

An international approach to establishing a Competent Authority to manage and protect traditional knowledge

Alternative Law Journal
2019, Vol. 44(1) 48–55
© The Author(s) 2018
Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/1037969X18815254
journals.sagepub.com/home/altj



Fiona Martin

Faculty of Law, UNSW Business School, The University of New South Wales, Australia

Ann Cahill

ARC Linkage Project: Garuwanga

Evana Wright and Natalie Stoianoff

Faculty of Law, University of Technology Sydney, Australia

Abstract

This article discusses the establishment of a Competent Authority in accordance with the Nagoya Protocol to ensure that traditional knowledge of Indigenous communities is accessed subject to free, prior and informed consent and the fair and equitable sharing of benefits arising out of such use. It builds on research expressing the view that the design and development of a Competent Authority should take a grass roots approach. It analyses the authorities established in the Cook Islands and Vanuatu that include significant Indigenous voice and concludes with comments on the attributes of each system and its limitations.

Keywords

Indigenous legal issues, intellectual property, international law, South Pacific law

The purpose of the ‘Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity’ 2010 (the Nagoya Protocol) is to implement one of the three main objectives of the *Convention on Biological Diversity* 1992 (CBD).¹ The Protocol focuses on the fair and equitable sharing of benefits arising from the utilisation of genetic resources.

Article 13 of the Nagoya Protocol sets out criteria for the establishment of what is termed a ‘Competent Authority’. A Competent Authority is recommended by the United Nations to ensure that Indigenous communities are properly consulted and can provide free, prior and informed consent when their traditional knowledge is accessed and that they are able to take advantage of fair and equitable benefits when this occurs.²

¹Maiko Sentina et al, ‘International Laws and Developments relating to Indigenous Knowledge in Australia, Supplementary Paper 2’ (IP Australia, 2018) 8.

²Nagoya Protocol art 1 and 13.

Corresponding author:

Professor Fiona Martin, UNSW Business School, The University of New South Wales, Sydney, NSW 2052, Australia.

Email: f.martin@unsw.edu.au

This article provides insights into what is meant by a Competent Authority at the international level, and by two countries that have established competent authorities that are separate to their governments. It builds on the work of other researchers in this area, highlighting the fact that for a Competent Authority to function effectively its design, development and operation must incorporate participation from Indigenous Australians. The authors have examined the legislation of 69 different countries that have Indigenous populations and determined that 20 of these countries have legislation providing for a Competent Authority regulating access and benefit sharing in relation to traditional knowledge. On further examination of the legislation it has been found that only two countries out of the 20 – the Cook Islands and Vanuatu – have established Competent Authorities that are separate to government.³ The article examines the approaches taken in each of these countries and concludes with thoughts about the effectiveness of the Cook Islands and Vanuatu processes.



International law providing a rationale for a Competent Authority

The Nagoya Protocol requires that signatories establish at least one 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) establishing fair and equitable benefit-sharing mechanisms for use of Indigenous knowledge.⁴

Article 13(3) states that a Competent National Authority and a National Focal Point on access and benefit sharing is required but that the relevant functions can be fulfilled by a single entity. The Competent National Authority is responsible for granting access or providing

evidence that access requirements have been complied with, for providing advice on the relevant procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms with regard to access. The National Focal Point is essentially an information service responsible for providing procedural information and fulfilling international reporting obligations.⁵ The Nagoya Protocol entered into force on 12 October 2014.⁶

The need for a Competent Authority to administer access and benefit sharing arrangements with respect to traditional knowledge has been discussed at international, regional and national levels. From an international perspective, the United Nations CBD addresses the rights of Indigenous communities in their traditional knowledge and 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 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.⁷

The Nagoya Protocol, an international agreement under the CBD, in turn 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.⁸

The World Intellectual Property Organisation has drafted, but not finalised, model provisions that address the protection of traditional knowledge and cultural expressions and provide for a Competent Authority to be involved in administering the system of protection.⁹ The draft articles set out provisions governing the establishment of a Competent Authority.¹⁰

Some countries and regions have also established their own protocols for protection and access to traditional knowledge. These include the Andean Community's Decision No 391 Establishing the

³See Table 2 in Evana Wright, Natalie P Stoianoff and Fiona Martin, 'Comparative Study – Garuwanga: Forming a Competent Authority to protect Indigenous knowledge' (UTS Indigenous Knowledge Forum, 2017), 14.

