

Indigenous Knowledge Forum

Garuwanga: Forming a Competent Authority to protect Indigenous knowledge

Proposed National Indigenous Arts and Cultural Authority (NIACA)
Submission



Acknowledgement

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

In this submission we will use the term Indigenous People(s) (or Indigenous Australians) to refer collectively to the many nations of the Aboriginal and Torres Strait Islander Peoples of Australia. Use of this terminology is done with respect and is in no way intended to diminish identity of particular Indigenous People of Australia with particular nations.

Who we are

The Indigenous Knowledge Forum started in 2012. We work to understand the impact of law and policy on Indigenous knowledge and biodiversity management. The Forum focuses on how Indigenous knowledge can be protected in Australia for the benefit of Aboriginal and Torres Strait Islander Peoples.

In 2014 the Indigenous Knowledge Forum presented a White Paper to the NSW Government entitled *Recognising and Protecting Indigenous Knowledge Associated with Natural Resource Management (the White Paper)*¹. The White paper was developed during a research project funded by the Aboriginal Communities Funding Scheme of the Namoi Catchment Management Authority (now North West Local Land Services (NWLLS)). The main aims of that project were to identify key elements of a regime to recognise and protect Indigenous knowledge associated with natural resource management through consultation with Aboriginal communities in North West New South Wales and members of the Indigenous Knowledge Forum. The White Paper recommended adoption of a stand-alone regime for the state of NSW, operating within a natural-resources management framework. An important aspect of that regime was the establishment of a competent authority to manage the protection of and access to Indigenous knowledge.

In 2016, the Indigenous Knowledge Forum together with other researchers commenced working on the Garuwanga Project which builds on the work of the White Paper. This Project is funded by the Australian Research Council Linkage Grant Scheme and is led by a team of Chief Investigators from the University of Technology Sydney and the University of NSW and Aboriginal Partner Investigators who together direct the research program. The project employs a part time Research Fellow and supports an Aboriginal PhD student. The Garuwanga Project is concerned with developing an Australian competent authority (Competent Authority)² to govern and administer a legal framework for protection of 'traditional knowledge' of Indigenous Australians as required under the Nagoya Protocol³ to the *Convention on Biological Diversity 1992*. The Nagoya Protocol,

¹ UTS – Indigenous Knowledge Forum and North West Local Land Services, 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management' (White Paper, Office of Environment and Heritage, Government of New South Wales, 2014) <https://www.indigenouknowledgeforum.org/white-paper> (White Paper).

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

³ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* was adopted by the Conference of the Parties to the Convention on Biological Diversity at its tenth meeting on 29 October 2010 in Nagoya, Japan, entered into force on 12 October 2014.

to which Australia is a signatory, calls for a Competent Authority to govern and administer a legal framework:

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

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

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

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

In particular, the Garuwanga Project addresses concerns over the form, independence and funding of a Competent Authority, as well as local Indigenous representation, by facilitating 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.

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

This submission was prepared by:

Prof. Natalie P Stoianoff, Dr Ann Cahill, Neva Collings, Dr Evana Wright, Prof. Fiona Martin.

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

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

Question 1: Do you think a NIACA should exist? Why or why not?

The Indigenous Knowledge Forum and its Garuwanga Project recognise the need for the Indigenous Peoples of Australia to have a culturally appropriate representative body or bodies to promote their interests. This is important to Indigenous individuals and Indigenous communities. It is also important for a healthy, progressive, multicultural society, that there is clear recognition of and respect for the First Nations' cultures of the country.

Recognising all of the rights under Article 31

Establishment of an Authority that addresses the rights of the Indigenous Peoples of Australia under Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples 2007*, would be welcome.

Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples 2007*, at paragraph 1, recites the following matters:

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

The NIACA discussion paper focuses on enabling Aboriginal and Torres Strait Islander artists and their communities *to control and protect their cultural expressions and to realise the economic, social and cultural benefits of participation in the arts* (NIACA Discussion Paper page 3). The discussion paper recognises that there is currently:

no national peak body providing a collective voice across art forms; promoting the rights of First Nations artists and cultural custodians across Australia; or building networks and capacity to support a flourishing First Nations arts sector in its diversity and entirety (NIACA Discussion Paper page 4).

Further, such a body could focus on *First Nations arts and cultures as a priority area of national significance and provide a strategic and integrated response on culturally based solutions to arts and cultural matters, grounded in First Nations self-determination and the authority of cultural custodians* (NIACA Discussion Paper page 4).

The NIACA Discussion Paper does not address in any detail:

traditional knowledge as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora.

The focus on arts and cultures as the purpose for creating a NIACA does not provide a holistic response to the intent of Article 31. Rather, a NIACA as proposed may leave gaps in the protections that should be afforded the Indigenous Peoples of Australia under Article 31. Further, as explained on pages 2 and 3 of this submission, it should be noted that there are other international instruments that go some way to address the issues surrounding traditional knowledge, namely, the Nagoya Protocol and the CBD. These instruments promote free prior

informed consent for access to such knowledge and fair and equitable benefit sharing in the use of such knowledge.

There is mention of traditional knowledge including biodiversity knowledge at question 4 of the Discussion Paper. However, while traditional knowledge is holistic in nature, valuable traditional knowledge pertaining to biodiversity may be secret knowledge known to an individual or a limited number of community members and may not be held in an art form or as a cultural expression.

As described on pages 2 and 3, the Garuwanga Project is concerned with protection of Indigenous knowledge and culture in Australia with the specific objective of recommending a legal structure for a Competent Authority to manage such a protection regime. In this way, the Garuwanga Project and the proposed NIACA have similar objectives.

Some aspects of the activities which the Garuwanga Project addresses will require particular treatment and management. For instance, the forms of intellectual property that may apply to Indigenous or traditional knowledge are typically quite different from those which apply to “art forms”. The protection of Indigenous or traditional knowledge associated with genetic resources may involve creation of patent rights, licensing or assignment of patent rights and the defence of communities against enforcement of patent rights that invalidly cover their traditional knowledge. The timing of acquiring rights compared to potential timelines for commercialisation of products arising through use of Indigenous or traditional knowledge is an important factor. Obtaining patent rights can be costly without necessarily generating any substantial benefit for Indigenous communities if not handled correctly.

