Indigenous Knowledge Forum
University of Technology Sydney

Submission by
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To:

IP Australia

Re:

Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge

9 November 2022

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Executive Summary

The Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge (IK) is a most welcome development and one which has been the focus of the Indigenous Knowledge Forum as well. Building on the seminal works of scholars such as Terri Janke, The Indigenous Knowledge Forum has worked closely with First Nations knowledge holders to develop a path for the establishment of such stand-alone legislation as is espoused by the Interim Report.

This submission addresses Part A and Part B of the Scoping Study and offers the research contained in the projects undertaken by the Indigenous Knowledge Forum and reported in several publications, some of which have direct links provided. In summary, the challenges of protecting IK are clearly recognised and this submission offers several other challenges to consider when drafting stand-alone legislation to protect and commercialise IK. These are well documented in the community consultations carried out in the development of a White Paper prepared for the NSW government in 2014. As for the establishment of a National body to administer such a regime, the Garuwanga Project undertaken by the Indigenous Knowledge Forum provides a pathway to determining the structure, form and governance principles necessary for a First Nations' led competent authority.

Acknowledgement

The Indigenous Knowledge Forum acknowledges and honours 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 we acknowledge them as the traditional custodians of their lands, waters and knowledge. We acknowledge and honour the many nations of the Aboriginal and Torres Strait Islander Peoples of Australia.

In this submission, the term Indigenous or First Nations peoples/communities/Australians will be used to refer collectively to the many nations of the Aboriginal and Torres Strait Islander Peoples of Australia. Use of this terminology is done with respect and is in no way intended to diminish identity of particular Indigenous People of Australia with particular nations.

Indigenous Knowledge Forum Research Background

For the past 10 years, the Indigenous Knowledge Forum has been working to understand the impact of law and policy on Indigenous knowledge and biodiversity management. The Forum focuses on how Indigenous knowledge can be protected in Australia for the benefit of Aboriginal and Torres Strait Islander Peoples and how the implementation and operation of relevant laws affects the rights and interests of Australia's First Nations Peoples.

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 (the NSW White Paper)[1]. The NSW White Paper was developed during a research project funded by

[1] Natalie P. Stoianoff, Ann Cahill, Evana Wright and Virginia Marshall on behalf of the UTS – Indigenous Knowledge Forum and North West Local Land Services, 'Recognising and Protecting Aboriginal Knowledge

the Aboriginal Communities Funding Scheme of the Namoi Catchment Management Authority (now North West Local Land Services (NWLLS)).

The main aim of that project was to identify key elements for the development of a model law 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 draft legislation was created through a process of: analysing relevant treaties and laws from other countries that address similar issues; discussion and review of the legislative regimes by Working Party (comprised on Indigenous and non-Indigenous researchers, community leaders, legal professionals and government officials) to prepare a first draft; consultation with various NSW Aboriginal Communities to obtain feedback on the first draft and preparation of the final draft from Aboriginal Community responses during the consultation.

The NSW White Paper recommended adoption of a stand-alone regime for the state of NSW, operating within a natural-resources management framework. An important aspect of that regime was the establishment of a competent authority to manage the protection of and access to Indigenous knowledge (or IK).

In 2016, the Indigenous Knowledge Forum together with other researchers commenced working on the Garuwanga Project which builds on the work of the NSW White Paper. This Project has been funded by the Australian Research Council Linkage Grant Scheme and is led by a team of Chief Investigators from the University of Technology Sydney, the University of NSW and the Australian National University, and Aboriginal Partner Investigators who together direct the research program. The project employed a part time Research Fellow and supported an Aboriginal PhD student who has now graduated with a thesis exploring 'Aboriginal and Torres Strait Islander Peoples' governance of traditional knowledge and the roles and functions of incorporated community organisations'.