⁴Nagoya Protocol art 13(2).

⁵Nagoya Protocol art 13(1).

⁶CBD, The Nagoya Protocol on Access and Benefit-sharing <https://www.cbd.int/abs/>.

⁷CBD art 8(j).

⁸Nagoya Protocol art 7.

⁹World Intellectual Property Organisation, The Protection of Traditional Knowledge: Draft Articles (TK Draft Articles) (15 March 2017) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=368218; World Intellectual Property Organisation, The Protection of Traditional Cultural Expressions: Draft Articles (TCE Draft Articles) (16 June 2017) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=375036; World Intellectual Property Organisation, Consolidated Document Relating to Intellectual Property and Genetic Resources (15 March 2017) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=368344. The Protection of Traditional Knowledge: Draft Articles Facilitator's Rev 2 (2 December 2016).

¹⁰Art 8 TK Draft Articles and Art 6 TCE Draft Articles respectively.

Common Regime on Access to Genetic Resources; the Organisation of African Unity's African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources; and the Secretariat of the Pacific Community's Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002. Each of these regional instruments provides for a Competent Authority.¹¹

The Australian federal government has not established a Competent Authority and has treated its obligations under the Nagoya Protocol as being met through environmental protection and biodiversity conservation systems already in place.¹² This issue has been addressed by IP Australia which, together with the Department of Industry, Innovation and Science, commissioned Terri Janke to produce a discussion paper examining issues relating to protection and management of Indigenous knowledge.¹³ Janke had previously recommended the establishment of a National Indigenous Competent Authority to educate and raise awareness within the community about rights relating to Indigenous knowledge.¹⁴ In the discussion paper Janke recommends a National Competent Authority as a possible legal option to stop appropriation and misappropriation of traditional knowledge and enhance economic benefits and Indigenous human rights in respect of culture.¹⁵ Other Australian research work has commenced relating to the investigation of forms that a Competent Authority might take. In particular, in July 2016, the Australian Research Council granted funds to a project titled 'Garuwanga: Forming a Competent Authority to protect Indigenous knowledge' (the Garuwanga Project) led by academics at the University of Technology Sydney and University of New South Wales partnering with Indigenous community representatives from New South Wales and the Kimberleys in Western Australia.¹⁶ At the time of writing this article, the project had produced a report and a discussion document.¹⁷

National approaches

An examination of relevant law from 69 countries undertaken as part of the Garuwanga Project identified 20

nations with laws protecting traditional knowledge that include provisions relating to access and benefit sharing and a form of a Competent Authority.¹⁸ Table I summarises the legislation relating to the 20 countries identified in the Report of the Garuwanga Project and outlines each country's legislation relating to the establishment of a Competent Authority.

An analysis of the law of each of the 20 countries with respect to establishing a Competent Authority demonstrates a wide variety of approaches. Some countries use existing authorities to form a Competent Authority and others have established completely new entities. Twelve out of the 20 countries have established new entities. These are Brazil, the Cook Islands, Costa Rica, Ethiopia, India, Kenya, Niue, Peru, Philippines, South Africa, Vanuatu and Zambia.¹⁹ However, in 10 of these countries, the Competent Authority is part of a government ministry.²⁰ This is seen as problematic by some researchers who have reported resistance to government involvement in a Competent Authority to protect and administer traditional knowledge arising from some Australian Indigenous communities.²¹ This negative response is largely based on Indigenous experiences with government agencies that do not consider Indigenous culture or land management when making decisions relating to them and that regularly have disruptive personnel changes which lead to further communication breakdown.²² Other research strongly suggests that a Competent Authority should be made up of a significant number of representatives from the Indigenous communities that it represents.²³

Countries that have established a Competent Authority independent from government

In view of the criticism of decisions being made by an authority that is closely connected to government highlighted above, this article now analyses the approaches taken by the only two nations in the Garuwanga Project study that provide a model in which there is some independence from government. These countries are the Cook Islands and Vanuatu.²⁴ It should be noted that

¹¹Evana Wright, Natalie P Stoianoff and Fiona Martin, 'Comparative Study - Garuwanga: Forming a Competent Authority to protect Indigenous knowledge' (UTS - Indigenous Knowledge Forum, 2017) 21–25.

¹²UTS-Indigenous Knowledge Forum and North West Local Land Services, 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management' (NSW Office of Environment and Heritage, 2013) <https://www.indigenousknowledgeforum.org/white-paper>.

