

Indigenous Knowledge Forum

**Garuwanga: Forming a
Competent Authority to protect
Indigenous knowledge**

Discussion Paper



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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 have failed to do so. This declaration is not part of Australian law. It is not binding in Australia.

We acknowledge the principles set out in the AIATSIS 2012 Guidelines for Ethical Research in Australian Indigenous Studies² 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.

This Discussion Paper continues to evolve as Aboriginal people provide input into its content and how the ideas it contains should be expressed to be culturally appropriate to Aboriginal and Torres Strait Islander peoples and accessible to the widest possible audience.

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) <<http://aiatsis.gov.au/sites/default/files/docs/research-and-guides/ethics/gerais.pdf>>.

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	Partner Investigator
Dr Anne Poelina	Madjulla Association	Partner Investigator
Professor Natalie Stoianoff	University of Technology Sydney	Lead Chief Investigator & Chair of meeting
Professor Fiona Martin	University of New South Wales	Chief Investigator
Professor Andrew Mowbray	University of Technology Sydney	Chief Investigator
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Paul Marshall	Triple BL Pty Ltd	Additional Investigation Team Member
Ian Perdrisat	Madjulla Association	Additional Investigation Team Member
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Executive Summary

A regime to recognise and protect Indigenous knowledge and culture under the *Convention on Biological Diversity* and *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization*, requires a Competent Authority to administer the regime.

Australia is still in the process of developing protection for Indigenous knowledge and culture. Two recent developments include: the draft New South Wales (NSW) bill, *Aboriginal Cultural Heritage Bill 2018*, which introduces protection for intangible Aboriginal cultural heritage in NSW for the first time,³ and the IP Australia discussion paper, *Indigenous Knowledge: Issues for protection and management*, prepared by Indigenous intellectual property firm Terri Janke and Company⁴ following the consultations that IP Australia finalised in 2016.

Input on how a system for protecting Indigenous knowledge and culture in Australia might be realised has been provided by the Indigenous Knowledge Forum's 2014 White Paper entitled *Recognising and Protecting Indigenous Knowledge Associated with Natural Resource Management*. The 2014 White Paper recommended: a stand-alone regime for the state of NSW; a legislative framework for the protection of rights in knowledge resources held by Aboriginal Communities in NSW governing access and benefit sharing; establishment of Aboriginal knowledge databases and registers; and establishment of an independent Competent Authority.

In 2016, funding was granted by the Australian Research Council to members of the UTS based Indigenous Knowledge Forum for the Garuwanga Project which is focussed on the last of these recommendations - establishment of an independent Competent Authority. The Project takes a national rather than a state-based perspective on this issue. The Garuwanga Project includes a Research Roundtable comprising both Indigenous and non-Indigenous investigators. This group of researchers has: examined the structure, function and operations of competent authorities in 'traditional'⁵ knowledge protection and benefit sharing regimes of other nations; analysed available Australian legal structures; identified and developed key governance principles against which competent authorities can be evaluated; and applied those principles to Australian case studies to identify key governance elements that an Australian competent authority might comprise.

This Discussion Paper presents these findings as a tool for considering what form of Competent Authority might best suit the needs of Aboriginal and Torres Strait Islander peoples. It provides a series of discussion questions and some associated discussion tools

³ See < <http://www.environment.nsw.gov.au/achreform/> >

⁴ See < <https://www.ipaustralia.gov.au/about-us/news-and-community/news/indigenous-knowledge-issues-protection-and-management> >

⁵ For a discussion on what is traditional knowledge and what it Indigenous knowledge see: Natalie P Stoianoff, 'Navigating the Landscape of Indigenous Knowledge – A Legal Perspective' (2012) 90 *Intellectual Property Forum* 23. See also Smallacombe, S., Davis, M., Quiggin, R. *Scoping Project on Aboriginal Traditional Knowledge, Report 22*, Desert Knowledge CRC, 2007, pp.7-8.

that seek to enable a deeper exploration of the issues that may arise in formulating the final proposal for a model Competent Authority.

Earlier consultations with Aboriginal communities in north west NSW in relation to the 2014 White Paper expressed several concerns with regard to the formation and operation of a Competent Authority. These included concerns regarding independence from government, how the Competent Authority would be funded and wound up, local Aboriginal and Torres Strait Islander representation, self-governance and self-determination. The Garuwanga Project recognises the need to address these concerns as important aspects of developing a Competent Authority for protecting Indigenous knowledge and culture in Australia.

1. Purpose

This Discussion Paper is part of the ARC Linkage Project *Garuwanga: Forming a Competent Authority to protect Indigenous knowledge* (Garuwanga Project) and will be used in community consultations that will take place in the Kimberley and in the Sydney/South Coast Basin during April – May and August 2018.

The Garuwanga Project deals with protection of Indigenous knowledge and culture in Australia.⁶ The international Nagoya Protocol,⁷ 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. The Garuwanga Project addresses concerns over the form, independence and funding of such an Authority, as well as local Indigenous representation, by facilitating Aboriginal Community engagement in identifying, evaluating and recommending an appropriate Competent Authority legal structure. 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
3. recommend an appropriate legal structure for such a Competent Authority in accordance with that engagement.

The purpose of this Discussion Paper is to facilitate participation of Indigenous Australians in the Garuwanga Project. It provides background information that will assist Aboriginal communities with identifying, evaluating and recommending an appropriate governance structure for a Competent Authority suitable for governing and administering an Indigenous knowledge protection regime.

The Discussion Paper explains:

- the need for a Competent Authority;
- what a Competent Authority is, and what it is required to do;
- how a Competent Authority has been established in other nations;
- different types of existing Australian organisations and governance frameworks which could be considered as models for the Australian Competent Authority.

An important aspect of the Garuwanga Project is a grassroots approach to designing an appropriate legal structure ensuring that Aboriginal Communities are engaged in the choice of the most appropriate governance framework for the Competent Authority.

⁶ Natalie P. Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia – The Case for Sui Generis Legislation' (2015) 41 *Monash University Law Review* 745.

⁷ *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, UNEP/CBD/COP/DEC/X/1 (entered into force 12 October 2014) ('Nagoya Protocol').

1.1. Disclaimer

The choice of suitable structures for the Competent Authority will necessarily involve considerations that are beyond the scope of this Discussion Paper. Issues that are not canvassed in this Discussion Paper may therefore impact the ultimate form of the Competent Authority.