The importance of ensuring that there is a host for all Article 31 activities

The Indigenous Knowledge Forum is keen to ensure that the creation of an Authority to address particular cultural rights does not jeopardise protection for other cultural rights.

The importance of avoiding unnecessary duplication

At the same time, the Indigenous Knowledge Forum is keen to ensure that the rights and aspirations of Indigenous communities and individuals are not hampered by unnecessary duplication of entities carrying out these roles. Research activities of the Garuwanga Project have highlighted frustration experienced by Indigenous people within their communities when proliferation of agencies and fragmentation of services make it difficult to identify who to deal with for particular issues. This type of duplication gives rise to inefficiencies and wastes funds.

To this end, it is also important to be clear about how the proposed Authority and existing organisations will operate.

Is a national approach the best approach?

Research conducted by the Indigenous Knowledge Forum has highlighted the importance of a grassroots approach in protecting the rights of, and creating opportunities for, Indigenous communities. The terms “culturally based” and “cultural matters” used in the NIACA Discussion Paper are very broad and encompass the cultures of the diverse First Nations of Australia. While the authors of the NIACA Discussion Paper are well positioned to recognise this reality, we believe that it is worth emphasising that a national Authority should not seek to represent and speak for all nations without appropriate deference to those with the right to speak for their particular nations.

Is a new Authority required?

The Garuwanga Project has considered whether a new Authority is required or whether an existing entity could do the job at the national level. To that end, the Garuwanga Project has identified and reviewed numerous existing organisations of a variety of forms and purpose. These are outlined in the Garuwanga Project Discussion Paper⁶ and will be further explored in the final report that will be delivered in June 2019. However, an important aspect of the research is the need for different tiers in the management model. This recognises the role of local or regional organisations as ‘competent authorities’ that then provide information to a national body that manages the interface between Australia and international reporting obligations.

While the Research Roundtable of the Garuwanga Project has yet to explore this, there are a number of existing organisations worth considering as a potential NIACA. These include the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), the proposed NSW Aboriginal Cultural Heritage Authority (ACH), the Australian Tropical Herbarium (ATH), National Trusts of Australia (NTA), and the Copyright Agency Limited (CAL).

The characteristics of such organisations include:

- a structure suitable to the domestic legal and regulatory context
- independence from government
- stable or ongoing funding
- appropriate winding up provisions (desirably the organisation would be of a form where the risk of winding up provisions being invoked would be limited)
- provision for local Aboriginal representation and engagement
- adherence to relevant Aboriginal laws and customs (as explained through the Garuwanga governance provisions and as manifested in the organisation’s governance and culture)
- efficient and effective operation (including avoiding unnecessary additional compliance burden, operating effectively at the interface between western law and business and Indigenous culture)
- ability to deal with confidential information
- effective dispute resolution processes (including appeals processes)
- local and national presence
- Indigenous affairs being managed by Indigenous people
- support to strengthen capacity
- proficiency in managing information and requests for accessing information and advice

Of these existing organisations considered, AIATSIS comes closest to being suited to carrying out the role of a national Authority with respect to Indigenous knowledge.

⁶ Indigenous Knowledge Forum, *Garuwanga: Forming a Competent Authority to protect Indigenous knowledge – Discussion Paper*, UTS, April 2018, available at < <https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho> > (Garuwanga Project Discussion Paper).

Question 2: What do you think are the most important needs and priorities a NIACA should address – for the short, medium and long term?

The NIACA Discussion Paper observes that the:

vision of a NIACA is for a recognised collective voice for First Nations arts and culture promoting the rights of First Nations artists and cultural custodians and a strong, empowered and growing First Nations arts and cultural sector.

The Discussion Paper argues that the value of a NIACA will be defined by what it does for its membership in achieving its vision, that the objectives should be long term, with a fifty year focus, and that at the initial stages of development focus needs to be on what is current and realistic for a NIACA to achieve, in building a sustainable organisation.

Three groups of policy objectives and potential activities are described:

1. establishing networks, partnerships and services to strengthen the First Nations arts and cultural sector.

We believe that a support role for a national presence is highly desirable.

The Garuwanga Project has found that there is frustration within Indigenous communities with regard to the way in which services are provided across a plurality of organisations, particularly when, from an Indigenous cultural perspective the relevant services relate to a single issue.

It is also important to recognise the need for Indigenous communities to play a key role in the delivery of services to its members. Rather than services being delivered to the communities externally and remotely, engagement needs to be at the community level in partnership with services providers.

2. policy development, advisory services and advocacy.

From the perspective of the Garuwanga project, these activities need to incorporate the voices of people chosen from within the Indigenous communities they represent. Current policy of engaging with specific organisations is not representative of Indigenous communities as a whole. For example, some communities have a strong allegiance to their relevant land council while others may not. Accordingly, policy development needs to engage more broadly as different issues may require input from different voices.

It is also important that as far as possible the expertise sought is Indigenous expertise unless mandated by Indigenous people.

3. supporting and defending Indigenous cultural intellectual property rights.

As noted above, the range of intellectual property rights that apply across the breadth of Indigenous culture is diverse. The issues that arise can be complex and costly. It is important that Indigenous communities and individuals have access to advice regarding protection and enforcement that takes into consideration both timeliness and implications for the community or individual.

Two examples that highlight this issue are the plight of Ethiopian communities with respect to rights to the ancient grain, teff, and Australian Indigenous communities with respect to the gumbi gumbi bush where patent rights held by third parties are impacting traditional practices.⁷

Where communities have the capacity and the will to negotiate on their own behalf this needs to be encouraged.

Services in support of Indigenous cultural intellectual property rights need to be provided by Indigenous people where possible and where that is not possible capacity building is important.

⁷ FM Birhanu 2010, 'Challenges and prospects of implementing the access and benefit sharing regime of the Convention on Biological Diversity in Africa: the case of Ethiopia', *International Environmental Agreements: Politics, Law and Economics*, vol, 10, pp 249–266. See also, Daniel Robinson and Margaret Raven, 2017, 'Identifying and Preventing Biopiracy in Australia: patent landscapes and legal geographies for plants with Indigenous Australian uses', (2017) 48, *Australian Geographer*, vol. 48, 311 - 331, <http://dx.doi.org/10.1080/00049182.2016.1229240>

Question 3: What activities are the most relevant to you, your community, your region or your organisation?