The Garuwanga Project considered the elements of the model law developed in the NSW White Paper to be applicable at a national level and so is concerned with developing an Australian competent authority (Competent Authority)[2] to govern and administer a legal framework for protection of 'traditional knowledge' of Indigenous Australians as required under the Nagoya Protocol[3] to the *Convention on Biological Diversity 1992*. The Nagoya Protocol, to which Australia is a signatory, calls for a Competent Authority to govern and administer a legal framework:

(i) ensuring prior informed consent of Indigenous communities is obtained for access to their traditional knowledge, and
(ii) that establishes fair and equitable benefit-sharing mechanisms for use of that knowledge.[4]

Associated with Natural Resource Management – White Paper for the Office of Environment and Heritage, NSW', (2014) https://www.indigenousknowledgeforum.org/white-paper (NSW White Paper).

[2] A 'Competent Authority' is an organisation that has the legal authority to perform a specific function or to deal with a particular matter.

[3] *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* 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.

[4] Article 13 of the *Nagoya Protocol* requires Australia, once it has ratified the Protocol, to designate both a 'competent national authority' and a 'national focal point' on access and benefit sharing. These functions can be performed by the same entity and there can be more than one competent national authority.

The term 'traditional knowledge' grew out of Article 8j to the *Convention on Biological Diversity 1992* (CBD) where nation states are expected to:

> *respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*

To this end the terms 'traditional knowledge' and 'Indigenous knowledge' can be used interchangeably.[5] However, despite this terminology, what the Indigenous Knowledge Forum and its Garuwanga Project recognise is the holistic nature of knowledge and culture such that the expressions of knowledge and culture, artistic or otherwise, are part of the knowledge and culture.

In particular, the Garuwanga Project addresses concerns over the form, independence and funding of a Competent Authority, as well as local Indigenous representation, by facilitating the engagement of First Nations communities in identifying, evaluating and recommending an appropriate Competent Authority legal structure. The specific aims of this project have been 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 the engagement of First Nations communities (in this project the Partner Organisations were Aboriginal Communities only) in the process of such identification and evaluation;
3. recommend an appropriate legal structure for such a Competent Authority in accordance with that engagement.

Papers discussing our work are available on the Indigenous Knowledge Forum website: www.indigenousknowledgeforum.org.

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[5] For a discussion regarding these terms and their meaning see N. P. Stoianoff, 'Navigating the Landscape of Indigenous Knowledge – A Legal Perspective' (2012) 90 *Intellectual Property Forum* 23, 23-25.

PART A: CHALLENGES FOR INDIGENOUS KNOWLEDGE PROTECTION

OVERVIEW:

The six issues constituting the primary concerns of Aboriginal and Torres Strait Islander Peoples relating to their Indigenous Knowledge (IK) referred to in the Interim Report accord with the findings of the Indigenous Knowledge Forum's community consultations carried out in its research projects mentioned above. Similarly, the four consistent themes that Aboriginal and Torres Strait Islander Peoples indicated they want in relation to IK accord with the community consultations carried out by the Indigenous Knowledge Forum.

Further issues were raised in the raw data and its analysis from the work leading to the NSW White Paper. These issues can be found in Chapter 5 of the NSW White Paper, while a further analysis of that data can be found in Chapter 2 of N.P. Stoianoff (ed), *Indigenous Knowledge Forum – Comparative Systems for Recognising and Protecting Indigenous Knowledge and Culture*, Lexis Nexis, 2017. Quotations will be provided from both publications.

Issues affecting the capacity to protect and benefit from IK:

The following issues were raised and discussed during the consultations that resulted in the development of the Model Law espoused by the NSW White Paper. While the NSW White Paper is directed at Aboriginal Australians, the following issues may or may not be of concern to Torres Strait Islander Peoples. A separate set of consultations would be necessary to ascertain their views.

- Connection to culture and Country:

'The spiritual significance of knowledge for Aboriginal peoples and the responsibilities attaching to knowledge and its use must be respected. However, the history of European interaction with Aboriginal peoples has significantly impacted the opportunity for Aboriginal peoples to live on their Country and express their culture.'[6]

- Defining Aboriginal communities:

'This was probably one of the most contentious issues during the consultation … There is a tension between continual connection to Country, displacement (both voluntary and involuntary), active participation in community and identification with community to attract benefits.'[7]

- Rights to knowledge:

'The consultations emphasised that rights to knowledge about Country 'never ceased to exist and that preservation of these rights is paramount'. The participants also confirmed that access to traditional lands and waters is crucial for the protection of knowledge and culture for the benefit of future generations.'[8]

- Beneficiaries under an access and benefit-sharing agreement:

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[6] NSW White Paper, above n 1, 36.