2. 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. In addition to this Discussion Paper, Information Sheets and Consent Forms will be provided at consultations.

2.1. Use of the term Indigenous

In this paper 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.

3. Background

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.⁸

There has been increasing recognition of the need to protect traditional knowledge from acts of misappropriation and exploitation. The Convention on Biological Diversity⁹ (CBD) acknowledges the protection of the rights of Indigenous communities in their traditional knowledge in the third objective of the Convention.¹⁰ The CBD provides for the conservation and sustainable use of biological resources, but also requires *the fair and equitable sharing of the benefits arising from the use of genetic resources*.¹¹ The CBD requires member countries 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

⁸ 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>> ('White Paper').

⁹ Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 30619 (entered into force 29 December 1993) ('CBD')

¹⁰ *Convention on Biological Diversity*, Article 8(j).

¹¹ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 30619 (entered into force 29 December 1993) ('CBD') art 1.

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.¹²

The meaning of traditional knowledge is encapsulated in the following quotation from Aboriginal 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.¹³

In other words, 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'.¹⁴

The use of genetic resources may involve the use of traditional knowledge. The link is explicitly recognised in the Nagoya Protocol, an international agreement under the CBD. The Nagoya 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.¹⁵

Australia is a signatory to the Nagoya Protocol and the federal government claims to be working on how it will implement the Protocol.¹⁶ The Department of the Environment has stated 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 resources and associated traditional knowledge.'¹⁷

However, 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, if at all. 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 from the grassroots up.

¹² CBD art 8(j).

¹³ Terri Janke, *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, Terri Janke and Company Pty Ltd, 2009, p.21.

¹⁴ Stoianoff 2012, above n 3, 24-25.

¹⁵ Nagoya Protocol, art 7.

¹⁶ Department of Environment and Energy, Government of Australia, *The Nagoya Protocol – Convention on Biological Diversity* <<http://www.environment.gov.au/topics/science-and-research/australias-biological-resources/nagoya-protocol-convention-biological>>.

¹⁷ Department of Environment, Government of Australia, *A Model for Implementing the Nagoya Protocol in Australia* (Canberra, 2014).

3.1. Competent Authority

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.¹⁸

A 'Competent Authority' is an organisation that has the legal authority to perform a specific function or to deal with a particular matter.¹⁹

Article 13 of the Nagoya Protocol²⁰ 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.

Under the Nagoya Protocol, the Competent National Authority is responsible for: (i) granting access or issuing written evidence that access requirements have been met; and (ii) for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms.²¹ Information on the Competent Authority is published on the ABS Clearing-House, a mechanism established under the Nagoya Protocol to capture and share information from each member country on: legislative, administrative and policy measures on access and benefit sharing; information on the national focal point and competent authorities; and details of permits issued as evidence of prior informed consent and mutually agreed terms.²²

The National Focal Point is responsible for providing information on procedures for obtaining prior informed consent and mutually agreed terms including benefit sharing as well as providing information on the competent national authorities, Indigenous and local communities, and third party stakeholders.²³ It is possible for the Competent Authority and the national focal point to be the same organisation.²⁴

¹⁸ 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).

¹⁹ Angus Stevenson (ed), *Oxford Dictionary of English* (Oxford University Press, 3rd ed, 2010) 'competent'. See further: European Commission, Commission Staff Working Document Impact Assessment, Brussels, 12.3.2018 SWD(2018) 54 final, 3, a 'Competent Authority' is any person or organisation 'that has the legally delegated or invested authority, capacity, or power to perform a designated function'.

²⁰ The full contents of article 13 are extracted in Appendix 1 to this Discussion Paper.

²¹ Nagoya Protocol, art 13.

²² Nagoya Protocol, art 14.

²³ Nagoya Protocol, art 13.

²⁴ Nagoya Protocol, art 13.3.

3.2. Indigenous Knowledge Forum White Paper

In 2014 the Indigenous Knowledge Forum²⁵ presented a White Paper to the NSW Government entitled *Recognising and Protecting Indigenous Knowledge Associated with Natural Resource Management*²⁶ that 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) (2014 White Paper). 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 New South Wales and members of the Indigenous Knowledge Forum.²⁷ The 2014 White Paper recommended adoption of a stand-alone regime for the state of NSW, operating within a natural resources management framework.²⁸

In the draft legislation contained in the 2014 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.*²⁹

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.*³⁰

The draft provisions from the 2014 White Paper relating to the Competent Authority are set out in Appendix 2 to this Discussion Paper.

²⁵ 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>>.

²⁶ 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>> (‘White Paper’).

²⁷ *ibid*

²⁸ Natalie Stoianoff, ‘Garuwanga: Forming a Competent Authority to Protect Indigenous Knowledge – A Project Supported by the Australian Research Council Linkage Scheme’ (2017) 108 *Intellectual Property Forum* 73

²⁹ 2014 White Paper, 61.

³⁰ 2014 White Paper, 75.

Aboriginal community consultations that formed part of the project raised concerns about ‘*the form such an authority would take, its independence from government, how it would be funded and wound up, and the importance of local Aboriginal representation and engagement*’.³¹

3.3. Garuwanga

The ARC Linkage Project *Garuwanga: Forming a Competent Authority to protect Indigenous knowledge* commenced in 2016. The Project is funded by the Australian Research Council Linkage Scheme and is led by a Research Roundtable comprising a team of Chief Investigators (representing the University of Technology Sydney and the University of New South Wales) and Aboriginal Partner Investigators (each representing an Aboriginal Partner Organisation) who together identify and direct the research program. The project employs a part time Research Fellow and supports an Indigenous Australian PhD student. The four Aboriginal Partner Organisations, together with other associated Aboriginal organisations and communities, represent the variety of legal structures to be investigated. Each Aboriginal Partner Investigator and corresponding Partner Organisation have been tasked to hold 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. Meanwhile, the Chief Investigators include an expert in protection mechanisms for traditional and Indigenous knowledge, an expert in Indigenous charitable structures and an expert in the operation of large database systems that include confidential and sensitive material including Indigenous materials.