¹³Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for Protection and Management' (IP Australia, 2018).

¹⁴Ibid 118.

¹⁵Ibid.

¹⁶Indigenous Knowledge Forum, 'Garuwanga: Forming a Competent Authority to Protect Indigenous Knowledge' <https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho> 2016.

¹⁷Wright, Stoianoff and Martin, above n 11; 'Garuwanga: Forming a Competent Authority to protect Indigenous knowledge: Discussion Paper' (UTS, April 2018).

¹⁸Wright, Stoianoff and Martin, above n 11, 26–86.

¹⁹Ibid 13.

²⁰Ibid.

²¹UTS-Indigenous Knowledge Forum and North West Local Land Services, above n 12, 34, 35, 49.

²²Natalie P Stoianoff, Ann Cahill and Evana Wright, 'Indigenous knowledge: What are the issues?' in Natalie P Stoianoff (ed), *Indigenous Knowledge Forum: Comparative Systems for Recognising and Protecting Indigenous Knowledge and Culture* (LexisNexis, 2017) 32–4.

²³See Janke and Sentina, above n 13, 49; Terri Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (1999) *University of New South Wales Law Journal* 631, 637.

²⁴Wright, Stoianoff and Martin, above n 11, 14.

Table 1. Countries and laws protecting traditional knowledge including provisions on access and benefit sharing and a Competent Authority.

Country	Legislation
Benin	<i>Law No 2005-30, 5 April 2006, relating to Copyright and Related Rights of the Republic of Benin</i>
Bhutan	<i>Biodiversity Act of Bhutan Water Sheep Year 2003</i>
Bolivia	<i>Supreme Decree No 24676, 21 June 1997 – Regulations to Decision No 391 of the Commission of the Cartagena Agreement and Regulations on Biosafety</i>
Brazil	<i>Law No 13.123, 20 May 2015 Access and Benefits Sharing of Genetic Resources and Associated Traditional Knowledge</i>
Burundi	<i>Law No 1113 of July 28, 2009, on Industrial Property in Burundi</i>
Cook Islands	<i>Traditional Knowledge Act 2013</i>
Costa Rica	<i>Law No 7788 of April 30, 1998, on Biodiversity (as last amended by Law No 8686 of November 21, 2008)</i> <i>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)</i>
Ethiopia	<i>Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No 482/2006</i>
India	<i>Biological Diversity Act 2002</i>
Kenya	<i>Protection of Traditional Knowledge and Cultural Expressions Act 2016</i>
Kyrgyzstan	<i>Law of the Kyrgyz Republic on the Protection of Traditional Knowledge</i>
Niue	<i>Tāoga Niue Act 2012</i>
Panama	<i>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</i> <i>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</i>
Peru	<i>Law No 28216 on the Protection of Access to Peruvian Biological Diversity and Collective Knowledge of Indigenous Peoples</i> <i>Law No 27811 of 24 July 2002, introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources</i>
Philippines	<i>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</i> <i>Implementing Rules and Regulations on the Prospecting of Biological and Genetic Resources, Administrative Order No 96–20 National Cultural Heritage Act of 2009</i> <i>The Indigenous Peoples Rights Act of 1997</i>
South Africa	<i>National Environmental Management: Biodiversity Act 2004 (Act No 10 of 2004)</i> <i>Regulations on Bio-Prospecting, Access and Benefit Sharing 2008</i>
Sri Lanka	<i>A Legal Framework for the Protection of Traditional Knowledge in Sri Lanka</i>
Thailand	<i>Protection and Promotion of Traditional Thai Medicinal Intelligence Act, B.E. 2542 (1999)</i>
Vanuatu	<i>Copyright and Related Rights Act No 42 of 2000</i> <i>Patents Act No 2 of 2003</i> <i>Designs Act No 3 of 2003</i>
Zambia	<i>The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, 2016 (Act No 16 of 2016)</i>

the populations of both these countries are largely Indigenous; with only a small percentage of European or other settlers,²⁵ they are geographically part of the Pacific and their overall population is relatively small and dispersed across the many islands that make up each nation²⁶ and even farther afield.²⁷ These factors may go some way towards explaining why each country has provided for what at least appears

on the surface to be stronger Indigenous participation than others that have established a Competent Authority.

