishing on our website.

The primary source of Madjulla Inc.'s communication to the global community is through the web site: www.majala.com.au. The organisation also engages with film and audio material to articulate the voice of the community. One example is a film *Three Sisters: Women of High Degree* produced by Madjulla Inc. and released in 2015. This film, about Nyikina women, has been presented at international film festivals and screened on Australian public

broadcasting network the Special Broadcasting Services Television (SBS TV) and its sister network National Indigenous Television (NITV).[233]

Reciprocity: Madjulla Inc. is established around an Indigenous cultural framework grounded in traditional laws and customs to strengthen collective wellbeing. In this context individual wellbeing is dependent on the wellbeing of 'one society under Warloongarriy Law', this includes all traditional owners who are guardians and stewards of the Martuwarra, Fitzroy River Country, from the Sunrise Country to the Sundown Country. This includes the need for broader dialogue on matters which impact on the native title rights and interests of all traditional owners. This ensures respectful and reciprocal conduct through customary law, spiritual, cultural, social and professional engagement, through informed ethical and cultural decision making, to consider the greater good of all.[234]

4.5 Identifying relevant governance principles for different tiers of governance

The nature of the governance principles identified and developed by the Garuwanga Project (see above in this report at section 4.3.3) reinforce the universality of those principles regardless of where they are applied in the governance framework for protecting Indigenous knowledge, enshrined in placed based traditional laws and customs. Each principle has meaning for each potential tier of governance. Accordingly, the Garuwanga Governance Principles can provide a framework to assist each tier of governance to be effective in achieving their respective aims and purpose in respect of Indigenous cultural norms. The table below describes the proposition.

[233] *Three Sisters, Women of High Degree* (48 mins). Madjulla Association, Broome, 2015. It can be viewed at https://vimeo.com/147866161 - Password: Kimberley.
[234] Contributed by Professor Anne Poelina.

Table 5: Garuwanga Governance Principles at each Tier.

Governance Principles	Local	Regional	National
Relationships/ Networks	√	√	√
Trust/ Confidence	√	√	√
Independence from government	√	√	√
Community participation	√	√	√
Guarantees/ Confidentiality	√	√	√
Transparency/ Accountability	√	√	√
Facilitation	√	√	√
Advocacy	√	√	√
Communication	√	√	√
Reciprocity	√	√	√

5 Consultations with Indigenous Peoples

Having explored a variety of governance frameworks available for the establishment of a Competent Authority, including the development of governance principles to underpin a Competent Authority framework, and reporting this work in a Discussion Paper, the next step in the Garuwanga Project was to consult with communities and representatives of the Partner Organisations involved in the project. This chapter reports on the consultation process explaining the background and methodology undertaken, exploring the meaning of the term 'Indigenous knowledge' and its iterations as this was an issue raised at each consultation, and reporting on the ethics and consent process.

5.1 Background and Methodology

The methodology for the Garuwanga Project, which involved a collaborative approach with Aboriginal Partner Organisations and the Research Roundtable, has been discussed above (Section 1.1.1). This chapter discusses in further detail the process of consultations with Aboriginal people, including the methodological approach, and critical underlying elements such as traditional Indigenous knowledge, and Indigenous ethics.

5.1.1 The Process of Consultations with Aboriginal People

The appropriate management of Indigenous knowledge, innovations and practices is at the heart of any structure, governance, and operations of a Competent Authority. Central to the Garuwanga Project's aims, to elicit views about Competent Authority or authorities, was the process of consulting with Aboriginal communities about these matters.

The submission to the Australian Research Council for a Linkage Grant (LP160100146) stated in regard to consultations that there was a need to conduct research and consultations in order to determine the form and nature of competent authorities as provided in the Nagoya Protocol, and the governance and legal structure for such a Competent Authority. From the start, the Project has been conducted as a collaboration between the university-based research team and the Garuwanga Partner Organisations, thus ensuring that Indigenous peoples' voices, perspectives and worldviews are central in the Project's design and outcomes. The Garuwanga Project community consultations had also developed, in part, from earlier work, supported by a New South Wales Government Project (2013-14) that was aimed at 'Recognising and Protecting Indigenous Knowledge associated with Natural Resource Management'.[235]

The Project Discussion Paper that was circulated in 2018 formed a basis for the consultations that were carried out with Aboriginal communities and organisations in Broome and the West Kimberley (WA). Consultations also took place in and near Sydney (NSW) involving Aboriginal organisations and communities in urban and rural locations. Informed consent was obtained for all consultations, and these consent processes were carried out in compliance with UTS ethics approval processes and principles, and also conformed to the Australian

[235] UTS – Indigenous Knowledge Forum and North West Local Land Services, 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management' (White Paper, Office of Environment and Heritage, Government of New South Wales, 2013) <https://www.indigenousknowledgeforum.org/white-paper>

Research Council's requirements. For these consultations, free, prior informed consent was sought, and obtained from all participants either in written form, or verbally as a group or individual representing their organisation.

In the Analysis of Consultations Report,[236] it was considered necessary to review some of the issues that should be considered when engaging in research consultations:

- *Context – regional; language group; community and local politics*
  Aboriginal community organisations typically do not 'stand alone', in isolation from the wider geo-politics of place, region and language/cultural group. People in Aboriginal communities form part of a complex, intertwined network of organisations, people, family, language and community groups. As such, there are ongoing local politics that comprise the fabric within which the people and their organisations are situated. Research needs to be cognisant of these wider factors, and, consistent with the principles and practices of ethical, participatory Indigenous research, researchers need to work closely with Indigenous participants in carrying out the project.[237]

- *Who 'speaks' for the community*

  The issue of Aboriginal representation is critical to any research engagement.[238] We discuss this further in this report below, at section 6.4.1. When engaging with Aboriginal people to seek their views on complex issues, a project will necessarily identify particular individuals with whom the primary engagement and involvement is conducted.[239] It is important to keep in mind that who this person is, is a local community-based decision, and as such, is subject to discussion and debate within the community. The process of determining precisely who has responsibility for representing, or who 'speaks for' a community, organisation, or other 'local' group is complex, and there may be ongoing questions to resolve in regard to the selected representative. According to the AIATSIS Guidelines it is essential for Indigenous research to recognise the diversity of Indigenous groups and communities and to not presume that the view of one group represents the collective view of the community.[240] Furthermore, it is important to differentiate between individual, group or collective rights, responsibilities and ownership.[241]

Many of the community consultations were organised by the Partner Organisations (POs) and corresponding Partner Investigators (PIs) through focus group sessions, and individuals,

[236] Michael Davis, Ann Cahill, Natalie P. Stoianoff, Fiona Martin, Evana Wright, Neva Collings and Andrew Mowbray, *Report on Consultation Findings - Garuwanga: Forming a Competent Authority to protect Indigenous knowledge* (UTS - Indigenous Knowledge Forum, 2020), found at <https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho>
[237] AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012, 4 & 14.
[238] See generally, Iris Marion Young, 1990, *Justice and the Politics of Difference*, Princeton: Princeton University Press.
[239] In keeping with Principle 6, AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012, 9.
[240] AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012, 4.
[241] Ibid.

including presentations about the project and its aims. The views obtained during these consultations, and also from the discussions with the Research Roundtable, form the foundation upon which the Project has been able to detail options for structures and operations of competent authorities.

5.1.2 Limitations

In discussing the approach to consultations, it is necessary to outline some of the ways in which the consultations for this Project were subject to limitations or constraints. In general, the consultation process had to take into account many factors, including the unavailability of people, prior commitments by communities, and divergent timeframes. Additionally, the notion of 'community fatigue' was mentioned in one meeting, and there was also a perceived incompatibility between the language used to explain the project, and the plain language asked for by the community, in order to adequately understand the project's purpose. Inevitably, these factors resulted in limitations on the extent to which full participation by the community, and the research could be effectively achieved.

Effective and respectful research with Aboriginal peoples requires an understanding of, and adherence to relevant community protocols and ethics, and of the importance of Indigenous peoples' ontologies, epistemologies and praxis.[242] As such, the Garuwanga Project sought to incorporate an appropriate decolonising stance, ensuring that a collaborative, participatory and inclusive approach was adopted. This is discussed further below (section 5.1.3.1). A *decolonising* approach means that the whole process, from design, through the conduct of this project, and the analysis of results, is informed, and underpinned by, a critique of the dominant 'Western', or Eurocentric or non-Indigenous ways of knowing, narratives and systems of power derived from the legacy of colonialism in all its forms.[243] This also means that 'consultations', as a modality of engagement in the research process, must necessarily be cognisant of all the multiple obligations and responsibilities of Indigenous people within their communities and organisations.[244] In this context, there is often likely to be a 'mismatch' between the expectations and requirements of some of the researchers, and those of the Indigenous people whose views are being sought for this project. This may have impacts on timing, schedules, logistics, and the nature of outcomes.

In the light of these factors, much of the consultation time was devoted to the research team and consultation groups seeking to build trust and understanding, before moving on to the substantive issues that were the focus of the discussions. Where Partner Investigators played

[242] See, for example: Shawn Wilson, What is an Indigenous research methodology (2001), *Canadian Journal of Native Education,* 25(2), 175-179; and more generally, AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012.

[243] There is a vast literature on decolonising approaches. For a global view see for example Walter D Mignolo, *The Politics of Decolonial Investigations*, Durham and London: Duke University Press, 2021; see also Juanita Sherwood and Thalia Anthony, Ethical Conduct in Indigenous Research: It's Just Good Manners (pp. 19-40) In Lily George, Juan Tauri, Lindsey Te Ato o Tu MacDonald, eds, *Indigenous Research Ethics: Claiming Research Sovereignty Beyond Deficit and the Colonial Legacy*, UK: Emerald Publishing, 2020; for the relationships between decolonising, and Indigenous research methodologies, see for example Jason Chalmers, 'The transformation of academic knowledges: Understanding the relationship between decolonising and Indigenous research methodologies', *Socialist Studies / Études socialistes* 12 (1) Spring 2017, 97-116.

[244] AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012, 4.

a more active role in engagement with those consulted, more time was able to be spent engaging more deeply with the discussion questions posed as part of the consultation. This highlights the desirability of building into the design of future research projects provisions that will enable preliminary consultation meetings to take place that can, among other things, allow for full provision of information to project participants, as part of the free prior informed consent process. Nevertheless, the consultation process generally yielded rich results in understanding the range of expectations and concerns about the concept of a Competent Authority and Indigenous knowledge governance.

In the context of the complex nature of consultations with Aboriginal communities, there were several matters that impacted on the research team's being able to hold all the meetings with communities that had been planned. For example, two of the planned consultation meetings did not take place because of matters relating to the timing.

In addition, some meetings took place without the participation of some, or any of the participants with the authority to attend and speak on these community issues (such as Board Members or senior staff for example) due to ill health, timing or other community commitments. As well as this, two of the planned meetings did not proceed, again because the timing was not suitable for the respective communities. However, two additional meetings with other communities were held that had not been anticipated.

Notwithstanding these limitations, overall, the Garuwanga Project has still met its original objective to consult with at least some of the communities represented by the POs. The range of meetings held and their locations illustrates the diversity of demographics between Aboriginal communities. The Garuwanga Project was also restricted in scope in that, owing to the limitations of budget and timeframe, it was not feasible in the design of the project to provide for re-visiting communities, or for consultations with communities and organisations in the Torres Strait. However, the themes, issues, and findings from this project may provide valuable insights relevant to the interests of Torres Strait Islander peoples.

5.1.3 Methodology

Section 1.1.1 above discussed the methodology engaged with overall for the Garuwanga Project. This comprised an action research approach involving collaborative, participatory research with the Research Roundtable members and POs. An Indigenous-centred methodological approach was employed, which would 'engage with Aboriginal Communities through an action research methodology within an Indigenous research paradigm'.[245] In this context, the Project aimed to engage with Indigenous methodologies and epistemologies that place story, narrative, ethics, and place-based worldviews at the centre.

[245] Many Australian Indigenous people are working and writing in the field of Indigenous research methodologies. See for example Tyson Junkaporta and Doris Shillingsworth, 'Relationally responsive standpoint' (2020), Journal of Indigenous Research, 8(4); Dennis Foley, 'Indigenous epistemology and Indigenous standpoint theory' (2003), *Social alternatives*, *22*(1), 44-52; Lester Irabinna-Rigney (2001), 'A first perspective of Indigenous Australian participation in science: Framing Indigenous research towards Indigenous Australian intellectual sovereignty', *Kaurna Higher Education Journal*, 7, 1–13.

5.1.3.1 Decolonising Research: Indigenous Epistemologies

The discussion above about the 'constraints', or 'limitations' of the consultation meetings goes to the matter of incorporating elements of Indigenous research methodologies and epistemologies into the project, and in the discussion in this Report.

Projects and research activities involving Indigenous people needs to be carried out in a fully participatory and inclusive way, in accordance with relevant ethics, protocols and guidelines (for example, the Australian Institute of Aboriginal and Torres Strait Islander Studies – AIATSIS - Code of Ethics for Aboriginal and Torres Strait Islander Research, 2020). That is the purpose of the Research Roundtable comprising Indigenous and non-Indigenous researchers working together to achieve the aims of the Garuwanga Project. Central to such projects is the requirement that they be carried out within a framework, or standpoint of Indigenous research methodologies and ways of knowing, or epistemologies.[246] What this means is that research should be carried out, not just 'from an Indigenous perspective', but using a deep understanding of the Indigenous paradigm. The Indigenous paradigm is derived from, and embedded in, Indigenous concepts, cosmologies, and ways of seeing and acting in the world. An Indigenous research paradigm seeks to work from a contrary position to the dominant Western framework, to acknowledge a range of Indigenous worldviews.[247] One of many elements of this approach is to understand that Indigenous knowledge, and many aspects of Indigenous ways of being in the world are not isolated, or discrete events, processes and behaviours, but are *relational*, and must be seen in this context.[248] We discuss this idea further below (section 6.1.3). The discussions of the Research Roundtable meetings demonstrate this. In advancing an Indigenous research methodology, there is also a need to explore 'local' protocols and epistemologies as part of the *relational* context of people in *Country*. Here the role of the Partner Investigators is crucial in guiding the Chief Investigators and the rest of the research team prior to and during the consultations.

5.1.3.2 The consultations

As mentioned in section 5.1.1, a Discussion Paper was prepared identifying Australia's obligations once the Nagoya Protocol is ratified. That Paper outlined the idea of a Competent Authority, and suggested some options for its establishment and functions. A shorter document was also prepared to provide a summary of the key points covered in the Discussion Paper. The methodology used for the consultations (flowing from the Garuwanga Discussion Paper) with Aboriginal communities and community organisations, were

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[246] There is a large literature on Indigenous research methodologies, including Indigenous standpoint. See for example Dennis Foley, *supra* n 236; Aileen Moreton-Robinson (2013) 'Towards an Australian Indigenous women's standpoint theory: A methodological tool', *Australian Feminist Studies*, *28*(78), 331-347; Martin Nakata (2007) *Disciplining the Savages, Savaging the Disciplines*, Canberra: Aboriginal Studies Press; Linda Tuhiwai Smith (2017), *Decolonizing Methodologies: Research and Indigenous Peoples*. Zed Books Ltd..

[247] See for example Moreton Robinson and others, *supra* n 237; Shawn Wilson, 'What is an Indigenous research methodology' (2001), *Canadian Journal of Native Education,* 25(2), 175-179.

[248] On relationality as a place-based approach in Indigenous research see for example Mary Graham (2014) 'Aboriginal notions of relationality and positionalism: a reply to Weber', *Global Discourse* 4(1), 17-22

facilitated through the project's Partner Organisations. Consultations took the form of focus group sessions, and the outcome from those were analysed, and a draft report produced. This was then discussed by the Research Roundtable group at a meeting on 12 April 2019, and further comments and input provided on that report. The details of that process are incorporated into this final report.

Permission was obtained from participants in the consultations for sessions to be sound recorded, and these recordings were supplemented by note taking. Two Chief Investigators, other research staff, and the Garuwanga PhD student participated in the consultations, along with at least one of the Partner Investigators and Additional Investigator responsible for the relevant region. The former Research Associate provided continuity with arrangements made and data collected during her tenure. It proved impractical to hold Research Roundtable meetings to de-brief and finalise the notes taken following the consultations.

In the light of these factors, as has already been said, much of the consultation time was devoted to the research team and consultation groups building trust and understanding, before moving onto the substantive issues that were the focus of the discussions. The project was developed from the beginning in a participatory way with the Aboriginal Partner Organisations.

Where possible, it would be desirable in future to build into the design of research projects, provisions that will enable preliminary consultation meetings to take place that can, among other things, allow the time for full provision of information to project participants, as part of the free prior informed consent process.

5.2 Indigenous Knowledge

The concept of 'Indigenous knowledge' has been briefly discussed previously in this Report (see above, introductory pages; and section 1.2.3). However, before detailing the process of consultations with Aboriginal people, it is useful here to firstly elaborate further on what is meant by Indigenous knowledge, as this formed the essential basis upon which the project's consultations were conducted.[249] Indigenous knowledge, as well as the associated practices and innovations relating to genetic and biological resources, also underpins the purpose and functions of the proposed competent authorities – the bodies that will have responsibility for the management of, and possibly decision-making over, this knowledge and those resources, as provided in the Nagoya Protocol.

5.2.1 Defining Indigenous Knowledge

Earlier in this report (at p. 7, and section 1.2.3 above), the term 'Knowledge Resources 'was used to denote Indigenous knowledge. As briefly outlined above, there are a range of terms

[249] See for example Michael Davis, *Biological Diversity and Indigenous Knowledge*. Research Paper No. 17. Canberra. Department of the Parliamentary Library, Canberra, 1998; Michael Davis, 'Indigenous Knowledge: Beyond Protection, Towards Dialogue' (2008), *Australian Journal of Indigenous Education* 37, Supplement, 25-33.

and phrases used to describe and define Indigenous knowledge, in different discourses and domains of interest. International legal discourse, for example, in the WIPO, makes a distinction between Traditional Knowledge', and 'Traditional Cultural Expressions'. [250] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) draws on terminology that is used in both the WIPO, and the CBD, referring to 'traditional knowledge and cultural expressions' (at article 31).[251] It is acknowledged that these various ways of referring to Indigenous knowledge that draw on international instruments and bodies may be entirely different to the diverse ways that Indigenous knowledge is spoken about by Aboriginal people in community and on Country.

5.2.1.1 Traditional Ecological Knowledge

The term 'traditional ecological knowledge' is another one that has often been used to denote the 'traditional knowledge, innovations and practices of Indigenous and local peoples embodying traditional lifestyles'. [252] Again, as noted above, it is important to acknowledge that Indigenous peoples in Australia speak about and refer to their Indigenous knowledge in very diverse ways. In the global literature, Gadjil et al define Traditional Ecological Knowledge as 'a cumulative body of knowledge and beliefs handed down through generations by cultural transmission about the relationship of living beings (including humans) with one another and with their environment'.[253] Posey defines this knowledge as 'holistic, inherently dynamic, and constantly evolving through experimentation and innovation, fresh insight, and external stimuli'. [254]

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.[255] There is no sharp separation between this knowledge, and all the other aspects of Indigenous peoples' material and spiritual lives.[256] This knowledge is also performative and expressive, and it finds its form through action, and re-enactment, in ceremony, and in song, story, dance and other

[250] See for example Natalie Stoianoff, 'Navigating the Landscape', op. cit.
[251] UNDRIP, Art 31; Stoianoff, op. cit, 30-31.
[252] Darrell Addison Posey, 'Ethnobiology and Ethnoecology in the Context of National Laws and International Agreements Affecting Indigenous and Local Knowledge, Traditional Resources and Intellectual Property Rights', in Roy Ellen, Peter Parkes, and Alan Bicker, eds, *Indigenous Environmental Knowledge and its Transformations: Critical Anthropological Perspectives*, Harwood Academic Publishers, Australia, 2000, (pp. 35-51), at p. 36; also citing Madhav Gadgil, Fikret Berkes and Carl Folke, 'Indigenous Knowledge for Biodiversity Conservation', *Ambio* Vol. 22, No. 2/3, Biodiversity: Ecology, Economics, Policy (May, 1993), pp.151-156, at p. 151.
[253] Madhav Gadgil, Fikret Berkes and Carl Folke, 'Indigenous Knowledge for Biodiversity Conservation', *Ambio* Vol. 22, No. 2/3, Biodiversity: Ecology, Economics, Policy (May, 1993), pp.151-156, at 151.
[254] Posey, op.cit., p. 36.
[255] Sonia Smallacombe, Michael Davis, and Robynne Quiggin, *Scoping Project on Aboriginal Traditional Knowledge*, Report of a study for the Desert Knowledge Cooperative Research Centre, Desert Knowledge Cooperative Research Centre, Alice Springs, 2006.
[256] Michael Davis, Bridging the Gap, or Crossing a Bridge? Indigenous Knowledge and the Language of Law and Policy, in *Bridging Scales and Knowledge Systems: Concepts and Applications in Ecosystem Assessments*, eds. Fikret Berkes, Doris Capistrano, Walter V. Reid, and Tom Wilbanks (Washington DC, Island Press, 2006), 145-182.

manifestations such as in artworks, and in ways of relating to one another.[257] In general, Indigenous knowledge is regulated by understood codes, rules, obligations and responsibilities. Its use, transmission and expression are governed by these protocols, which are also typically regulated along lines of gender, age, and other aspects of social and cultural status (such as kinship, family, or ritual status for example).[258]

A further aspect of Indigenous knowledge is that, while it is embedded in place and topography, associated with important features of the ancestral domain, it is also embodied in personhood, as much as in the specifics of place.[259] The nexus between place-based, and person-based knowledge is intricate, and cannot be adequately addressed in this analysis.[260] Australian Indigenous lawyer Terri Janke, a Wuthathi/Meriam woman, has summed up some aspects of Indigenous knowledge thus:

> *Indigenous people have customary rights and obligations to their Indigenous knowledge, cultural expression, just like land. Sometimes that knowledge is sacred, but at all times that knowledge comes from a place and forms the identity of the people. There are rules about how it should be respected, and reproduced, disseminated and interpreted.*[261]

5.2.1.2 Indigenous Knowledge and Intellectual Property Rights

There has been considerable discussion in the literature about the relationships between intellectual property rights (IPRs) and Indigenous knowledge, and some of the salient points are briefly reviewed here. Much of this turns on questions about the scope provided by intellectual property laws to provide adequate protection for Indigenous knowledge. Underpinning these questions is the complex matter of whether Indigenous knowledge may be recognised as a form of property right for the purposes of IPRs.[262] Notwithstanding for the

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[257] In the development of international legal instruments for recognising and protecting Indigenous knowledge, there is a distinction made between 'Traditional Knowledge' and 'Traditional Cultural Expressions'. This is most developed in the work being carried out by the World Intellectual Property Organisation (WIPO). See for example Terri Janke, *Indigenous Knowledge: Issues for Protection and Management: Discussion Paper*, Report Commissioned by IP Australia, 2018, at <https://www.ipaustralia.gov.au/sites/default/files/ipaust_ikdiscussionpaper_28march2018.pdf >

[258] Davis 2016, n 231.

[259] In some of the discussions with the Research Roundtable, a suggestion was made that these ideas about 'personhood' are essentially Western ones.

[260] For a discussion on the complexities of these issues concerning Indigenous knowledge and place, see for example Michael Davis, '"I live somewhere else but I've never left here": Indigenous Knowledge, History, and Place', in *Indigenous Philosophies and Critical Education*, ed. George Sefa Dei (New York: Peter Lang Publishing, 2011)), 113-126.

[261] Terri Janke, Mabo Oration 2011 - *Follow the stars: Indigenous culture, knowledge and intellectual property rights (website),* https://www.adcq.qld.gov.au/resources/a-and-tsi/mabo-oration/2011-Mabo-oration *viewed 25 June 2018.*

[262] See generally, WIPO Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore Draft Gap Analysis On The Protection Of Traditional Knowledge, May 30,

moment whether it is 'property' (in the Western sense of property) or not, Indigenous knowledge is certainly a component of Indigenous cultural heritage.[263] As such, IPRs are generally inadequate for providing effective recognition, and protection for Indigenous knowledge. Posey and Dutfield argue that IPRs are not 'a panacea for the lack of self-determination of indigenous peoples and the inequalities of wealth and power between local communities on one hand and governments and corporations on the other'[264]. They elaborate on this:

> IPR laws are generally inappropriate and inadequate for defending the rights and resources of local communities. IPR protection is purely economic, whereas the interests of indigenous peoples are only partly economic and linked to self-determination. Furthermore, cultural incompatibilities exist in that traditional knowledge is generally shared and, even when it is not, the holders of restricted knowledge probably still do not have the right to commercialize it for personal gain.[265]

There have, though, been some examples where IPR laws have provided some limited protection for Indigenous knowledge, or, more precisely, where these laws have been used to obtain redress for misuse of some expressions of Indigenous knowledge, especially where such expressions have been underpinned by secret or sacred knowledge.[266] In general, however, there is an incompatibility between Western IPR laws and Indigenous knowledge systems.[267]

Having briefly outlined some of the salient features of Indigenous knowledge, and reviewed key issues concerning the relationships between Indigenous knowledge and intellectual property, we emphasise that the Garuwanga Project has as its focus Indigenous knowledge relating to biological diversity and genetic resources. The CBD and the Nagoya Protocol employ throughout, the phrases 'traditional knowledge' and 'knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity'. It was noted above at sections 1.2.1 and 1.2.4 of this Report that the CBD recognises the sovereign rights of the nation state (Australia) over genetic resources in scientific research and of commercial and non-commercial uses of genetic resources.[268] For the Garuwanga Project, this aspect of Indigenous knowledge may be termed 'Indigenous Ecological Knowledge', but only on the understanding that Indigenous peoples do not separate knowledge that relates to biological diversity from all other forms of knowing. The crucial relationships that many Indigenous

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2008, at <https://www.wipo.int/export/sites/www/tk/en/igc/pdf/tk_gap_analysis.pdf> ; and also, Freedom-Kai Phillips, 'Intellectual Property Rights in Traditional Knowledge: Enabler of Sustainable Development' (2016) 32(83) *Utrecht Journal of International and European Law* 1.