The Garuwanga Project aims 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*
- *Recommend an appropriate legal structure for such a Competent Authority in accordance with that engagement.*³²

The Research Roundtable meets regularly to identify existing legal structures available for a Competent Authority; to evaluate the legal structures for (i) suitability to the domestic legal and regulatory context; (ii) expectations of the functions and powers of the Competent Authority; and (iii) relevant Aboriginal laws and customs. Investigations commenced with a comparative study of competent authorities in existence in other countries, an analysis of the governance structures of existing Indigenous and other Australian organisations, and identification of governance principles.

The Garuwanga Project encompasses a national approach to the development of a Competent Authority, so consultations (to be carried out in the Kimberley region, Western Australia, and in South West Sydney, and South Coast New South Wales) are an important aspect of the project.

³¹2014 White Paper, <<https://www.indigenousknowledgeforum.org/white-paper>>.

³² Evana Wright, Natalie P. Stoianoff and Fiona Martin, *Comparative Study - Garuwanga: Forming a Competent Authority to protect Indigenous knowledge* (UTS - Indigenous Knowledge Forum, 2017).

4. 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.³³ 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.³⁴

The key findings from the comparative study are as follows. Meanwhile, the full report is available at: <https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-authority>

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 following countries 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 1 and Table 2 below.

Table 1: 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	

³³ Evana Wright, Natalie P. Stoianoff and Fiona Martin, *Comparative Study - Garuwanga: Forming a Competent Authority to protect Indigenous knowledge* (UTS - Indigenous Knowledge Forum, 2017).

³⁴ Evana Wright, Natalie P. Stoianoff and Fiona Martin, *Comparative Study - Garuwanga: Forming a Competent Authority to protect Indigenous knowledge* (UTS - Indigenous Knowledge Forum, 2017).

Table 2: 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.

4.1 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.³⁵ The Are Korero also has authority to register traditional knowledge on the register, on behalf of the traditional community concerned,³⁶ to resolve disputes, submit applications to the

³⁵*Traditional Knowledge Act 2013* ss 19(1), 20.

³⁶ *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.

Executive Officer of the island, ³⁷ review statements of opposition and make a decision as to registration,³⁸ consider requests for relief and make recommendations as to remedies.³⁹

The Secretary of Cultural Development is responsible for accepting applications for registration and maintaining the register and sub-registers of traditional knowledge⁴⁰ and any other registers considered necessary for the purposes of the *Traditional Knowledge Act*.⁴¹

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.⁴² The Traditional Knowledge Advisory Committee is made up of one member appointed by each Are Korero.⁴³

4.2 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;⁴⁴
- granting approvals for the transfer of research results to Foreign and Non-Resident Indian Users;⁴⁵
- regulating the transfer of biological resources or associated knowledge that has been accessed following earlier approval of the NBA to a third party;⁴⁶
- approving applications for intellectual property rights over inventions based on Indian biological resources and associated knowledge;⁴⁷
- opposing grant of intellectual property rights overseas over biological resources or associated knowledge from India;⁴⁸
- 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';⁴⁹

³⁷ 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)

³⁸ *Traditional Knowledge Act 2013* s 31.

³⁹ *Ibid* ss 36, 39.

⁴⁰ *Ibid* ss 56(a), 56(b).

⁴¹ *Ibid* s 56(c).

⁴² *Ibid* s 63.

⁴³ *Ibid* s 64.

⁴⁴ *Biological Diversity Act 2002* (India) s 3(1).

⁴⁵ *Ibid* s 4.

⁴⁶ *Ibid* s 20.

⁴⁷ *Ibid* s 6(1).

⁴⁸ *Ibid* s 18(4).

⁴⁹ *Ibid* s 21.

- 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;⁵⁰
- coordinating the activities of and providing advice and technical assistance to the State Biodiversity Boards;⁵¹
- commissioning studies and research on biodiversity conservation and benefit sharing;⁵²
- communicating the importance of biodiversity conservation and benefit sharing;⁵³
- publishing information on approvals granted under the *Biological Diversity Act*;⁵⁴ and
- consult with the Biodiversity Management Committee when making a decision about biological resources or associated knowledge within their territory⁵⁵.

The National Biodiversity Authority 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. ⁵⁶

The National Biodiversity Authority comprises a Chairperson and 10 ex-officio members appointed by the Central Government and 5 non-official members.⁵⁷ 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.⁵⁸ The NBA must appoint a Secretary who is responsible for organising and maintaining records of the meetings of the NBA.⁵⁹

Each State of India must establish a State Biodiversity Board under State legislation.⁶⁰ 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.⁶¹

The State Biodiversity Boards are responsible for:

- regulating access to biological resources and associated knowledge by Indian citizens and companies for commercial utilisation or bio-survey and bio-utilisation;⁶²
- 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;⁶³ and
- consulting with the Biodiversity Management Committee when making a decision about biological resources or associated knowledge within their territory.⁶⁴

⁵⁰ Ibid s 18(3)(a), Biological Diversity Rules 2004 (India) r 12(ii).

⁵¹ Biological Diversity Rules r 12(iii) – (iv)

⁵² Ibid r 12(v), 12(vii)

⁵³ Ibid r 12(viii).

⁵⁴ *Biological Diversity Act 2002* (India) s 19(4).

⁵⁵ Ibid s 41(2).

⁵⁶ Ibid s 8(2).

⁵⁷ Ibid s 8(4).

⁵⁸ Ibid ss (8)(4)(a), 10.

⁵⁹ *Biological Diversity Rules 2004* (India) r 9.

⁶⁰ Except for the Union Territories. See *Biological Diversity Act 2002* (India) ss 22(1), 22(2).

⁶¹ *Biological Diversity Act 2002* (India) s 22(3).

⁶² Ibid ss 7, 23(b).

⁶³ Ibid s 23(a).

⁶⁴ Ibid s 41(2).

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'.⁶⁵ The Chair is also the Chief Executive Officer and is appointed by the State Government.⁶⁶ 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.⁶⁷

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.'⁶⁸

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.⁶⁹ 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';⁷⁰
- preparing the People's Biodiversity Register for their region in consultation with local people;⁷¹
- 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.⁷²

Each Biodiversity Management Committee is made up of the Chair and 6 members nominated by the local body.⁷³ 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.⁷⁴

The National Biodiversity Authority may appoint Expert Committees to assist in the 'efficient discharge of its duties and the performance of its functions'.⁷⁵ 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

⁶⁵ Ibid s 22(4)(a).

⁶⁶ Ibid.