The Indigenous Knowledge Forum would not be a client of the Authority. Our interest stems from our work in seeking to advance recognition and protection of the rights of Indigenous communities in their knowledge.

The Garuwanga Project is working to formulate a recommended structure for an organisation that would be responsible for protecting Indigenous knowledge as a Competent Authority under the Nagoya Protocol.

The Competent Authority is responsible for:

- (i) making sure genuine, free and prior informed consent is given by Indigenous people or communities before their traditional knowledge is taken and used, and
- (ii) setting up ways for Indigenous communities to be fairly compensated in relation to the use of their knowledge for which consent has been granted.

The Competent Authority would need to have a database of information that helps to identify Indigenous communities that have particular knowledge. How much information the Competent Authority should have will be explored in another project. There would need to be at least one person called a Registrar to manage the database and preferably a female Registrar for women's business and a male Registrar for men's business.

Administration of a system protecting the rights of Indigenous individuals and communities with respect to traditional knowledge is a complex issue as highlighted in the Indigenous Knowledge Forum's White Paper⁸ and the Garuwanga Project Discussion Paper⁹.

⁸ White Paper above, n 1.

⁹ Indigenous Knowledge Forum 2018 above, n 6.

Question 4: What cultural material should be covered by the NIACA model? Arts? Cultural expression including languages? Potential to cover traditional knowledge more broadly including biodiversity knowledge?

It is important to recognise the holistic nature of knowledge and cultural materials. Traditional knowledge may embrace cultural expressions, language, songs, artworks, dances and stories for example, as well as knowledge in a more scientific sense as understood in western frameworks. In the White Paper, the Indigenous Knowledge Forum has explained Indigenous knowledge in the following way:

*Knowledge Resource(s) means bodies of knowledge held by Aboriginal Communities relating to the use, care and understanding of Country and the resources found on Country. Knowledge Resources include cultural heritage, traditional knowledge and traditional Cultural Expressions, as well as manifestations of Aboriginal sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. Knowledge resources include 'law knowledge' and 'cultural knowledge' of an Aboriginal Community and knowledge of observing ecological interactions between plants, animals, medicines, foods and seasonal cycles which relate to genetic resources. Genetic resources may exhibit different properties in different locations and environments.*¹⁰

The proposed activities of the NIACA would be more appropriate to dealing with arts, cultural expressions and languages than the broader concept of traditional knowledge, including biodiversity knowledge. This is because of the additional complexities that protection of this type of knowledge presents as noted elsewhere in this submission. Stoianoff and Roy reference the way WIPO has divided up the different areas.¹¹

However, the Indigenous Knowledge Forum wants to ensure that Australian Indigenous communities are provided with the opportunity to have their knowledge and culture respected and protected. Consequently, it would be preferable to see Indigenous knowledge in its entirety being under the umbrella of a single institution rather than risk aspects of Indigenous knowledge having no organisational representation at all.

¹⁰ White Paper above, n 1.

¹¹ Natalie Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia – The Case for Sui Generis Legislation' (2015) 41 *Monash University Law Review* 745, 746.

Question 5: What groups should a NIACA represent – through its membership, steering committee, decision-making structure and board? What art and cultural forms should be represented?

The NIACA Discussion Paper states that:

A NIACA would need to uphold the authority of cultural custodians, and represent Aboriginal and Torres Strait Islander people at a national level across First Nations arts and cultures, [and that] A NIACA has the potential to be a self-determining national body.

This would be achieved through creating a steering committee to build a governance and accountability framework, engage the membership and oversee the election of the governing board. The NIACA Discussion Paper goes on to say:

The First Nations arts and culture sector encompasses independent artists and cultural practitioners, peak bodies, organisations and regional representative bodies. Other representation considerations include art and cultural forms, gender, geography and age. A NIACA model needs to consider how each group can have effective participation through decision-making structures such as voting rights, annual meetings or representation on the board.

It is important to ensure that the Authority does not simply appoint decision-makers but instead empowers Indigenous communities and individuals to nominate and elect (for example, the AIATSIS model) their cultural leaders as representatives. Where the election processes involve use of existing organisations to facilitate such processes, the Authority needs to ensure those organisations are considered appropriate by the relevant communities and individuals as far as possible.

We recommend consideration of the Indigenous Empowerment framework developed by the Empowered Communities group in their 2015 *Empowered Communities: Empowered Peoples Design Report*.¹² Specifically, in relation to cultural leadership, we refer to the following passage:

*Indigenous people continue to have cultural leaders who undertake ancestral responsibilities for maintaining and protecting Indigenous laws, traditions, systems of knowledge, and jurisdictional rights and interests. There are leaders of extended families, clan groups and kinship groups. There are leaders of ceremony, ritual, sacred sites, songlines and Dreaming tracks. There are leaders who are holders of restricted knowledge, and separate leaders for men's and women's business. Cultural leadership must continue in this traditionally oriented sphere, but must also have a respected place where there is intersection with the leadership in other domains.*¹³

¹² Empowered Communities, *Empowered Communities: Empowered Peoples Design Report*, 2015, 38, <<https://empoweredcommunities.org.au/wp-content/uploads/2018/04/EC-Report.pdf>>

¹³ Ibid, 38

Question 6: How should the NIACA model include local and regional decision-making structures?

Research conducted by the Indigenous Knowledge Forum both through the Garuwanga Project and through its earlier project, *Recognising and Protecting Indigenous Knowledge associated with Natural Resource Management*¹⁴ has shown that Indigenous communities favour a community or local level approach to managing their property, rights and benefits.