[7] Ibid, 39-40.

[8] N.P. Stoianoff (ed), *Indigenous Knowledge Forum – Comparative Systems for Recognising and Protecting Indigenous Knowledge and Culture*, Lexis Nexis, 2017, 28.

‘Concerns were expressed as to how broadly the term ‘beneficiary’ was to be cast. Th is relates to how the Aboriginal community is to be defined. The issue relates to the potential for dilution of rights to benefits flowing from the granting of access to knowledge, should claims be made by descendants of traditional custodians living outside the community. The preference expressed was that benefits should flow only to those descendants of traditional custodians actively involved in caring for Country.’[9]

- Access to knowledge:

‘The consultations emphasised the need to identify who speaks for the knowledge within a community but also recognised the need for that knowledge holder to go back to the community and consult its Elders before a decision could be made’.[10]

- Concepts of benefit-sharing:

‘A key issue for communities was to have the right to ‘make their own decisions about the form of benefit they should receive and how the benefits should be distributed’. It was important to recognise that communities are not homogeneous but have their own laws and protocols that will assist them to determine how to share the benefits arising from access to their knowledge.’[11]

- Sanctions and remedies under the proposed regime:

‘The consultations confirmed acceptance of both criminal and civil sanctions and remedies against those who would misappropriate Aboriginal culture and knowledge, despite scepticism around enforcement of community rights over culture and knowledge. Penalties need to be a ‘serious deterrent against abuse’ and there should be ‘[g]uidelines for community impact statements’. Caution was expressed over the use of mediation.’[12]

- Competent authority:

A National Indigenous Knowledge Authority established in partnership with First Nations Peoples as described in the Interim Report has similarities to the Competent Authority provided in the Model Law in the NSW White Paper. The Community consultations revealed several concerns which led to further research undertaken by the Indigenous Knowledge Forum with the assistance of an ARC Linkage Grant. The Garuwanga Project was tasked with recommending an appropriate legal structure for a Competent Authority suitable for governing and administering an IK protection regime that is independent of government, led by First Nations Peoples and provides for local representation. The NSW White Paper consultations noted:

‘For the most part concerns focussed around what form the competent authority would take, how it would be funded and what would happen if it were wound up. The example of ATSIC and funds going into consolidated revenue was raised. The need for the competent authority to include a local administrative level was a common theme. There was also a call for the competent authority to be independent of existing bodies … Ensuring Aboriginal representation is important … Different tiers to the authority are needed to provide for local engagement. Community involvement is important. Involvement of younger people in the process would be good … Avoiding loss of databases and benefits if the Competent Authority dissolves is important. It is important to specify what happens if the Competent Authority dissolves. It was suggested that funds in the Competent Authority should be distributed within a prescribed period and that consideration should be given to vesting

[9] Ibid, 29.

[10] Ibid.

[11] Ibid, 31.

[12] Ibid, 32.

provisions … The need for an appeal process was raised … Register of access agreements is important.'[13]

- Multiple 'owners' of registered knowledge:

'The White Paper anticipated a situation where more than one community could claim rights over particular knowledge. This was acknowledged as a real issue by many participants in the consultations. Does access to the knowledge require all potential knowledge-holder communities to agree or is it sufficient for one community to agree to access and enter into a benefit-sharing agreement to the exclusion of the others? Could family vendettas impact the decision-making? What happens if the access or disclosure of the knowledge would cause harm to one or more communities claiming rights over that knowledge? In the latter situation one of the consultations advanced the idea that where disclosure would amount to harm to a community then disclosure ought to be denied. In other situations an objection or arbitration process might be necessary and could be heard by the Registrar of the relevant database.'[14]

- Databases:

'The White Paper proposes a variety of databases be established to enable Aboriginal knowledge to be gathered, stored and preserved for the benefit of communities and their knowledge holders and to enable them to control access to their knowledge and on what terms. Mechanisms are suggested for both confidential and public or non-confidential information but concern was expressed about the potential for abuse of the databases. Participant 13 expressed the following: 'You are going to have all this knowledge in one spot and it's only got to get in the wrong hands of someone …'. Accordingly, it was considered important that the knowledge holders' database be held locally rather than centrally by a national Competent Authority, in order to deal with the change in the list of such knowledge holders with the progression of time.