⁶⁷ Ibid ss 25, 13.

⁶⁸ Ibid s 41(1).

⁶⁹ National Biodiversity Authority, *Biodiversity Management Committees* (17 July 2017)

<<http://nbaindia.org/content/20/35/1/bmc.html>>.

⁷⁰ *Biological Diversity Act 2002* (India) s 41(1).

⁷¹ *Biological Diversity Rules 2004* (India) r 22(6).

⁷² Ibid r 22(7).

⁷³ Ibid r 22(2).

⁷⁴ Ibid r 22(3).

⁷⁵ *Biological Diversity Act 2002* (India) s 13.

includes representatives from government ministries, the national IP office, State Biodiversity Boards, universities and research institutes.⁷⁶

4.3 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;⁷⁷
- 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;⁷⁸
- 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;⁷⁹
- maintain relationship with foreign intellectual property offices;⁸⁰ and
- raise awareness of biopiracy and formulate policy statements and proposals on preventing biopiracy.⁸¹

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.

⁷⁶ 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>.

⁷⁷ *Law No. 28216 on the Protection of Access to Peruvian Biological Diversity and Collective Knowledge of Indigenous Peoples* art 4(a).

⁷⁸ *Ibid* arts 4(c), (d).

⁷⁹ *Ibid* arts 4(e), (f).

⁸⁰ *Ibid* art 4(g).

⁸¹ *Ibid* arts 4(h), (i).

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.⁸² 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;⁸³
- maintaining a register of licenses for the use of collective knowledge;⁸⁴ and
- hearing and resolving disputes relating to the protection of traditional knowledge.⁸⁵

Law 27811 provides for the establishment of an Indigenous Knowledge Protection Board to oversee and monitor the implementation of the regime under Law 27811.⁸⁶ The Indigenous Knowledge Protection Board is responsible for: reviewing and providing an opinion on the validity of license contracts entered into under Law 27811;⁸⁷ providing advice and assistance to representative organisations of Indigenous communities upon request;⁸⁸ and providing support to INDECOPI and the Administrative Committee of the Fund for the Development of Indigenous Peoples.⁸⁹

The Indigenous Knowledge Protection Board is made up of five members with experience in the protection of collective knowledge⁹⁰ appointed by the National Commission for the Andean, Amazonian and Afro-Peruvian Peoples and representative organisations of Indigenous communities.

4.4 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 where the Competent Authority is the National Cultural Council. The Vanuatu National Cultural Council (VNCC) was established under the *Vanuatu National Cultural Council Act*. 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.⁹¹

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

- authorise acts in relation to expressions of culture;⁹²
- institute proceedings, on request, on behalf of custom owners of expression for infringement;⁹³ and

⁸² 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.

⁸³ Ibid art 64.

⁸⁴ Ibid art 64.

⁸⁵ Ibid arts 47 – 62.

⁸⁶ Ibid arts 65, 66(a).

⁸⁷ Ibid art 66(c).

⁸⁸ Ibid art 66(d).

⁸⁹ Ibid art 66(b).

⁹⁰ Ibid art 65.

⁹¹ *Vanuatu National Cultural Council Act* s 2.

⁹² *Copyright and Related Rights Act 2000* s 41(2)(e).

⁹³ Ibid s 42(3).

- 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.⁹⁴

The Council may issue written guidelines for the purpose of sections 41-42 dealing with offences in relation to expressions of Indigenous culture.⁹⁵

The National Cultural Council is made up of⁹⁶ 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 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.⁹⁷ 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.⁹⁸ 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’.⁹⁹

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.¹⁰⁰ 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.¹⁰¹ However, in accordance with section 62(3), the Registrar may register the design without the prior informed

⁹⁴ Ibid s 42(4).

⁹⁵ Ibid s 42(9).

⁹⁶ Ibid s 3(1).

⁹⁷ *Patents Act 2003* s 47(1).

⁹⁸ Ibid s 47(2).

⁹⁹ Ibid s 47(5).

¹⁰⁰ *Designs Act 2003* s 62(1).

¹⁰¹ Ibid s 62(2).

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'.¹⁰²

5. Existing Australian Legal Structures

Australian law provides for several legal structures available to be used by a Competent Authority. Table 3 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 Discussion Paper does not recommend any particular structure.

5.1. Incorporated entities

The following provides a brief definition of incorporated structures detailed in Table 3.

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) must be CATSI corporations.

¹⁰² Ibid s 62(5).

5.2. 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 principles¹⁰³ and objects¹⁰⁴ 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-operative¹⁰⁵ is able to distribute any surplus to its members while a 'non-distributing' co-operative¹⁰⁶ uses the surplus to support activities of the co-operative.¹⁰⁷ The co-operative must have a board¹⁰⁸ and at least one primary activity specified in its rules. Upon registration it becomes a corporation under the *Co-operatives National Law*¹⁰⁹ with all the attributes of a legal person, has perpetual succession, is able to sue and be sued and may have a common seal.¹¹⁰ Co-operatives have been utilised in the primary industries and taxi industries and in the Aboriginal art sector.¹¹¹

¹⁰³ *Co-operatives National Law 2014*, s. 10.

¹⁰⁴ *Co-operatives National Law 2014*, s. 3.

¹⁰⁵ *Co-operatives National Law 2014*, s. 18. Such a co-operative must have a share capital and comply with the rules on membership.

¹⁰⁶ *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).

¹⁰⁷ John Gooley, Michael Zammit, Matthew Dicker, David Russell, *Corporations and Associations Law: Principles and issues* (LexisNexis, 6th Ed, 2015) 252.

¹⁰⁸ *Co-operatives National Law 2014*, s. 172.

¹⁰⁹ *Co-operatives National Law 2014*, s. 28.

¹¹⁰ *Co-operatives National Law 2014*, s. 38.

¹¹¹ John Gooley, Michael Zammit, Matthew Dicker, David Russell, *Corporations and Associations Law: Principles and issues* (LexisNexis, 6th Ed, 2015) 251.