Cook Islands

The Cook Islands are a series of islands in the centre of Polynesia in the South Pacific.²⁸ The ethnic background

²⁵CIA World Fact Book, Cook Islands Ethnic Groups https://www.indexmundi.com/cook_islands/ethnic_groups.htm; Miranda Forsyth, 'Legal pluralism: The regulation of traditional medicine in the Cook Islands' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 233, 236.

²⁶Daniel F Robinson and Miranda Forsyth, 'People, plants, place and rules: the Nagoya Protocol in Pacific island countries' (2016) 54 (3) *Geographical Research* 324, 325.

²⁷Forsyth, above n 25, 236 reports that approximately 70,000 Cook Islanders live in New Zealand and Australia.

²⁸Ibid.

of the majority of Cook Islanders is Polynesian.²⁹ The Cook Islands has not ratified the Nagoya Protocol.³⁰

The Cook Islands has introduced legislation that provides legal recognition of the rights in traditional knowledge of its traditional communities. The legislation encourages the registration of traditional knowledge by knowledge-holders and its written documentation.³¹ The *Traditional Knowledge Act 2013* (TK Act) of the Cook Islands states in its preamble that the traditional knowledge of the traditional communities of the Cook Islands is legally recognised and that the aim of the legislation is to assist those communities, and the holders of those rights, to protect those rights for the benefit of the people of the Cook Islands.³² The TK Act provides for three levels of decision maker or competent authority. These are Are Korero, the Secretary of Cultural Development and a Traditional Knowledge Advisory Committee.³³

Section 3 of the TK Act states that an Are Korero is essentially a body of persons authorised by the regional chiefs to exercise and carry out functions traditionally exercised by an Are Korero. The term Are Korero means 'house of knowledge'³⁴ and it has been suggested that this term is used in the legislation in order to reinvigorate this institution and include the traditional chiefs for the relevant regions in the decision-making process.³⁵

The Act defines traditional knowledge very broadly as, in essence, knowledge originating from a traditional community or created, developed, acquired or inspired for traditional purposes.³⁶

Applications to register traditional knowledge must first be made to the relevant Are Korero.³⁷ Section 20(2) ensures that the Are Korero is the entity empowered to verify that the subject of the application is traditional knowledge and that the applicant is either the only rights holder or is one of several rights holders and is acting on behalf of all rights holders of the knowledge.

Once the matter has been approved by the local Are Korero it goes before the Secretary of Cultural Development who is responsible for accepting applications for registration and maintaining all registers

considered necessary for the purposes of the Act.³⁸ This includes the register of traditional knowledge.³⁹

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 this Act'.⁴⁰ It is made up of one member appointed by each Are Korero.⁴¹ This is to ensure that each region is represented in evaluating the operation of the TK Act.

As the legislation was only enacted in 2013 it is too early to tell whether it is operating effectively. However, at least two significant issues of concern have been raised with the legislation. First, it is limited in its jurisdictional reach to Cook Islands, and so will have no ability to impact on any misuse or misappropriation of traditional knowledge taking place outside the country. This is despite the fact that this was the main reason why Members of Parliament and the general public wanted the legislation.⁴² Second, although the TK Act was passed in 2013, by the end of 2014 there were still no processes in place for its implementation and knowledge of the Act itself is not widespread.⁴³ Forsyth also points out that Are Korero used to exist in all communities as a means of sharing specialised knowledge but that this has fallen into disuse,⁴⁴ which suggests that it may be difficult to interest community members in what might be seen as a defunct system. The Cook Islands is, however, still an example of an attempt to include traditional community leaders in the decision-making process, both at the initial decision-making stage and as part of the evaluation of the process and as such, should be applauded for this initiative. As Forsyth states, 'This provision for making determinations about rights over traditional knowledge at local levels is a major improvement on previous frameworks that give such decision-making power to state or regional authorities'.⁴⁵

Vanuatu

Vanuatu is located in the southwestern Pacific Ocean and has a population of approximately 290,000 people. The ethnic background of the population is predominantly

²⁹ CIA World Fact Book, above n 25. The nation comprises 12 inhabited islands spread over 2 million square kilometres of ocean, with a population of approximately 15,000 people. It has been self-governing since 1965. The Polynesian peoples of the Cook Islands are also known as Cook Islands Maori.

³⁰ CBD, Parties to the Nagoya Protocol <https://www.cbd.int/abs/nagoya-protocol/signatories/default.shtml>.

³¹ Robinson and Forsyth, above n 26, 330.

³² *Traditional Knowledge Act 2013* (Cook Islands) preamble.