[263] Evana Wright and Natalie Stoianoff, 2018, *Submission in Response to Aboriginal Cultural Heritage Reforms in NSW: A Proposed New Legal Framework. Sydney: State of NSW and Office of Environment and Heritage*.

[264] Darrel A Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, International Development Research Centre, Ottawa, 1996, p. 76.

[265] Ibid, 92.

[266] See for example Foster v Mountford; for details of these cases see Janke; Davis; Stoianoff

[267] Virginia Marshall, Terri Janke and Anthony Watson, 'Community Economic Development in Patenting Traditional Knowledge: A case study of the mudjula TK project in the Kimberley region of Western Australia' (2013) 8(6) *Indigenous Law Bulletin* 19.

[268] Virginia Marshall, 'Negotiating Indigenous Access and Benefit Sharing agreements in genetic resources and scientific research' (2013) 8(8) *Indigenous Law Bulletin* 16.

peoples have with areas of biological diversity cannot be underestimated, as Posey states, 'globally, there is a growing recognition of the "inextricable link" between biological and cultural diversity that has stimulated a process of re-evaluation of the importance of indigenous peoples in the international community'.[269]

5.3 Ethics and the Consent Process

The Project has been carried out in accordance with current ethical standards, values and processes. It has been informed by the AIATSIS *Guidelines for Ethical Research in Australian Indigenous Studies* (GERAIS) and conducted in compliance with UTS ethics approval processes and principles, and the Australian Research Council's requirements. For these consultations, free, prior informed consent was sought, and obtained from all participants either in written form, or verbally as a group.[270]

5.3.1 Giving Back: Return of Aboriginal Data to Communities

In the process of consultations with Aboriginal communities, important questions have arisen about 'giving back' and the return of materials to Aboriginal people. In regard to the particular methodology adopted, which is guided by free prior informed consent (FPIC) and research ethics, it was essential to ensure the anonymity of people who participated in the consultation meetings. This anonymity has been maintained throughout the process, including in the analysis of the transcripts of recordings of those meetings. An equally important matter, in the context of working in accordance with Indigenous ethics and protocols, is to return materials – voice recordings, transcripts and other information provided by Aboriginal people – to the appropriate people. However, in the course of the project, reflecting on this latter point about returning materials, there was some concern about potential risks in returning research materials to communities. This could result in people being able to identify the particular communities and individuals in the meetings, and that some of the comments in those recordings may present problems to some listening to them. In accordance with the wishes of communities consulted, transcripts were returned to these communities, with an offer of providing the voice recordings if requested. These issues raise the very important subject of Indigenous rights and ownership in data and information, sometimes described as 'Indigenous data sovereignty'. While there has not been the scope in this project to consider this, it is a subject that will need to be considered in future projects.[271]

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[269] Posey, op cit., 38. This connection was also recognised in the *Declaration of Belem*, (Adopted at the First International Congress of Ethnobiology in Belém, Brazil in 1988), which refers to traditional knowledge as the basis for the 'inextricable link" between biological and cultural diversity'.

[270] At the time of completing this Report, the AIATSIS was conducting a public review process on its Guidelines for Ethical Research in Indigenous Studies. The Guidelines have been reviewed and revised several times, to ensure they reflect current standards, developments and practices. See for example Michael Davis, 'Bringing Ethics Up To Date? A Review of the AIATSIS Ethical Guidelines' (2010), *Australian Aboriginal Studies* 2, Special Edition: Contemporary Ethical Issues in Australian Indigenous Studies, eds Sarah Holcombe and Michael Davis, pp. 10-21.

[271] See for example Tahu Kukutai and John Taylor. *Indigenous data sovereignty: Toward an agenda*. Canberra: ANU press, 2016;

6 Discussion of Findings from Consultations: Concepts and Approaches

This chapter sets out the findings from the analysis of the Garuwanga Project consultations. Analysis of the consultation outcomes was carried out within the framework of an Indigenous research paradigm, which seeks to encompass epistemologies (ways of knowing) articulated through stories, narrative and reflection, and connectedness to Country, culture and spirituality.[272] It will be seen from the extracts of transcribed recordings of community consultations, that there was a strong sense of culture and heritage embedded in the views articulated by Aboriginal people. It is understood in the design and approach adopted by this project that the style of language used in discussing the research and analysis is likely to differ to the kinds of language used by and within Aboriginal communities. The analysis has identified this cultural framework as highly significant to the way in which this Project endeavoured to put forward options for structures and operations of competent authorities that would be key to control and decision making for Indigenous biodiversity and traditional knowledge.

6.1 Analysis of the Transcripts – Methodology and Approach

The recordings of the consultations were transcribed. There were some issues in regard to the quality of the recordings. In some meetings, the quality of the recordings was compromised by background noise, room size and participants being softly spoken. As a result, professional transcription was not possible for those recordings and transcription was undertaken by the Research Associate who had the benefit of notes taken and having listened to the discussions first-hand. For the sake of consistency, all transcripts were prepared by the Research Associate. In some places the recordings were not audible or clearly understood. Where possible approximations of what was said were noted and any material of this nature included in this Report is noted as "paraphrased". Meetings and participants were de-identified and are referred to by numbers so each quotation in the data presented is identified by a meeting number (M#) and a participant number (P#). Recordings and/or transcripts will be returned to communities where requested.[273]

Analysis of the transcripts from the consultation meetings was carried out using a qualitative approach that included textual and discourse analysis and 'narrative inquiry'.[274] Initially,

[272] There is a large body of literature on Indigenous research methodologies. See for example Linda Tuhiwai Smith, *Decolonising Methodologies*; Evelyn Steinhauer, 'Thoughts on an Indigenous research methodology' (2002), *Canadian Journal of Native Education* 26(2), pp. 69-81;

[273] Following reflection on this point, there was some concern about potential risks in returning research materials to communities, that this could result in people being able to identify the particular communities and individuals in the meetings, and that people listening to the recordings may object to some of the comments in those recordings.

[274] There is a large volume of literature on social research methodological issues. See for example Norman Fairclough, 'Discourse and text: linguistic and intertextual analysis within discourse analysis', *Discourse and Society* 3(2): 193-217, 1992; Terry Locke, *Critical Discourse Analysis*, London and New York: Continuum, 2004; Sylvia S. Barton, 'Narrative inquiry: locating Aboriginal epistemology in a relational methodology', *Journal of Advanced Nursing* 45(5): 519-526, 2004.

some thematic analysis was engaged with.[275] This involved unpacking the transcripts and then repacking them in a way that presented an overview of shared and unique perspectives. The original plan for the analysis had envisaged a quantitative approach using a three-stage manual coding,[276] and matrix presentations based on the work of Miles and Huberman.[277] Engaging with this methodology, the Project aimed to address the three evaluation criteria for proposed Competent Authority legal structures that were set out in the Garuwanga Project Discussion Paper:[278]

(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 most importantly; and
(iii) those Aboriginal laws and customs considered relevant by the Partner Investigators, and other Aboriginal members of the Research Roundtable.[279]

While the structured coding approach enabled some useful themes to be derived from the transcripts of community discussions, this was ultimately limited, and a textual based approach was used instead. A textual analysis is based on a close study of textual (written, or documentary) materials, including transcripts of interviews and other documents, to investigate the way language and speech is used, and to derive from this an understanding of writers' and speakers' intentions and meanings.[280] Since the coding approach was not used, it did not require the participation of, or consultations with the Project's principal researchers.

6.1.1 Questions for Discussion in Consultation Meetings

The Garuwanga Project Discussion Paper detailed several questions that would serve to guide the consultations with Aboriginal communities and community organisations. These are (as grouped under the respective evaluation criteria listed above):

Reflecting Aboriginal customary laws, and cultural protocols

- What do you consider to be the most important features for a Competent Authority?
- What existing organisations do you think provide effective models for protecting Aboriginal and [Torres Strait Islander] interests?
- What existing organisations do you think provide ineffective models for protecting Aboriginal and [Torres Strait Islander] interests?
- How should local competent authorities (LCAs) be formed?

[275] RE Boyatzis, *Transforming qualitative information: Thematic analysis and code development*, (Thousand Oaks, London & New Delhi: SAGE Publications, 1998).
[276] Margaret McKerchar, *Design and Conduct of Research in Tax, Law and Accounting*, (Thomson Reuters, Sydney 2010), 227-230.
[277] M. Miles and A. M. Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (2nd ed, Sage, Thousand Oaks CA, 1994).
[278] Indigenous Knowledge Forum, Garuwanga: Forming a Competent Authority to protect Indigenous knowledge – Discussion Paper, UTS, April 2018. The Garuwanga Project Discussion Paper can be found at: https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho
[279] Ibid, 6.
[280] See e.g. supra n 274, n 286 on textual analysis.

- Should all employees, officers and councillors be Aboriginal or [Torres Strait Islander] people?

Expectations of the functions and powers of the Competent Authority:

- Should there be a single National Competent Authority (NCA)?
- Should the NCA carry out both the duties of the NCA and the National Focal Point?

Suitability to Australian law and regulations

- 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?

Data collected from some of the consultations did not address each of these questions and themes, and thus produced some limits on the utility of a matrix analysis. This was an additional factor in the decision to focus more on language and textual analysis, nuanced understanding of the concerns of community, and especially the knowledge-holders charged with protecting the knowledge of the community.[281]

Taking all these factors into account, a narrative was created from the consultation meetings that incorporated all the issues and concerns discussed earlier in this report. This narrative was useful in extracting contextual data that helped inform the thematic analysis. Responses addressing any of the discussion questions relating to each of the evaluation criteria were noted. 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. As outlined above, this coding approach to analysing the consultations outcomes was initially pursued and 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.

6.1.2 Language and Discourse: Listening to Indigenous Voices

[281] See for example Aboriginal scholar Mary Graham. 'Some thoughts about the philosophical underpinnings of Aboriginal worldviews.' (1999), *Worldviews: Global Religions, Culture, and Ecology*, *3*(2), 105-118; also Ewa Czaykowska-Higgins, 'Research Models, Community Engagement, and Linguistic Fieldwork: Reflections on Working within Canadian Indigenous Communities' (2009), *Language Documentation & Conservation* 3(1),182-215.

Analysis of the transcripts from the consultation meetings was carried out using an approach drawn from elements of textual and discourse analysis and 'narrative inquiry'.[282] Following an initial draft analysis, on further reflection and a review of the consultation meetings transcripts, it became apparent that the analysis employing an 'intuitive' discursive and textual, ethnographic analysis of the language used in consultations was a more appropriate methodology, rather than 'iterative manual coding', or other more formal, structured methodological tools.[283] This is because discourse and textual analysis methodologies allowed for greater capture, and close interpretation of, the rich and nuanced language and stories in the recorded community consultation meetings, and the transcripts. By attending to the language, and the ways of talking in the community discussions, the Indigenous cultural frame can be more effectively elicited, as a key to interpreting Aboriginal peoples' ways of expressing and describing their laws, governance, and approaches to decision-making.

6.1.3 Indigenous Methodologies, Ethics, and Worldviews

As discussed previously, projects and research involving Indigenous people should be carried out in fully participatory and inclusive ways, in accordance with relevant ethics, protocols and guidelines (for example, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Guidelines for Ethical Research in Indigenous Studies). The requirement that projects be carried out within a framework, or standpoint of Indigenous research methodologies and ways of knowing, or epistemologies is central.[284] In discussing Indigenous research methodologies, we have included here ethics, as it is usually the case, on the basis of the literature on Indigenous methodologies, that ethics has a key place in an Indigenous methodological approach. What this means is that research should be carried out, not just 'from an Indigenous perspective', but it needs to engage with a deep understanding of Indigenous paradigms. The Indigenous paradigm is derived from, and embedded in, Indigenous concepts, cosmologies, and ways of seeing and acting in the world. An Indigenous research paradigm seeks to work from a contrary position to the dominant Western framework, to provide a critique of the Western approach, and to acknowledge and embed a range of Indigenous worldviews.[285] One of many elements of this approach is to understand that Indigenous knowledge, and many aspects of Indigenous ways of being in the world, are not isolated, or discrete events, processes and behaviours, but rather, are

[282] There is a large volume of literature on social research methodological issues. See for example Norman Fairclough, 'Discourse and text: linguistic and intertextual analysis within discourse analysis', *Discourse and Society* 3(2): 193-217, 1992; Terry Locke, *Critical Discourse Analysis*, London and New York: Continuum, 2004; Sylvia S. Barton, 'Narrative inquiry: locating Aboriginal epistemology in a relational methodology', *Journal of Advanced Nursing* 45(5), 2004, pp. 519-526.

[283] See for example T. A. Van Dijk., 'Principles of critical discourse analysis' (1993), *Discourse & Society* 4(2), 249–83; J. Blomeart, J. and C. Bulcaen, C., 'Critical discourse analysis' (2000), *Annual Review of Anthropology*, 29, 447–66.

[284] There is a large literature on Indigenous research methodologies, decolonising research and Indigenous epistemologies, and this warrants further discussion elsewhere. See for example Linda Tuhiwai Smith, *Decolonizing methodologies: Research and indigenous peoples*. (Zed Books Ltd., 2013).

[285] See for example Shawn Wilson, What is an Indigenous research methodology (2001), *Canadian Journal of Native Education* 25(2), 175-179.

relational, and must be seen in this context.[286] Relationality is described by Hart in the following way:

> Indigenous worldviews highlight a strong focus on people and entities coming together to help and support one another in their relationship. This has been called a relational worldview. …. Key within a relational worldview is the emphasis on spirit and spirituality and, in turn, a sense of communitism and respectful individualism.[287]

Indigenous research methodologies, epistemologies and worldviews have formed the bases upon which the consultations, analysis of these, and the proposed models and approaches for competent authorities have been conducted and formulated in the Garuwanga Project and in this Report.

6.2 Findings from the Analysis

Analysis of the transcripts of discussions at community consultation meetings, and of the Project's Research Roundtable discussions, have enabled a picture to be built of the range of views on competent authorities across the whole range of questions.

6.2.1 Themes for Analysis

The analysis of the transcripts of the community consultations elicited several themes and sub-themes, and the data was examined in accordance with these:

1. Indigenous knowledge
2. A single national competent authority
   - 2.1. Legal structure for the national competent authority
   - 2.2. How the national competent authority would operate
     - 2.2.1. Clearly defined purpose, and relationship to the community and to other organisations
     - 2.2.2. The national competent authority needs to be Aboriginal led and run
     - 2.2.3. The role of the individual in the community
     - 2.2.4. The national competent authority needs to be independent from government
       - 2.2.4.1. The national competent authority needs to be long lasting and securely funded
     - 2.2.5. The national competent authority needs to strengthen capacity
     - 2.2.6. The national competent authority needs to have sound governance
     - 2.2.7. The national competent authority needs to facilitate regional/local competent authority operations
     - 2.2.8. The national competent authority needs to have appropriate decision-making protocols

[286] On 'relationality' in Indigenous worldviews see for example Michael Anthony Hart, 'Indigenous worldviews, knowledge and research', *Journal of Indigenous Voices in Social Work* 1(1), February 2010, pp.1-16; Shawn Wilson, What is an Indigenous research methodology (2001), *Canadian Journal of Native Education* 25(2), pp. 175-179.

[287] Michael Anthony Hart, 'Indigenous worldviews, knowledge and research', *Journal of Indigenous Voices in Social Work* 1(1), February 2010, pp.1-16, at p.3; for an Australian Aboriginal discussion on relationality see for exampleMary Graham 'Aboriginal notions of relationality and positionalism: a reply to Weber'. (2014), *Global Discourse* 4(1), 17-22

3. Regional/Local competent authorities
    3.1. The form of the regional and/or local competent authority is for each community to decide
    3.2. The scope of community served by a regional and/or local competent authority
    3.3. Who sits on the regional and/or local authority and how they are appointed to that role
    3.4. Decision-making
    3.5. Relationship between regional/local and national competent authorities
    3.6. Regional/local competent authorities supported by a national competent authority
4. The role of a Registrar

For a detailed analysis of these themes see the Garuwanga Project's Analysis of Consultations Report annexed to this Report.[288] People in the community consultations did not necessarily articulate discussions about competent authorities using that specific term, but referred to community organisations. However, these themes coalesce around key issues of:

(1) types and levels of competent authorities;
(2) relationships between and among competent authorities, and between these and existing organisations;
(3) structure, operation and governance of competent authorities; and
(4) self-determination, including decision-making, representation and participation, and capacity building and strengthening; and
(5) the role of a registrar.

The discussion below focusses on exploring these issues.

6.2.2 Outcomes from Consultations

This section is an overview of the consultation outcomes. For specific details see Appendix 1, Report on Consultations Findings.

6.2.2.1 Types and levels of competent authorities

The Garuwanga consultations considered whether there should be a single national Competent Authority that carries responsibility for all the obligations under the Nagoya Protocol, including acting as a national focal point; or whether several Competent Authorities (which could be regional and local community authorities) would better serve the aims of the Protocol. This research question was not specifically addressed in the consultation meetings. In some of the consultation meetings however, where there was discussion about the need for different types, or 'levels' of competent authority (such as 'national', or 'local'). The discussion focused mostly on the idea of a single national Competent Authority, and how that might operate.

In general, the idea of a local Competent Authority appointed by each community, with the structure and operations of the authority to be determined by the community, was favoured by some people in the community discussions. Some consultation participants indicated support for a single body serving as both a national Competent Authority and a focal point, with regional and/or local Competent Authorities at different levels. These may vary in their geographical coverage. Consultations, discussions and meetings considered the concepts of 'national', 'regional', and 'local' levels.

[288] Also available at: https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho

In one consultation meeting, it was seen that the unnecessary duplication of organisations is undesirable, as duplication leads to confusion and a waste of resources. This supports the idea that a single organisation carrying out both roles may be preferable.

6.2.2.2 Relationships between and among competent authorities, and between these and existing organisations

The relationships between the various levels and types of competent authorities were discussed in the project. A general view that emerged was that a national competent authority should support the operations of regional and/or local competent authorities. This is discussed in more detail below (section 7.1.3).

6.2.2.3 Structure, operation and governance of competent authorities

The question of 'legal structure' goes to the heart of the type of organisation that may be considered, including: governance; decision-making; and consistency with national and state laws. Although this was discussed to some extent, there was no specific view expressed by the participants regarding the legal structure that should be used for the national Competent Authority. Rather, the discussions were more concerned with matters such as function, rationale for Competent Authority, and best practice.

Overall, consultations revealed that many people maintained strong affinities with their existing regional representative organisations. This raises questions about whether another, separate organisation might be established as a Competent Authority, or whether existing organisations might take on the roles of a Competent Authority, responsibilities, networks and existing connections, or relationships that people maintain with their existing organisations.

Although there was no universal endorsement among consultation participants for a specific kind of legal structure for competent authorities, the consultations did regard the ways in which a Competent Authority might operate to be an important consideration. Accordingly, the national Competent Authority needs to have the following features:

- clear purpose
- security of tenure
- secure funding
- independence from government
- sound governance
- Aboriginal and Torres Strait Islander leadership and employees
- capacity strengthening protocols
- protocols for facilitating local and/or regional Competent Authority operations
- sound decision-making protocols
- databases with robust security.

The consultations showed in general that people in a specific community and/or region should have the opportunity to determine the form of Competent Authority that is best suited to their needs at a local level.

6.2.2.4 Self-determination, including decision-making, representation and participation, and capacity building and strengthening

The importance of Aboriginal people controlling decision-making was voiced very clearly by participants in consultation meetings. At several meetings participants expressed the view that decision-making for cultural matters on country needs to be undertaken by appropriate Aboriginal people. In the case of decision-making around Indigenous knowledge, at the regional and/or local level, participants also held the view that the traditional custodians of the lands to which the knowledge relates should be the decision-makers, with particular reference to the relevant knowledge holders, and/or senior law people.

Overall, the consultations emphasised that Aboriginal communities should determine for themselves how decisions are made within their community and whether there is a single process for all knowledge or whether different processes will apply to different types of knowledge. In addition to decisions around access to knowledge, there are also decisions that will need to be made around access and benefit sharing. Access and benefit-sharing decisions are made in Aboriginal communities in accordance with their own existing local protocols and ethics.

6.2.2.5 The role of a registrar

In the Discussion Paper, and in the Comparative Study prepared through the course of the Garuwanga Project, it was seen that many organisations included the role of a Registrar. This role was elaborated in the White Paper.[289] In regard to the role of the Registrar, the Garuwanga Project consultations in general showed that there is support for a male and a female registrar in the national Competent Authority. The consultations demonstrated some resistance to the registrars being able to delegate authority.

6.3 Two Laws: Reconciling Indigenous and Western Laws

One theme in the Garuwanga Project that arose during project meetings and discussions concerned the idea of an integration, synthesis, or rapprochement between Indigenous laws and Western legal systems, especially in regard to cultural heritage and Indigenous knowledge. A ‘reconciling’ between Aboriginal and Western laws emerged in this project as an important consideration and was the focus of one of the workshops at the 2019 Indigenous Knowledge Forum held in June 2019. 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. As one writer has suggested, in discussing the Nagoya Protocol:

[289] IKF White Paper, esp Part 9, ‘Registers and Disclosure’.

> 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.[290]

The text of the Nagoya Protocol, with its clear provisions concerning recognition of Indigenous community protocols and customary laws (in particular Article 12 (1)) invites a genuine shift towards acknowledging the Indigenous voice, and finding a meeting place between Western, and Indigenous laws.

Recognition of Indigenous peoples' rights to their customs, laws and traditions is an important element of their right to self-determination. These rights have emerged through international discourse in recent decades, most notably as provided in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). Although the UNDRIP, as a Declaration, is non-binding, it nonetheless forms an important part of the development of international norms, or 'customary international law' which includes Indigenous peoples' 'rights to their own legal regimes and the concomitant obligation of states to respect and recognise Indigenous peoples' legal regimes in order to secure their human rights'.[291] This is a crucial point in the realisation of models for competent authorities that are self-determining bodies.

In reconciling the prevailing Australian legal system with Aboriginal and Torres Strait Islander peoples' legal systems, the workshop at the 2019 Indigenous Knowledge Forum noted the key conflict between the two systems. Indigenous laws are land-based laws in that they are rooted in the concepts of what is good for the land and what is good for people on the land, while Western laws have developed out of feudal systems where the focus is on protecting the interests of the sovereign and maximising agricultural production from the land, which benefitted the feudal landlord. Indigenous laws come from the land and are designed to protect the biospheres/environment and the people on that land and does so through a framework of rights and responsibilities grounded in the land. Further, it was emphasised at the workshop that, while the Australian legal system is underpinned by a predominantly adversarial approach, Indigenous legal systems are in general informed more by negotiation, mediation and conciliation and other dispute resolution mechanisms. However, the Research Roundtable workshop discussion noted that the prevailing Australian legal system is able to incorporate some elements of Indigenous customary law, as Indigenous communities become empowered to self-regulate and achieve greater self-

[290] Saskia Vermeylen, 'The Nagoya protocol and customary law: the paradox of narratives in the law', *Law, Environment and Development Journal*, 9 (2). 2013, pp. 187-201, at P. 187.

[291] See Brendan M Tobin 'Bridging the Nagoya Compliance Gap: the Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights', *Environment and Development Journal* (2013), p. 146.

determination.[292] The report of the workshop has been recorded in the Closing Plenary of the 2019 Indigenous Knowledge Forum.[293]

Former Aboriginal and Torres Strait Islander Social Justice Commissioner with the Australian Human Rights and Equal Opportunity Commission, Professor Tom Calma notes 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.[294] Furthermore, some young Indigenous people reject the customary way of life and this too must be respected and brought into balance at the community level.[295] Calma observes that the different legal systems are not at cross purposes. Rather, one must support the other and we need to acknowledge that the Australian legal system cannot exclusively support Indigenous justice in communities where customary law practices endure.[296] As Smith and Bauman explain:

> [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 [297]

This comment supports the themes that we are dealing with in this project; that is, how a Competent Authority might function in a way that can mediate between these two approaches to governance.

6.4 Indigenous Governance and Self-Determination

The role of decision-making in forming competent authorities (briefly discussed in 6.2.2.4, theme 4, above) is central to of Indigenous governance and self-determination.

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[292] See for example David Weisbrot, 'Customary law', *Indigenous Law Bulletin*6.21 (2006): 3-4; Peter. R. Grose. (1995) 'An indigenous imperative: The rationale for the recognition of aboriginal dispute resolution mechanisms'. (1995), *Mediation Quarterly*, *12*(4), 327-338. These ideas are extensively discussed in the report *Recognition of Aboriginal Customary Laws*, Australian Law Reform Commission (ALRC) Report 31, 1986, Canberra: ALRC. On international legal discussions around customary law see Brendan Tobin, *Indigenous peoples, customary law and human rights-Why living law matters*. Routledge, 2014; Brendan M. Tobin, 'Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights', 9/2 *Law, Environment and Development Journal* (2013), p. 142,

[293] See 2019 Indigenous Knowledge Forum, Models for a Competent Authority – Facilitating Self-Determination, 12-13 June 2019, UST, Sydney, at <https://www.indigenousknowledgeforum.org/2019-forum>

[294] The Integration of Customary Law into the Australian Legal System Speech by Mr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner National Indigenous Legal Conference 2006; https://www.humanrights.gov.au/about/news/speeches/integration-customary-law-australian-legal-system-calma

[295] Ibid

[296] Ibid

[297] Diane Smith and Toni Bauman (2014), 'Background Paper for the Indigenous Governance Development Forum: Mapping Current and Future Research and Resource Needs', An initiative of The Australian Institute of Aboriginal and Torres Strait Islander Studies and The Australian Indigenous Governance Institute 29-30 July 2014, AIATSIS, Canberra, <https://aiatsis.gov.au/sites/default/files/products/research_outputs_other/smith-bauman-2014-background-paper-indigenous-governance-development-forum_0.pdf>, 10.