Table 3:

	Proprietary Company	Public Company limited by Shares	Public Company limited by Guarantee	Incorporated Association	Registered Co-operative	CATSI Corporations
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	<i>Corporations Act 2001 (Cth)</i>	<i>Corporations Act 2001 (Cth)</i>	<i>Corporations Act 2001 (Cth)</i>	<i>Associations Incorporation Act 2009 (NSW) or equivalent in other States</i>	<i>Co-Operatives National Law (CNL) (Uniform State-based legislation).</i>	<i>Corporations (Aboriginal and Torres Strait Islanders) Act 2006 (Cth) + regulations</i>
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

5.3. Examples of legal entities established for the benefit of Aboriginal and Torres Strait Islander peoples

5.3.1 Indigenous Remote Communications Association (IRCA)¹¹²

IRCA is: an Aboriginal corporation registered with ORIC; incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act); a charity and a deductible gift recipient (DGR); the peak body for Aboriginal and Torres Strait Islander broadcasting, media and communications founded in 2001 to serve remote Indigenous media and communications services.

Governance structure

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.

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; 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; 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 18 years of age and who have a commitment to one or more of the Objects of the Association; 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.

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.¹¹³

¹¹² <<https://irca.net.au>>; IRCA 2016/2017 Annual report; IRCA consolidated rule book available on ORIC website.

¹¹³ Constitution of IRCA.

Relevant Legislation

Corporations (Aboriginal and Torres Strait Islander) Act 2006.¹¹⁴
Australian Charities and Not-for-Profits Commission (ACNC) Act 2012 (Cth).

Winding up

IRCA is a registered charity. If IRCA is wound up 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.¹¹⁵

5.3.2 The Association of Northern, Kimberley and Arnhem Aboriginal Artists (ANKAAA)¹¹⁶

ANKAAA incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act). ANKAAA 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 12 directors who are elected every two years with 3 representatives from each of ANKAAA's 4 regions. There must be a minimum of 6 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.¹¹⁷

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.

¹¹⁴ Constitution of IRCA.

¹¹⁵ Constitution of IRCA.

¹¹⁶ <<http://ankaaa.org.au>>.

¹¹⁷ THE RULE BOOK Arnhem Northern and Kimberley Artists Aboriginal Corporation – ANKA ICN 1076

Membership

Members must be at least 18 years of age and 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.¹¹⁸

Relevant Legislation

*Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act).*¹¹⁹
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.¹²⁰

5.3.3 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 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. At least the secretary and public officer must be Aboriginal persons.¹²¹

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.¹²²

Relevant Legislation

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

¹¹⁸ THE RULE BOOK Arnhem Northern and Kimberley Artists Aboriginal Corporation – ANKA ICN 1076

¹¹⁹ THE RULE BOOK Arnhem Northern and Kimberley Artists Aboriginal Corporation – ANKA ICN 1076

¹²⁰ THE RULE BOOK Arnhem Northern and Kimberley Artists Aboriginal Corporation – ANKA ICN 1076

¹²¹ Winanga-Li Aboriginal Child and Family Centre Constitution 2013.

¹²² Winanga-Li Aboriginal Child and Family Centre Constitution 2013.

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.¹²³

5.3.4 Papunya Tula Artists Pty Limited¹²⁴

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.'¹²⁵

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

Relevant Legislation

Corporations Act 2001 (Cth).

5.3.5 North Australian Indigenous Land and Sea Management Alliance Ltd (NAISMA)

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

Governance structure

NAISMA is a public company limited by guarantee. It is a charity.¹²⁶ 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 NAISMA.

¹²³ Winanga-Li Aboriginal Child and Family Centre Constitution 2013.

¹²⁴ Papunya Tula Artists Pty Ltd, *History*, <<http://papunyatula.com.au/history/>>.

¹²⁵ Ibid.

¹²⁶ 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>.

Membership

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

However, currently the only member of NAILSMA is the Northern Land Council.¹²⁷

Relevant Legislation

Corporations Act 2001

Australian charities and NFP Commission Act

IUCN Member organisation

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.

IUCN helps the world find solutions to our most pressing conservation and development challenges. In becoming an IUCN Member, NAILSMA commits 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.¹²⁸

5.3.6 Gawler Ranges Aboriginal Corporation (GRAC)

GRAC is a corporation incorporated under the CATSI Act. It is a PBC and the native title it holds is in respect of land described in a 2011 consent determination over an area of approximately 34,000 square kilometres in the Gawler Ranges area and Lake Gardiner National Park in South Australia.¹²⁹ 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.¹³⁰

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.¹³¹

Membership

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

¹²⁷ NAILSMA, Company Members, <<https://www.nailsma.org.au/company-members.html>>.

¹²⁸ NAILSMA, Our History <<https://www.nailsma.org.au/our-history.html>>.

¹²⁹ *McNamara on behalf of the Gawler Ranges People v State of South Australia*, consent determination 2011.

¹³⁰ AIATSIS, *Gawler Ranges Aboriginal Corporation*, <http://nativetitle.org.au/profiles/profile_sa_gawleranges.html>.

¹³¹ GRAC, Rule Book 8 April 2016, [11].

Relevant Legislation

CATSI Act

Native Title Act 1993 (Cth)

5.3.7 Partner Organisations

This section sets out brief details of each of the organisations represented by the Partner Investigators on the Garuwanga ARC Linkage Project. Further details on each Partner Organisation are set out in section 8 of this Discussion Paper.

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

DTKDC 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 25 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.

5.3.7.2 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 45 members and numerous volunteers (around 30 individuals) operating in South Western Sydney including Picton. There is an Executive Board of 10 members and governance is in accordance with the model rules of the NSW Associations Act. Funding for our activities varies annually and is derived from volunteer contributions, periodic fundraising and grants from various sources.

5.3.7.3 Triple B 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.

5.3.7.4 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*. The Executive Committee consists of three (3) 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 3 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 development change.

5.4 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 *Native Title Act 1993 (Cth)*(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.¹³²

PBCs must have a board of directors, a contact person and a rule book that is consistent with the *Native Title Act 1993 (Cth)*.¹³³

PBCs are registered with 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, 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.¹³⁴

5.5. 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

¹³² AIATSIS, *Prescribed Bodies Corporate, Overview* <<http://aiatsis.gov.au/research/research-themes/native-title-and-traditional-ownership/prescribed-bodies-corporate>>.

¹³³ <http://www.oric.gov.au/>.

¹³⁴ <http://www.oric.gov.au/>.

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.¹³⁵

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 or not 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.¹³⁶

5.5.1. Indigenous Statutory Authorities

5.5.1.1 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*. Until recently AIATSIS sat within the portfolio of the Department of 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*.¹³⁷

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 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.¹³⁸

¹³⁵ <<https://www.quora.com/What-is-the-difference-between-a-statutory-agency-statutory-authority-and-statutory-corporation-in-Australia>>.