The Australian Institute of Family Studies in its *Child Family Community Australia* Paper No. 32 (May 2015) emphasised that of the critical factors in successful Indigenous community-managed programs,

*Community ownership is considered important because it ensures authority and autonomy over all aspects of the project; builds the commitment and enthusiasm of all people involved in the program, including collaborators ... and contributes to building community capacity so that communities can address their own needs...*¹⁵

The need for a community or local level approach is also supported by Empowered Communities:

*Critical to the practice of empowerment is a clear understanding of where responsibility best resides in a given context. The current practice of placing nearly all responsibility with central governments disempowers Indigenous people and impedes development. Instead, power and responsibility should be more widely shared among individuals, families and communities at the local, subregional and regional levels ...*¹⁶

The Garuwanga Project emphasises the importance of establishing a competent authority independent of government that ensures Indigenous communities and individuals have the power and responsibility for leadership of such an authority:

*Governments must stop assuming Indigenous people need government intervention and leadership in all aspects of their lives. Instead, government must respond by providing Indigenous people with the means of their own empowerment. This must entail sharing or relinquishing certain powers and responsibilities and supporting Indigenous people with resources and capability building to assume these powers and responsibilities.*¹⁷

In this way self-determination can be exercised from local to national levels. Perhaps regard can be given to the way in which Indigenous Protected Areas are an example of how the Federal Department of the Environment and Energy has engaged Indigenous communities in the protection of biodiversity across Australia's National Reserves System. Through funded agreements with the Australian Government, Indigenous communities or organisations can voluntarily manage their land and sea country as a protected

¹⁴ Funded by the Aboriginal Communities Funding Scheme of the Namoi Catchment Management Authority (now North West Local Land Services (NWLLS) and carried out through UTS and on behalf of the Indigenous Knowledge Forum.

¹⁵ *What works in effective Indigenous community-managed programs and organisations* CFCA Paper No. 32 – May 2015 Australian Institute of Family Studies <https://aifs.gov.au/cfca/publications/what-works-effective-indigenous-community-managed-programs-and-organisations/critical>

¹⁶ Empowered Communities 2015, n 9, 22.

¹⁷ Empowered Communities 2015, n 9, 20

area for biodiversity conservation.¹⁸ Cultural heritage in these Indigenous Protected Areas can be protected into the future, and employment, education and training opportunities can be provided for the members of these Indigenous communities.¹⁹ This program, now within the portfolio of the Department of Prime Minister and Cabinet, empowers Aboriginal and Torres Strait Island peoples 'to choose when, where and how they will manage their own country, combining traditional knowledge with western science'.²⁰ This program was established in 1997 and includes 75 Indigenous Protected Areas covering 45% of the National Reserve System.²¹

¹⁸ Department of the Environment and Energy, Indigenous Protected Areas, <<http://environment.gov.au/land/indigenous-protected-areas>>

¹⁹ Ibid

²⁰ Ibid

²¹ Department of Prime Minister and Cabinet, Indigenous Protected Areas, < <https://www.pmc.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas>>

Question 7: What are the required skills, attributes and experiences of the NIACA steering committee and board?

Submissions to the Garuwanga Project to date support the need for directors to be Indigenous, to be appropriately skilled, amenable to capacity development, have the authority to speak for, and promote the views and interests of, the membership they are there to represent. As the report by Empowered Communities reinforces, 'strong Indigenous-led organisations are necessary for driving reform'.²²

Where a non-Indigenous director is required for their valuable skill set, cultural competency of such a director would be an important characteristic.

What has been readily apparent during the course of the Garuwanga project is the skill base within Indigenous communities that such an authority can value and utilise.

Concerns have been expressed during consultations regarding reliance on existing organisations as *de facto* representatives of Indigenous communities, or determining who should represent the interests of communities in particular circumstances. This is because existing entities may have been set up in a way that gives scope for individuals to speak on behalf of country and communities where they do not have the cultural authority to do so.

These views are supported elsewhere. The Australian Institute of Family Studies in its Child Family Community Australia Paper No. 32 (May 2015) emphasised that of the critical factors in successful Indigenous community-managed programs, facilitating trusting relationships requires that an organisation '...work with existing Indigenous leaders and organisational structures established in the community;....seek feedback from both Indigenous peak bodies and community members'.²³ Further, 'a legitimate cultural fit' was considered necessary for good governance to be achieved in Indigenous communities.²⁴ The paper goes on to explain 'cultural fit':

While complex in practice, a cultural fit in the context of governance involves a balance between organisational governance standards and community traditions and values (ORIC, 2010). Dodson and Smith highlighted that "problems arise for many Indigenous governing bodies when they lose sight of the fact that their ongoing legitimacy is often grounded, at the local level, in culturally-based values [and] priorities" (2003, p. 19). Accordingly, given the context-specific nature of good governance, there is no one-size-fits-all approach to governance of Indigenous community organisations and programs (AIATSIS, 2007; Dodson & Smith, 2003).²⁵

Principle 1 of the AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012 recommends that the diversity of individuals must be recognised and further recommends against presuming the view of one group is representative of the collective view of the community.²⁶

²² Empowered Communities 2015, n 9

²³ *What works in effective Indigenous community-managed programs and organisations* CFA Paper No. 32 – May 2015 Australian Institute of Family Studies <https://aifs.gov.au/cfca/publications/what-works-effective-indigenous-community-managed-programs-and-organisations/critical>

²⁴ Ibid.

²⁵ Ibid.

²⁶ 'Guidelines for Ethical Research in Australian Indigenous Studies', AIATSIS, 2012, 2.

But what is 'good' governance? Smith and Bauman point out that internationally the concept has 'become synonymous with western democratic, neo-liberal ideas of what is supposed to constitute 'good' governance'.²⁷ The term has tended to apply to the way in which an organisation complies with 'regulations, financial accountability issues, and technical standards of measurement'.²⁸ Smith and Bauman go on to point out that in the context of Indigenous governance:

*Governance ... operates in both formal and informal settings and in a range of contexts both within and across Indigenous groups, and in their interactions with governments and the private sector.*²⁹

Finding a way for cultural practices to be part of governance strategies was shown to be important for Aboriginal and Torres Strait Islander people 'to harness the strength and resilience of cultural roots in ways that are credible and workable today'.³⁰ In this context Smith and Bauman point out:

*At the same time, the intercultural authorising environments in which groups, communities and particularly organisations have to operate today are realities. For Aboriginal and Torres Strait Islander peoples, the challenge lies in how to achieve a balance in their governance arrangements between interrelated cultural, social and economic priorities and the other forces of 'western' governance acting upon them. The important thing in making decisions about such issues is that it all takes time — time to talk, consult, and get feedback from people; time to experiment and learn from mistakes, and time to change and adapt as all societies do.*³¹

²⁷ Diane Smith and Toni Bauman, *Background Paper for the Indigenous Governance Development Forum: Mapping Current and Future Research and Resource Needs*, An initiative of The Australian Institute of Aboriginal and Torres Strait Islander Studies and The Australian Indigenous Governance Institute 29-30 July 2014, AIATSIS, Canberra, https://aiatsis.gov.au/sites/default/files/products/research_outputs_other/smith-bauman-2014-background-paper-indigenous-governance-development-forum_0.pdf, 6.