'Also, as knowledge holders (senior law men and women) have responsibility to protect the knowledge, they need to have the power to decide what is stored, taking into account sensitivities around the knowledge, and establish protocols for the use of the databases and the information stored in them.'[15]

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[13] NSW White Paper, above n 1, 48.
[14] Stoianoff, above n 8, 34-35.
[15] Ibid, 35.

PART B: MODELS FOR SUI GENERIS LEGISLATION

OVERVIEW:

I recommend consideration of the draft legislation contained in the Indigenous Knowledge Forum's White Paper to the then NSW Office of Environment and Heritage (NSW White Paper). The architecture of that draft legislation was built from the perspective of the Aboriginal communities it is intended to protect. It deals with the challenges for Indigenous knowledge protection identified in Part A of the Interim Report while providing a model that has the capacity to bring together Western-based law with Indigenous customary law with the assistance of regulations developed by the national competent authority in consultation with First Nations Peoples. The NSW White Paper is available at https://www.indigenousknowledgeforum.org/white-paper but is also available at https://opus.lib.uts.edu.au/bitstream/10453/37401/1/white_paper.pdf and has been provided to IP Australia in past submissions on this topic area.

ELEMENT 1: CREATE A NEW IK RIGHT

The model law espoused by the NSW White Paper provides for the creation of rights over Indigenous knowledge. In the NSW White Paper such knowledge is referred to as "Knowledge Resources" in an attempt to recognise the breadth of meaning of Indigenous knowledges:

> ***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.*

This need for a holistic view of Indigenous knowledge was brought to the fore in the Garuwanga Project Community consultations. The research of the Indigenous Knowledge Forum has shown that dividing Indigenous knowledge and culture, or indeed Indigenous intangible cultural heritage, into "traditional knowledge" (such as bush foods and bush medicines) and "traditional cultural expressions" (such as visual arts and crafts), as the World Intellectual Property Organization (WIPO) has, fails to acknowledge the holistic nature of such knowledge and culture.[16]

It is encouraging that the Interim Report has adopted such an holistic definition at page 11 defining Indigenous Knowledge (IK) as covering traditional knowledge, traditional cultural expressions including knowledge about genetic resources.

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[16] 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), 15.

The *Convention for the Safeguarding of the Intangible Cultural Heritage 2006*, to which Australia is unfortunately not a party, provides an equally holistic definition at Article 2:

> *Article 2 – Definitions*
>
> *For the purposes of this Convention,*
>
> *1. The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.*
>
> *2. The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains:*
>
> *(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;*
>
> *(b) performing arts;*
>
> *(c) social practices, rituals and festive events;*
>
> *(d) knowledge and practices concerning nature and the universe;*
>
> *(e) traditional craftsmanship.*

Accordingly, this drafting may provide some further guidance in the way Indigenous knowledge and culture can be dealt with under a *sui generis* regime. Whatever definition is given to the subject of an IK Right, it must be holistic in nature, that is, not dividing Indigenous knowledge and culture/heritage into knowledge on the one side and arts and crafts on the other. While such a division might be convenient from conventional intellectual property perspectives, it fails to 'reflect the interaction and interdependence of these two "aspects" of traditional or Indigenous culture'.[17]

As for the establishment of an IK Right, the NSW White Paper addresses this in section 1 of the model legislation.[18] At paragraph (2), Aboriginal Communities have the inherent right to maintain, control, protect and develop their *Knowledge Resources*, while at paragraph (3) moral rights over these Knowledge Resources are granted to the Aboriginal Communities.

Further, the NSW White Paper's model laws include the following rights:

(5) Aboriginal communities that create, hold or preserve Knowledge Resources have the right to:

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[17] Patricia Adjei and Natalie Stoianoff , 'The World Intellectual Property Organisation (WIPO) and the Intergovernmental Committee: Developments on Traditional Knowledge and Cultural Expressions' [2013] 92 *Intellectual Property Forum* 37, 38.