In discussing competent authorities, an emphasis is on the governance and regulation of bio-resources and associated traditional knowledge. This can be framed in a context of rights; for example, the notion of biocultural rights in the *Convention on Biological Diversity* (CBD) and the Nagoya Protocol.[298] These rights underpin the idea of 'governance principles', especially as these have been articulated in the Garuwanga Project. These governance principles, which are discussed in more detail in Chapter 4 section 4.3 of this Report, are founded in the concept of Indigenous self-determination, a concept articulated most prominently in the UNDRIP.

It is important to consider some of the nuances in the concept of self-determination. These include for example, the ways that self-determining rights and interests are situated, expressed and performed in contexts of specific locality, community and place. In this regard, the discussions in the Research Roundtable on April 12 of 2019 also turned to the question of Indigenous peoples' vis-à-vis the nation state; some members held that [the concept of] self-determination 'goes wider than Indigenous peoples versus nation-states'. If a Competent Authority is to be established within a framework that recognises Indigenous peoples' rights to self-determination, it will be independent from government, and be formed in accordance with Indigenous concepts of governance, and adherence to Indigenous ethics and cultural protocols.

6.4.1 Representation and Participation

There are many issues and challenges to be considered around representation and participation. Aboriginal community organisations typically are not situated in isolation from the wider geo-politics of place, region and language/cultural group. Aboriginal communities form part of complex, intertwined networks of organisations, people, family, language and community groups. As such, there are ongoing local politics that comprise the fabric within which the people and their organisations are situated. It also has to do with hierarchies of seniority at law. These factors are all critical in representation, that is, who is entitled to 'speak for country'.

We have discussed questions of representation briefly above, in section 5.1.1 of this report. Representation and identity are critical to any research engagement, with matters such as who 'speaks for' a community or group. When engaging with Aboriginal people to seek their views on complex issues, a project will necessarily identify particular individuals with whom the primary engagement and involvement is conducted. For this project, the PI's had the responsibility of identifying who were the relevant individuals in their respective communities. It is important to keep in mind that the matter of who this person is, is often a political one, and may in some circumstances be subject to some discussion and debate within the community. To adequately and precisely determine who has responsibility for representing, or who 'speaks for' a community, organisation, or other 'local' group is not easily determined, and there may be ongoing problems in regard to the selected representative. According to the AIATSIS Guidelines[299] it is essential for Indigenous research to recognise the diversity of Indigenous groups and communities and to not presume

[298] On Indigenous biocultural rights and biocultural governance, see for example J. Marina Agar, 'Biocultural Approaches: Opportunities for Building More Inclusive Environmental Governance', IDS Working Paper No. 502, 2017; Sanjay Kabir Bavikatte, Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights, New Delhi, Oxford University Press, 2014.

[299] Australian Institute for Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Aboriginal and Torres Strait Islander Studies*, Canberra, 2012.

that the view of one group represents the collective view of the community. Furthermore, it is important to differentiate between individual, group or collective rights, responsibilities and ownership.

6.5 Concepts of Place: Region, Locality, and Group

In discussing the concept of a Competent Authority, complex issues arise in regard to different 'levels' of Competent Authority. The Nagoya Protocol refers to 'relevant competent authorities of Indigenous and local communities'.[300] How is the concept of 'local' interpreted in the context of the Australian Aboriginal communities? It is important to tease out the issues, problems and challenges when discussing concepts of 'regional', 'local', and 'national', and how these concepts relate to Aboriginal notions of place, language and belonging. While our discussion here is at a more conceptual level, and are informed by our analysis of the project's outcomes, it is also essential to acknowledge that these are issues negotiated and decided by Aboriginal people.

For example, what is the nature of 'a community', and what are the implications of this for considering what level(s) and/or types of competent authorities have been favoured by participants in the consultations. Similarly, interpretations of what the terms 'regional' and 'local' mean, or imply, are situated within the specifics of place and community. This was discussed at the Research Roundtable meeting in April 2019, where some members suggested that when people refer to 'regional' in the Kimberley, they mean the whole of the Kimberley region. For example, the Kimberley Aboriginal Law and Cultural Centre (KALACC) represents the whole of the Kimberley region on Aboriginal law and culture issues. If people in the Kimberley region, for example, discuss the concept of 'local', they are likely to be referring more to the Prescribed Bodies Corporate, rather than to 'local communities'. The concept of the 'local' then, is particularly place, or area- dependent. This indicates that in designing a Competent Authority at a 'local' level, consideration must be given to the varieties of local discourse and meanings of 'local'.

The CBD and the Nagoya Protocol refer throughout to 'Indigenous and local communities'. This is an expression in international discourse and will be interpreted differently by each Party to the Convention and to the Protocol. In Australia, the use of the term 'local' in referring to Indigenous communities may indicate a range of meanings in terms of factors such as geographical location, language group, and proximity to a town or urban or regional centre. An expression that is often used is 'the local community'. This expression has implications in terms of proximity (or perhaps 'degree of local-ness') to important towns, other communities and organisations, services, and also to family/clan/language/culture groups. Therefore, it is necessary to remain aware of these nuances when discussing 'local' in the context of this project. The term 'regional' is also used to represent large geographical areas in Australia such as the 'Kimberley region' or the 'Murray Darling region' for example. In the Kimberley for example, people from among the many language groups have formed the Kimberley Land Council (KLC), Kimberley Aboriginal Law and Culture Centre (KALACC), and the Kimberley Language Resource Centre (KLRC).

[300] Nagoya Protocol, Article 14(3)(a).

The Garuwanga Project community consultations heard of the diverse make up of different communities. Particularly in urban locations, traditional owners may be significantly outnumbered by people from other Indigenous nations. In particular instances this may not present an impediment to running an effective Competent Authority where the traditional owners are respected as the custodians of Knowledge and the decision makers with regard to that Knowledge. However, where this may not be the case it should be open to the relevant groups of traditional owners to designate their own local Competent Authority and vest in such an authority the necessary powers they deem required regarding registering Indigenous knowledge. The Garuwanga Project through its Partner Organisations and community consultations has encountered examples of very simply structured community groups that could serve this purpose.

6.6 Conclusions from the Consultations

As discussed above, the consultations did not provide a universal endorsement for any specific kind of legal structure for a Competent Authority. However, it was clear that a single national Competent Authority would be insufficient for the proper governance of Indigenous knowledge protection, access and benefit sharing. A local or regional response would be necessary to ensure Indigenous community self-determination is achieved. These local or regional authorities will need to be supported by a national authority that would serve to satisfy Australia's international reporting requirements under the Nagoya Protocol.

Meanwhile, a number of features that the Competent Authority might have were identified through the consultations as reported above (section 6.2.2.3) and worth repeating. These are:

- clear purpose
- security of tenure
- secure funding
- independence from government
- sound governance
- Aboriginal and Torres Strait Islander leadership and employees
- capacity strengthening protocols
- protocols for facilitating local and/or regional Competent Authority operations
- sound decision-making protocols
- databases with robust security.

These features may be exercised differently depending on whether the Competent Authority is a local, regional or national one. But it is clear that to enable Australia's Indigenous peoples to exercise self-determination, each community and/or region must be empowered to determine the form of Competent Authority that best suits that community's/region's needs.

7 Models and Approaches for Competent Authorities

The Garuwanga Project has examined and discussed possible models and approaches for competent authorities in Australia, to manage, control, and make decisions in regard to Indigenous knowledge, and biological resources, and access and benefit-sharing regimes in regard to these. This Chapter discusses the range of possible models and options, in the context of some current and emerging developments in Australia that offer relevant insights and analogies. Some of these developments have been outlined in submissions prepared by the Indigenous Knowledge Forum. One was to the Australia Council, in relation to a Proposed National Indigenous Arts and Cultural Authority (2019).[301] The other, submitted in 2018, to the New South Wales Office of Environment and Heritage in relation to Aboriginal cultural heritage in NSW: A proposed new legal framework for cultural heritage in NSW.[302] But first, this section will review the outcomes from the Garuwanga Project Research Roundtable meetings, on Country consultations and the Indigenous Knowledge Forum held in June 2019.

7.1 A Tiered Approach

Through the discussions, consultation and analyses in the Garuwanga Project, a suggested approach has emerged in which competent authorities would be established as a 'multi-tiered' structure. The following discussion explores these different levels of Competent Authority, and the governance principles and standards that might be developed for each tier. Also important to examine are the relationships between each level, or tier of Competent Authority.

How a Competent Authority would operate

Discussions throughout the Garuwanga Project considered the ways in which a Competent Authority might operate. Among the elements discussed were the relative functions, roles and the responsibilities of the different levels or tiers of competent authorities. There is a reciprocal relationship between the structure of an organisational entity, and the way it operates. Structure, operation, legal framework, and associated political, socio-legal and cultural issues – are all components of the broader issue of governance. Although the consultations did not yield detailed comments on a possible structure for the national Competent Authority, there were strong views expressed about the way in which the authority should operate. One consistent view was that a peak body Competent Authority should operate only as a servicing body to the other bodies, not as a decision-making body. There was also a view that among the roles of a regional and/or local level Competent Authority, should be that of advocacy. In matters where there is the need for wider discussion on research projects which impacts collective rights, opportunities for broader dialogue and

[301] Natalie P Stoianoff, Dr Ann Cahill, Neva Collings, Dr Evana Wright, Fiona Martin, Proposed National Indigenous Arts and Cultural Authority (NIACA) Submission, Indigenous Knowledge Forum, 5 March 2019 available at: https://www.indigenousknowledgeforum.org/publications

[302] Evana Wright and Natalie Stoianoff, Submission on behalf of: Indigenous Knowledge Forum University of Technology Sydney, To: The NSW Government, Office of Environment and Heritage In response to Aboriginal cultural heritage reforms in NSW: A proposed new legal framework, 20 April 2018 available at: https://www.indigenousknowledgeforum.org/publications

resolution could be brokered through peer and broader cultural review. When considering possible roles for a Registrar, a likely role might include managing issues relating to databases. There may be a need for a male, and a female Registrar.

7.1.1 National, Regional, Local

The Nagoya Protocol, at article 13, calls for a National Focal Point, and for National Competent Authorities, and acknowledges that there may be more than one competent national authority on access and benefit sharing. Article 14(3)(a) also acknowledges the possible establishment of 'competent authorities of indigenous and local communities'. Such a Competent Authority, or authorities, would have the responsibility:

> for granting access or, as applicable, issuing written evidence that access requirements have been met and be responsible for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms.[303]

Despite not having yet ratified the Nagoya Protocol, Australia has named an individual in the Biodiversity Policy Section of the Federal Department of Agriculture, Water and the Environment as the national focal point on access and benefit sharing.[304] While this might be a necessary step in order for there to be a single reporting line responsible for Australia's liaison with the Secretariat, it reinforces the need to have a dedicated Competent Authority in relation to access and benefit sharing regarding traditional knowledge associated with Australia's genetic resources. This is important as the national focal point has the responsibility to make information available in relation to:

> procedures for obtaining prior informed consent or approval and involvement, as appropriate, of indigenous and local communities and establishing mutually agreed terms including benefit-sharing.[305]

Such a competent national authority, backed up by a series of local and/or regional competent authorities, would serve to provide that information to the national focal point. At present, no competent national authority has been put forward by Australia to the Access and Benefit-Sharing Clearing-House.[306] It should be noted that the vast majority of countries that have done so have nominated their relevant ministries or other government departments as the national competent national authority.[307] However, as identified in our Comparative Study,[308] there is precedent for non-government organisations to be endowed with the responsibility of a competent national authority.[309]

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[303] Nagoya Protocol, Art. 13(2).
[304] National Focal Points on Access and Benefit Sharing, Secretariat of the Convention on Biological Diversity, 4 July 2021, at: <https://www.cbd.int/doc/lists/nfp-abs.pdf>; See also ABS Clearing House, the official mechanism for recording such information: <https://absch.cbd.int/en/countries/AU>.
[305] Nagoya Protocol, Art. 13(1)(b).
[306] Access and Benefit Sharing Clearing-House, National Competent Authority, Secretariat of the Convention on Biological Diversity, at: https://s3.amazonaws.com/absch.documents.abs/contacts.pdf/absch-all-authority-en.pdf
[307] Ibid.
[308] Comparative Study Report, above n 85.
[309] Ibid, 14.

The Garuwanga Project has considered the ways in which competent authorities might be structured at different levels – national, regional and local – as the Nagoya Protocol recognises that, not only may there be more than one competent national authority, but that there may be several 'relevant competent authorities of indigenous and local communities' as noted above. Keeping this in mind, the Garuwanga Project Discussion Paper[310] explored the variety of existing Australian legal structures that could be utilised for the establishment of competent authorities in accordance with the Nagoya Protocol. These legal structures ranged from incorporated entities, registered co-operatives, prescribed bodies corporate, to independent statutory authorities, Aboriginal Land Councils, and trusts. For some of these people, none of these legal models may suit. Instead, unincorporated associations may be utilised at a local level, as evidenced by one of the Partner Organisations to the Garuwanga Project. These structures and their examples have been explored in Chapter 4 of this report. What became immensely clear when the Research Roundtable sought to discuss the suitability of the various structures was the need to identify the relevant governance principles against which each structure could be evaluated. As described in section 4.3.3, the Garuwanga Project developed its own model of governance principles for competent authorities charged with managing access and benefit sharing of Indigenous knowledge.

7.1.2 Relevant Governance Principles at each Tier

As a set of layered, or tiered entities, competent authorities will need to be established and operated in accordance with specific governance principles, to inform the identification of the most appropriate legal structure for the Competent Authority. Principles for governance (which we have discussed at length throughout this report, especially at Chapter 4 above) for these include values such as trust, confidence, participation and advocacy.

Broadly, governance has been described in one formulation as being: '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'.[311]

A critical feature of competent authorities is that they are established on the basis of effective governance principles. The concept of governance principles was introduced above (Chapter 4), and was also discussed in the Garuwanga Project Discussion Paper.[312] Governance Principles, enshrined in placed based traditional law and customs, that have been identified in the Garuwanga Project are:

- Relationships/Networks
- Trust/Confidence
- Independence from government
- Community participation

[310] Indigenous Knowledge Forum, Garuwanga: Forming a Competent Authority to protect Indigenous knowledge – Discussion Paper, UTS, April 2018. Available at: https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho

[311] Michael Dodson and Diane Smith, *Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities*, Centre for Aboriginal Economic Policy Research (CAEPR) Working Paper No.250/2003 (ANU Press, 2003), p. 1.

[312] Garuwanga Project Discussion Paper, above n 30, 32.

- Guarantees/Confidentiality
- Transparency/Accountability
- Facilitation
- Advocacy
- Communication
- Reciprocity

Another aspect of governance that was discussed by Research Roundtable members was the development of standards. A suggestion put forward at the Research Roundtable meeting of 19 April 2019, was that there might be templates, standards and tools developed by a peak body, for selection and use by other regional and/or local bodies. It was also suggested that the peak body should have ethical standards and guidelines for determining representation, and for how it would be oversighted financially. The development of standards would comprise an important element in the governance of competent authorities. It was suggested at one of the Research Roundtable meetings that there could be developed some standards, or regulations, from an Indigenous perspective, possibly along the lines of industry standards. The development of standards is partly also about developing capacity for competent authorities. It was suggested that a brokerage model might be relevant to this standard setting process, with the national Competent Authority performing the brokerage role, as it would provide for different regions and different communities to build frameworks and make decisions in regard to standards for each Competent Authority. The standards could also, in some Research Roundtable members' views, provide a baseline for benefit-sharing. A critical point in this discussion turned again, to the importance of Indigenous governance enshrined in traditional law and customs being developed from placed based Indigenous perspectives.

The Garuwanga Governance Principles have been demonstrated to apply at each tier of Competent Authority in accordance with the particular situations and experiences, and requirements of each level. As noted in Table 5 above and the analysis of structures in Chapter 4, these principles are relevant for the governance of competent authorities whether they are local, regional or, indeed, national.

7.1.3 Relationships between Competent Authorities

How will the different 'levels' or tiers of Competent Authority interact and engage with each other? The notion of a 'national' Competent Authority, and the relationships between this, and various types of 'regional' and/or 'local' competent authorities are discussed here.

This Report has clearly identified the need for different tiers of competent authorities. The relationships between these different tiers of competent authorities will depend on the nature of the separate, but mutually reinforcing roles and responsibilities of these competent authorities. The actual relationships between these different levels need to be considered, as well as the respective roles, functions and responsibilities.

Another suggestion from Research Roundtable discussions was that the Garuwanga Governance Principles could be transformed into a set of functions, or 'functionalities' for competent authorities. These would be important elements in the operations of either the peak body, and/or regional and local organisations. This then raises 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. Some members of the Research Roundtable suggested that a peak body Competent Authority (what might be termed a 'national', or 'Australian' Competent Authority) should be a servicing body to the other bodies, not a decision-making body.

At several points throughout the Garuwanga Project, a view has been expressed that local and regional competent authorities should not be subordinate to a national Competent Authority. The national Competent Authority needs to facilitate for, not to govern over, regional and/ local competent authorities. This is an important view about relationality that again reflects an Indigenous worldview. It is suggested, from many of the discussions in the Research Roundtable meetings, on Country consultations and at the 2019 Indigenous Knowledge Forum held on 12 and 13 June, that relationships between organisations are often seen not in a hierarchical, top-down sense, but rather, in terms of interconnecting, reciprocal and mutually supporting entities.

7.2 Relationships with Existing Indigenous Organisations

As discussed in the Garuwanga Project Discussion Paper, and borne out through consultations with Aboriginal communities and organisations, the relationships and networks that people in communities have with their existing organisations are crucial. These networks and relationships are built around family and kin relationships as well as a variety of other relationships. Some discussions with community organisations acknowledged that people place high importance on their relationships and networks with existing community organisations in their locality and region. In considering the purpose, roles and functions of a Competent Authority, it is important that the relationship a Competent Authority has with these existing organisations is understood.

As pointed out in the Garuwanga Project Discussion Paper, among the governance principles formulated to guide the development of a legal structure and functions for competent authorities, is that 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.'[313] Relationships are critical to establishing group membership and determining who has authority to make decisions. Importantly, a Competent Authority must also recognise the different kinds of relationships and networks that are already in existence and take a supporting and complementary role. These relationships were deemed to be highly important in the discussions during the community consultations. They acknowledged that people place high importance on their relationships and networks with existing community organisations in their locality and region. In considering the purpose, roles and functions of a Competent Authority, it is important that the nature of the relationship a Competent Authority has with these existing organisations is understood.

7.3 Competent Authorities and Indigenous Self-Determination

The idea of a Competent Authority owned, controlled and managed by, and for, Indigenous peoples is critical to this discussion. This part of the Report explores some of the issues and challenges for a Competent Authority for access and benefit sharing to be established in ways that can achieve effective self- determination for Indigenous peoples.

[313] Garuwanga Project Discussion Paper, 34.

For a Competent Authority to effectively realise Indigenous peoples' rights to self-determination it should be independent from government, and be owned, controlled and managed by Indigenous people. The ways in which this can be done require consideration of the kinds of structure of such an organisation. One possible arrangement that was suggested in discussions during the project (at the Research Roundtable meeting of 12 April 2019) is the notion of a charitable trust structure which will be considered, among others, in section 7.4. Meanwhile, in this section, the achievement of Indigenous self-determination will be explored.

For many decades, Indigenous peoples have been calling for their rights to self-determination to be recognised. Their voices were provided an international forum, with the establishment in 1982 of the Working Group on Indigenous Peoples within the United Nations. A substantial outcome from long negotiations in that forum over many decades, was the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). Key provisions on the right to self-determination are at Articles 3 and 4. Article 3 states that:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[314]

James Anaya has described rights, what he referred to as 'internal' self-determination, as entailing 'the possibility of each people and community to regulate its internal matters through the use of its legal institutions and rules, which reflect its cultural patterns, such that the members may generally feel associated with the decision taken'.[315] This is reinforced by Article 4 which states that:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

It is worth noting here that Victoria Tauli-Corpuz, who was Special Rapporteur on the Rights of Indigenous Peoples from 2014 to 2020, produced a report on her visit to Australia in 2017, in which she drew attention to problems in human rights for Aboriginal and Torres Strait Islander people. She wrote:

> While Australia has adopted numerous policies aiming to address the socioeconomic disadvantage of Aboriginal and Torres Strait Islander peoples, the failure to respect their rights to self-determination and to full and effective participation is alarming. The compounded effect of those policies has contributed to the failure to deliver on the targets in the areas of health, education and employment in the "Closing the Gap" strategy and has contributed to aggravating the escalating incarceration and child removal rates of Aboriginal and Torres Strait Islanders.[316]

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[314] UNDRIP, Art 3.

[315] James Anaya, *Indigenous Peoples in International Law*, OUP, 1996, who questions the usefulness of the internal/external dichotomy.

[316] Victoria Taulit-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, Note by the Secretariat, UN Human Rights Council, Thirty-sixth session, 11-29 September 2017, A/HRC/36/46/Add.2, 8 August 2017, para 36, p. 7.

Of particular relevance to competent authorities is the comment by another writer, Giulia Sajeva, that

> Traditional local institutions regulating the use of lands and natural resources are the primary instrument giving voice to the needs, concerns, and interests of the peoples and communities …'.[317]

In particular, it is envisaged that 'Indigenous peoples may exercise self-determination through participating in, and influencing the law and decision-making processes of the State'.[318] But control may also be exercised 'over the legislation and administrative functions of the State in areas which affect their nations or communities through the devolution of State governance powers'.[319]

The establishment, in 1990, of the Aboriginal and Torres Strait Islander Commission (ATSIC) was a key moment in enabling Australia's Indigenous peoples some measure of control over aspects of their own affairs.[320] ATSIC did not achieve self-determination for Aboriginal and Torres Strait Islander peoples, as the organisation was not independent from government, ultimate decision-making on critical aspects of Indigenous affairs remained with relevant Ministers, and ATSIC's budgets were controlled by Cabinet. ATSIC did provide a representative structure, where members were elected by Aboriginal and Torres Strait Islander people from throughout the country, through sixty regional councils and a twenty-member national board of commissioners. One commentator described the organisation as:

> … a hybrid corporatist organisation which could be seen, alternately, as bringing large numbers of Indigenous representatives (almost 800 in all) into government, or as delegating some elements of Indigenous affairs governance to elected Indigenous representatives.[321]

While ATSIC was a unique and important development in regard to achieving a measure of control for Australia's Indigenous peoples, ultimately the model required substantial reform if it was to succeed. The organisation was abolished by the Howard Government in 2005.

However, there are other ways that Aboriginal and Torres Strait Islander peoples have achieved some measures of control over decision-making in regard to various aspects of their lives, such as through the Aboriginal Land Councils, the Australian Institute of Aboriginal and Torres Strait Islander Studies, and Prescribed Bodies Corporate. The extent to which these various organisations may be said to enable Australia's Indigenous peoples some degree of self-determination is a theme that warrants further investigation. The establishment

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[317] Giulia Sajeva, *When Rights Embrace Responsibilities: Biocultural Rights and the Conservation of Environment*, New Delhi, India, OUP, 2018, p. 106.

[318] *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Asia Pacific Forum of National Human Rights Institutions (APF), August 2013, 22.

[319] Ibid.

[320] See for example Diane Smith, 'From cultural diversity to regionalism: the political culture of difference in ATSIC', in Patrick Sullivan, ed, Shooting the Banker: Essays on ATSIC and Self-Determination, Darwin, the North Australia Research Unit, ANU, 1996, pp. 17-41.

[321] Will Sanders, *Towards an Indigenous order of Australian government: Rethinking self-determination as Indigenous affairs policy*, CAEPR Discussion Paper No. 230/2002, Canberra: ANU, p. 4; see also Patrick Sullivan, ed. Shooting the banker: Essays on ATSIC and self-determination, North Australia Research Unit, ANU, 1996.

of competent authorities over their traditional and cultural knowledges at local, regional and national levels by Indigenous Australians for Indigenous Australians would be an 'effective recognition of indigenous peoples' political and legal institutions by the State and the exercise of direct decision-making power in accordance with their own laws, traditions and customs.'[322] This is reinforced by article 18 of UNDRIP, which states that

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

In relation to the local and regional competent authorities, the Empowered Peoples Design Report (2015)[323] emphasises the sharing of responsibilities and powers 'among individuals, families and communities at the local, subregional and regional levels' as a mechanism for ensuring local or regional controls.[324] Such action would be necessary in order to reverse the impact of current practices which place 'nearly all responsibility with central governments disempower[ing] Indigenous people and imped[ing] development'.[325] The Empowered Peoples Design Report goes on to explain that, in this context, for Indigenous people to achieve 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'.[326] It is worth noting too the Uluru Statement from the Heart, which was presented to the Australian Government in 2017. This powerful statement, which was formulated through a consultation process by Aboriginal and Torres Strait Islander peoples, reaffirms Indigenous peoples' continued sovereignty, and calls for, among other things, the truly inclusive participation of Indigenous peoples in the nation state, through an Indigenous Voice to Parliament enshrined in the Australian Constitution. The Australian Government has considered this to some extent, although in a weak approach (omitting Constitutional entrenchment, and proposing a 'Voice to Government'). In October 2020 the Federal Minister for Indigenous Australians released a report entitled *Indigenous Voice Co-Design Interim Report*, calling for submissions. That Interim Report proposed a three-tier approach, with an Indigenous Voice at the national, regional and local levels. Meanwhile, the Albanese government has promised a referendum on an Indigenous Voice to Parliament will take place in the 2023-24 financial year.[327]

7.4 Options for Legal Structures of Competent Authorities at each Tier

There are a number of options for models and approaches for competent authorities and their legal and administrative structures as explored in Chapter 4 of this Report. Underpinning consideration as to what structure and form a Competent Authority might have, is the principle that people in a specific community and/or region should have the opportunity to determine the form of Competent Authority that is best suited to their needs at a local level.