²⁸ Ibid.

²⁹ Ibid, 7.

³⁰ Ibid, 10.

³¹ Ibid.

Question 8: How should the board members be selected and how long should they serve?

The community consultations carried out through the Garuwanga Project have shown that those Aboriginal communities want to represent their own interests with representatives appointed in accordance with customary community law. Reliance on existing bodies to represent or appoint representatives may not adequately reflect community interests. The structure to be adopted needs to recognise and respect this requirement and may in turn require a different approach to setting up governance structures from that commonly used in Western corporate models.

This view is supported in other research which acknowledges that Indigenous community governance has the fundamental challenge of 'a lack of agreed understandings'.³² Tsey *et al*, in their study on strengthening organisational capacity, note that:

Each community is different and local decisions need to be made about:

1. *group membership and identity (who is the 'self' in their governance)*
2. *who has authority within the group, and over what*
3. *agreed rules to ensure authority is exercised properly and decision makers are held accountable*
4. *how decisions are enforced*
5. *how rights and interests with others are negotiated*
6. *what arrangements will best enable the achievement of goals (Hunt *et al.* 2008; Hunt & Smith 2006 a,b).*³³

This recognises the importance of the principle of self-determination as a mechanism for empowerment of each of Australia's First Nations. For Indigenous empowerment to flourish, each community needs to strengthen its governance capacity through 'community ownership' providing communities with the autonomy and authority to 'address their own needs'.³⁴ Tsey *et al* reinforce this view as follows:

*Organisational capacity strengthening for good governance can take many forms. Governance capacity is greatly strengthened when Indigenous people create their own rules, policies, guidelines, procedures, codes and so forth, and design the local mechanisms to enforce those rules and hold their own leaders accountable...*³⁵

The length of appointment of board members is probably less important than ensuring that the appointees are effectively representing the views and interests of Indigenous communities and individuals.

³² Komla Tsey, Janya McCalman, Roxanne Bainbridge and Catherine Brown, 'Strengthening organisational capacity to improve Indigenous Australian community governance: A two-way approach' (2012) 2(2) *International Review of Social Sciences and Humanities*, 162, 163.

³³ Ibid.

³⁴ *What works in effective Indigenous community-managed programs and organisations* CFCA Paper No. 32 – May 2015 Australian Institute of Family Studies <https://aifs.gov.au/cfca/publications/what-works-effective-indigenous-community-managed-programs-and-organisations/critical>

³⁵ Tsey *et al*, n 32, 169.

Question 9: What do you think should be the funding and revenue sources for a NIACA?

Consultations by the Garuwanga Project to date have not provided any specific insight into how authorities should be funded. During consultation we have been directed to the Empowered Communities model with the notion that the challenge is not to source additional funding but rather to ensure that existing funding is well managed avoiding duplications of services.³⁶

Issues that have been identified include:

- the need for reform to ensure funding is more productively funnelled towards driving development;³⁷
- avoiding excessive compliance and administrative burden;³⁸
- ensuring that funding timeframes are realistic and fit with Indigenous community and cultural needs;³⁹
- ensuring that funding is adequate;⁴⁰
- ensuring funding policy and services are well coordinated and collaborative.⁴¹

³⁶ Empowered Communities 2015, n 9.

³⁷ Ibid.

³⁸ Julie Finlayson, Joanna Lunzer, Toni Bauman and Dermot Smyth, *Organising for success- successful strategies in Indigenous organisations*, Australian Institute of Aboriginal and Torres Strait Island Studies and The Australian Collaboration, 2007, 40 – 41, 48.

³⁹ Ibid, 48.

⁴⁰ Ibid, 41.

⁴¹ *What works in effective Indigenous community-managed programs and organisations* CFCA Paper No. 32 – May 2015 Australian Institute of Family Studies <https://aifs.gov.au/cfca/publications/what-works-effective-indigenous-community-managed-program/barriers-successful>.

Question 10: What do you think is the best legal model for a NIACA? Why?

The NIACA Discussion Paper observes:

A NIACA would need to operate on sound business principles in parallel with cultural appropriateness and underpinned by First Nations self-determination and governance. It is envisioned that a NIACA would be a national not-for-profit organisation providing service to members through strong governance and administration, with the potential to become self-sufficient.

Ideas that are included are:

- independence from government funding and direction; and
- potential legal structures and registration options as a not-for-profit such as a:
 - a. publicly listed or private company;
 - b. statutory authority;
 - c. Indigenous corporation;
 - d. registered charity;
 - e. Deductible Gift Recipient (DGR) registration.

In research conducted by the Indigenous Knowledge Forum both through the Garuwanga Project and through its earlier project, *Recognising and Protecting Indigenous Knowledge associated with Natural Resource Management*,⁴² Indigenous communities have stressed the need for an Authority to be independent from government. Concern was also expressed that any Authority needs to have clear provisions around winding-up to ensure that communities do not lose benefits and assets in that process.⁴³

Consultations by the Garuwanga Project to date have not shown Indigenous communities to favour a particular legal model for an authority. Feedback received through the Garuwanga Project suggests that communities see what the Authority does as being far more important than what the Authority is.

Requirements from the Garuwanga Project⁴⁴

The Garuwanga Project set out to examine:

- the legal structure a competent authority would take;
- its independence from government;
- how it would be funded;
- how it would be wound up on the cessation of the organisation; and

⁴² This project was funded by the Aboriginal Communities Funding Scheme of the Namoi Catchment Management Authority (now North West Local Land Services (NWLLS) and carried out through UTS and on behalf of the Indigenous Knowledge Forum.