[18] The Model Law can be found in the NSW White Paper, above n 1, Appendix 2, 121 – 137.

(a) prevent unauthorised persons from:

(i) the use or carrying out of tests, research or investigations relating to Knowledge Resources; and

(ii) the disclosure, broadcast or rebroadcast of data or information that incorporates or constitutes such Knowledge Resources; and

(b) derive benefit from economic exploitation by authorised persons of Knowledge Resources held by the Aboriginal Community as provided in this Act.

Such rights are considered communal property held by the Aboriginal Community that is a custodian for the Knowledge Resource and not an individual person or persons within that Aboriginal Community (section 3 (2) of the model law). Section 5(2) grants Aboriginal Communities the right to regulate access to their Knowledge Resources.

ELEMENT 2: MEASURES AIMED AT INAUTHENTIC PRODUCT

While the NSW White Paper does not specifically address the problem of inauthentic product, it does so from the perspective of such product being an infringement of IK rights. To access Knowledge Resources requires free prior informed consent of the community holding that Knowledge Resource. This is provided in section 5 of the Model Law.[19] The process of access is then explained in sections 6, 7 and 8 of the Model Law.[20] Then there is the question of benefit sharing explained in sections 9, 10 and 11 of the Model Law.[21]

It is possible that a person infringing the IK right could be construed as doing so through the creation and exploitation of inauthentic product if they cannot provide an access agreement from the community whose Knowledge Resource is being emulated. The NSW White Paper sets out a series of sanctions and remedies based on the circumstances of the act of infringement in a similar way that infringement is dealt with under other forms of intellectual property.[22]

There is, of course, the option of passing off actions and misleading and deceptive conduct actions that could be taken against those dealing in inauthentic product. Such an action could be taken on behalf of the affected communities by the Competent Authority administering the *sui generis* legislation.

ELEMENT 3: NATIONAL INDIGENOUS KNOWLEDGE AUTHORITY

Australia's commitment[23] to implementing laws which are consistent with the human rights principles of the United Nations Declaration on the Rights of Indigenous Peoples[24] (UNDRIP) is

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[19] Ibid, 126.
[20] Ibid, 126-128.
[21] Ibid, 128-129.
[22] Ibid, 129-132.
[23] Jenny Macklin, 2009, Statement on the United Nations Declaration on the Rights of Indigenous Peoples. Canberra: Australian Government; Human Rights Council, 2016, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review, Report of the Working Group on the Universal Periodic Review: Australia. Doc no. A/HRC/31/14/Add.1, 29 February.
[24] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, UN Doc. A/RES/61/295, 13 September 2007, Arts. 18, 19 (UNDRIP).

evidenced by this proposal to establish legislation to protect IK and a legislative body to work with First Nations Australians to administer such a regime.

Indigenous- led decision-making processes and institutions are crucial to achieving the key principles espoused by the UNDRIP. A National Indigenous Knowledge Authority (NIKA) led by First Nations Australians would go some way toward compliance with Article 18 of UNDRIP, namely, facilitating the participation of Aboriginal and Torres Strait Islander peoples in decision-making about matters that affect their rights, in this instance, in relation to Indigenous knowledge and culture:

> 'The UNDRIP specifically recognises the rights and obligations of Indigenous people to their cultural knowledge and practices, and grounds these rights and obligations in the customary laws of their communities.'[25]

In particular, Article 31 of the UNDRIP not only confirms the rights of Indigenous peoples over 'their cultural heritage, traditional knowledge and traditional cultural expressions …', but specifically notes that Indigenous peoples

> 'also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.'

This, together with the acknowledgement that Indigenous peoples have the right to self-determination,[26] reinforces the importance of consent processes being facilitated by Indigenous-led institutions and organisations.[27] Accordingly, the structure, form and governance of NIKA must be chosen by Aboriginal and Torres Strait Islander peoples in accordance with their decision-making processes, cultural practices and institutions. This is a crucial element of Indigenous empowerment and central to Indigenous governance and ultimately self-determination.[28]

Consequently, how NIKA would be constituted is a matter for Aboriginal and Torres Strait Islander people. It is reasonable that IP Australia through the Interim Report makes some suggestions regarding structure and membership, but ultimately, it is for Australia's First Nations Peoples to determine the constitution and operation of NIKA.