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[322] OHCHR & APF, above n 317.

[323] Empowered Communities, *Empowered Communities: Empowered Peoples Design Report*, 2015. Available at: < https://empoweredcommunities.org.au/wp-content/uploads/2018/04/EC-Report.pdf>

[324] Ibid, 22.

[325] Ibid.

[326] Ibid.

[327] The Hon. Anthony Albanese, Prime Minister of Australia, Address to the First nations referendum Engagement Group, 29 September 2022, Parliament House, Canberra, available at < https://www.pm.gov.au/media/address-first-nations-referendum-engagement-group >

This reinforces the exercise of self-determination. In considering competent authorities as self-determining entities, attention should be paid to the local level of decision making in Aboriginal communities, which typically rests among clan, family, and language groups on Country. As such, tensions may arise in the ways that decisions are made, between local and regional levels. The complex dynamics at play in the nexus between local and regional levels is a subject that we draw some attention to in other parts of this report.

Although the consultations for this project did not yield a consensus view about what kind of legal structure should be developed for competent authorities, there were some indications in Garuwanga forums and discussions as to the possible options for organisational structures. For example, these organisations may be established as incorporated, or unincorporated bodies. A regional Competent Authority structure might be established as a Trust arrangement which has a charitable purpose, and with beneficiaries being the Prescribed Bodies Corporate of the communities in that region. If an unincorporated entity is considered, then that may be more closely aligned to Aboriginal communities in terms of the ways that decision-making is conducted, although as unincorporated bodies, these would have no legal basis for entering into formal agreements with government. It may be feasible in this case, for an arrangement of some kind to be made that links an unincorporated body to an incorporated one, which would then enable the former to access formal legal mechanisms required for its operation within a Western style management structure.

There were also some indications as to other features that competent authorities might have. For example, an optimal approach might be to establish a series of competent authorities at different levels: national, regional and/or local. A 'national', or 'Australian' Competent Authority could serve the purpose of the National Focal Point (Nagoya Protocol article 13), and also provide for the development and implementation of standards for benefit-sharing, which would service all the different tiers of competent authorities.

7.4.1 National Competent Authority

In summary, drawing from all the various inputs into the Garuwanga Project, a picture of what a national Competent Authority to administer protection of Indigenous knowledge and access and benefit sharing arrangements would ideally look like has emerged. It would exhibit the following features:

- A single national competent body should be established, under the provisions of the Nagoya Protocol, to carry out the tasks of both national Competent Authority and to be a national focal point for Indigenous knowledge.
- It should be long lasting and securely funded
- It should be independent from government
- Its legal structure is less important than its function and purpose
- It should be Aboriginal and Torres Strait Islander controlled and managed as far as possible

- It should have sound governance in accordance with the Garuwanga principles (see section 4.4 above in this report)

- It should have clearly defined purpose, relationship to the community and to other organisations

- It should serve to strengthen capacity for Aboriginal and Torres Strait Islander peoples

- It should facilitate local Competent Authority operations; and

- It should have appropriate decision-making protocols, including provisions for dispute resolution and mediation between different levels of Competent Authority.

7.4.2 Regional/local competent authorities

Analysis of the consultations have produced the following general views about how regional/local competent authorities might operate:

- The form of the local Competent Authority is for each community to decide, or in the case of a regional Competent Authority, the collective of the communities represented;

- The scope of community served will need to be negotiated for each local/regional Competent Authority, taking into account the differing demographics between communities;

- Who sits on the local/regional authority and how they are appointed to that role will need to be negotiated for each Competent Authority;

- The local/regional competent authorities are independent of the national Competent Authority and are not subordinate to it;

- Local/regional competent authorities should be supported by the national Competent Authority;

- 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.

Funding

One of the constraints that may influence how local/regional competent authorities are formed and operate is the extent to which external funding to support this activity will be available. Some entities may be self-funded. This may be particularly so for smaller community-based organisations. It is also highly desirable to ensure that local/regional competent authorities are not overburdened with compliance systems.

Decision-making

The local/regional competent authorities are not intended to be subordinate to the national Competent Authority. Rather, the national Competent Authority is viewed as an organisation that exists to support and serve the local/regional competent authorities while meeting Australia's international obligations under the CBD and Nagoya Protocol.

By providing centralised services that can be used by all local/regional competent authorities, the national Competent Authority will help reduce the financial burden on local/regional competent authorities. At the same time this will provide these competent authorities with access to a level of service and expertise that they might otherwise struggle to secure. Communities find it beneficial to be able to source the services they need from a central provider rather than having to deal with multiple agencies to craft solutions in relation to particular issues.

The national Competent Authority would also play a role in strengthening capacity within local/regional competent authorities, helping to build the range and depth of skills that these competent authorities can access. Importantly the relationship between the national and local/regional competent authorities should be such that opportunity is provided for Indigenous communities to achieve self-determination with respect to protection of their knowledge.

7.4.3 Possible Legal Models

At the beginning of the Garuwanga Project, several potential Competent Authority legal structures were envisaged: Aboriginal and Torres Strait Islander Corporations, corporations under section 57A of the *Corporations Act 2001* (Cth), including incorporated and unincorporated associations, trust arrangements involving such organisations, statutory bodies and Aboriginal Land Councils. These have been examined in chapter 4 of this Report.

This range of opportunities have been acknowledged in other research. Most notably, the work of Terri Janke in 1999[328] and 2009[329] on the establishment of a National Indigenous Cultural Authority canvassed a range of options, including consideration of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) as an entity in terms of the extent to which it may be independent from government.

As discussed in section 4.1.4.1, the AIATSIS is a statutory body that plays a significant role in relation to ethics and protocols for research related to Aboriginal and Torres Strait Islander peoples and manages collection databases of materials related to the cultures and histories of Aboriginal and Torres Strait Islander peoples.

Janke's work has since inspired other efforts to explore the establishment of a national body for the protection of Australian Indigenous cultural and intellectual property rights such as the concept of a National Indigenous Arts and Cultural Authority (NIACA) mentioned at the

[328] Terri Janke, Our Culture: Our Future – Report on Australian Indigenous cultural and intellectual property rights, Michael Frankel and Company, 1999.
[329] Terri Janke, Beyond Guarding Ground: A vision for a National Indigenous Cultural Authority, Terri Janke and Company Pty Ltd, Sydney, 2009.

beginning of this chapter. The Australia Council commenced action on this proposal in October 2018.[330] A NIACA would be a 'peak body providing a collective voice across art forms; promoting the rights of First Nations artists and cultural custodians across Australia; or building networks and capacity to support a flourishing First Nations arts sector in its diversity and entirety'.[331] The Indigenous Knowledge Forum submission to the Australia Council Discussion Paper proposed that a body such as the NIACA should include in its scope, Indigenous knowledge, and related innovations and practices, as these are elements of a more holistic Indigenous culture and heritage.[332]

In examples of some existing approaches to Indigenous people managing their own Indigenous knowledge and biodiversity, we might look to the Indigenous Protected Areas Program of the Australian Federal Government. Indigenous Protected Areas are an example of how the Federal Department of the Environment and Energy has engaged Indigenous communities in the protection of biodiversity across Australia's National Reserves System. In the Indigenous Knowledge Forum submission to the Australia Council NIACA proposal, it was demonstrated that with respect to these Indigenous Protected Areas

> [t]hrough funded agreements with the Australian Government, Indigenous communities or organisations can voluntarily manage their land and sea country as a protected area for biodiversity conservation.
>
> Cultural heritage in these Indigenous Protected Areas can be protected into the future, and employment, education and training opportunities can be provided for the members of these Indigenous communities. This program empowers Aboriginal and Torres Strait Island peoples 'to choose when, where and how they will manage their own country, combining traditional knowledge with western science'. This program was established in 1997 and includes 75 Indigenous Protected Areas covering 45% of the National Reserve System.[333]

However, on the question of the choice of legal model for a national authority, the Australia Council Discussion Paper also recognised the potential of publicly listed or private companies, statutory authorities, Indigenous corporations, and the registration of companies limited by guarantee and Indigenous corporations as charities.[334]

In its submission to the Australia Council on the question of legal model, the Indigenous Knowledge Forum referred to its past work encapsulated in its White Paper for the NSW Office of Environment and Heritage in 2014[335], and also to the research findings of this Garuwanga Project.[336] After providing a summary of the key criteria for an Indigenous Competent Authority and the results of the international comparative study conducted under

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[330] Australia Council, *A Proposed National Indigenous Arts and Cultural Authority: Public Discussion Paper*, 8 October 2018.
[331] Ibid, 4.
[332] Stoianoff et al, above n 300, 4-6.
[333] Ibid, 12-13; also, See the Federal Department of Agriculture, Water and the Environment website https://www.environment.gov.au/land/indigenous-protected-areas
[334] With the Australian Charities and Not-for-profits Commission (ACNC) under the Charities Act 2013 (Cth).
[335] UTS – Indigenous Knowledge Forum and North West Local Land Services, *Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management* (White Paper, Office of Environment and Heritage, Government of New South Wales, 2014) https://www.indigenousknowledgeforum.org/white-paper (White Paper).
[336] Stoianoff et al, above n 300, 16-26.

the Garuwanga Project, the submission reviewed state-based examples of Australian legislation dealing with Aboriginal cultural heritage. These examples included the Victorian *Aboriginal Heritage Act 2006*, the West Australian *Aboriginal Heritage Act 1972,* the *Northern Territory Heritage Act 2011*, and the Queensland *Aboriginal Cultural Heritage Act 2003*. The nature of the bodies created by these laws were in effect advisory only. Hence, the decision-making models created by these laws are insufficient for a Competent Authority dealing with access and benefit sharing in relation to Indigenous knowledges. Unsurprisingly, '[t]hese examples fail to demonstrate a government commitment to self-determination by Aboriginal and Torres Strait Islander peoples'.[337]

The submission also referred to the NSW proposal of an Aboriginal Cultural Heritage Authority (ACHA), which would be responsible *inter alia* for the registration of intangible Aboriginal cultural heritage, to be established should the draft *Aboriginal Cultural Heritage Bill 2018* proceed.[338] Although there are some useful elements in the proposed ACHA, as the Indigenous Knowledge Forum submission on the draft Aboriginal Cultural Heritage Bill asserted, in its proposed form, such an ACHA is problematic as it centralises decision-making, rather than offering a dispersed model.[339]

Finally, the Indigenous Knowledge Forum submission to the Australia Council Discussion Paper on the establishment of a NIACA, presents an overview of the key legal structures available for establishing a Competent Authority

> that is better placed to support self-determination and provide Aboriginal and Torres Strait Islander peoples with true control over processes and decision-making with respect to access and benefit-sharing in relation to their traditional knowledge.[340]

Each structure was described with reference to a particular Aboriginal/Indigenous organisation that utilised that structure. While the majority of this material originally is sourced from the Garuwanga Project Discussion Paper and chapter 4 of this Report, it is worthwhile reproducing the way that material was presented in the Indigenous Knowledge Forum submission to the Australia Council, as provided by the following box (footnotes omitted):

[337] Ibid, 24.

[338] Draft *Aboriginal Cultural Heritage Bill 2018*, clause 8. For a discussion about the proposed Aboriginal Cultural Heritage Authority see: Kylie Lingard, Natalie P. Stoianoff, Evana Wright and Sarah Wright, 'Are we there yet? A review of proposed Aboriginal cultural heritage laws in New South Wales, Australia', *International Journal of Cultural Property* (2021), 1, 9-11.

[339]Wright & Stoianoff, above n 301, 4-6.

[340] Stoianoff et al, above n 300, 24.

Examples of Existing Australian Legal Structures

Papunya Tula Artists Pty Limited is a **private company** owned and operated by traditional Aboriginal people from the Western Desert of the Luritja/Pintupi language groups. 'The aim of the company is to promote individual artists, to provide economic development for the communities to which they belong and assist in the maintenance of a rich cultural heritage.' There are 49 shareholders and the company represents approximately 120 artists.

The North Australian Indigenous Land and Sea Management Alliance Ltd (NAILSMA) was established to assist Indigenous land and sea managers and owners across northern Australia. NAILSMA is a **public company limited by guarantee**. It is a charity. There is a maximum of 10 and no less than 5 directors who are representatives of the body corporate members. The members may by resolution at an annual general meeting appoint four independent directors to the Board who are able to contribute relevant skills and experience to the Board, including one director appointed as the independent chair of the company. The Board may appoint Advisory Committees to advise the Board from time to time on any matters considered by the Board to be relevant to promoting the objects and purposes of NAILSMA. In 2013, NAILSMA was admitted as a Member organisation of the world's largest professional global conservation body, IUCN (International Union for Conservation of Nature). NAILSMA is the first Indigenous-led Australian organisation to become a member.

Winanga-Li Aboriginal Child and Family Centre is a **not for profit incorporated association** and a charity that provides services in family support, disability support, health services and education. In addition to a long day care centre, the organisation provides family support services and outreach activities across northern and north-west New South Wales. There is a Board comprising up to 7 Directors elected from the association members. At least 5 of the directors must be Aboriginal persons and no more than 2 directors may be non-Aboriginal persons. The Board elects a Chairperson and Deputy Chairperson. There is also provision for appointment of a secretary, public officer and treasurer and a CEO. A minimum requirement is that the secretary and public officer must be Aboriginal persons.

Indigenous Remote Communications Association (IRCA) is an **Aboriginal corporation registered with ORIC**. It is incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). Fifty-one per cent of members must be Indigenous. IRCA has members as opposed to shareholders. It is a charity and a deductible gift recipient (DGR). It is the peak body for Aboriginal and Torres Strait Islander broadcasting, media and communications. The Constitution allows for up to 9 Board members at least half of whom must be from remote areas. Directors must be Aboriginal or Torres Strait Islander. There is also provision for up to an additional 3 Board appointed positions to provide particular expertise. The Board includes a male and female chairperson. Directors are elected under a Diversity policy and Skills and Experience matrix.

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is a research, collections and publishing organisation established as **a statutory authority** under the *Public Governance, Performance and Accountability Act 2013*. A statutory authority is a body set up by enabling legislation that authorises the body to enact Regulations or Rules on behalf of the government. The delegation of power by government to the Statutory Authority is intended to provide legal efficiency, better allocation of resources, transparency and accountability. Federal statutory authorities are established under the *Commonwealth Authorities and Companies Act 1997*. AIATSIS operates under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989.* Until recently AIATSIS sat within the portfolio of the Department of Education and Training. The Minister responsible for AIATSIS was the Minister for Education and Training. In a recently announced change, AIATSIS will move to the Department of the Prime Minister and Cabinet reportedly *to play a more strategic role in informing the government on matters relating to Aboriginal and Torres Strait Islander cultures and languages*. AIATSIS is governed by a Council of 9 members responsible for ensuring performance across all of AIATSIS' functions and setting its policies. The Council is also responsible for appointing a CEO who in turn is responsible for the operations and performance of the organisation. This responsibility is carried out with the assistance of a Senior Executive Board including a Chief Operating Officer and directors of collections and research.

If we are to draw conclusions from this analysis, it is that the nature of the Competent Authority might dictate the legal structure required. For instance, a local community engaged in commercial enterprise with relation to its Indigenous knowledge and cultural production might utilise a private company structure such as that utilised by Papunya Tula Artists Pty Limited. Meanwhile, a larger community of native title holders might use their Prescribed Body Corporate as their local Competent Authority and have the opportunity for it to be registered as a charity.

Similarly, an association of Indigenous knowledge holders from several communities might also make use of a not-for-profit incorporated association (registered under the laws of one state or territory) or an Indigenous corporation registered with ORIC and obtain charitable registration and deductible gift recipient endorsement for the common purpose of protecting and managing their collective knowledges databases. That would be an example of a potential regional Competent Authority, but the Indigenous corporation might also be suitable for a national Competent Authority such as IRCA, the peak body for Aboriginal and Torres Strait Islander broadcasting, media and communications. Alternatively, a public company limited by guarantee such as NAILSMA described above, also registered as a charity, might be another option for either a regional or even national Competent Authority.

In establishing a national Competent Authority that answers to each of the regional and local competent authorities, three structures, namely, an Indigenous corporation registered with ORIC, a public company limited by guarantee or an independent statutory authority, are viable options. The first two options provide a clear separation from government involvement or influence. And if the Indigenous corporation is utilised as a trustee, the national Competent Authority could be established as a charitable trust with regional and local competent authorities as the beneficiaries. As for the statutory authority, such as AIATSIS, there is still that connection to government which might be considered unacceptable to Aboriginal and Torres Strait Islander communities.

What is clear in each scenario is that no matter what that legal structure is, the Competent Authority could incorporate the features identified in section 7.4.1 above and the way it operates should comply with good governance standards. The Garuwanga Project Governance Principles provide a model for such governance standards, but what this project emphasises is that it is up to the relevant Indigenous communities to exercise self-determination. A community's governance capacity can be strengthened through 'community ownership' and the exercise of autonomy and authority to 'address their own needs'.[341] As Tsey et al explain, for such Indigenous empowerment to flourish, 'community ownership' is necessary and that:

> Organisational 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...[342]

[341] *What works in effective Indigenous community-managed programs and organisations* CFCA Paper No. 32 – May 2015 Australian Institute of Family Studies https://aifs.gov.au/cfca/publications/what-works-effective-indigenouscommunity-managed-programs-and-organisations/critical

[342] Komla Tsey, Janya McCalman, Roxanne Bainbridge and Catherine Brown, 'Strengthening organisational capacity to improve Indigenous Australian community governance: A two-way approach' (2012) 2(2) *International Review of Social Sciences and Humanities*, 162, 169.

8 Conclusions and Implications for Further Research

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.[343]

The second paragraph of Article 31 of UNDRIP expects nation states to work with their Indigenous peoples to 'take effective measures to recognize and protect the exercise of these rights'. That requires the development of legal mechanisms to recognise and protect 'cultural heritage, traditional knowledge and traditional cultural expressions'. As described in chapter 1 to this Report, the Indigenous Knowledge Forum embarked upon that journey with its first major project to create a legal regime for the state of New South Wales that would recognise and protect Aboriginal knowledge associated with natural resource management. That project was based on Australia's obligations to comply with the *Convention on Biological Diversity 1992*, in particular Article 8(j) of the Convention, and Australia's path to ratification of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization 2010*.

The White Paper[344] that resulted from that project proposed a legislative 'Competent Authority' framework to provide governance for administering a legal regime covering the creation, maintenance and protection of community knowledge databases. However, community consultation raised concerns about the form such an authority would take, its independence from government, how it would be funded and wound up, local Aboriginal representation and engagement. That led to the Garuwanga Project designed to address these issues by engaging Aboriginal communities through an action research methodology within an Indigenous research paradigm. The specific aims of the Garuwanga Project were to:

1. identify and evaluate a variety of legal structures for a Competent Authority suitable for governing and administering an Indigenous knowledge protection regime
2. facilitate Aboriginal Community engagement in the process of such identification and evaluation
3. recommend an appropriate legal structure for such a Competent Authority in accordance with that engagement.

This document has reported on the outcomes of the Garuwanga Project with chapter 1 setting out the background to and methodology of the project and chapter 2 explaining the significance of a Competent Authority in the governance over the protection of, access to and

[343] United Nations Declaration on the Rights of Indigenous Peoples 2007, article 31(1).
[344] UTS – Indigenous Knowledge Forum and North West Local Land Services, *Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management* (White Paper, Office of Environment and Heritage, Government of New South Wales, 2013) <https://www.indigenousknowledgeforum.org/white-paper>

benefit sharing over the use of Indigenous knowledge. Chapter 3 reports on the Comparative Study undertaken at the beginning of the Garuwanga Project to help identify key examples of competent authorities in use from sixty-nine nations that already have functioning access and benefit sharing regimes over their genetic resources and associated traditional or Indigenous knowledges. Chapter 4 goes on to provide detailed analyses of the variety of legal structures available for competent authorities under Australian law, comparing and contrasting existing Indigenous and non-Indigenous organisations utilising those structures and reporting on the Garuwanga Project Governance Principles developed as a model of governance for their evaluation.

Chapter 5 of this Report focusses on the consultations with Aboriginal communities associated with the Garuwanga Project. It explains the background to, and methodology employed in, the consultations including the ethics and consent process. Chapter 6 goes on to provide an analysis of the consultation data collected and summarises the Garuwanga Project's Analysis of Consultations Report. Based on these consultations, the Comparative Study, Research Roundtable meetings and the 2019 Forum, chapter 7 provides a detailed examination of the models and approaches that can be taken for the establishment of competent authorities to govern Indigenous knowledges in Australia.

The Garuwanga Project Governance Principles that were developed to evaluate Australian-based organisations offer an important framework for examining these potential models for competent authorities. These principles, and the outcomes of the Garuwanga Project 'on Country' consultations, have been crucial in the project's proposed tiered approach for competent authorities, which would operate in Australia starting with the local or regional level, supported by a national level reporting body. What is clear from this project is that there are a variety of legal structures that can be employed to establish competent authorities at each of the potential three tiers. Some structures are more appropriate at the local and/or regional level while others are more suited at the national level. But ultimately, Aboriginal and Torres Strait Islander communities must be empowered to make that choice. 'Community ownership' has been described as the critical factor in successful Indigenous community-managed programs:

> Community ownership is considered important because it ensures authority and autonomy over all aspects of the project; builds the commitment and enthusiasm of all people involved in the program, including collaborators … and contributes to building community capacity so that communities can address their own needs...[345]

Australian governments, whether, commonwealth, state or territory, have the opportunity to support Australia's Indigenous communities and individuals in exercising their self-determination over their cultural knowledge and heritage through independent competent authorities. As the Empowered Communities: Empowered Peoples Design Report explains:

> Governments must stop assuming Indigenous people need government intervention and leadership in all aspects of their lives. Instead, government must respond by providing Indigenous people with the means of their own empowerment. This must entail sharing or relinquishing certain powers and responsibilities and supporting

[345] *What works in effective Indigenous community-managed programs and organisations* CFCA Paper No. 32 – May 2015 Australian Institute of Family Studies https://aifs.gov.au/cfca/publications/what-works-effective-indigenouscommunity-managed-programs-and-organisations/critical

> Indigenous people with resources and capability building to assume these powers and responsibilities.[346]

This notion is supported by the Garuwanga Project. The project has sought to explore the potential for Indigenous organisations to be established (competent authorities as provided by the Nagoya Protocol) that can empower communities in decision-making and control over their biological and genetic resources and associated knowledge. The Garuwanga Project relies on the need to implement stand-alone or *sui generis* legislation to regulate the protection and use of Indigenous knowledges and culture. Finally, we are seeing recognition of the need for such stand-alone legislation across several recent government enquiries and reports. Two such reports were delivered this year. One by the Productivity Commission and the other by IP Australia.

In July 2022, the Productivity Commission issued a draft report analysing Indigenous cultural intellectual property (ICIP) and proposing policy and regulatory responses to address current deficiencies in dealing with inauthentic visual arts and crafts in First Nations styles.[347] The key regulatory response embraces the need for dedicated legislation to tackle the annual $50 million plus fake arts and crafts industry.[348]

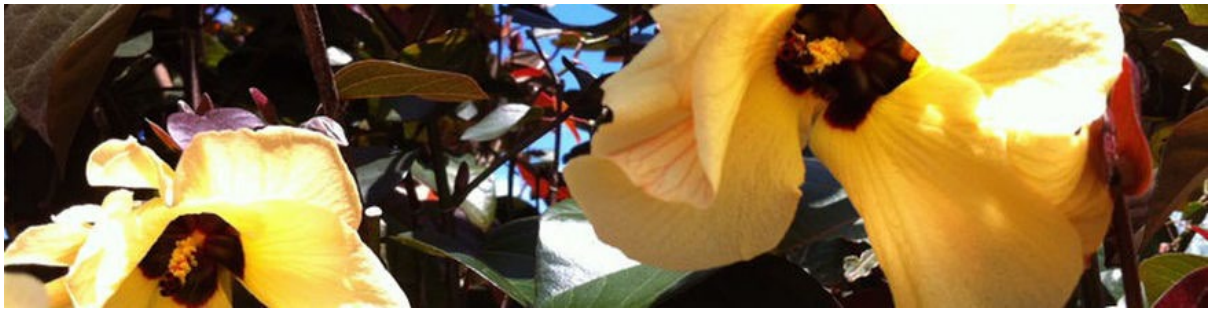
Meanwhile, the work of IP Australia on the protection of traditional knowledge and traditional cultural expressions has led to a scoping and feasibility study for new stand-alone legislation to protect such ICIP referring to it as Indigenous Knowledge or IK. The 'Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge', was prepared by Ninti One Limited under commission by IP Australia on behalf of the Intellectual Property Policy Group and issued 5 October 2022.