⁴³ White Paper above, n 1.

⁴⁴ Indigenous Knowledge Forum, ARC Linkage Grant Project - Garuwanga: forming a competent authority to protect Indigenous knowledge (2016-2019), available at <<https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho>>

- how it would provide for local Aboriginal representation and engagement .

In order to recommend an appropriate legal structure for such a Competent Authority, the Garuwanga Project is evaluating a range of legal structures against the criteria of:

- (i) suitability to the domestic legal and regulatory context;
- (ii) expectations of the functions and powers of the Competent Authority [to be established under the White Paper⁴⁵]; and,
- (iii) relevant Aboriginal laws and customs. ⁴⁶

2014 Indigenous Knowledge Forum research

Research by the Indigenous Knowledge Forum in 2014, that led to and was reported in the White Paper,⁴⁷ observed that, from an Indigenous perspective, the Competent Authority needs to:

- be independent;
- include local or regional community agency to administer the Knowledge Holder registers and provide for Community Knowledge databases;
- avoid unnecessary additional compliance burden;
- protect confidential information;
- have an appeal process; and,
- have a process for ensuring benefits under the control of the Competent Authority are applied and are not lost if the Authority is wound up.^{48 49}

Thus, these criteria are also relevant under the Garuwanga Project.

The Research Roundtable under the Garuwanga Project has developed good governance principles that the project's Indigenous Partner Investigators consider accord with Aboriginal laws and customs as associated with their communities or partner organisations.

These principles are described in the Garuwanga Project Discussion Paper⁵⁰ and are reproduced in the following box (footnotes omitted):

⁴⁵ White Paper above, n 1.

⁴⁶ Indigenous Knowledge Forum, *Garuwanga: Forming a Competent Authority to protect Indigenous knowledge – Discussion Paper*, UTS, April 2018, (Garuwanga Project Discussion Paper) available at < <https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho> >, 6.

⁴⁷ White Paper above, n 1.

⁴⁸ Ibid

⁴⁹ Indigenous Knowledge Forum 2018 above, n 47, 5.

⁵⁰ Ibid, pages 33 – 35.

Garuwanga Research Roundtable suggested governance principles

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

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

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

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

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

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

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

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

Communication: Engages in various communication activities including: - education and capacity building with Aboriginal and Torres Strait Islander communities to raise awareness of rights and how to enforce them - 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'.

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

Authorities in other countries

The Garuwanga Project has investigated how such authorities have been structured in other

countries. It has also considered available Australian legal structures. This research is available in our comparative study⁵¹ and Garuwanga Project Discussion Paper ⁵².

At a national level, in an examination of relevant law from sixty-nine countries, Wright *et al*⁵³ identify twenty nations with laws protecting traditional knowledge, that include provisions relating to access and benefit sharing and a Competent Authority. Details regarding these countries and the relevant laws are set out in the following table reproduced from Martin *et al*.⁵⁴

Table 1: Countries and laws protecting traditional knowledge including provisions on access and benefit sharing and a Competent Authority in Martin *et al* 2019.

Country	Legislation
Benin	Law No. 2005-30, 5 April 2006, relating to Copyright and Related Rights of the Republic of Benin
Bhutan	Biodiversity Act of Bhutan Water Sheep Year 2003
Bolivia	Supreme Decree No. 24676, 21 June 1997 – Regulations to Decision No 391 of the Commission of the Cartagena Agreement and Regulations on Biosafety
Brazil	Law No. 13.123, 20 May 2015 Access and Benefits Sharing of Genetic Resources and Associated Traditional Knowledge
Burundi	Law No. 1/13 of July 28, 2009, on Industrial Property in Burundi
Cook Islands	Traditional Knowledge Act 2013
Costa Rica	Law No. 7788 of April 30, 1998, on Biodiversity (as last amended by Law No. 8686 of November 21, 2008) Executive Decree No. 31514-MINAE of October 3, 2003, approving the General Standards for Access to the Genetic and Biochemical Components and Resources of Biodiversity (as amended up to Regulation for the Implementation of Administrative Punishments in respect of Unauthorized Access to Genetic and Biochemical Elements and Resources established in Biodiversity Law No. 7788, approved by Executive Order No. 39341 of August 4, 2015)
Ethiopia	Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006
India	Biological Diversity Act 2002
Kenya	Protection of Traditional Knowledge and Cultural Expressions Act 2016
Kyrgyzstan	Law of the Kyrgyz Republic on the Protection of Traditional Knowledge
Niue	Tāoga Niue Act 2012
Panama	Law No. 20 of June 26, 2000 on Special System for the Collective Intellectual Property Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge Executive Decree No. 12 of March 20, 2001 regulating Law No. 20 of June 26, 2000 on the Special Intellectual Property Regime governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge, and enacting other provisions
Peru	Law No. 28216 on the Protection of Access to Peruvian Biological Diversity and Collective Knowledge of Indigenous Peoples Law No. 27811 of 24 July 2002, introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources

⁵¹ Evana Wright, Natalie P. Stoianoff and Fiona Martin, *Comparative Study - Garuwanga: Forming a Competent Authority to protect Indigenous knowledge* (UTS - Indigenous Knowledge Forum, 2017). (Garuwanga Comparative Study) Available at < <https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-authority> >

⁵² Indigenous Knowledge Forum 2018 above, n 47.

⁵³ Wright *et al* 2017 above, n 52.