¹³⁶ *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.

¹³⁷ Prime Minister of Australia, *2018 Closing the Gap Report: Media Release* (12 February 2018) <<https://www.pm.gov.au/media/2018-closing-gap-report>>.

¹³⁸ AIATSIS, *Governance and Structure* <<https://aiatsis.gov.au>>.

5.5.1.2 National Native Title Tribunal¹³⁹

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 evolve since its inception. This has been in part due to the changing understanding and law of native title which in turn has impacted the number and type of matters the NNTT has needed to address. In response to these changes the number of Members and staff has fluctuated. Amendments to the NTA have also brought about changes within the organisation. In 1999, a restructure established legal services; practice and procedures, research and library; geospatial information; and administration, information technology and human resources functions.

As part of the 2012–13 Budget, the Australian Government announced institutional reforms under which the NNTT remained an independent and separate statutory authority, but merged its corporate services, staff and appropriation with the Federal Court of Australia. The NNTT lost its status as an agency for the purposes of the *Financial Management and Accountability Act 1997* (Cth) and some of the NNTT's functions were transferred to the Federal Court.

5.5.2 Non-Indigenous statutory entities

5.5.2.1 Independent Commission Against Corruption (NSW) (ICAC)

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

- (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

¹³⁹ *The National Native Title Tribunal 1994–2017*; <<http://www.nntt.gov.au>>.

- (b) confer on the Commission special powers to inquire into allegations of corruption.¹⁴⁰

ICAC is an independent authority¹⁴¹ and is not responsible to a Government Minister however ICAC is accountable through the following mechanisms:¹⁴²

- 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.

5.5.2.2 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 structure provided under the Act allows the University to operate independently of Government, but the legislation imposes certain constraints on the purpose and operation of the organisation. The Act also provides that the University of Western Australia consists of 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.

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 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.

¹⁴⁰ *Independent Commission Against Corruption Act 1988* (NSW) s 2A.

¹⁴¹ Independent Commission Against Corruption, *Accountability mechanisms* <<http://www.icac.nsw.gov.au/about-the-icac/independence-accountability/accountability>>.

¹⁴² Independent Commission Against Corruption, *Accountability mechanisms* <<http://www.icac.nsw.gov.au/about-the-icac/independence-accountability/accountability>>.

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.

5.6. 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 instruments¹⁴³ and 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.

5.6.1 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*.¹⁴⁴ NSWALC operates as a network with a head office, 5 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.

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

¹⁴³ 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)*.

¹⁴⁴ New South Wales Aboriginal Land Council, *Our Organisation* <<http://alc.org.au/about-nswalc/our-organisation.aspx>>.

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.¹⁴⁵

NSWALC's elected arm consists of 9 Councillors, one for each region,¹⁴⁶ 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.¹⁴⁷

5.6.1.1 Local Aboriginal Land Councils (LALCs)

Part 5 of the New South Wales *Aboriginal Land Rights Act 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. These can be the model rules set out in the Act or the LALC may prepare its own rules and submit them to the Registrar for approval. The rules may, with the approval of the Registrar, be amended, repealed or replaced from time to time.

¹⁴⁵ New South Wales Aboriginal Land Council, *Our Organisation* <<http://alc.org.au/about-nswalc/our-organisation.aspx>>.

¹⁴⁶ 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

¹⁴⁷ New South Wales Aboriginal Land Council, *Our Organisation* <<http://alc.org.au/about-nswalc/our-organisation.aspx>>.

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.

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,
- 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.

5.6.2 Central Land Council

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

The CLC is established under the ALRA and also has functions under the Native Title Act 1993 and the Pastoral Land Act 1992. The CLC represents Aboriginal people in Central Australia and supports them to manage their land and promote their rights. The CLC comprises nine regions roughly based on 15 different language groups.

The CLC has a council of 90 elected Aboriginal representatives from the 9 regions. The council elects an 11 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.

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).¹⁴⁸

¹⁴⁸ Governance of the Central Land Council-a guide to being a Council member 2016.

In carrying out its functions with respect to any Aboriginal land in its area, the CLC is required to have regard to the interests of, and consult with, any traditional Aboriginal owners of the land and any other Aboriginals interested in the land.

5.6.3 Kimberley Land Council (KLC)

Kimberley Land Council 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 are targeted at relieving poverty or necessitous circumstances. They developed as a type of charity, through very complicated legal historical reasons. As a PBI they are exempt from income tax and they are also DGRs. The majority of charities are not DGRs, but all charities including PBIs are still liable for GST - although there are some concessions.

5.7 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.¹⁴⁹

A trust is not a separate legal entity, so that there is no separate trust entity which owes duties or takes actions.¹⁵⁰ 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.¹⁵¹

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 active duties to perform beyond conveying the trust property to the beneficiary when they are instructed to.¹⁵²

A fixed trust occurs where the beneficiaries' shares to 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.¹⁵³

¹⁴⁹ *FCT v Bruton Holdings Pty Ltd (in liq)* [2010] FCA 978.

¹⁵⁰ *FCT v Bamford; Bamford v FCT* [2010] HCA 10 [18].

¹⁵¹ *Stein v Sybmore Holdings* 2006 ATC 4741.

¹⁵² *Kafataris v FCT* [2008] FCA 1454 [58].

¹⁵³ *Commission of Taxation v Vegners* 89 ATC 5274; *Colonial First State Investments Ltd v FCT* [2011] FCA 16.

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.¹⁵⁴

6. Governance Principles

*Governance can broadly be defined 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.*¹⁵⁵

6.1. 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:¹⁵⁶

- 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.
- 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.’

¹⁵⁴ *Commissioner of Stamp Duties v Livingstone* [1965] AC 694.

¹⁵⁵ Michael Dodson and Diane Smith, *Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities*, (ANU Press, 2003).

¹⁵⁶ 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.

6.2. Indigenous Governance

The Australian Indigenous Governance Institute's Indigenous Governance Toolkit¹⁵⁷ includes resources on: understanding governance; culture and governance; leadership; rules and policies; management and staff; nation building and development.