Both Reports recognise the need for a national body to regulate such stand-alone legislation whatever form that might take. It is hoped that the work of the Garuwanga Project, including the models and approaches for creating competent authorities discussed at Chapter 7 of this report, provide a pathway to empower communities in decision-making and control over not only their biological and genetic resources and associated knowledge but also, more broadly, their Indigenous knowledges and culture.

[346] Empowered Communities, above n 322, 20.
[347] Productivity Commission*, Aboriginal and Torres Strait Islander Visual Arts and Crafts Draft Report*, Commonwealth of Australia, July 2022. At the time of approving the Garuwanga Report, the Study Report of the Productivity Commission was released.
[348] Ibid, 2.

Appendix 1 Report on Consultation Findings

Indigenous Knowledge Forum



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Evana Wright, Neva Collings and Andrew Mowbray

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1 Overview of Findings

Many of the consultation participants indicated support a single national Competent authority serving as both a national Competent authority and a national focal point, with regional or community based competent authorities that may vary in their geographical coverage.

It is important to note here that the terms 'local', 'regional', and 'community', require further analysis and discussion. For example, what is the nature of 'a community', and what are the implications of this for considering what level(s) and/or types of competent authorities have been favoured by participants in the consultations. Similarly, interpretations of terms 'regional' and 'local' also need to be further teased out, This is done to some degree later in this Analysis of Consultations Report, and will be a subject for discussion in the Project's Final Report.

There was not a universal endorsement among consultation participants for any specific kind of legal structure. However, participants did consider the ways in which a Competent authority might operate.

The analysis of the consultations indicated that the national Competent authority needs to have the following features:

- clear purpose
- security of tenure
- secure funding
- independence from government
- sound governance
- Aboriginal and Torres Strait Islander leadership and employees
- capacity strengthening protocols
- protocols for facilitating local and/or regional Competent authority operations
- sound decision making protocols
- databases with robust security.

The consultations showed that people in a specific community and/or region should have the opportunity to determine the form of Competent authority that is best suited to their needs at a local level.

In regard to the role of the Registrar, consultations showed that there is support for a male and a female registrar in the national Competent authority. There is some resistance to the registrars being able to delegate authority.

2 Background and Scope of the Project

In 2014 the Indigenous Knowledge Forum presented a White Paper to the NSW Government entitled *Recognising and Protecting Indigenous Knowledge Associated with Natural Resource Management*. That White Paper was created during a research project funded by the Aboriginal Communities Funding Scheme of the Namoi Catchment Management Authority (now North West Local Land Services (NWLLS). The main aims of that project were to identify key elements of a regime to recognise and protect Indigenous knowledge associated with natural resource management through consultation with Aboriginal communities in North West New South Wales and members of the Indigenous Knowledge Forum. The White Paper recommended the adoption of a stand-alone regime for the state of NSW, operating within a natural resources management framework.[349]

The present project, *Garuwanga: Forming a Competent authority to Protect Indigenous Knowledge*, commenced in 2016, funded by an ARC Linkage Grant. The Garuwanga Project aims to inquire into ways to provide better protection of biodiversity-related Indigenous Knowledge for the benefit of Australian Indigenous communities, specifically by examining possible models for a Competent authority. Further detail on what is meant by a Competent authority is provided below. In 2018, the Garuwanga Project produced a Discussion Paper, which was used as a basis for consultations with Aboriginal communities. Analysis of the outcomes of those consultations is what forms the basis of this current Report.

A framework for protecting Indigenous Knowledge has been developed internationally through the United Nations *Convention on Biological Diversity 1992* (CBD).[350] The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity* [351]is a supplementary agreement to the CBD. It provides a legal framework for the implementation of one of the three objectives of the CBD: the fair and equitable sharing of benefits arising out of the utilisation of genetic resources. The Nagoya Protocol on ABS was adopted on 29 October 2010 in Nagoya, Japan and entered into force on 12 October 2014. Australia ratified the Convention on Biological Diversity on 18 June 1993, and signed the Nagoya Protocol in January 2012, and has yet to ratify it and implement it.[352]

Late last century, countries around the world recognised the importance of the world's biological resources to economic and social development. They also recognised growing threats to species and the environment. In response, the United Nations Environment Programme (UNEP) established a Working Group to prepare an international agreement for the conservation and sustainable use of biological diversity. The agreement needed to promote the needs of developing countries and Indigenous peoples.

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[349] See Natalie Stoianoff, 'Garuwanga: Forming a Competent Authority to Protect Indigenous Knowledge – a Project Supported by the Australian Research Council Linkage Scheme' (2017) *Intellectual Property Forum* 108, 73-75.

[350] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 30619 (entered into force 29 December 1993) ('CBD').

[351] *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Resources* was adopted by the Conference of the Parties to the Convention on Biological Diversity at its tenth meeting on 29 October 2010 in Nagoya, Japan, entered into force on 12 October 2014 (Nagoya Protocol).

[352] See the Australian Government's environment department website for updates: http://www.environment.gov.au/topics/science-and-research/australias-biological-resources/nagoya-protocol-convention-biological

By 1992, this group had agreed text for the CBD. It was opened for signature at the Rio "Earth Summit".[353]

The CBD has three main goals:

- conservation of biological diversity,
- sustainable use of biological resources, and
- fair and equitable sharing of benefits arising out of the utilisation of genetic resources.[354]

The last of these goals is the focus of the Garuwanga Project as the utilisation of genetic resources is often associated with the traditional or Indigenous knowledge about those resources. Under the CBD (Article 8(j)) countries must *respect, preserve and maintain, knowledge, innovations and practices of Indigenous communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.*[355] They must *promote the wider use of knowledge, innovations and practices of Indigenous communities with the approval and involvement of the knowledge holders and encourage the equitable sharing of benefits* arising from the utilisation of such knowledge, innovations and practices.[356]

The federal law implementing the CBD is the *Environment Protection and Biodiversity Conservation Act 1999*. Various states and territories have their own legislation attempting to do the same.[357] The federal Act specifically addresses access to biological resources as section 301 and refers to the regulations for the mechanism to be employed. Regulations under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) do require entities seeking to access and commercialise biological resources to negotiate an agreement that provides for 'reasonable benefit sharing arrangements, including protection for, recognition of and valuing of any [I]ndigenous peoples' knowledge to be used' by in relation to those biological resources.[358] However, this federal legislation only applies in relation to Commonwealth land and waters and Native Title land. In the absence of federal ratification of the Nagoya Protocol, Australian biodiscovery entities are unable to obtain an International Certificate of Compliance (ICC), limiting their capacity to collaborate internationally and their access to important markets. Various state governments are moving to align their state legislation with the Nagoya Protocol's requirements, including creating regulatory frameworks that require proof of prior informed consent and reasonable benefit sharing arrangements with Indigenous land owners before authorisation to collect and use native biological material is given.[359]

The Nagoya Protocol requires each member state to designate one or more competent national authorities and a national focal point on access and benefit sharing in relation to genetic resources and Indigenous or traditional knowledge about those genetic resources.[360] The national focal point has the responsibility of providing procedural information to applicants seeking access to genetic resources and the Indigenous knowledge associated with those resources and liaising with the Secretariat of the Convention on

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[353] United Nations Convention on Biological Diversity (website), https://www.cbd.int/history/.
[354] In the Convention on Biological Diversity, Article 1: Objectives
[355] United Nations Convention on Biological Diversity (website), https://www.cbd.int/convention/wg8j.shtml.
[356] United Nations Convention on Biological Diversity (website, https://www.cbd.int/convention/wg8j.shtml.
[357] For example, *Biodiscovery Act 2004 (Qld)* and *Biological Resources Act 2006 (NT)*.
[358] *Environment Protection and Biodiversity Conservation Regulations 2000*, r. 8A.08; see also Queensland Biotechnology Code of Ethics: Update of the Code of Ethical Practice for Biotechnology in Queensland, <https://publications.qld.gov.au/dataset/qld-biotechnology-ethics/resource/47bf0b73-a1ed-4677-863f-f960b667b952 >
[359] Queensland Government 2018, Pathways to reform: Biodiscovery Act 2004: Options Paper, <https://environment.des.qld.gov.au/licences-permits/plants-animals/documents/biodiscovery-reform-options-paper.pdf>
[360] Nagoya Protocol Article 13(1) &(2).

Biological Diversity.[361] Such information includes 'procedures for obtaining prior informed consent or approval and involvement, as appropriate, of [I]ndigenous and local communities and establishing mutually agreed terms including benefit-sharing'.[362]

As for a competent national authority on access and benefit-sharing, such an organisation has responsibilities in accordance with 'applicable national legislative, administrative or policy measures' including being either

> *responsible for granting access or, as applicable, issuing written evidence that access requirements have been met and be responsible for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms* [363]

Accordingly, the word "authority" does not mean that the organisation necessarily has power and control. That would depend on the legislation or administrative and policy measures under which the authority is created. Rather, as a Competent authority, it is an appropriate organisation that is permitted to carry out its required tasks and is responsible for doing so. It is possible for the competent national authority and the national focal point to be the same organisation.[364] And while these roles may be the sole responsibility of a national organisation, the reference to relevant [I]ndigenous and local communities and relevant stakeholders in Article 13(1)(c) does not preclude the establishment of local, community organisations, and regional organisations.

To encompass the range of options for Competent authority organisations, we have used the term 'Competent authority' to identify the various organisations that could operate at national, regional and local levels. This would assist with managing access and benefit sharing arrangements and negotiations with respect to Indigenous Knowledge.

The CBD and the Nagoya Protocol do not specify details on the nature of Indigenous Knowledge, in terms of how it is owned, managed and transferred, whether as 'community' knowledge, or as knowledge that is the particular responsibility of individuals. However the Nagoya Protocol recognises that it is the right of Indigenous communities, in the particular nation states, to determine their rightful knowledge holders, and therefore how to provide for community participation in access and benefit sharing arrangements.[365] Although the Nagoya Protocol and the CBD refer throughout to the 'rights of Indigenous and local communities' the term, 'indigenous peoples and local communities' now applies, as if it was intended.[366]

It is understood in this Report that the relationships in Indigenous communities between the rights of individuals, and those of the group or community is complex. There is often not a clear dichotomy

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[361] Nagoya Protocol Article 13(1).
[362] Nagoya Protocol 13(1)(b).
[363] Nagoya Protocol Article 13(2).
[364] Nagoya Protocol Article 13(3).
[365] Article 5 Nagoya Protocol
[366] For definitional clauses relating to use of the term 'Indigenous peoples and local communities' see Secretariat to the Convention on Biological Diversity, CBD/NP/MOP/DEC/2/7 10 December 2016, 'Decision Adopted by the Parties to the Nagoya Protocol on Access and Benefit-Sharing, Article 2/7. Use of the tern "indigenous peoples and local communities'; 'The Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol: *Decides* to apply, mutatis mutandis, decision XII/12 F of the Conference of the Parties to the Convention on Biological Diversity on the use of the terminology "indigenous peoples and local communities".

between the rights of an ‘individual’ and ‘group’ rights and responsibilities in regard to Indigenous Knowledge. As mentioned above, it is also important to recognise the complexities in such terms as ‘group’, ‘community’, and ‘local’ wherever these terms appear in transcripts from consultations with Aboriginal people.

It is useful to discuss the term ‘local’, since this appears frequently throughout the consultations, and in the CBD and the Nagoya Protocol. The Nagoya Protocol refers throughout the text to ‘Indigenous and local communities’. However, in Australia, the use of the term ‘local’ in referring to Indigenous communities may indicate a range of meanings in terms of factors such as geographical location, language group, and proximity to a town or urban or regional centre. An expression that is often used in this context is ‘the local community’. This expression has implications in terms of proximity (or perhaps ‘degree of local-ness’) to important towns, other communities and organisations, services, and also to family/clan/language/culture groups. Therefore it is necessary to remain aware of these nuances when discussing ‘local’ in the context of this report, and projects generally. The term ‘regional’ is also used to represent large geographical areas in Australia, for example, the ‘Kimberley region’ or the ‘Murray Darling region’. In the Kimberley, for example, these are comprised of many Aboriginal language groups who have grouped themselves under one or two representative bodies such as the Kimberley Land Council (KLC),Kimberley Aboriginal Law and Culture Centre (KALACC), and the Kimberley Language Resource Centre (KLRC).

3 Approach to Community Consultations and Research Methodology

The Garuwanga Project 'Forming a Competent authority to Protect Indigenous Knowledge' (The Garuwanga Project) commenced in 2016. The Project's aims are to:

- *Identify and evaluate a variety of legal structures for a competent authority suitable for governing and administering an Indigenous knowledge protection regime;*
- *Facilitate Aboriginal Community engagement in the process of such identification and evaluation; and*
- *Recommend an appropriate legal structure for such a competent authority in accordance with that engagement.* [367]

The Garuwanga Project developed from the outcomes of the Indigenous Knowledge Forum project entitled *Recognising and Protecting Indigenous Knowledge Associated with Natural Resource Management* and reported in the 2014 White Paper produced for the New South Wales Office of Environment and Heritage.[368]

Discussions of the investigators and other participants in the Garuwanga Research Roundtable took up many of the questions flowing from that White Paper in relation to the issue of establishing a cto administer a national access and benefit-sharing scheme with relation to Indigenous Knowledge. In 2018 a Discussion Paper was produced and distributed, and used as a basis for further discussions and consultations.

3.1 Approach to Community Consultations

Consultations and discussions on the Discussion Paper took place with Aboriginal communities and representatives of organisations in Broome and the West Kimberley (WA), in and near Sydney (NSW) in both urban and rural locations. Informed consent was obtained for all consultations. Consent processes were carried out in compliance with UTS ethics approval processes & principles, and also conformed to the Australian Research Council's requirements. For these consultations, free, prior informed consent was sought, and obtained from all participants either in written form, or verbally as a group. Examples of the approved consent forms used are reproduced in the Appendix to this report.

It is necessary to review some of the issues that should be considered when engaging in research consultations:

- *Context – regional; language group; community and local politics*

[367] See Natalie Stoianoff, 'Garuwanga: Forming a Competent Authority to Protect Indigenous Knowledge – a Project Supported by the Australian Research Council Linkage Scheme' (2017) *Intellectual Property Forum* 108, 73-75; also Evana Wright, Natalie P. Stoianoff and Fiona Martin, *Comparative Study - Garuwanga:Forming a Competent Authority to protect Indigenous knowledge* (UTS - Indigenous Knowledge Forum, 2017).

[368] UTS – Indigenous Knowledge Forum and North West Local Land Services, 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management' (White Paper, Office of Environment and Heritage, Government of New South Wales, 2013) <https://www.indigenousknowledgeforum.org/white-paper>

Aboriginal community organisations typically do not 'standalone' in isolation from the wider geo-politics of place, region and language/cultural group. People in Aboriginal communities form part of a complex, intertwined network of organisations, people, family, language and community groups. As such, there are ongoing local politics that comprise the fabric within which the people and their organisations are situated. Research needs to be cognisant of these wider factors, and, consistent with the principles and practices of ethical, participatory Indigenous research, researchers need to work closely with Indigenous participants in carrying out the project.[369]

- *Who 'speaks' for the community*
  The matter of representational and identity politics is critical to any research engagement.[370] When engaging with Aboriginal people to seek their views on complex issues, a project will necessarily identify particular individuals with whom the primary engagement and involvement is conducted.[371] It is important to keep in mind that the matter of who this person is, is often a political one, and may in some circumstances be subject to some discussion and debate within the community. To adequately and precisely determine who has responsibility for representing, or who 'speaks for' a community, organisation, or other 'local' group is not easily determined, and there may be ongoing problems in regard to the selected representative. According to the AIATSIS Guidelines it is essential for Indigenous research to recognise the diversity of Indigenous groups and communities and to not presume that the view of one group represents the collective view of the community.[372] Furthermore, it is important to differentiate between individual, group or collective rights, responsibilities and ownership.[373]

Limitations

With the approach to consultations, it is also necessary to outline some of the ways in which the consultations for this project were subject to limitations or constraints. In general, the consultation process had to take into account many factors, including the unavailability of people, prior commitments by communities, and divergent timeframes. Additionally, the notion of 'community fatigue' was mentioned in one meeting, and there was also a perceived incompatibility in the kind of language used to explain the project, and the language understood within the community. Inevitably, these factors imposed limitations on the extent to which full participation could be effectively achieved.

Effective and respectful research with Aboriginal peoples requires an understanding of, and adherence to relevant protocols and ethics, and of the importance of Indigenous peoples' ontologies, epistemologies and praxis.[374] As such, the Garuwanga Project seeks to incorporate an appropriate decolonising stance, ensuring that a collaborative, participatory and inclusive approach is adopted. This also means that 'consultations', as a modality of engagement in the research process, must necessarily be cognisant of all the multiple obligations and responsibilities of Indigenous people within their communities and organisations.[375] In this context, there is often likely to be a 'mismatch' between the expectations and

[369] AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012, 4 & 14.
[370] See generally, Iris Marion Young, 1990, *Justice and the Politics of Difference*, Princeton: Princeton University Press.
[371] In keeping with Principle 6, AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012, 9.
[372] AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012, 4.
[373] Ibid.
[374] See, for example: Shawn Wilson, What is an Indigenous research methodology (2001), *Canadian Journal of Native Education,* 25(2), 175-179; and more generally, AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012.
[375] AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012, 4.

requirements of the researchers, and those of the Indigenous people whose views are being sought for this project. This may have impacts on timing, schedules, logistics, and the nature of outcomes.

In the light of these factors, much of the consultation time was devoted to the research team and consultation groups building trust and understanding, before moving on to the substantive issues that were the focus of the discussions. Where Partner Investigators played a more active role in engagement with those consulted, more time was able to be spent engaging more deeply with the discussion questions posed as part of the consultation. This highlights the desirability of building into the design of future research projects provisions that will enable preliminary consultation meetings to take place that can, among other things, allow for full provision of information to project participants, as part of the free prior informed consent process. Nevertheless, the consultation process yielded rich results in understanding the range of expectations and concerns about the concept of a competent authority and Indigenous knowledge governance.

In the context of the complex nature of consultations with Aboriginal communities, there were several matters that impacted on the research team's being able to hold all the meetings with communities that had been planned. For example, two of the planned consultation meetings did not take place because of matters relating to the timing. In addition, some meetings took place without some of the participants with the authority to attend and speak for these issues (Board Members for example) due to ill health, timing or other commitments. Meanwhile, two additional meetings took place that were not originally anticipated. However the Garuwanga Project has still met its original objective to consult with at least some of the communities represented by the Partner Organisations. The range of meetings held and their locations illustrates the diversity of demographics between Aboriginal communities. The Garuwanga Project was also restricted in scope in that, owing to the limitations of budget and timeframe, it was not feasible in the design of the project, to provide for consultations with communities and organisations in the Torres Strait. However, the themes, issues, and findings from this project are nonetheless also highly relevant to the interests of Torres Strait Islander peoples.

3.2 Decolonising Research: Indigenous Epistemologies

The discussion above about the 'constraints', or 'limitations' of the consultation meetings goes to the matter of incorporating elements of Indigenous research methodologies and epistemologies into the project, and in the discussion in this Report.

Projects and research involving Aboriginal people needs to be carried out in a fully participatory and inclusive way, in accordance with relevant ethics, protocols and guidelines (for example, the Australian Institute of Aboriginal and Torres Strait Islander Studies – AIATSIS - ethical guidelines). That is the purpose of the Research Roundtable comprising Indigenous and non-Indigenous researchers working together to achieve the aims of the Garuwanga Project. Central to such projects is the requirement that they be carried out within a framework, or standpoint of Indigenous research methodologies and ways of knowing, or epistemologies.[376] What this means is that research should be carried out, not just 'from an Indigenous perspective', but using a deep understanding of the Indigenous paradigm. The Indigenous paradigm is derived from, and embedded in, Indigenous concepts, cosmologies, and ways of seeing and

[376] There is a large literature on Indigenous research methodologies, decolonising research and Indigenous epistemologies, and this warrants further discussion elsewhere. See for example Linda Tuhiwai Smith, *Decolonizing methodologies: Research and indigenous peoples*. (Zed Books Ltd., 2013).

acting in the world. An Indigenous research paradigm seeks to work from a contrary position to the dominant Western framework, to acknowledge a range of Indigenous worldviews.[377] One of many elements of this approach is to understand that Indigenous knowledge, and many aspects of Indigenous ways of being in the world are not isolated, or discrete events, processes and behaviours, but rather, are *relational*, and must be seen in this context. The conduct of the Research Roundtable meetings demonstrates this. In advancing an Indigenous research methodology, there is also a need to explore 'local' protocols and epistemologies as part of the *relational* context of people in *Country*. Here the role of the Partner Investigators is crucial in guiding the Chief Investigators and the rest of the research team prior to and during the consultations.

3.3 Methodology in Analysis of Consultation Transcripts

Identifying Australia's obligations under the Nagoya Protocol, and the role of a competent authority in that context, as a critical part of the Garuwanga Project, a Discussion Paper[378] was prepared. That Paper outlined the idea of ac, and suggested some options for its establishment and functions. A shorter document was also prepared to provide a summary of the key points covered in the Discussion Paper. Permission was obtained from participants in the community consultations for sessions to be sound recorded, and these recordings were supplemented by note taking. Two Chief Investigators other research staff, and the Garuwanga PhD student participated in the consultations, along with at least one of the Partner Investigators and Additional Investigator responsible for the relevant region. The former Research Associate provided continuity with arrangements made and data collected during her tenure. It proved impractical to hold Research Roundtable meetings to de-brief and finalise the notes taken following the consultations.

The recordings of the consultations were transcribed, with some issues in regard to the quality of the recordings. In some meetings, the quality of the recordings was compromised by background noise, room size and participants being softly spoken. As a result, professional transcription was not possible for those recordings and transcription was undertaken by the Research Associate who had the benefit of notes taken and having listened to the discussions first hand. For the sake of consistency, all transcripts were prepared by the Research Associate. In some places the recording were not audible or clearly understood. Where possible approximations of what was said were noted and any material of this nature included in this Report is noted as "paraphrased". Meetings and participants were de-identified and are referred to by numbers so each quote in the data presented is identified by a meeting number (M#) and a participant number (P#). Transcripts and/or recordings were returned to communities where requested.[379]

Analysis of the Transcripts

Analysis of the transcripts from the consultation meetings was carried out using a qualitative approach drawn from elements of textual and discourse analysis and 'narrative inquiry'.[380] . Initially, some

[377] See for example Shawn Wilson, What is an Indigenous research methodology (2001), *Canadian Journal of Native Education,* 25(2), 175-179.

[378] Garuwanga: Forming a Competent Authority to protect Indigenous knowledge - Discussion Paper (April 2018).

[379] Following reflection on this point, there was some concern about potential risks in returning research materials to communities, that this could result in people being able to identify the particular communities and individuals in the meetings, and that people listening to the recordings may object to some of the comments in those recordings.

[380] There is a large volume of literature on social research methodological issues. See for example Norman Fairclough, 'Discourse and text: linguistic and intertextual analysis within discourse analysis', *Discourse and Society* 3(2): 193-217, 1992; Terry Locke, *Critical Discourse Analysis*, London and New York: Continuum, 2004; Sylvia S. Barton, 'Narrative inquiry: locating Aboriginal epistemology in a relational methodology', *Journal of Advanced Nursing* 45(5): 519-526, 2004.

thematic analysis was engaged with.[381] This involved unpacking the transcripts and then repacking them in a way that presented an overview of shared and unique perspectives. As stated in the ARC Application, the original plan was to use three-stage manual coding[382] and matrix presentations based on the work of Miles and Huberman,[383] addressing the three evaluation criteria in the Discussion Paper:

(iv) suitability to the domestic legal and regulatory context;
(v) expectations of the functions and powers of competent authority to be established under the White Paper; and most importantly
(vi) those Aboriginal laws and customs considered relevant by the Partner Investigators, and other Aboriginal members of the Research Roundtable.

On further reflection, and review of the consultation meetings transcripts, it became apparent that analysis employing an 'intuitive' discursive and textual, ethnographic analysis of the language used in consultations was a more appropriate methodology, rather than 'iterative manual coding', or other more formal, structured methodological tools.[384] This is because discourse and textual analysis methodologies allowed for greater capture and close interpretation of the rich and nuanced language in the recorded community consultation meetings, and the transcripts.

Questions for Discussion in Consultation Meetings

In the Discussion Paper and consultations these evaluation criteria were explored through a series of discussion questions, as follows

Reflecting Aboriginal customary laws, and cultural protocols

- What do you consider to be the most important features for ac?
- What existing organisations do you think provide effective models for protecting Aboriginal and interests?
- What existing organisations do you think provide ineffective models for protecting Aboriginal interests?
- How should local competent authorities (LCAs) be formed?
- Should all employees, officers and councillors be Aboriginal people?

Functions and powers of the competent authority

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

Suitability to Australian law and regulations

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[381] RE Boyatzis, *Transforming qualitative information: Thematic analysis and code development*, (Thousand Oaks, London & New Delhi: SAGE Publications, 1998).
[382] Margaret McKerchar, *Design and Conduct of Research in Tax, Law and Accounting*, (Thomson Reuters, Sydney 2010), 227-230.
[383] M. Miles and A. M. Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (2nd ed, Sage, Thousand Oaks CA, 1994).
[384] See for example T. A. Van Dijk., 'Principles of critical discourse analysis' (1993), *Discourse & Society* 4(2), 249–83; J. Blomeart, J. and C. Bulcaen, C., 'Critical discourse analysis' (2000), *Annual Review of Anthropology*, 29, 447–66.