³³ TK Act s 3.

³⁴ Forsyth, above n 25, 241.

³⁵ *Ibid* 233.

³⁶ TK Act s 4.

³⁷ TK Act s 19.

³⁸ TK Act s 56(c).

³⁹ TK Act s 56(a).

⁴⁰ TK Act s 63.

⁴¹ TK Act s 64.

⁴² Rachel Smith, 'New law will protect traditional knowledge in the Cook Islands' <http://www.cookislandsnews.com/item/37268-new-law-will-protect-traditional-knowledge-in-the-cook-islands/37268-new-law-will-protect-traditional-knowledge-in-the-cook-islands> 2 March 2012; Forsyth, above n 25, 241.

⁴³ Forsyth, above n 25, 244.

⁴⁴ *Ibid* 241.

⁴⁵ *Ibid* 244.

Melanesian.⁴⁶ Vanuatu ratified the Nagoya Protocol on 1 July 2014.⁴⁷

Vanuatu established a National Cultural Council under the *Vanuatu National Cultural Council Act 2006* (VNCC Act) in 2006. This Council operates as a Competent Authority for the purpose of protecting cultural heritage and expressions of culture. Its objects include to support, encourage and make provision for the preservation, protection and development of various aspects of the cultural heritage of Vanuatu.⁴⁸ The National Cultural Council comprises a director and six members who are appointed by the Minister responsible for Cultural Affairs.⁴⁹ Four of the six members are a representative of the Ministry responsible for Cultural Affairs, a representative of the National Council of Chiefs nominated by the National Council of Chiefs, a representative of the National Council of Women nominated by the National Council of Women and a representative of the Vanuatu Cultural Centre. The remaining two are persons whom the Minister considers have relevant experience in matters relating to museums, public libraries or archives. Therefore, one of the seven members is a representative of the National Council of Chiefs.⁵⁰

The *Copyright and Related Rights Act No 42 of 2000* of Vanuatu (Vanuatu Copyright Act) provides that it is an offence for someone to reproduce, publish, perform and so on, any expression of Indigenous culture if they are not the 'custom owner' of that expression or authorised by the custom owners.⁵¹ The Act authorises the National Cultural Council to institute proceedings, at the request and on behalf of customary owners of expression in cases of alleged infringement⁵² and institute proceedings as if it were the owner of the copyright or other right in the event that the customary owners cannot be identified or there is a dispute about ownership.⁵³ The Council may also issue written guidelines for the purposes of ss 41–42 dealing with offences in relation to expressions of Indigenous culture.⁵⁴

Under the *Patents Act No 2 of 2003* and the *Designs Act No 3 of 2003*, patent and design applications involving Indigenous knowledge must be referred to the National Council of Chiefs.⁵⁵ This Council is established under s 29 of the Constitution of Vanuatu and consists of custom chiefs elected by the Island Councils of Chiefs

and the Urban Councils of Chiefs.⁵⁶ Patents that are based on, arose out of, or incorporate Indigenous knowledge can only be registered, after the application has gone to the Council of Chiefs.⁵⁷ The Registrar must not grant a patent for an invention that is based on, arose out of, or incorporates elements of, Indigenous knowledge unless the custom owners of the Indigenous knowledge have given their prior informed consent to the grant and the applicant and the custom owners have entered into an agreement on the payment by the applicant to the custom owners of an equitable share of the benefits from exploiting the patent.⁵⁸ If the Registrar is, after consultation with the National Council of Chiefs, satisfied that the custom owners cannot be identified or there is a dispute about ownership of the Indigenous knowledge concerned, 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 Council of an equitable share of the benefits from exploiting the patent.⁵⁹ A similar process is used for the registration of designs that are based on Indigenous knowledge.⁶⁰

Vanuatu therefore allows for significant input into protection and benefit sharing relating to traditional knowledge by representatives of its Indigenous Peoples. The Competent Authority in Vanuatu takes two forms, that of the National Cultural Council which has a representative of the National Council of Chiefs as one of its members and the National Council of Chiefs which has a significant role in the protection and benefit sharing of traditional knowledge if the custom owners cannot be identified or if there is a dispute about ownership. As Marahare states:

The involvement of the two institutions of the Council of Chiefs and the National Cultural Council along with the custom owners in the whole process guards against both unscrupulous pharmaceutical companies and custom owners from benefiting from IKEC [Indigenous Knowledge and Expressions of Culture] at the expense of genuine custom owners. The involvement of both the Council of Chiefs and Vanuatu National Cultural Council in the whole process leading up to the grant of patents, designs or trademarks over indigenous property rights should be highly commended.⁶¹