'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'*¹⁵⁸

The focus of the toolkit is on the concept of effective or legitimate governance as opposed to good governance.¹⁵⁹ This theory is supported by research from the Indigenous Community Governance Project carried out by the Centre for Aboriginal Economic Policy Research at ANU. This project has 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.¹⁶⁰

7. Suggested model of governance

The Garuwanga Research Roundtable formulated suggested governance principles to inform identification of the most appropriate legal structure for the 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

¹⁵⁷ Indigenous Governance Toolkit <<http://toolkit.aigi.com.au>>.

¹⁵⁸ Indigenous Governance Toolkit, *Indigenous governance and culture*, <<http://toolkit.aigi.com.au/toolkit/2-1-indigenous-governance-and-culture>>.

¹⁵⁹ Indigenous Governance Toolkit, *The important parts of governance* <<http://toolkit.aigi.com.au/toolkit/1-1-indigenous-governance-2>>.

¹⁶⁰ Janet Hunt, Diane Smith, Stephanie Garling and Will Sanders, *Contested Governance: Culture, power and institutions in Indigenous Australia* (ANU Press, 2008) 21.

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.'¹⁶¹

Trust/Confidence

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

Independence from government

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

Community participation

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

Guarantees/Confidentiality

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

Transparency/Accountability

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

Facilitation

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

Advocacy

Engages in activities as an influencer in international, regional, national and/or local level. This may include attending conferences relevant to protection of traditional knowledge,

¹⁶¹ Indigenous Governance Toolkit, 1.2 *Indigenous governance* <<http://toolkit.aigi.com.au/toolkit/1-2-community-governance>>

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'.¹⁶²

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

8. Partner Organisation Case Studies

The Garuwanga project team Partner Investigators represent different Indigenous organisations and they have shared how these organisations address each of the governance criteria below:

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

Who we are: DTKDC is an 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 25 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. Participants contribute their thoughts, and this continues until consensus is reached. Gatherings only occur upon request and funding of activities is auspiced through other Aboriginal organisations or with partnering agencies or businesses.

¹⁶² 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>>.

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 relationship with Banyadjaminga Swaag Incorporated.

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".¹⁶³

8.2 Banyadjaminga Swaag Incorporated

Who we are: Banyadjaminga SWAAG Incorporated is a not for profit Aboriginal organisation in Elderslie that is focused on advancing the status of Aboriginal individuals and families and associated cultural knowledge. 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 45 members and numerous volunteers (around 30 individuals) operating in South Western Sydney including Picton. There is an Executive Board of 10 members and governance is in accordance with the model rules of the NSW Associations Act. Funding is derived from volunteer contributions, periodic fundraising and grants.

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.

¹⁶³ Contributed by Aunty Fran Bodkin

Independence from government: Completely independent from government

Community participation: Banyadjaminga Swaag is made up of community members (approximately 40-50 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

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".¹⁶⁴

8.3 Triple BL Pty Ltd

Who we are: Triple BL Pty Ltd is an Indigenous business which was registered under the Corporations Act 2001 (Cth) in 2002 and registered with Supply Nation in 2016. Triple BL Pty Ltd trades as Triple BL Legal and Triple BL Consulting. Triple BL Consulting has a focus on capacity building, community development and sustainable natural resource management (NRM) and the focus of Triple BL Legal spans Intellectual Property, Traditional Knowledge and commercial law, including Benefit Sharing Agreements, Collaboration Agreements, Shareholder Agreements and Contracts.

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 30 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)

¹⁶⁴ Contributed by Uncle Gavin Andrews

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.

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 provides advocacy on a range of Aboriginal rights and interests. Dr Marshall 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 the nominee of the National Aboriginal and Torres Strait Islander Women's Alliance, is 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. Mr Marshall 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'. The directors of Triple BL Pty Ltd have advocated on behalf of Aboriginal interests in both national and international forums.

Communication: Triple BL Pty Ltd maintains open and clear communication channels and high standards professional communications. Triple BL Pty Ltd abides by Professional Standards Legislation and legal practice guidelines in all its communications both to clients and on behalf of clients.

Reciprocity: As an Aboriginal managed and focussed company, Triple BL Pty Ltd abides by Aboriginal cultural protocols relating to reciprocity, making every effort to maintain fairness and goodwill and consider reciprocity obligations.¹⁶⁵

¹⁶⁵ Contributed by Virginia Marshall and Paul Marshall

8.4 Madjulla Inc.

Madjulla is a non-government, not for profit organisation with Indigenous cultural, education, research, and training and evaluation expertise. Located in the Kimberley region of Western Australia, it is a registered charity with Deductible Gift Recipient recognition incorporated under the *Association Incorporation Act (WA) 2015*. Membership is open to Aboriginal people and currently has 30 members. The leadership are multi-disciplinary Indigenous professionals holding undergraduate and postgraduate qualifications in Indigenous policy, health, education, science and the arts. Madjulla has broad national experience in consulting and designing collaborative intervention strategies to draw together a range of diverse partners with the purpose of building the capacity of individuals, families and communities towards actioning sustainable Indigenous community cultural, social and economic development.

Relationships/Networks: Madjulla 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 has cultural and professional relationships with Nyikina Inc. and Balginjirr Aboriginal Community. Madjulla 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 Chance'.

Trust/Confidence: The annual general meeting reports to the members and chooses 6 governing committee members who meet quarterly. We have adopted a Code of Conduct to promote trust and confidence among our membership.

Independence from government: Madjulla is a not for profit, non-government organisations 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 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 and we provide 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 including the management and reporting of funding.

Facilitation: Madjulla 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 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 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.