- 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?

Data collected from some of the consultations did not address each of the evaluation criteria, limiting the utility of a matrix analysis. Opportunity was provided for interested parties to make written submissions and for consultation participants to provide further written comments to supplement the information made available. No written submissions were received due to time pressures and other pressing priorities. At the same time, the data was rich with stories, narrative and reflection, connectedness to *Country*, culture and spirituality providing deep understanding of the concerns of community, especially the knowledge-holders charged with protecting the knowledge of the community.[385]

Consequently, a narrative was created from the consultation meetings that helped frame these concerns. This narrative was useful in extracting contextual data that helped inform the thematic analysis. Responses addressing any of the discussion questions relating to each of the evaluation criteria were noted. 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. As outlined above, this coding approach to analysing the consultations outcomes was initially pursued, and 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.

Table 1 (after the Appendix) shows the range of specific discussion themes, mapped against each consultation meeting.

[385] Ewa Czaykowska-Higgins, 'Research Models, Community Engagement, and Linguistic Fieldwork: Reflections on Working within Canadian Indigenous Communities' (2009), *Language Documentation & Conservation* 3(1), [pp?]

4 Theme 1: Indigenous Knowledge

It is important to be clear about what is meant by Indigenous knowledge. Also important, is to acknowledge that it is for Aboriginal and Torres Strait Islander peoples themselves to define what they mean by their Indigenous knowledge.[386]

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.[387] There is no sharp separation between this knowledge, and all the other aspects of Indigenous peoples' material and spiritual lives.[388] This knowledge is also performative and expressive, it finds its form through action, and re-enactment, in ceremony, and in song, story, dance and other manifestations such as in artworks, and in ways of relating to one another.[389] There is much knowledge that is bounded by strict rules of secrecy and sacredness. The protection of traditional knowledge is often incompatible with western legislative regimes; for example an infringement of traditional knowledge may offer unsatisfactory relief for Indigenous communities.[390] In general, Indigenous knowledge is regulated by understood codes, rules, obligations and responsibilities. Its use, transmission and expression is governed by these protocols, which are also typically regulated along lines of gender, age, and other aspects of social and cultural status (such as kinship, family, ritual status and so.[391]

A further aspect of Indigenous knowledge is that, while it is embedded in place and topography, associated with important features of the ancestral domain, it is also embodied in personhood, as much as in the specifics of place. The nexus between place-based, and person-based knowledge is intricate, and cannot be adequately addressed in this analysis.[392]

These matters are important to note here, as the Garuwanga Project has as its focus, Indigenous knowledge relating to biological diversity and genetic resources, insofar as these are provided for in the CBD and the Nagoya Protocol. The CBD and the Nagoya Protocol employ throughout, the phrases 'traditional knowledge' and 'knowledge, innovations and practices of [I]ndigenous and local communities

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[386] See for example Michael Davis, *Biological Diversity and Indigenous Knowledge*. Research Paper No. 17. Canberra. Department of the Parliamentary Library, Canberra, 1998; Michael Davis, 'Indigenous Knowledge: Beyond Protection, Towards Dialogue' (2008), *Australian Journal of Indigenous Education* 37, Supplement, 25-33,

[387] Sonia Smallacombe, Michael Davis, and Robynne Quiggin, *Scoping Project on Aboriginal Traditional Knowledge*, Report of a study for the Desert Knowledge Cooperative Research Centre, Desert Knowledge Cooperative Research Centre, Alice Springs, 2006.

[388] Michael Davis, Bridging the Gap, or Crossing a Bridge? Indigenous Knowledge and the Language of Law and Policy, in *Bridging Scales and Knowledge Systems: Concepts and Applications in Ecosystem Assessments*, eds. Fikret Berkes, Doris Capistrano, Walter V. Reid, and Tom Wilbanks (Washington DC, Island Press, 2006), 145-182.

[389] In the development of international legal instruments for recognising and protecting Indigenous knowledge, there is a distinction made between 'Traditional Knowledge' and 'Traditional Cultural Expressions'. This is most developed in the work being carried out by the World Intellectual Property Organisation (WIPO). See for example Terri Janke, *Indigenous Knowledge: Issues for Protection and Management: Discussion Paper*, Report Commissioned by IP Australia, n.d.

[390] Virginia Marshall, Terri Janke and Anthony Watson, 'Community Economic Development in Patenting Traditional Knowledge: A case study of the mudjula TK project in the Kimberley region of Western Australia' (2013) 8(6) *Indigenous Law Bulletin* 19.

[391] Davis, Bridging the Gap, ibid.

[392] For a discussion on the complexities of these issues concerning Indigenous knowledge and place, see for example Michael Davis, '"I live somewhere else but I've never left here": Indigenous Knowledge, History, and Place', in *Indigenous Philosophies and Critical Education*, ed. George Sefa Dei (New York: Peter Lang Publishing, 2011)), 113-126.

embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity'. It should be noted that the CBD recognises the sovereign rights of the nation state (Australia) over genetic resources in scientific research and of commercial and non-commercial uses of genetic resources.[393] For the Garuwanga Project, this aspect of Indigenous knowledge may be termed 'Indigenous Ecological Knowledge', but on the understanding that Indigenous peoples do not separate knowledge that relates to biological diversity from all other forms of knowing. Indigenous lawyer Terri Janke has summed up some aspects of Indigenous knowledge thus:

> *Indigenous people have customary rights and obligations to their Indigenous knowledge, cultural expression, just like land. Sometimes that knowledge is sacred, but at all times that knowledge comes from a place and forms the identity of the people. There are rules about how it should be respected, and reproduced, disseminated and interpreted.*[394]

Central to the CBD and the Nagoya Protocol is the matter of access and benefit-sharing. These instruments offer a framework within which Parties can devise ways in which Indigenous peoples and local communities can receive benefits from the wider use of their knowledge and practices relating to biodiversity and genetic resources. An effective access and benefit-sharing regime can form the basis for capacity building, and economic development for many Indigenous communities.[395] In designing such schemes, it will also be crucial to take into account the idea, noted by many researchers, that the protection of TK has often proved incompatible with Western legislative regimes.[396]

The subject of Indigenous knowledge was discussed at all consultation meetings, and participants also talked about the importance of the protocols around this knowledge. These discussions provided part of the context to the project's research questions around forming a competent authority. The following extracts from the consultations illustrate the kinds of discussions around this particular research theme.

P1M1: *detail as to what is sacred will be different across each local group… Some songs can only be sung by certain family members and if they don't have anyone to pass it on to then that history dies.*

P2M2: *we are really passionate about protecting knowledge of plants and Aboriginal knowledge for anything that's on Country, that's one of our main issues …. What is connected to the land, what is the story, who belongs to the story, who is the traditional owner of that story?*

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[393] Virginia Marshall, 'Negotiating Indigenous Access and Benefit Sharing agreements in genetic resources and scientific research' (2013) 8(8) *Indigenous Law Bulletin* 16.

[394] Terri Janke, Mabo Oration 2011 - *Follow the stars: Indigenous culture, knowledge and intellectual property rights (website),* https://www.adcq.qld.gov.au/resources/a-and-tsi/mabo-oration/2011-Mabo-oration *viewed 25 June 2018.*

[395] Professor Natalie Stoianoff - *Garuwanga: Forming a Competent Authority to Protect Indigenous Knowledge – A Project supported by the Australian Research Council Linkage Scheme* Intellectual Property Forum, March 2017, 73-75 – place held?.

[396] Virginia Marshall, Terri Janke and Anthony Watson 'Community economic development in patenting traditional knowledge: A case study of the mudjala TK project in the Kimberley region of Western Australia' (2013) *Indigenous Law Bulletin* 8(6) pp. 17-21; see also Michael Davis, 'Law, Anthropology, and the Recognition of Indigenous Cultural Systems', in *Law and Anthropology: International Yearbook for Legal Anthropology* 11, eds. René Kuppe and Richard Potz (The Hague, Martinus Nijhoff), 298-320, 2001.

P4M4: *Knowledge is not your own. It comes from your ancestors and gets passed on to children and grandchildren. Knowledge holders are caretakers.*

P4M5: *Like if my old people were still alive and I asked them what knowledge was, they would say it's the reason the fish swim up the river. And why do the fish swim up the river? They swim up the river to spawn. So, you can't catch new fish unless you have spawning fish, and that's just one example. Six season weather patterns, that's incredible knowledge because it explains why the trees grow, why the trees blossom, why the fish come in, why the birds move, why, what's that little mouse that screams in the middle of the night, it explains the ecosystem, yeah, why the lyrebird builds its mound.*

P2M6: *any knowledge that is given to me that is my inherent right as a matriarch and elder of my family to pass on that knowledge to my own children, my own grandchildren, the neighbours, the kids at school, whatever.*

P3M6: *and that's culture. To pass your knowledge onto one person who can help the community. They then choose a person to then pass that on to so that then not everybody else is either burdened with it but they can benefit from it …*

P5M6: *I'm still learning now too my cultural stuff and I have my elders that are sitting here, and I try and talk to them and if it's right I get the answer, and if it's not I have to go back to the drawing board and that's the same thing I do with my son.*

In Meeting 3, a participant spoke strongly of the pain, or hurt caused by the abuse of Knowledge.

P1M3: *They send a letter for us. They say we will come here on this date. They tell us we come to the bush. They come, take us. They look at plants and things… They explain that they come for our stories. …already, already, already…that's what I am saying… we don't get a response back and we are lost, we are crying, pain, sorrow, heartache. The miners, all them, taking over, stealing our stories… we mind our own business … We gave them all the stories and they don't come back. They are sweet talkers. They tell us … we are lost. This is all bulldust. Cheat. Liar. Who knows… no answers… we used to have a free life…in the bush … where is it today…*

5 Theme 2: A single National Competent Authority

The consultations considered whether there should be a single national competent authority that carries responsibility for all the obligations under the Nagoya Protocol, including acting as a national focal point; or whether several competent authorities would better serve the aims of the Protocol such as regional and local community authorities. This research question was not specifically addressed in the consultation meetings. In some of the consultation meetings however, where there was discussion about the need for different types, or 'levels' of competent authority (such as 'national', or 'local'), the discussion focused mostly on the idea of a single national competent authority, and how that might operate. The following extract illustrates this:

P1M1: *I do see a need for a national body, but it has to be carefully constructed. … there is an important need for an overarching authority that sets the broad principles and framework and best practices but there still needs to be some support for those people to be able to apply and implement those things …. I always see the benefit of having a regional or national body a strong voice in a single presence and sort out ourselves, and make a clear pitch for whatever it may be towards the government …em… concise, succinct.*

Question to M2: and then what about a national body that all the [Aboriginal organisations] speak to?

P2M2: *I think the competent authority would be made out of whoever works in the [regional organisation] to make up that competent authority.*

Question to M2: So each land council has a rep?

P2M2: *Yep or a couple.*

Question to M2: and then they just meet whenever it is necessary to report to the government or to the international body?

P2M2: *Yeah*

Question to M3: Do you think there should be one national body and then a regional organisation?

P1M3: That's how it should be

P1M4: *We would like a bit of time to think about It …. That would be easier. Gives us a chance to read through it and then add our own opinions*

P5M5: *Now if there was an authority, a competent authority that ran that I don't know how that would work.*

P1M6: *My answer to the question of a national entity is to take some of the earlier thoughts. It's a yes and no answer. Yes, but only if the federal or national body's functions are clearly defined and limited.*

In one meeting, it was seen that the unnecessary duplication of organisations is undesirable, as duplication leads to confusion and a waste of resources. This supports the idea that a single organisation carrying out both roles may be preferable.

P1M1: *what we find is duplication of services across the region. They are all trying to do the same thing … in isolation …. Aboriginal people on the ground are just like any other consumer and they want to know what's in it for me. I don't want to set up another entity or structure that doesn't have a place, have a mission where Aboriginal people may feel they are going to be ripped off. So, you need to be clear about what you are trying to achieve and how you are going to go about it …*

Theme 2.1 Legal structure for the national Competent Authority

An important consideration in establishing views as to the forms and functions of a competent authority, was to understand what type of legal structure this may represent. This question is a difficult and complex one for all involved in the project, since the matter of 'legal structure' goes to the heart of the type of organisation that may be considered, including: governance; decision-making; consistency with national and state laws. The extracts from the transcripts of the consultation meetings ask participants what should be an appropriate legal structure for a competent authority. However there were no specific views expressed by the participants regarding the legal structure that should be used for the national competent authority. The discourse in some of the consultation discussions were about matters such as function, rationale for competent authority, and best practice, as illustrated in the extracts quoted here (above and below).

The participants in Meeting 2 expressed a strong affinity with their regional representative organisations, and the participants in Meeting 3 with their regional cultural organisations, and to some extent other representative organisations. This points to an issue concerning the relationships that Aboriginal people already maintain with their existing organisations. It raises questions about whether another, separate organisation might be established as a competent authority, or instead, existing organisations take on the roles of a competent authority given their responsibilities, networks and existing connections, or relationships that people maintain with their existing organisations.

Consultation discussions had the focus of participants during these two meetings as more regional than national, particularly in the case of Meeting 3. This suggests that caution should be exercised in assuming that participants were providing a clear endorsement of these types of organisation as competent authorities at the national level. In Meeting 2, there was general support for the regional representative organisations being involved. The discussion in Meeting 3 did not tie the concept of a national body to any particular type of existing organisation.

There was a response by participants from Meeting 4 regarding the benefits of forming a new organisation over trying to introduce new activities into existing organisations. This again illustrates, the importance of considering the relationships and networks that already exist between people and their existing community organisations.

In Meeting 5, the challenges of conforming Aboriginal law and culture to Western style organisations was raised, but no structural solution was suggested. This goes to the heart of the issue of Indigenous methodologies and epistemologies, as discussed above. It invites reflection as to what extent the consultation questions were underpinned by understandings of decolonising Indigenous research methodologies, or whether they were driven more by Western notions concepts and notions regarding legal structures, types of governing and regulating organisations, and related matters. It is in the nature of any research project to be constantly engaging in self-reflexivity about the methodological approach as the project progresses. Indigenous methodologies are more oriented to grounded theory where the participants create the agenda, whereas the Garuwanga Project defined the question prior to the

interviews. The questions in this instance helped to shape the answers. This invites reflection on the extent to which this project engages in 'Indigenous methods' for decolonising research, or mainstream methods that bring about a decolonising effect. But the Garuwanga Project is trying to bring together two systems of law – Aboriginal law and the Western colonial law that operates in Australia. And the further complication lies in bringing these systems together to address national obligations under international law. If the ultimate aim is self-determination, this needs to be achieved regardless of the legal framework in which the nation state is operating.

In response to a question raised in Meeting 6 there was acknowledgement that a statutory authority structure might be useful as a funding and sustainability model.

P1M1: [paraphrased] *I'm not fixed on a particular structure … em - what is best practice? Actual structure won't worry people – it's more important to show how people will relate to it and explain the rationale behind choosing a particular structure.*

P3M4: *Just thinking from what I have gathered and what I have read and when I have talked to people, a new model is a lot easier and quicker than trying to change an existing one.*

P1M5: *… the whole thing is around protecting knowledge and who are the right people and the right groups to protect the knowledge and I think you said it before that we are trying to create something new and in that notion of creating something new is the dominant structure and legal system going to allow that newness? That protects the very essence of what you are wanting this to be which is knowledge which is all encompassing and actually takes into account law/lore. Is the western system that is currently in place going to allow that?*

Question to meeting 6: as opposed to having to apply for grants and stuff what about things like statutory authorities where their funding comes through government appropriations?

P1M6: *That's as close as you will get to secure as far as I know.*

Theme 2.2 How the national Competent Authority should operate

The consultations also sought Aboriginal peoples' views on how a national competent authority might operate, either as a single authority or several, and about the legal structure of such an authority. There is a reciprocal relationship between the structure of an organisational entity, and the way it operates. Structure, operation, legal framework, and associated political, socio-legal and cultural issues encompassing principles of good governance – are all components of governance as addressed in the Garuwanga Project Discussion Paper. While there were few direct comments by participants in consultation meetings about a possible structure for the national competent authority, there were strong views expressed about the way in which the authority should operate. Thus, comments about its operation also imply structural issues where these are viewed in the wider context of governance. In brief, governance principles identified by the Garuwanga Project Research Roundtable embrace values such as trust, confidence, participation and advocacy.

Theme 2.2.1 Clearly defined purpose, relationship to the community and to other organisations

Some discussions with community organisations acknowledged that people place high importance on their relationships, and networks with existing community organisations in their locality and region. In considering the purpose, roles and functions of a competent authority then, it is important that the relationship a competent authority has with these existing organisations is understood. In at least two

consultation meetings, some participants indicated the importance of understanding the purpose of a competent authority, and of its mandate and scope, and how such an organisation would serve them.

P1M1: *people need to see the need for the Authority … how do they interrelate and how they work together. You have to be clear about what is your mandate - what are you taking charge of…*

P1M6: *I think that an organisation's purpose, role or job has to be very clear, defined and specific, rather than lovely, wandering words and…and then you know what your business is, and you stick to it and you are required to stick to it. If you want to change your business there's obviously got to be a process where you can do that but not just by choosing to change.*

Theme 2.2.2 The national Competent Authority needs to be Aboriginal-led and run

Consistent with self-determination and Indigenous rights, as articulated for example in the United Nations Declaration on the Rights of Indigenous Peoples, a national competent authority should be owned, controlled and managed by Aboriginal people. Meetings 1 and 6 addressed this issue. In those meetings participants acknowledged that in some instances Aboriginal communities will not have all the skills required to lead and operate a competent authority but where those skills exist, then Aboriginal people should fill those roles. A participant in Meeting 6 suggested the use of parallel roles to facilitate skill development for Aboriginal people. This suggests an implicit tension between Western oriented models for organisational and business affairs, and the requirements imposed on Indigenous communities to conform to these.

This issue of Aboriginal control and management of a competent authority also goes to the heart of the matter of engaging in a decolonising Indigenous epistemology, wherein peoples are at the centre of, and drive any processes for legislative and political reform and innovations that flow from Australia's obligations under the CBD and Nagoya Protocol.

P1M1: *it's great to be working towards 100% Indigenous but the reality is that it is quite a specific skill set that you are looking at and it needs to be acknowledged that a community might not have all that skill set at a particular point in time, but it should be stated that this is the skill set that is going to be needed into the future. We should be backed, and the community should be supported to build that skill set.*
P1M1 [paraphrased]: *representatives are not able to speak on an issue if they are not from the country that the issue relates to. I think it comes back to not having a great appreciation of how we operate in terms of who can speak for country.*

P1M6: *… the people who operated, not ran, but operated the system would have to have specific skills or be able to acquire specific skills … Any decision making on Aboriginal cultural matters must and can only be done by Aboriginal people. Administrative decision making about what bank account, paying the bills and which bills get paid first I don't care. That's not cultural business. So, I think that answers your question about staffing being a mix.*

Another critical component of governance, structure and function, and decision-making for a national competent authority would be how individuals are appointed to such a body. These issues were discussed in some of the consultations. Participants talked about how democratic processes have been abused, and some expressed scepticism around the way in which some government appointments work. Problems

with attempts at representative models were also raised, for example, with reference to the issue of who has authority to speak for *Country*.

There was some discussion of the decision-making body at the national level needing to be in the form of an Aboriginal Congress with participants from all Aboriginal nations. This structure may be unwieldly for more routine decision-making operations, but consideration should be given to implementing this model in a form that allows each community to have a voice on key issues.

Theme 2.2.3 The role of the individual in the community

Discussions in some consultation meetings also turned to the matter of roles, responsibilities and rights of individuals within Aboriginal communities with respect to knowledge for which they are the knowledge holders. It was suggested by some that a community-based model is not consistent with how Indigenous knowledge works.

P1M6: *The key, and this is my opinion now, the mistaken belief of the notion of community knowledge is an anthropological myth in my mind. Knowledge belongs to the individual. Either they have been taught stuff by their parents, aunties, uncles or whatever and they have learned stuff through their own lives that adapts, modifies or whatever the stuff they have been taught. Knowledge is not a collective thing because it is drawn from a lot of different experiences and sources. It is purely an individual and what [name] has decided to do is her decision and her right to make that decision and it is a good demonstration. A lot of people might make the decision and say well I want a million dollars, so they will sell it to a pharmaceutical or something. That will happen and that is because of the other influences in society but what you might call traditional knowledge… is an individual knowledge. The decision making about it is not only a right but the responsibility of that individual.*

The CBD and Nagoya Protocol do not detail the specifics of individual versus community roles and responsibilities in regard to access and benefit-sharing, beyond using the term 'Indigenous and local communities'. The earlier discussion also outlined some of the complexities in the relationships between the individual and the community in Aboriginal society. These are matters that go to the heart of the cultural and socio-political organisation in particular Aboriginal communities, and are central to determining how a competent authority will regulate and manage access and benefit-sharing arrangements. This underscores the importance to 'not generalise from understandings of one Indigenous community to others or to all Indigenous peoples' as noted in Principle 1 of the AIATSIS Guidelines. The diversity among individuals, groups and communities is important to recognise in a project such as this. A fuller discussion of this is outside the scope of this document, but it is important to acknowledge this as a matter that will require some analysis and discussion, and will be taken up in the project's Final Report.

Theme 2.2.4 The national Competent Authority needs to be independent from government

To realise the rights of self-determination, a competent authority should be independent from government.[397] The requirement that a competent authority should be independent from government was raised in the Indigenous Knowledge Forum 2014 White Paper,[398] and also in the Garuwanga Governance

[397] See generally, National Congress of Australia's First Peoples, *The Call for a National Indigenous Cultural Authority*, 2013.
[398] See background on the White Paper at the beginning of this Report, and UTS – Indigenous Knowledge Forum and North West Local Land Services, 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management'

Principles.[399] This crucial aspect of self-determination was mentioned in Meetings 1 and 6. As well as fulfilling the right to self-determination, independence from government would also be important to the tenure of the organisation, and strengthen its capacity to maintain decision-making and control over assets and databases. The matter of databases is one for discussion in the project Final Report.

P1M1: *Independence, membership are important. How does it fit into the political landscape?*

P1M6: *So, it's accountable down the line not up the line to government or whatever because it has no accountability to government because it is an independent authority.*

Theme 2.2.4.1 The national Competent Authority needs to be long lasting and securely funded

The Indigenous Knowledge Forum 2014 White Paper[400] raised questions around the timing of a competent authority – and access and control of data by Aboriginal communities. Forum and consultation participants were concerned about what would happen to any databases and assets held by a competent authority if it was wound up. This issue was addressed most clearly in Meeting 6 where it was observed that a national competent authority would need to have secure tenure, as far as possible. In part, this concern reflects peoples' weariness with frequent changes in governments, which often results in changes in programs and entities with responsibility for particular matters.

P1M6: *What I'm worried about is security of tenure, not a guarantee because you can't provide guarantees but whatever the construct is it should provide the securest tenure and therefore less ability for government intervention so the least ability for government to intervene. … So, if the organisation had the security of the knowledge that its position was safe as long as it did the job that it was specified to do, that's the only insecure thing or questionable thing, you need that sort of thing.*

Another concern is that a national competent authority should be securely and independently funded. Participants in some of the consultation meetings raised the funding issue, and these discussions referred to government funding as the primary funding source. In Meeting 1, the response was that the issue was not necessarily one of more funding, but rather of more efficient use of existing funds. In meeting 6 participants reflected on some programs that have used particular sources of government revenue to fund Aboriginal communities. There was some discussion of other funding options, however these were not presented as possible solutions to funding a national competent authority.

A participant in Meeting 4 noted that some Aboriginal organisations, at least at the local level, were self-funded through member contributions. In some instances, meeting space is apparently provided through local area land councils (Meeting 6).

In Meeting 5, the possibility of cultural decision-making positions being honorary with funding for expenses was raised (see also discussion below on membership of competent authorities).

(White Paper, Office of Environment and Heritage, Government of New South Wales, 2013); see UTS (website), https://www.indigenousknowledgeforum.org/white-paper.

[399] Garuwanga: Forming a Competent Authority to protect Indigenous knowledge - Discussion Paper (April 2018).

[400] UTS – Indigenous Knowledge Forum and North West Local Land Services, 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management' (White Paper, Office of Environment and Heritage, Government of New South Wales, 2013) https://www.indigenousknowledgeforum.org/white-paper.

We note that the experience various participants have with managing different types of organisations was varied. Some of the community members consulted have established income generating small to medium enterprises. However, for some groups there seems to be significant reliance on government funding. Many participants were not currently in paid work due to remoteness of locality, age, health issues, caring or other responsibilities. Many were engaged in voluntary work.

P1M1: *Financial support is really important. There has been a lot of research around governance structures and best practices, but the reality is that none of it has been applied and used in practice. It's theory and that's where I think more needs to happen. … we aren't asking for any more money we are just asking that in these difficult times that better use is made of it. Give it to us and we will make decisions about who to use as service providers, what programs are they running, and we will hold them accountable for that ourselves*.

P1M6: *There are models and variants around that could provide a greater level of security. The land rights tax one I thought was good as an idea and a concept … So how you are going to do that in the long term with annual funding and all, that em- I'm talking about guarantees and unimpeachable guarantees they don't exist but maybe there's a way that something close to it.*

Theme 2.2.5 The national Competent Authority needs to strengthen capacity

The Nagoya Protocol provides for capacity building for nation states, their institutions, and for Indigenous and local communities.[401] Capacity building has many aspects, including infrastructure, financial and economic strengthening, and strengthening and support for participation, and decision-making. It can be addressed at community, and/or individual, levels, and include skills development, organisational strengthening, and a wide range of other components. The National competent authority will have a key role in capacity-building.