While the NSW White Paper sets out the functions of such a competent authority for administering the Model Law (section 22),[29] there is also a recognition that there could be local, regional and state level administrations. Such a tiered approach is recommended by the Garuwanga Project which had the specific aims 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 the engagement of First Nations communities (in this project the Partner Organisations were Aboriginal Communities only) in the process of such identification and evaluation;

[25] Natalie Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia – The Case for sui generis Legislation', (2016), *Monash University Law Review* (Vol 41, No 3), 745, 755.
[26] UNDRIP, Article 3.
[27] Terri Janke Company for IP Australia, 'Managing Indigenous Knowledge: Report 2 - Indigenous protocols and processes of consent relevant to trade marks' (Discussion Paper, 2020), 12.
[28] Natalie Stoianoff, 'Sustainable Use of Indigenous Ecological Knowledge: A Case Study for Implementing the Nagoya Protocol', in Mauerhofer V., Rupo D., Tarquinio L. (eds) *Sustainability and Law.* (2020) Springer, Cham., pp. 431- 451, https://doi.org/10.1007/978-3-030-42630-9_22
[29] NSW White Paper, above n 1, Appendix 2, 133.

3. recommend an appropriate legal structure for such a Competent Authority in accordance with that engagement.

The community consultations that were carried out have been reported by the Indigenous Knowledge Forum.[30]

> *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.*[31]

The grass-roots level of governance is crucial for a regime that aims to protect IK. This was made clear in both the NSW White Paper and the Garuwanga Project. Aboriginal communities consulted for the development of the NSW White Paper favoured 'the concept of subsidiarity with decision-making residing with regional bodies or the local community where possible'.[32]

> *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.*[33]

While the establishment of a national body was recognised as important for the operation of a regime to protect IK, the consultations carried out in the Garuwanga Project noted the importance of local-ness to Aboriginal peoples, requiring consideration to be given to establishing regional and/or local competent authorities that are the decision-making and negotiating bodies for each community with regard to their IK.

[30] 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, April 2020) (Stage 3 Activity 6 Analysis of Consultations Report) available at https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho
[31] Ibid, 4.
[32] Ibid, 29.
[33] Ibid.

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.[34]

Another important contribution from the Garuwanga Project was the development of a set of governance principles that would assist in identifying and evaluating the most appropriate legal structure for the competent authority. These principles are:

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

An explanation of each of these principles can be found in the Discussion Paper for the Garuwanga Project.[35] By developing a set of 'culturally appropriate governance principles against which a variety of already existing governance structures could be evaluated in order to identify the most suitable structure for the Competent Authority', these principles effectively define a model of governance that might be acceptable to Indigenous Australians more generally.[36]

The Garuwanga Project analysed a broad spectrum of legal structures that might be suitable for the establishment of a competent authority. Organisations capable of meeting the Garuwanga governance principles ranged from unincorporated to incorporated organisations including Prescribed Bodies Corporate and proprietary limited companies.[37]

A potential model for the establishment of a national or even a regional competent authority might be a trust arrangement which has a charitable purpose, an Aboriginal and Torres Strait Islander Corporation as trustee, and beneficiaries being either regional competent authorities which have their own trust arrangements or, in the case of a regional competent authority, the Prescribed Bodies Corporate or other organisations of the communities in that region. While such cascading trust arrangements can be complicated, they offer a workable independence from government provided they are able to attract the necessary funding to operate.[38]

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[34] Ibid, 41.
[35] Indigenous Knowledge Forum, Garuwanga: Forming a Competent Authority to protect Indigenous knowledge – Discussion Paper, UTS, April 2018.
[36] Natalie Stoianoff, *'Indigenous Knowledge Governance: Developments from the Garuwanga Project'* (2019) 117 Intellectual Property Forum 9, 15-16.
[37] Ibid, 21
[38] Ibid.