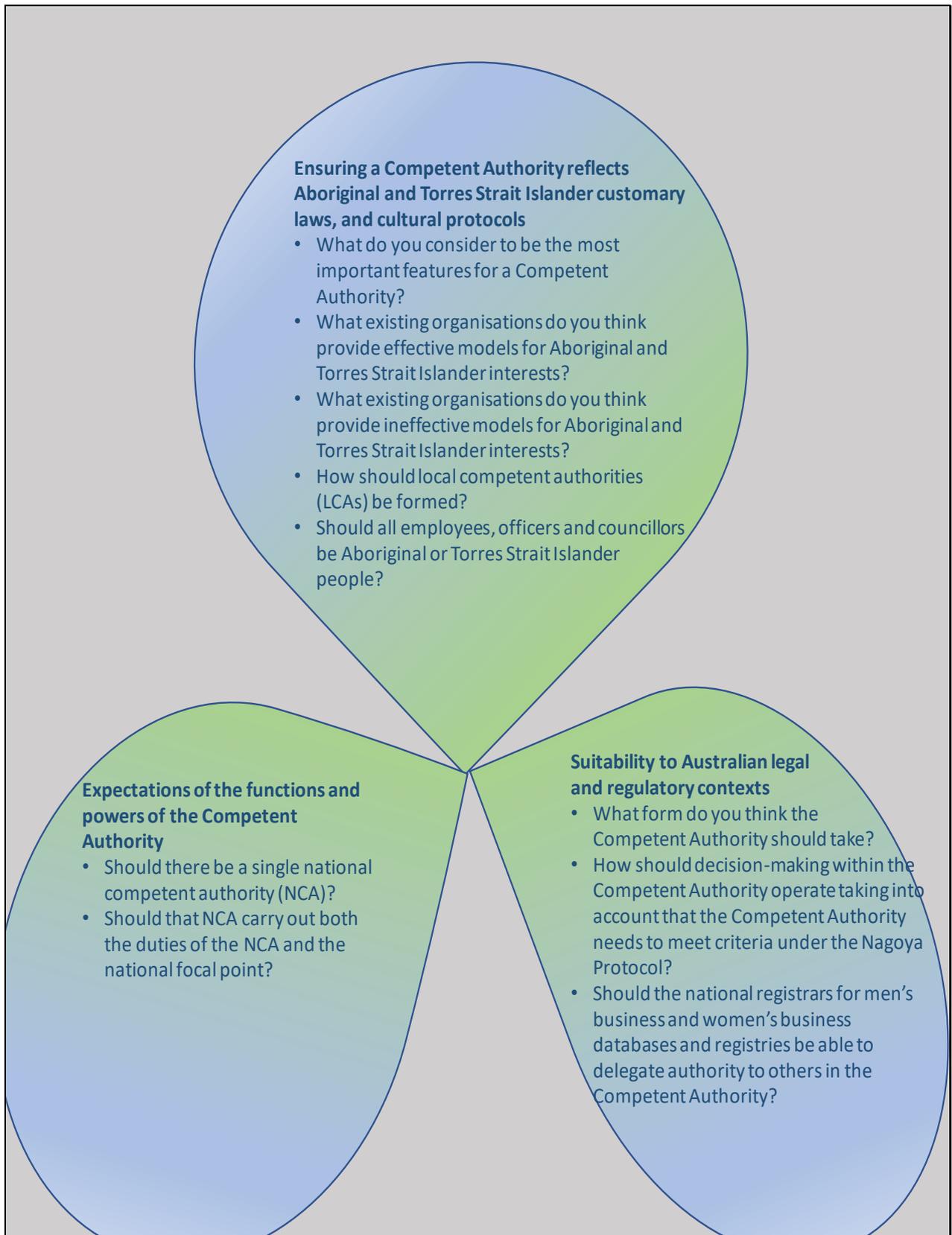
Madjulla participates in national academic and government research partnership management committees in Indigenous knowledge and wider regional and Indigenous matters. Madjulla has provided a great deal of advocacy to governments on behalf of Indigenous communities to establish projects and supported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

Communication: Madjulla 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's communication to the global community is through the web site: www.maiala.com.au The film *Three Sisters: Women of High Degree* is a film produced by Madjulla about Nyikina women and has been presented at international film festivals and has been screened on SBS TV and NITV for the past two years it will cease screening on the 1st April 2018. *Three Sisters, Women of High Degree* (42 mins). Madjulla Association, Broome is available at <https://vimeo.com/147866161> - Password: Kimberley

Reciprocity: Madjulla is established around an Indigenous cultural framework grounded in collective wellbeing. In this context individual wellbeing is dependent on the wellbeing of the group. This includes the need for respectful and reciprocal conduct in cultural, social and professional engagement.

9. Discussion questions



Appendix 1:

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization

Article 13: National Focal Points and Competent National Authorities

1. Each Party shall designate a national focal point on access and benefit-sharing. The national focal point shall make information available as follows:

- (a) For applicants seeking access to genetic resources, information on procedures for obtaining prior informed consent and establishing mutually agreed terms, including benefit-sharing;
- (b) For applicants seeking access to traditional knowledge associated with genetic resources, where possible, information on 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; and
- (c) Information on competent national authorities, relevant indigenous and local communities and relevant stakeholders.

The national focal point shall be responsible for liaison with the Secretariat.

2. Each Party shall designate one or more competent national authorities on access and benefit sharing.

Competent national authorities shall, in accordance with applicable national legislative, administrative or policy measures, be 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.

3. A Party may designate a single entity to fulfil the functions of both focal point and competent national authority.

4. Each Party shall, no later than the date of entry into force of this Protocol for it, notify the Secretariat of the contact information of its national focal point and its competent national authority or authorities. Where a Party designates more than one competent national authority, it shall convey to the Secretariat, with its notification thereof, relevant information on the respective responsibilities of those authorities. Where applicable, such information shall, at a minimum, specify which competent authority is responsible for the genetic resources sought.

Each Party shall forthwith notify the Secretariat of any changes in the designation of its national focal point or in the contact information or responsibilities of its competent national authority or authorities.

5. The Secretariat shall make information received pursuant to paragraph 4 above available through the Access and Benefit-sharing Clearing-House.

Appendix 2:

2014 White Paper: *Recognising and Protecting Indigenous Knowledge Associated with Natural Resource Management*

Section 7. Competent Authority

- (1) There shall be an independent Competent Authority for administering the provisions of this Act comprising local, regional and state level administrations.
- (2) The Competent Authority shall
 - (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 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.
- (3) There shall be a female Registrar to administer women's Knowledge Resources and a male Registrar to administer men's Knowledge Resources.
- (4) All officers of the Competent Authority are required to maintain confidentiality of information provided to the Competent Authority.
- (5) An Appeal from a decision of the Competent Authority shall be heard by a prescribed court or prescribed tribunal.
- (6) Shared Benefit(s) administered by the Competent Authority must be made payable to Aboriginal Communities within the prescribed period.
- (7) If the Competent Authority ceases to exist any outstanding monetary Benefit(s) held by the Competent Authority must be transferred to the prescribed Aboriginal Authority.