The issue of capacity-building was discussed in several of the consultation meetings. Participants in some of the meetings reflected an interest in skills building and in enabling organisations to operate more effectively. There was also recognition by some participants that differences in access to education and employment opportunities affect the skills base that may exist in different communities.

P1M1: *… there is an important need for an overarching authority that sets the broad principles and framework and best practices but there still needs to be some support for those people to be able to apply and implement those things … create tools that are used to say how would you work in this complex framework. How would you govern yourselves?*

P1M6: *There has got to be a parallel position where people are developed within the structure of the organisation to take on that role. So that CEO role must be a term role and must have its performance measurement include staff development, Aboriginal staff development, so after the three or five year term or whatever it is there should be somebody in the organisation capable of filling that role.* **P5M6:** *An Aboriginal person?* **P1M6:** *Absolutely, yes sorry I didn't make that clear but yes because there are just certain skills that a person may not have and as long as they have the other skills, the cultural skills and*

[401] Nagoya Protocol, Article 22.

they have the capacity to acquire the non-cultural skills they should be fostered and sponsored because isn't that what we talked about? In terms of our knowledge processes?

Theme 2.2.6 The national Competent Authority needs to have sound governance

Principles and practices for good governance are vital in developing a national competent authority. Governance Principles have been discussed in the Discussion Paper, and are also referred to earlier in this document.

The need for good governance was discussed directly by participants in Meetings 1 and 6. The Garuwanga Project has developed a set of governance principles using input from a number of sources.[402] These principles are set out in the Discussion Paper and were provided to participating communities.[403] The Garuwanga principles relate to:

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

Meeting 6 discussed and endorsed the Garuwanga principles. In addition, that Meeting raised safety as an issue, although the view was subsequently expressed that safety was captured in other principles already listed in the Garuwanga principles. The notion of 'safety' has multiple meanings, including 'cultural safety'.

The participants were asked to identify organisations that provided both effective and ineffective governance models for protecting Aboriginal interests. In response, participants offered some examples of existing organisations that provide efficient models for a competent authority. Again, this relates to emerging central themes in this analysis, that of the relationships, networks and associations that participants already maintain with existing organisations in their community, locality and region. The connections that bind people and these organisations, whether in urban or rural areas are of vital importance and are informed by complex combinations of kin, family, clan group, language and other ties. Participants will often talk about these organisations, some of which include health services. At meeting 1 participants mentioned the work being done in Empowered Communities[404] as an exciting and beneficial development.

[402] See Section 6 of Garuwanga: Forming a Competent Authority to protect Indigenous knowledge - Discussion Paper (April 2018).
[403] Ibid, Section 7.
[404] Empowered Communities, *Empowered Communities: Empowered Peoples Design Report*, 2015, https://empoweredcommunities.org.au/wp-content/uploads/2018/04/EC-Report.pdf>

For examples of organisations deficient in some aspects of governance, some participants expressed strong views about the operation of Aboriginal land councils. At meeting 2 participants noted the importance of Aboriginal people having rights, reflecting the view that often Aboriginal people feel they have no voice in the organisations that serve them. Such comments turn on critical matters of participation, empowerment, representation, and control over decision-making.

Some of the issues that were identified as problematic in terms of the ways in which organisations operate include nepotism, fighting, with decisions being made that do not reflect the interests of key stakeholder groups, and disenfranchisement of important stakeholder groups. These issues were discussed in most meetings.

P1M1: *you have a process put in place and you thoroughly work through that process but ultimately you have a decision maker that can overrule all that, so I think it's got to be respectful. People have to be reassured that if they are going to engage that their voice will be heard ….*

P1M1: *Representation is going to be difficult … but I think the real challenge for this process is that it is a complex issue that you are dealing with and how you translate that down to the grass roots level and try to be clear about what you are trying to achieve- communication is critical*

P2M2: *structuring a governance body where we have rights.*
P1M6: *it should be structured or set up so that any person, member or employee or whatever, would feel safe to raise any issue that they thought was relevant and I hadn't thought about that and I thought, the notion of safety is really important and then when I thought about it a little bit it said to me, this is why things like our lovely local land council doesn't work because nobody feels safe.*

Theme 2.2.7 The national Competent Authority needs to facilitate regional/local Competent Authority operations?

Turning again to the matter of how community organisations interact and relate to one another, some discussion was held on the relationship between a national competent authority and regional/local authorities.

At a number of meetings, participants expressed a view that local and regional competent authorities should not be subordinate to a national competent authority. The national competent authority needs to facilitate for, not to govern over, regional/local competent authorities. This is an important view on 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, places and so on –are interconnected and interdependent.[405] It is suggested, from many of the discussions in these consultations, that relationships between organisations are often seen not in a hierarchical, top-down sense, but rather, in terms of interconnecting, reciprocal and mutually supporting entities.

If a regional/local competent authority is considered, then questions need to be raised about resourcing and capacity building of communities. In some meetings, participants recognised that communities may not have the resources to carry out all the functions that a regional or local competent authority might

[405] See for example Kathy Absolon, 'Indigenous wholistic theory: A knowledge set for practice'. *First Peoples Child & Family Review, 5*(2), 74-87, 2010.

need to access, such as business and financial training and development skills and support, for example. In such circumstances it was considered that an important role for the national competent authority would be to provide the relevant resources and services. This has the advantage of avoiding unnecessary duplication of services that might be needed infrequently by communities. It would also mean that services, such as auditing and accounting, and financial management, that might place a significant financial burden on communities, may be accessible through the regional and/or the national competent authority. In response to a question about rights and responsibilities of competent authorities, participants at two meetings indicated that the national competent authority should be responsible for enforcement of intellectual property rights and traditional knowledge.

P1M1: *if you have an authority at a higher level then there's an expectation that there's a good governance structure at those lower levels and quite often it isn't there and if the overarching authority isn't as effective as it should be either because it doesn't provide appropriate support or in what it requires of those local authorities and governance structures to operate functionally they are not getting the support I suppose from government. … How do you make decisions about issues on country and they are just fundamental issues we have to deal with and then when you talk about specific subject matters about IP or land management or tenure or unemployment or whatever it might be then we've got a bit of a struggle to be able to make informed decisions on particular issues … the need for support to those more grass roots level*

P1M1: *so that people feel that when you going to that national group you are not having to take a lower position or a position that is different from your subgroup.*

P2M5: *And one of the conflicts that arises in that is, let's say some community out there has some magic medicine or something that they use, and it gets commercialised illegitimately, whatever that might mean, whatever the process might be, that little community is so disadvantaged. They have no means to actually combat the might of the pharmaceuticals or whoever the abusers are. Those abusers may well be government itself …. That's where I see a role for a competent authority not as a governing authority but as a support authority. So, it somehow gathers, through the databases you talk about, the resources to protect or support that mob in their battle against the giants. That could be a role at a higher level in the food chain of competent authorities whereas the actual competent authority itself as in what is legitimate to happen with that medicinal knowledge is that little mob down there that has held that knowledge for generations, but they need some back up because they are just going to get steam rolled given the might of society. That's why silence is golden in our business.*

P1M6: *So, if there's a valid reason for a national body to exist and I think there may well be and that body adhered to the validity of those reasons in its functions and it's not a controlling authority but it's like a support body.*

Theme 2.2.8 The national Competent Authority needs to have appropriate decision-making protocols

In discussions with participants on the topic of governance a theme that recurs throughout is concerned with decision-making. Effective protocols and processes for decision-making were identified by participants as being an important issue. For an Indigenous model of an organisation that is founded upon self-determination, the development and implementation of protocols and processes for effective decision-making is a first priority. That means that Aboriginal people must be the decision-makers, and

assert their ownership and control for overseeing informed consent, ethics and other protocols. Where decisions relate to a particular area or site on *Country*, the decision-makers should be traditional custodians and others who have rights and responsibilities over that country. Whether these are recognised Traditional Owners under native title, or land rights legislation, or as recognised by other Indigenous institutions, or community groups, will be matters for Aboriginal people to decide at their community levels.

A decision-making model that is often deployed by governments relies on Aboriginal advisory boards or committees. However, in an advisory role, Aboriginal people are often not the decision-makers. Rather, their advice is provided to the person or group who has the decision-making role, but who may have no obligation to take that advice into consideration in making a decision. For example, under the NSW National Parks and Wildlife Act, the Aboriginal Cultural Heritage Advisory Committee has no decision-making capacity, rather, the Chief Executive of the Office of Environment and Heritage has the decision-making power in relation to 'the protection of Aboriginal objects and Aboriginal places in New South Wales'.[406] Further, the composition of such advisory committees or boards may comprise of members appointed by government or other agency sectors. This raises issues with regard to how such individuals represent the interests of community, and reflect the views of the community/(ies) they are intended to represent.

Participants in all the meetings viewed Aboriginal decision-making as being of importance, including decisions on cultural matters. In Meeting 6, a participant shared anecdotes about community members who are not traditional owners exhibiting culturally inappropriate behaviour. This sentiment was mirrored in Meeting 4, where a participant noted the importance of all services being culturally appropriate. Comments in Meetings 3 and 5 reflect the need for institutions to remain compatible with Aboriginal culture.

P1M1: *going through processes but making decisions with no regard to the advice that has been provided … existing stuff like the Heritage Act where you have a process put in place and you thoroughly work through that process but ultimately you have a decision maker that can overrule all that, so I think it's got to be respectful. People have to be reassured that if they are going to engage that their voice will be heard ….*

P5M2: *There has to be a, what do you call them, a custodian of those areas on country that they have to look at to see who are the people.*

P2M4: *they've got to be cultural appropriate services. You can't do it any other way because we are protecting our arts and our designs.*

6 Theme 3: Regional/Local competent authorities

The consultations discussed the requirement and need for a national competent authority, and the possibility of establishing regional and/or local competent authorities. The importance of local-ness to Aboriginal peoples cannot be underestimated, as illustrated in the discussion on the consultations around the theme about relationships people have with their local organisations. In this way consideration needs to be given to establishing regional and/or local competent authorities that are the decision-making and

[406] National Parks and Wildlife Act 1974 (NSW) Section 85(1).

negotiating bodies for each community with regard to Aboriginal biodiversity-related knowledge and associated genetic resources. Consistent with observations made in the Indigenous Knowledge Forum's 2014 White Paper, Aboriginal 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*.

P2M4: *At the grassroots that's where everything happens.*

There are a number of themes with respect to regional and/or local competent authorities and the relationships between these and a national competent authority. Discussion of these themes is repeated here for the sake of completeness, and also to capture comments that specifically relate to the role of the regional and/or local competent authority in these arrangements.

Theme 3.1 The form of the regional and/or local Competent Authority is for each community to decide.

There is a great diversity between and among Aboriginal communities and some comments during the consultations reflect this diversity. According to one estimate, approximately 250 language groups existed at the time of European colonisation and around 120 of those languages continue to be spoken.[407] Each different language group (nation) has very specific rules, laws, codes and protocols that inform their conduct and decision-making. For this reason, the particularities of ways in which a regional and/or local competent authority might be established and function are to be decided by regional representative bodies and/or local communities, and each community expresses its own view on these matters.

Participants in Meeting 3 outlined a model in how their community conducts their decision-making. The participant described this process in a visual way, referring to concentric circles, talking about the specific roles and responsibilities of certain individuals and groups within the community, and how they engage with each other. This point raises again the importance of relatedness and interaction within Aboriginal communities – a theme that has resurfaced throughout the consultation discussions.

P1M5: *uniquely we are First Nations Peoples to this landscape. Uniquely, we are multicultural in our nations*

P1M1: *need to accommodate different language groups and communities in how the template is presented for how you apply a framework so that people can adapt it realise and localise. If you can get to that point will be very helpful not only for this region but also for the whole of Australia.*

[407] AIATSIS, Indigenous Australian Languages https://aiatsis.gov.au/explore/articles/indigenous-australian-languages.

P1M1: *there isn't a general understanding of the required resources to penetrate to the grass roots levels to support and be able to engage … you need to be able to penetrate through all of those layers*

P1M1: *Can't be too prescriptive*

P1M1: *Position that is consistent across the whole of Australia is unrealistic.*

P2M4: *… it's what the people here in Australia need. But it's going to be a problem because every area is different. Broome's different. Northern Territory different. North New South, Queensland different. Tasmania! Go down there. It's so different.*

P7M3: *On the outside of that circle, the last faded circle, that's all of us. All of the people that are coming in. That orange circle in the middle, that's the interpreters and that's the people who understand what you are saying and then they will go away and have a meeting with the elders and they will explain. You don't come and expect to get answers a yes or no right on the spot. It takes time. People should come in and talk to these people on the outside and then let them talk to the elders and discuss it in an understandable way and then that information, the yes or no, will come back out to you and it's just respect honouring the dignity that comes with all that ….*

That old man in the middle goes back out and tells us what to do. We don't make any decisions here … until he says yes or no but it's all explained to him in the proper way like how I just spoke now ….

Question to meeting 6: *In terms of the local entity, do you think different communities are going to have different ideas about what they want theirs to look like?* **P1M6:** *Absolutely* **P4M6:** *It's going to be like a diamond.* **P1 M6:** *A lot of different facets. Yes, a good analogy. Each facet is different*. **P2M6:** *Flexibility I think is a good word in all this too. Being flexible to maybe listen to somebody else's way of doing things and then adjust that little bit slightly to work for us.*

In regard to how a regional and/or local competent authority might be managed, participants in Meetings 1 and 5 spoke about the challenges of administering Aboriginal business within the ambit of Western legal and business systems. This turns again to questions about Indigenous versus Western ways, in regard to governance, decision-making, and organisation and management.

P1M1: *It's an enormous burden to do all that and we see it all the time where they say not only are we faced with this non-Indigenous construct to make decisions about and then we go home and have customary issues to deal with.*

P1M5: *and we are now having to operate within a foreign legal construct which is Western, a Westminster construct which is why I was kind of well what's your definition of knowledge because if it's that all-encompassing then we're going to try and fit a big massive round peg into a tiny square hole because the Western construct is so … limited …*

The way in which a regional and/or local competent authority needs to be run is also likely to be affected by the circumstances and history of the respective communities. For example, in remote communities, community Elders may speak English as a second, third or fourth language, and may have had a limited Western education. Lack of opportunity, poverty, poor health and social challenges faced by Aboriginal

communities[408] were clearly visible within the broader communities visited, and particularly in remote areas of the West Kimberley region of WA.

P1M1: *Reality is we sit and talk about a lot of big issues (that are important to us) but a lot of potential beneficiaries are in crisis mode living week to week and have more important issues.*

P1M1: *We are failing against the gross measures.*

P2M3: *I would like to say something about … we are getting ripped off by the…the old people with that tax that they brought in … too much money for us … we only get $200 a fortnight… the money out from… we got nothing to pay anything… all these bills come … we got nothing to pay out you know… pension…* **P1M3:** *aged pension…* **P2M3:** *we have nothing to pay … money … have to wait next fortnight, all that…*

P7M3: *So, I think that protocol should be understood from the outside before you come in here. I mean even how to communicate with people. I mean for a lot of our people English is a second language …*

Those circles on the outside represent the protocol you need to go through to talk to him because we have had problems a lot of times in the past where people come in even researchers, mining companies and all that and go straight to him and he might not understand all the jargon and language that people use, and they get him to sign anything.

Aboriginal people that live in urbanised and rural contexts also face challenges. Whilst there may be greater opportunities for community and access to services than experienced by remote communities, there are many social, health and economic issues faced by rural and urban Aboriginal communities.

In the extracts below, some urban and rural communities discussed additional challenges in terms of demography and group identity. These challenges may arise in regard to the extent to which they include Aboriginal people living off, and sustained by their traditional lands. For example, despite, traditional owners being significantly outnumbered in some developed areas, they continue to engage in cultural activities including hunting and collecting foods and medicines. This can be problematic with regard to traditional owners being heard or able to access their own *Country*.

P4M6: *One of the big problems we have with any organisation here is that people are not from here. They have no loyalty to the land you know and that's the big problem. We have these fly ins and they have full rights and what is it?*

P2M6: *… with our LORE, we wouldn't dream of going onto somebody else's country without being welcomed, without having some engagement with them about everything, and a meet and greet and all that sort of stuff, more than we would cut off our own arm, you know, you don't go in, you don't stamp on them, you don't take over their rights, you don't throw your beliefs and practices down their throats, you ask them for their permission if you can do this that or the other but yet they come down here from all over the place and it's like we can do this, we can do that and they're running over the top of us …*

[408] *Indigenous disadvantage in Australia: The disparity between Indigenous and non-Indigenous Australians* at https://www.australianstogether.org.au/discover/the-wound/indigenous-disadvantage-in-australia/ viewed 4 July 2018.

Discussions around competent authorities will also need to consider the contexts in which Aboriginal communities are changing, for example, with developments in community organisations, and programs such as land and environment related ones. These kinds of changes and developments are in some cases occurring quite rapidly, as illustrated in the quotation below.

P1M1: *We have done some really good things around land management.*

P7M3: *We've got the language centre, we've got our own youth programs [names specific program], we've got our own ranger programs to look after environmental stuff…*

P4M6: *the kids we get in to the uni we probably have about 1000 kids a year. We do all the year 9s the Aboriginal kids from throughout [this area]. We get them in. We give them a run around the university we show them the plants, give them a bit of knowledge, tell them the stories and how to get the meaning from the stories*

P4M6: *In the schools that I help I establish a medicine garden … Now I've got thirteen of those schools established throughout [this area].*

Intergenerational developments can also create challenges with regard to how a regional and/or local competent authority operates. For example, on the one hand there are younger community members who have had greater access to Western education, but on the other, some younger community members have limited connection with their Aboriginal cultural heritage. Respect for Elders as decision-makers is not always demonstrated. For example, in some communities, some of the Elders do not present the kinds of role models that younger people require.

P5M6: *and we do know there is a younger generation coming up and they are white smart and they understand it having been taught that way but they are culturally still within their system and it's a mix of two and that's where they are going but it's the younger generation.*

P2M6: *We have a handful of people in our community that respect our elders, and they are mainly us as elders, each other. You try and get that respect through the schools, that's a good start but if they are going home to parents that are not teaching the cultural respect to the grandchildren via aunty, nan, pop, uncles, whatever, there's a whole generation that has just slipped through the gaps.*

The range of different circumstances, experiences and situations faced by Aboriginal communities necessarily impacts on their community organisations, including those that are involved in cultural heritage and related matters. This also impacts on the differing views people expressed regarding the form of the regional and/or local competent authority might have. For example, in meeting 2, participants provided an example of a regional group who have begun to work on a form of protection for their traditional knowledge. This appears to be still a work in progress, however the participants desire to control access to their traditional knowledge is apparent.

P2M2: *I don't know if you guys have heard any movement but just going up in xxx we had a meeting and we are talking about what you are talking about, having a … body to protect Indigenous knowledge and if you are going to do it at a higher level that would be good like for Indigenous knowledge protection. We are not there yet but we are in the process but if you are doing the same thing that we are doing well that is even better … We are trying to develop a governance body where we protect Aboriginal rights and knowledge. They have to go through criteria and other stuff and even ownership to traditional owners. What is connected to the land, what is the story, who belongs to the story, who is the traditional owner of that story? So, we are on that at the moment.*

It is apparent that participants may often favour using an existing organisation such as a land council or a cultural organisation as their regional/local competent authority. For example, participants in Meeting 2 favoured using local and regional land councils.

P2M2: *So, for something like that, for knowledge, I reckon you should have the land councils from all over Australia. They would do the job then go to the regional. The regional would go to the traditional owners.*

Meeting 3 supported a combination of land council, cultural centre and a language centre.

As this report shows Indigenous knowledge is complex, and knowledge is embedded in, underpins, and permeates all domains of Indigenous peoples' lives. Knowledge resides in land, plants and animals, water, stories, ceremonies, dance, artworks, and language. For example, the dominant features of Australia's water and land are Aboriginal, and the Aboriginal creation stories provide some evidence for these connections.[409]

P3M3*: [name of organisation] … this is our Aboriginal organisation*

P5M3: *It depends on what you are asking for.*

P6M3: *It could be land knowledge.*

P1M3: *work together*

While often expressing support for their existing regional and/or local organisations, at the same time, in some cases, a challenge exists with equitable representation of all community members by existing organisations. For example, while successful native title claims have provided opportunities for some communities to improve their economic circumstances, there are others who have limited recognition as owners of traditional lands depending upon the type of determination such as by consent or litigation or where exclusive or non-exclusive rights are recognised by the court or tribunal. Australia's native title

[409] Virginia Marshall, *Overturning Aqua Nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, 2017) 32.

legal system often complicates and reconstructs Aboriginal concepts and knowledge,[410] creating winners and losers. This situation has been well documented.[411]

P1M3: *Because some conflicts happen up at my place. Some smart people… want for us not to go back… they are using our names and we are not there and that's why we are getting nowhere…*

In the case of some Aboriginal land councils, membership is open to Aboriginal people who reside in the area in which the land council operates, regardless of whether they are traditional custodians of the lands. In more urbanised areas there may be a lot of members who are not traditional owners. These individuals will not be custodians of knowledge from the relevant country. This is seen by some as a challenge with respect to developing a local competent authority.

P4M5: *I can see you have looked at Land Councils… they are an interesting structure…even in [this region] they are chalk and cheese depending on who the chair is. See one of the big problems [here], you have 46 or 50 Land Councils…and of those there is only a handful that are traditional owners … The people who run them aren't traditional owners and then there are several that are extremely well run by people who have married into traditional owners, so it is quite an interesting mix ….*

P4M5: *You are highlighting the big issue that we have got that we don't have representation. We don't have organisational representation.*

Meeting 6 supported the model of an Elders' council with senior members mentoring successors. There were differing views however with the degree of formality needed.

P5M6: … *with what we are talking about here with a new business we need to structure it not like a community-based organisation. It has to have its format as like a business, so you have everything down proper and it's got itself protected and talking about people feeling safe. You've got to have that as one of the main things or else you are not going to have people coming to do the job.*

By providing opportunities for Aboriginal communities to identify and appoint their preferred form of regional and/or local competent authority, questions will still need to be addressed in terms of the control of databases and other assets such as community cultural registers. For example, these questions are likely to arise if there is a risk that the entity is wound up, or that it is impacted by other external factors. These factors might include changes of personnel, people moving away from community, or other changes within the community. These are all matters that will require attention by local people, and must be

[410] Virginia Marshall, *Overturning Aqua Nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, 2017) 75.

[411] Australian Government, Human Rights Commission, *Native Title Report 2011* Chapter 2 Lateral violence in native title: our relationships over lands, territories and resources https://www.humanrights.gov.au/publications/native-title-report-2011-chapter-2

considered in determining the form, structure and operation of regional and/or local competent authorities. There are potential risks facing a regional and/or local competent authority in managing the most sensitive community information databases.

Theme 3.2: The scope of community served by a regional and/or local Competent Authority

The scope of the community to be served by a regional and/or local competent authority may be a relatively simple issue, if it assumed that the whole of the community will be potentially associated with the relevant Indigenous knowledge. As outlined in the beginning of this report, it can by no means be assumed that there will be a consensus in communities about ownership and management of knowledge, as the politics, laws and economics of knowledge management are complex, and are infused with networks, alliances, relationships along lines of kinship, extended family, clan, language and cultural ties, roles and responsibilities. In addition to these issues, what is meant by 'regional' and 'local' will also require some serious reflection by the respective community.

An example of the ways in which these complex layerings of associations and relationality may impact on allegiance to a regional/ and/or local competent authority, relates to an earlier point, 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. These issues were not widely discussed in the consultations.

P5M5: *my thinking having lived here for so long, most of my life, is that there are some people that pretend to be knowledgeable, but they are actors. So, you have got to be understanding where the actors are going to come in. So, to me, I think I had a dream a couple of months ago about wouldn't it be deadly if there was an agreement about you stay on that side of the river and this business is over here and this business is here. So, I was already creating that.*

P1M6: *It's about that group of knowledge holders, Elders. The question that remained unanswered was does it take in only people of country or does it take in others and I don't think we talked about that and my simple view is for Sydney that you have to take in others.* **P4M6:** *Yes.* **P1M6:** *But they should not be in a majority, ever.*

This issue is further complicated by blurring of 'borders' between nations. Participants in Meeting 6 discussed the concept of clans moving with sea levels, and the fluidity of boundaries that results. Shared responsibility is important where no one clan speaks exclusively for an area of land affected by these issues. Boundaries are artificial, imposed notions, and largely serve administrative purposes.

P4M6: *the tribes or the nations or whatever you want to call them, the groupings shifted with the rising and the falling of the sea levels.*

Theme 3.3: Who sits on the regional and/or local authority and how they are appointed to that role

One of the critical elements in creating governance structures and processes for competent authority organisations is the question of membership and representation within the Aboriginal community.

At some of the consultation meetings, participants expressed concern about how individuals would be appointed to roles on the regional and/or local competent authority. While there was consistent acknowledgement of the importance of Elders as decision-makers and advisors, there was also recognition that some communities have experienced a breakdown in respect for that model of representation.

Participants in Meeting 6 favoured using an Elders' council as the decision-making body with respect to Indigenous knowledge. This meeting also discussed a model proposed by other Aboriginal communities in which the board of an organisation would have one man and one woman from each of the families, elected by that family. This was viewed favourably by the meeting, although one participant observed that it might prove difficult where there are many families in a community.

There was notable wariness in some groups regarding nepotism in election processes, and abuse of power to favour the interests of particular stakeholder groups.