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

Philippines	Executive Order No. 247 of May 18, 1995, prescribing Guidelines and establishing a Regulatory Framework for the Prospecting of Biological and Genetic Resources, their By-Products and Derivatives, for Scientific and Commercial Purposes; and for other Purposes Implementing Rules and Regulations on the Prospecting of Biological and Genetic Resources, Administrative Order No. 96-20 National Cultural Heritage Act of 2009 The Indigenous Peoples Rights Act of 1997
South Africa	National Environmental Management: Biodiversity Act 2004 (Act No. 10 of 2004) Regulations on Bio-Prospecting, Access and Benefit Sharing 2008
Sri Lanka	A Legal Framework for the Protection of Traditional Knowledge in Sri Lanka
Thailand	Protection and Promotion of Traditional Thai Medicinal Intelligence Act, B.E. 2542 (1999)
Vanuatu	Copyright and Related Rights Act No. 42 of 2000 Patents Act No. 2 of 2003 Designs Act No. 3 of 2003
Zambia	The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, 2016 (Act No. 16 of 2016)

Wright *et al*⁵⁵ observe that very different approaches to establishing a Competent Authority for the protection of traditional knowledge have been adopted, with some countries using existing authorities, such as the national intellectual property office or Ministry of Environment, while other countries have established new entities. Wright *et al*⁵⁶ identified 12 countries of interest (Brazil, Cook Islands, Costa Rica, Ethiopia, Kenya, Niue, Peru, Philippines, South Africa, Vanuatu and Zambia⁵⁷) but observed that in nine of those countries the Competent Authority is part of a government ministry. The Indigenous Knowledge Forum' White Paper⁵⁸ reported resistance to government involvement in a Competent Authority to administer traditional knowledge amongst Australian Indigenous communities.

Independence from government

The only two nations that provide a model in which there is some independence from government are the Cook Islands and Vanuatu.⁵⁹ In each country a cultural authority is established under legislation but it is not the sole Competent Authority. While provision is made for these cultural authorities to play a role in processes around access and benefit sharing, it is not apparent that this is happening in practice.⁶⁰ Nonetheless, the inclusion of a cultural entity as a Competent Authority with a role that is not just advisory is promising.

Indigenous and Local Community Participation

Wright *et al*⁶¹ identify a further seven countries where there is Indigenous and local community participation in the Competent Authority: Brazil, Costa Rica, India, Niue, Peru, Philippines and South Africa. However, while these countries have provided for involvement of Indigenous peoples in their respective Competent Authorities, it appears that these roles are largely either

⁵⁵ Wright *et al* 2017 above, n 52.

⁵⁶ Ibid.

⁵⁷ Ibid, 12-13.

⁵⁸ White Paper above, n 1.

⁵⁹ Wright *et al* 2017 above, n 52.

⁶⁰ See Martin *et al* above, n 55, for an examination of the Cook Islands and Vanuatu regimes respectively.

⁶¹ Wright *et al* 2017 above, n 52.

advisory or nominal. While the Indigenous populations of many countries are minority groups the subject matter being addressed in this instance relates directly to their rights and interests. Thus, minimising the involvement of Indigenous and local communities in decision making around access and benefit sharing cannot be justified on a population base. Where legislation provides for stronger representation it seems that there are multiple factors at work conspiring against Indigenous participation. It is important that these issues are identified and addressed.

Australian structures

A comprehensive analysis of available legal structures and examples of their use are provided in the Garuwanga Project Discussion Paper.⁶² The following provides some examples of both the Australian legislation dealing with cultural heritage and the variety of legal structures of organisations that could serve as competent authorities either locally or nationally.

(i) Examples of Australian legislation dealing with cultural heritage

While there is currently no comprehensive legislation in Australia dealing with the requirements of the Nagoya Protocol, there are existing examples of how Australia has engaged with Aboriginal and Torres Strait Islander peoples with respect to protection for cultural heritage.

In New South Wales draft legislation with respect to protection of Aboriginal cultural heritage has been prepared and input from stakeholders requested. The draft legislation proposes an Aboriginal Cultural Heritage Authority, responsible *inter alia* for the registration of intangible Aboriginal cultural heritage. This Authority is to have a Board of 13 members appointed by the Minister. However, the process for selecting these members is not specified save to note that this process is 'intended to be a community-driven process to ensure that Board has cultural legitimacy and the requisite skills and expertise' and that 'The Minister is to appoint a representative of the New South Wales Aboriginal Land Council as a member of the Board.'⁶³ A board of 13 would at best represent only a fraction of the Aboriginal cultural groups of NSW.⁶⁴

The *Victorian Aboriginal Heritage Act 2006* establishes the Aboriginal Heritage Council which consists of up to 11 members appointed by the Minister. Section 130 provides that each member of the Council must be an Aboriginal person who is a traditional owner or can demonstrate traditional ownership of an area in Victoria, is resident in Victoria and in the opinion of the Minister, has relevant experience or knowledge of Aboriginal cultural heritage in Victoria. The functions of the Council are set out in s 132 of the Act and many of these functions relate to advising the Minister or Secretary to the Department. Under section 142A the Council has authority to set up advisory committees.

The *Western Australian Aboriginal Heritage Act 1972* provides for an advisory body known as the Aboriginal Cultural Material Committee. The Committee consists of appointed members and ex-officio members. One of the appointed members must be a person recognised as having specialised experience in the field of anthropology as related to the Aboriginal inhabitants of

⁶² Indigenous Knowledge Forum 2018 above, n 47.

⁶³ Evana Wright and Natalie Stoianoff (2018) Submission on behalf of Indigenous Knowledge Forum University of Technology Sydney to The NSW Government, Office of Environment and Heritage in response to Aboriginal cultural heritage reforms in NSW: A proposed new legal framework (Aboriginal Cultural Heritage Bill 2018).

⁶⁴ There are over 40 Aboriginal Nations recognised in the New South Wales Area Health Services Aboriginal Nations Map.

Australia. They are appointed by the Minister after consultation with the persons responsible for the study of anthropology at such of the establishments of tertiary education situated in the State as the Minister thinks fit. The appointed members are not required to be of Aboriginal descent, but must have special knowledge, experience or responsibility which, in the opinion of the Minister, will assist the Committee in relation to the recognition and evaluation of the cultural significance of matters coming before the Committee. The appointed members are selected from a panel of names submitted for the purposes of this Act by the Registrar (section 28).

The *Northern Territory Heritage Act 2011* provides for a Heritage Council at s124. Under s128 the Council consists of 10 members appointed by the Minister and the CEO or the CEO's nominee. The appointed members are:

- (a) a representative of The National Trust of Australia (Northern Territory); and
- (b) a representative of the Aboriginal Areas Protection Authority; and
- (c) a representative of an organisation representing the interests of local government; and
- (d) a representative of an organisation representing the interests of land owners; and
- (e) 6 persons with expertise or experience relevant to the administration of the Act.