P1M4: *why can't we be respected as the elders that we are?*

P2M5: *Yes, so anyone who has any power or authority can recognise who they choose to recognise for functional purpose and there is no comeback. You have no comeback. I have no comeback. I live in the [local] area and there's all sorts of people running around out there saying I'm in charge and I'm an authority on this and so you say okay well tell me your story and there is no story. That reveals one of two things. They aren't from and don't know country or they're just totally ignorant. If they are from country, they have not been passed on knowledge. And there is a reason for that and it generally boils down to you have not been worthy.*

P2M6: *That would be having an Elders' council with authority.*

P4M6: *and a majority of people of the land*

P3M6: *… I just don't like the election process. I think people should be elected on merit and what they can do for the community and their promises to the community rather than I will stand up and be nominated and my best friend will vote for me and now I'm in.*

P2M6: *It should be what you can bring to the table, what you are prepared to do for your community, how much passion and love and commitment you really have. Do you have the black blood running through you or do you have your own hidden agenda? Are you going to talk the talk but not walk the walk, then we don't want to know you basically because you are no help to us.*

P2M6: *Which is a rite of passage because that's the way that lore works. The elders are the people that you go to for advice, run everything past them, get their approval, include them in decision making, not just make decisions for them, trample over them on your way to the top of the ladder. It doesn't work that way.*

Theme 3.4: Decision-making

There has already been discussion in this Report about the decision-making processes. The importance of Indigenous people in controlling decision-making was voiced very clearly by participants. At several meetings participants expressed the view that decision-making for cultural matters on country needs to be undertaken by appropriate Aboriginal people. In the case of decision-making around Indigenous knowledge, at the regional and/or local level, participants also held the view that the traditional custodians of the lands to which the knowledge relates should be the decision-makers, with particular reference to the relevant knowledge holders, and/or senior law people.

Aboriginal communities should determine for themselves how decisions are made within their community and whether there is a single process for all knowledge or whether different processes will apply to different types of knowledge. In addition to decisions around access to knowledge there are also decisions that will need to be made around access and benefit sharing. Again, communities need to be able to adopt culturally appropriate protocols and what determines these protocols.

P2M6: *any knowledge that is given to me that is my inherent right as a matriarch and elder of my family to pass on that knowledge to my own children, my own grandchildren, the neighbours, the kids at school, whatever.*

In regard to benefit-sharing, not all communities expressed interest in monetary compensation/royalty payment for any knowledge they may provide access to. It is important to recognise that in the CBD, and the Nagoya Protocol, that benefits to communities from the wider use of their knowledge and practices will not only be monetary, but may take many other forms such as other intangible and tangible acts of reciprocity. For example, in the consultations it was proposed that strengthening capacity, receiving support and services are in some instances more important. Further, the idea of "selling" knowledge does not sit well with some participants.

P5M6: *Is not for sale.*

Theme 3.5 Relationship between regional/local and national competent authorities

The relationships between a national, and regional and or local competent authorities have been discussed in this document, but further discussion is warranted. Participants in consultation meetings expressed a view that regional and/or local competent authorities should not be subordinate to a national competent authority.

A number of meetings shared the view that a hierarchical structure of a national competent authority would seem as superior to the regional/local competent authorities and would be inconsistent with Aboriginal culture and values. This reflects the grass roots nature of decision-making. It also reflects the need for appropriate representation in decision-making, as borne out in the consultations.

P1M6: *You create an organisation that doesn't have any power or authority in itself. It can't make decisions that override and control people, but it has a specific job to do. It has a specific job to provide support to people who are recognised as contributing knowledge to communities ... It doesn't have a choice but to do the job and it can't make decisions not to do the job so you create an organisation that's job is clear and defined and not flexible unless you create a process to allow it extra things to do in the structure of the organisation but it can't do them until it's gone through whatever that process is. ...*

and also so that the national body is not ... a governing body because once it starts governing, you're drifting power on a false premise up to a level that's beyond its comprehension and then you either have a cultural area or region authorities however you want to define it that deal with the knowledge and business belonging to that area, however you define it. But the national body needs to be what we talked about earlier- being there in support of. Like it might not be that a regional or local body can pursue an American company for breach of copyright. You need something more in tune with that international stuff and all that so you either divert your regional resources and not do your local or regional job or you have a competent authority up there that can handle at the request of others, not at its own initiative. So, its accountable down the line not up the line to government or whatever because it has no accountability to government because it is an independent authority….

It instructs up. Same pattern should go in terms of its coming into being. You don't create a national body to then set up all these state or regional or local bodies. You create the local bodies who agree by some means to create the national body, so the national body's existence is dependent on the continuing support of the local bodies. What happens in the colonial, western construct is that the higher authority is at the top of the triangle and the other authorities' existence is dependent on them and that's the wrong way around. It has never been done and so why not? It's the only thing the governments of the day have not tried is a ground up model. They always come down.

Theme 3.6 Regional/Local competent authorities supported by a national Competent Authority

Returning to the theme concerning the relationships between a national competent authority and local competent authorities, people at several meetings expressed the view that the local competent authorities should be supported by the national competent authority in dealing with access and benefit sharing and enforcement issues. Again, as mentioned previously in this report, this aligns with an Indigenous worldview about relationality, preferring mutually supportive engagement between organisational entities, rather than command and power, top down hierarchical models. An important element in considering the relationships between competent authorities is the matter of relative roles, rights and responsibilities. Participants in Meeting 2 expressed the view that any enforcement of rights would need to be done by the national competent authority.

There are tensions that exist between Western style organisational structures, and Indigenous approaches. Participants indicated that their organisations have considerable expertise in business and legal matters, but others do not. Individual community members may or may not have relevant expertise in these areas. In some instances, the challenges are around particular skills and resources such as those mentioned in the consultations. A further challenge arises where many responsibilities fall to a small group of Elders who are already overburdened by existing community responsibilities.

P1M1: *if you have an authority at a higher level then there's an expectation that there's a good governance structure at those lower levels and quite often it isn't there and if the overarching authority isn't as effective as it should be either because it doesn't provide appropriate support or in what it requires of those local authorities and governance structures to operate functionally they are not getting the support I suppose from government. … How do you make decisions about issues on country and they are just fundamental issues we have to deal with and then when you talk about specific subject matters about IP or land management or tenure or unemployment or whatever it might be then we've got a bit of a struggle to be able to make informed decisions on particular issues … the need for support to those more grass roots level*

P2M3: *We don't know much about the law... white people don't know our culture*

P3M3: *Can you explain what you are really here for? … Before it went too high***.**

P3M6: *So, to have time to take up one more without any support from anybody is really hard. Like you might go, look I'm really tired I don't want to drive, can somebody drive you? Can somebody take notes, do the computer thing for me that sort of thing? If you had the support…*

P2M6: *You know I wouldn't say no to any assistance. I don't have a computer. I'm not computer tech savvy. If there was somebody I could go to. Yeah, no worries we can type up that welcome for you or we can photocopy that information for the kids or whatever that would mean the world to me and I feel like I'm getting some support morally, spiritually and whatever.*

P2M6: *…its extremely difficult and you can't as an elder stand up there and encourage your will on the community. You can't force the respect. It's a two-way thing. It's given and received and we as elders are wearing ourselves out because we are trying to impart our knowledge, trying to be on top of everything that is happening and trying to advise them, guide them …*

7 Theme 4 Role of the Registrar

The roles of a Registrar in a competent authority is outlined in the 2014 White Paper. The Registrar for the national competent authority would have responsibility for the databases held by the authority. The Registrar would have a role in dispute resolution, among other roles to be determined. Because of the separation of knowledge into men's knowledge and women's knowledge, the need for separate women's and men's registers is acknowledged. There may also be a register for knowledge that is not specifically women's or men's knowledge, but knowledge that can be shared. Meeting 1 expressed the view that different communities might have a different view on this issue. The other meetings responded favourably to this proposal.

P4M3: *Yes. I think that is the culture and it would feel right with all the old people to be part of that women's side or part of that men's side.*

Participants were also asked for their views regarding whether the Registrar(s) should be able to delegate its authority. The notion of a delegated authority caused some tension in Meeting 6.

P3M6: *How does the registrar then oversee that and make sure that they're doing the right job?*

P1M6: *Who is the registrar accountable to?*

P3M6: *He's got to know that the delegates are doing what they are meant to do and it just gets so big that no one person can do that.*

P2M6: *Our registrar is directly answerable to the minister but in saying that the minister sat across the room from me and said I can't, I've got no power, I can't help you but isn't that what the law is?*

8 Conclusions

What is clear from the analysis of the consultations in the Garuwanga Project is that simply a national competent authority is not enough for the governance of a regime that protects, facilitates access to and benefit-sharing from such access to Indigenous knowledge. For self-determination to be achieved by Aboriginal communities, a more local or regional response is required with the national body providing support to such local or regional authorities while satisfying international reporting requirements that Australia may have under its international obligations. Consultations showed that having both a male and female registrar in the national body would be appropriate culturally. There was, however, some resistance to the registrars being able to delegate their authority.

While there was no universal endorsement among consultation participants for any specific kind of legal structure, participants did consider the ways in which a competent authority might operate. The analysis of the consultations identified the following features that a competent authority might have, namely:

- clear purpose
- security of tenure
- secure funding
- independence from government
- sound governance
- Aboriginal and Torres Strait Islander leadership and employees
- capacity strengthening protocols
- protocols for facilitating local and/or regional competent authority operations
- sound decision making protocols
- databases with robust security.

The consultations showed that people in a specific community and/or region should be empowered to determine the form of competent authority that is best suited to their needs at a local level. In this way, Aboriginal (and Torres Strait Islander) communities would be able to exercise self-determination.

APPENDIX

The following comprise the

- Plain English Research Statement,
- Informed Consent Form,
- Informed Consent Script for Oral Consent, and
- Combined Plain English Research Statement and Consent Form

utilised for the consultations undertaken in the Garuwanga Project.

Plain English Research Statement

Research project:

Garuwanga: Forming a Competent Authority to protect Indigenous knowledge

This research project is being conducted by Professor Natalie P Stoianoff, Professor Fiona Martin, Professor Andrew Mowbray, Dr Evana A Wright, Dr Ann Cahill, Dr Virginia Marshall, Dr Anne Poelina, Aunty Frances Bodkin and Uncle Gavin Andrews, Paul Marshall and Neva Collings from 2016 - 2019. We have grant funding from the Australian Research Council Linkage Scheme to conduct this research. The research is being carried out through the University of Technology Sydney (UTS) and the Indigenous Knowledge Forum.

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Mr Paul Marshall is connected in kinship with Nyikina Mangala, is a natural resource management expert and is an additional investigator on this project.

Ms Neva Collings is a Yuin woman from south coast NSW, she is a solicitor and the PhD student associated with the project.

This research project has been approved by the UTS Human Research Ethics Committee [UTS HREC REF. NO. ETH16-0784].

What will the researchers do?

We are trying to find out what Aboriginal people think about our recommendations for the legal structure of a Competent Authority suitable for governing and administering an Indigenous knowledge protection regime.

We are asking interested members of the Aboriginal communities in the Sydney/south coast region of NSW and the Kimberley to be part of one of the several focus group meetings to be held in the region. This means that you sit in a group and talk with us and other people there about the recommended governance structure while we listen/record the session so we can study it later. We will try to make sure that we understand your feedback and opinions and will ask questions to try and make sure we have understood them. It is also important to recognise that other communities and other people participating in the meeting you attend may have different opinions from yours. We ask you to promise not to tell people outside the focus group meeting what other people say inside the focus group meeting.

The focus group meetings will take place in Broome, Jarlmadangah Burru, Derby and Fitzroy Crossing in The Kimberley Western Australia during the week 30 April – 5 May 2018; in Bargo New South Wales on 9 May 2018; North Sydney and Batemans Bay in New South Wales on dates to be advised in the second half of August 2018 and will require the following time commitments from each participant: 1-3 hours reading and up to 2 hours discussion in the focus group. In case of conflict the resolution process will be mediation by an outside party.

What will the researchers do with the information they collect?

The information will be used to prepare a Report with a recommendation for an appropriate legal structure for a Competent Authority suitable for governing and administering an Indigenous knowledge protection regime. Such a regime has been proposed by our research group in 2014 to

(i) ensure 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.

It may also be used to inform the nature of the operations of such a Competent Authority so that the structure can be used by individual or groups of Indigenous Australian communities, states, territories or even the Commonwealth government. We may also write papers for academic journals and books and put a summary of the research on the Indigenous Knowledge Forum website.

We won't include personal or culturally restricted information without your consent.
We won't use any names to identify people who participate in this research without their consent. We will identify people by numbers and location or community number only.

What will happen to the results of the research?

We can't guarantee that the Indigenous knowledge protection regime we have designed will be implemented by any of the Australian governments nor that the recommended form of Competent Authority to administer such a regime will be formed or that any of the Australian governments will agree with your opinions. However, you and your community will be free to implement your own governance organisation for the protection of your community's traditional knowledge using the recommendations we provide in the Report.

We will keep the notes/recordings of the focus groups in a locked filing cabinet at UTS for 5 years and data will be securely stored with limited access on a password protected computer. After that, we will destroy the records and data. Only the Discussion paper, the Report, material on the Indigenous Knowledge Forum website and other academic publications will be publicly available.

Informed Consent Form

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Garuwanga: Forming a Competent Authority to protect Indigenous knowledge [UTS HREC REF. NO. ETH16-0784].

Name of Researchers:

Chief Investigators:

Professor Natalie P. Stoianoff, Director, Intellectual Property Program, at UTS, the Chair of the Indigenous Knowledge Forum and is a solicitor.

Professor Fiona Martin, School of Taxation and Business Law at the University of New South Wales.

Professor Andrew Mowbray, Director, Australasian Legal Information Institute at UTS.

Partner Investigators:

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Additional Investigators:

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Dr Ann Cahill is the current Research Associate on this project.

Ms Neva Collings is a Yuin woman from south coast NSW, she is a PhD student on this project and is a solicitor.

Place of Focus Group Meetings: the towns of Broome, Jarlmadangah Burru, Derby and Fitzroy Crossing in The Kimberley Western Australia during the week 30 April – 5 May 2018; in Bargo New South Wales on 9 May 2018; North Sydney and Batemans Bay in New South Wales on dates to be advised in the second half of August 2018.

The research is supported by an Australian Research Council Linkage Grant. The research is being carried out through UTS and on behalf of the Indigenous Knowledge Forum.

Participant's understanding

1. I understand what this research is about. I have read/or had read to me the Plain English Research Statement which explains what this research project is about and I understand it.

2. I have had a chance to ask questions about the project and I am comfortable with the answers I have been given. I know I can ask more questions whenever I like.

3. I have volunteered to participate. I agree to participate in the research. I know I don't have to participate if I don't want to. I made up my own mind to participate- nobody is making me do it.

4. I know that I don't have to answer any questions I don't like.

5. I know I can pull out at any time without getting into trouble with the researchers or anyone else.

6. If I pull out the researchers will be able to use information I gave before pulling out unless I ask them not to.

7. I agree to talk about the questions the researchers give us in a group of people. This is called a 'focus group'. I agree that the focus group can be voice recorded. I agree that the researchers can take notes.

8. I know that I won't get paid for participating in the focus group.

9. I know that the researchers will ask other people in the focus group not to talk about what is discussed in the focus group but can't stop them from doing that.

10. I understand that the researchers want to write about the research in paper(s) that will be presented to other academics at conferences within Australia and internationally, through the Indigenous Knowledge Forum and other public meetings, published in academic journals and the books in the LexisNexis Indigenous Knowledge Forum Series. I will not be required to write any of these papers and my name will not appear in or on them.

11. The researchers can present information about the project at a conference without asking me first.

12. If the researchers keep a record of what I say that record will be stored securely in a locked filing cabinet at UTS or on a secure computer.

13. I understand that I will not have copyright in any papers, notes or recordings produced in this project.

14. I know that if I am worried about this research I can ring up Professor Natalie Stoianoff on (02) 9514 3543 and talk to her about it.

15. I also understand that this study has been approved by the University of Technology, Sydney Human Research Ethics Committee.

If I have any complaints or reservations about any aspect of my participation in this research which I cannot resolve with the researcher, I can contact the Ethics Committee through the Research Ethics Officer (ph: +61 2 9514 9772 Research.Ethics@uts.edu.au), and quote the UTS HREC reference number. I understand that any complaint I make will be treated in confidence and investigated fully and I will be informed of the outcome.

Or

If I think there has been a breach of my privacy I can write to the Privacy Commissioner.

I have read the Informed Consent Form and I agree with it.

Signed by the research participant_____

Name of the research participant_____

Date_____

AND

Signed by or on behalf of the researcher(s) _____

Name_____Date_____

Informed Consent Script for Oral Consent

Acknowledgement of Country
We acknowledge the traditional custodians of the land on which we meet and we pay our respect to their elders past, present and future.
OR
We respectfully acknowledge the past and present traditional custodians of this land on which we are meeting, the [D'harawal]/[Nyikina Mangala]/[Yawuru] people. It is a privilege to be here on [D'harawal]/ [Nyikina Mangala]/[Yawuru] country. We are honoured to be able to use this site for this meeting.

The research project title is: *Garuwanga: Forming a Competent Authority to protect Indigenous knowledge*
This research project is being conducted by Professor Natalie P Stoianoff, Professor Fiona Martin, Professor Andrew Mowbray, Dr Evana A Wright, Dr Ann Cahill, Dr Virginia Marshall, Dr Anne Poelina, Aunty Frances Bodkin, Uncle Gavin Andrews, Paul Marshall and Neva Collings from 2016 - 2019. We have grant funding from the Australian Research Council Linkage Scheme to conduct this research. The research is being carried out through the University of Technology Sydney (UTS) and the Indigenous Knowledge Forum.

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We are trying to find out what Aboriginal people think about our recommendations for the legal structure of a Competent Authority suitable for governing and administering an Indigenous knowledge protection regime. We are asking interested members of the Aboriginal communities in the Sydney/south coast region of NSW and The Kimberley Western Australia to be part of one of the several focus group meetings to be held in those regions. This

means that you sit in a group and talk with us and other people there about the recommended governance structure while we listen/record the session so we can study it later. We will try to make sure that we understand your feedback and opinions and will ask questions to try and make sure we have understood them. It is also important to recognise that other communities and other people participating in the meeting you attend may have different opinions from yours. We ask you to promise not to tell people outside the focus group meeting what other people say inside the focus group meeting.

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If there is conflict between you and us, the researchers, the resolution process will be mediation by an outside party.

If you are worried about this research you can ring up Professor Natalie Stoianoff on (02) 9514 3543 and talk to her about it. This study has been approved by the University of Technology, Sydney Human Research Ethics Committee. If you have any complaints or reservations about any aspect of your participation in this research which you cannot resolve with the researcher, you may contact the Ethics Committee through the Research Ethics Officer (ph: +61 2 9514 9772 Research.Ethics@uts.edu.au), and quote the UTS HREC reference number. Any complaint you make will be treated in confidence and investigated fully and you will be informed of the outcome.

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If you stay and take part in the focus group then we will take this as you agreeing that:

You understand what this research is about;

You have had a chance to ask questions about the project and you are comfortable with the answers you have been given. You can ask more questions whenever you like;

You have volunteered to participate. You agree to participate in the research. You know you don't have to participate if you don't want to. You made up your own mind to participate- nobody is making you do it;

You know that you don't have to answer any questions you don't like;

You know you can pull out at any time without getting into trouble with the researchers or anyone else;

If you pull out the researchers will be able to use information you gave before pulling out unless you ask them not to;

You agree to talk about the questions the researcher gives you in a group of people. This is called a 'focus group'. You agree that the focus group can be voice recorded. You agree that the researcher can take notes;

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You understand that you will not have copyright in any papers, notes or recordings produced in this project.

I _____read this Informed Consent Form aloud to the

participants at the focus group meeting at _____ and I believe that the participants understood and agreed to it:

Signed by Researcher: _____

Signed by witness_____

Name of witness_____

Date_____

Plain English Research Statement

Research project:
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What will the researchers do with the information they collect?

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(iii) ensure that prior informed consent of Indigenous communities is obtained for access to their traditional knowledge, and
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Professor Andrew Mowbray, Director, Australasian Legal Information Institute at UTS.

Partner Investigators:

Dr Virginia Marshall, Wiradjuri Nyemba connected in kinship with Nyikina Mangala. Solicitor.

Dr Anne Poelina, Nyikina Traditional Custodian from the Mardoowarra, Lower Fitzroy River (WA).

Aunty Frances Bodkin is a D'harawal Elder of the Bitter Water Clans.

Uncle Gavin Andrews is descended from the Ngatti'mattagal clans of the D'harawal peoples of the Sydney/south coast region of NSW.

Additional Investigators:

Paul Marshall, connected in kinship with Nyikina Mangala and is a natural resource management expert.

Dr Evana Wright is a solicitor, law lecturer and post-doctoral researcher at UTS and is the former Research Associate on this project.

Dr Ann Cahill is the current Research Associate on this project.

Ms Neva Collings is a Yuin woman from south coast NSW, she is a PhD student on this project and is a solicitor.

Place of Focus Group Meetings: Broome, Jarlmadangah Burru, Derby and Fitzroy Crossing in The Kimberley Western Australia during the week 30 April – 5 May 2018; in Bargo New South Wales on 9 May 2018; North Sydney and Batemans Bay in New South Wales on dates to be advised in the second half of August 2018.

The research is supported by an Australian Research Council Linkage Grant. The research is being carried out through UTS and on behalf of the Indigenous Knowledge Forum.

Participant's understanding

1. I understand what this research is about. I have read/or had read to me the Plain English Research Statement which explains what this research project is about and I understand it.

2. I have had a chance to ask questions about the project and I am comfortable with the answers I have been given. I know I can ask more questions whenever I like.

3. I have volunteered to participate. I agree to participate in the research. I know I don't have to participate if I don't want to. I made up my own mind to participate- nobody is making me do it.

4. I know that I don't have to answer any questions I don't like.

5. I know I can pull out at any time without getting into trouble with the researchers or anyone else.

6. If I pull out the researchers will be able to use information I gave before pulling out unless I ask them not to.

7. I agree to talk about the questions the researchers give us in a group of people. This is called a 'focus group'. I agree that the focus group can be voice recorded. I agree that the researchers can take notes.

8. I know that I won't get paid for participating in the focus group.

9. I know that the researchers will ask other people in the focus group not to talk about what is discussed in the focus group but can't stop them from doing that.

10. I understand that the researchers want to write about the research in paper(s) that will be presented to other academics at conferences within Australia and internationally, through the Indigenous Knowledge Forum and other public meetings, published in academic journals and the books in the LexisNexis Indigenous Knowledge Forum Series. I will not be required to write any of these papers and my name will not appear in or on them.

11. The researchers can present information about the project at a conference without asking me first.

12. If the researchers keep a record of what I say that record will be stored securely in a locked filing cabinet at UTS or on a secure computer.

13. I understand that I will not have copyright in any papers, notes or recordings produced in this project.

14. I know that if I am worried about this research I can ring up Professor Natalie Stoianoff on (02) 9514 3543 and talk to her about it.

15. I also understand that this study has been approved by the University of Technology, Sydney Human Research Ethics Committee.

If I have any complaints or reservations about any aspect of my participation in this research which I cannot resolve with the researcher, I can contact the Ethics Committee through the Research Ethics Officer (ph: +61 2 9514 9772 Research.Ethics@uts.edu.au), and quote the UTS HREC reference number. I understand that any complaint I make will be treated in confidence and investigated fully and I will be informed of the outcome.

Or

If I think there has been a breach of my privacy I can write to the Privacy Commissioner.

I have read the Informed Consent Form and I agree with it.

Signed by the research participant_____

Name of the research participant_____

Date_____

AND

Signed by or on behalf of the researcher(s) _____

Name_____Date_____

Table 1: Matrix of consultation themes by meetings

	Meeting 1	Meeting 2	Meeting 3	Meeting 4	Meeting 5	Meeting 6
Indigenous Knowledge	Discussed	Discussed	Discussed	Discussed	Discussed	Discussed
Functions and powers of the Competent Authority						
A single national Competent Authority (NCA)	Yes	yes	yes	Not addressed	Not addressed	Yes
Reflecting Aboriginal customary laws, and cultural protocols						
Important features for a Competent Authority	Clear purpose Securely funded Independent Indigenous led & run Capacity building Strong governance Facilitation	Capacity building Strong governance Facilitation	Strong governance	Strong governance	Capacity building Strong governance Facilitation	Clear purpose Security of tenure Securely funded Independent Indigenous led & run Capacity building Strong governance Facilitation
Effective models for protecting Aboriginal interests	Empowered communities	Local land councils; regional LC	cultural organisations and land councils	Not addressed	Not addressed	Health organisations Cultural organisations

Ineffective models for protecting Aboriginal interests	Not addressed	Not addressed	Not addressed	Not addressed	Local land councils.	Local land councils.
Local, grass roots presence	Yes	Yes	Yes, cultural organisations and land councils	yes	yes	Yes, Elders' council
Role of employees, officers and councillors in a Competent Authority	Indigenous where possible	Not addressed	Not addressed	Not addressed	Not addressed	Indigenous for decision making and capacity strengthening
Suitability to Australian law and regulations						
Form of the NCA in full	Best practice	Land council reps	Not identified	Perhaps a new entity	No specific response	Possibly statutory authority
Decision-making within the Competent Authority	Indigenous esp. on cultural issues	Indigenous esp. on cultural issues	Indigenous esp. on cultural issues	Indigenous esp. on cultural issues	Indigenous esp. on cultural issues	Indigenous esp. on cultural issues
Registrars	variable	Male and female	Male and female	Male and female	Male and female	Male and female
Delegating authority	variable	Not addressed	Not addressed	Not addressed	Not addressed	Concerns expressed