In appointing members, the Minister must, as far as practicable, ensure at least 2 of the appointed members are of Aboriginal descent. The function of the Council is largely advisory (section 125).

The *Queensland Aboriginal Cultural Heritage Act 2003* does not provide for a board or council but under s154 the Minister has discretion to establish advisory committees.

These examples fail to demonstrate a government commitment to self-determination by Aboriginal and Torres Strait Islander peoples. The models for decision-making provided by these laws is not sufficient for a Competent Authority dealing with access and benefit sharing as it relates to traditional knowledge.

(ii) Australian legal landscape: Existing Australian Legal Structures

If Australia is to establish a Competent Authority that is better placed to support self-determination and provide Aboriginal and Torres Strait Islander peoples with true control over processes and decision-making with respect to access and benefit-sharing in relation to their traditional knowledge, then a key starting point lies with determining how such an authority should be structured. Australian law provides for various legal structures that could be used by a Competent Authority. Some of these structures are described below together with reference to particular Aboriginal organisations that have utilised relevant structures.

*Papunya Tula Artists Pty Limited*⁶⁵ is a **private company** owned and operated by traditional Aboriginal people from the Western Desert of the Luritja/Pintupi language groups. 'The aim of the company is to promote individual artists, to provide economic development for the communities to which they belong and assist in the maintenance of a rich cultural heritage.'⁶⁶ There are 49 shareholders and the company represents approximately 120 artists.

⁶⁵ Papunya Tula Artists Pty Ltd, *History*, <<http://papunyatula.com.au/history/>>.

⁶⁶*Ibid.*

The North Australian Indigenous Land and Sea Management Alliance Ltd (NAILSMA) was established to assist Indigenous land and sea managers and owners across northern Australia. NAILSMA is a **public company limited by guarantee**. It is a charity.⁶⁷ There is a maximum of 10 and no less than 5 directors who are representatives of the body corporate members. The members may by resolution at an annual general meeting appoint four independent directors to the Board who are able to contribute relevant skills and experience to the Board, including one director appointed as the independent chair of the company. The Board may appoint Advisory Committees to advise the Board from time to time on any matters considered by the Board to be relevant to promoting the objects and purposes of NAILSMA. In 2013, NAILSMA was admitted as a Member organisation of the world's largest professional global conservation body, IUCN (International Union for Conservation of Nature). NAILSMA is the first Indigenous-led Australian organisation to become a member.

Winanga-Li Aboriginal Child and Family Centre is a **not for profit incorporated association** and a charity that provides services in family support, disability support, health services and education. In addition to a long day care centre, the organisation provides family support services and outreach activities across northern and north-west New South Wales. There is a Board comprising up to 7 Directors elected from the association members. At least 5 of the directors must be Aboriginal persons and no more than 2 directors may be non-Aboriginal persons. The Board elects a Chairperson and Deputy Chairperson. There is also provision for appointment of a secretary, public officer and treasurer and a CEO. A minimum requirement is that the secretary and public officer must be Aboriginal persons.⁶⁸

*Indigenous Remote Communications Association (IRCA)*⁶⁹ is an **Aboriginal corporation registered with ORIC**. It is incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). Fifty-one per cent of members must be Indigenous. IRCA has members as opposed to shareholders. It is a charity and a deductible gift recipient (DGR). It is the peak body for Aboriginal and Torres Strait Islander broadcasting, media and communications. The Constitution allows for up to 9 Board members at least half of whom must be from remote areas. Directors must be Aboriginal or Torres Strait Islander. There is also provision for up to an additional 3 Board appointed positions to provide particular expertise. The Board includes a male and female chairperson. Directors are elected under a Diversity policy and Skills and Experience matrix.

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is a research, collections and publishing organisation established as a **statutory authority** under the *Public Governance, Performance and Accountability Act 2013*. A statutory authority is a body set up by enabling legislation that authorises the body to enact Regulations or Rules on behalf of the government. The delegation of power by government to the Statutory Authority is intended to provide legal efficiency, better allocation of resources, transparency and accountability. Federal statutory authorities are established under the *Commonwealth Authorities and Companies Act 1997*. AIATSIS operates under the [Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989](#). Until recently AIATSIS sat within the portfolio of the Department of Education

⁶⁷ 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>.

⁶⁸ Winanga-Li Aboriginal Child and Family Centre Constitution 2013.

⁶⁹ <https://irca.net.au>; IRCA 2016/2017 Annual report; IRCA consolidated rule book available on ORIC website.

and Training. The Minister responsible for AIATSIS was the Minister for Education and Training. In a recently announced change, AIATSIS will move to the Department of the Prime Minister and Cabinet reportedly *to play a more strategic role in informing the government on matters relating to Aboriginal and Torres Strait Islander cultures and languages*.⁷⁰ AIATSIS is governed by a Council of 9 members responsible for ensuring performance across all of AIATSIS' functions and setting its policies. The Council is also responsible for appointing a CEO who in turn is responsible for the operations and performance of the organisation. This responsibility is carried out with the assistance of a Senior Executive Board including a Chief Operating Officer and directors of collections and research.⁷¹

As mentioned above, in the Garuwanga Project a set of governance principles were developed to assist in the process of evaluating the variety of legal structures available to form a Competent Authority. In the Garuwanga Project Discussion Paper, those criteria have been applied against the four different Indigenous partner organisations supporting the project.⁷² The same type of analysis could be utilised to evaluate other potential forms for a Competent Authority. But ultimately the choice of legal structure for a body like NIACA depends on whether it will be a local, regional or national organisation and what the communities being represented consider to be important in order to achieve empowerment and self-determination.

⁷⁰ Prime Minister of Australia, *2018 Closing the Gap Report: Media Release* (12 February 2018)

<<https://www.pm.gov.au/media/2018-closing-gap-report>>.

⁷¹ AIATSIS, *Governance and Structure* <<https://aiatsis.gov.au>>.

⁷² Indigenous Knowledge Forum 2018 above, n 47, 35-40.