⁴⁶Vanuatu consists of a chain of 13 principal and many smaller islands located about 800 km west of Fiji and 1770 km east of Australia, Sophie Foster and Ron Adams, Encyclopaedia Britannica, Vanuatu <https://www.britannica.com/place/Vanuatu>; Kanchana Kariyawasam, 'Protecting Biodiversity, Traditional Knowledge and Intellectual Property in the Pacific: Issues and Challenges' (2008) *Asia Pacific Law Review* 73, 76.

⁴⁷CBD, Parties to the Nagoya Protocol <https://www.cbd.int/abs/nagoya-protocol/signatories/default.shtml>.

⁴⁸VNCC Act s 5(a).

⁴⁹VNCC Act s 3(1).

⁵⁰VNCC Act s 3(1)(a).

⁵¹Vanuatu Copyright Act s 41(1). Note that the legislation uses the term 'custom owner'.

⁵²Vanuatu Copyright Act s 42(3).

⁵³Vanuatu Copyright Act s 42(4).

⁵⁴Vanuatu Copyright Act s 42(9).

⁵⁵Patents Act s 47(1) and Designs Act s 62(1).

⁵⁶*National Council of Chiefs Act No 23 of 2006* s 5(1).

⁵⁷Patents Act s 47(1).

⁵⁸Patents Act s 47(2).

⁵⁹Patents Act s 47(3).

⁶⁰Designs Act s 62.

⁶¹Don Marahare, 'Towards an Equitable Future in Vanuatu: The Legal Protection of Cultural Property' (2009) 13(1) *Journal of South Pacific Law* <http://www3.paclii.org/journals/fjSPL/vol08no2/6.shtml>.

Indigenous and local community participation in a Competent Authority

The Garuwanga Project also identified seven countries out of the 20 countries where a Competent Authority has been established in which it also appears that there is some Indigenous and local community participation in the Competent Authority. These countries are Brazil, Costa Rica, India, Niue, Peru, Philippines and South Africa.⁶²

Some of these countries specifically allow representation by Indigenous communities on the Competent Authority; however, this representation is in the minority in each case and the government representatives appear to be in control through sheer force of numbers. Furthermore, most of the countries demonstrate situations where the Indigenous representatives are there only in an advisory capacity and not in any decision-making role.

One example that is representative of the level of involvement of Indigenous communities is Brazil. The Brazilian legislation provides for the establishment of the Council of the Genetic Heritage Management (CGEN) under the Ministry of the Environment, as a 'collegiate body of deliberative, legislative, consultative and appeal character, which is responsible for coordinating the development and implementation of related policies for the management of access to genetic resources and associated traditional knowledge'.⁶³ CGEN is the Brazilian National Competent Authority and makes decisions on access requests to associated traditional knowledge and access to and shipment of components of genetic heritage for any of the three purposes prescribed by the legislation: scientific research, bioprospecting or technological development.⁶⁴

Da Silva and de Oliveira report that CGEN comprises representatives from a large range of government agencies. These include the Ministries of: the Environment; Justice and Public Security; Health; and Agriculture, Livestock and Supply. It also has representatives from the National Confederation of Industry, National Confederation of Agriculture, and the Brazilian Society for the Advancement of Science, Brazilian Association of Anthropology, Brazilian Academy of Sciences and entities or organisations representing indigenous peoples, traditional communities and traditional farmers.⁶⁵ The total

membership of CGEN is 20 persons; 11 are from government and nine are from civil society.⁶⁶ Da Silva and de Oliveira consider that this makeup demonstrates a strengthened position of the holders of associated traditional knowledge who now have more of a voice in decision making;⁶⁸ however, the government representatives are in the majority and the traditional owner voices are the minority even amongst civil society representatives.

Conclusion

This article highlights that there is a wide range of nations that have implemented Competent Authorities to manage and protect traditional knowledge and allow for benefit sharing when such traditional knowledge is accessed. It has also clearly demonstrated that there are few examples where the role of Indigenous peoples in these forums is more than minimal or advisory. This is a major concern given the criticism of government led entities by Indigenous researchers and Indigenous communities themselves. In Australia, research has identified concerns regarding the role of government in governing access and benefit sharing in relation to traditional knowledge.⁶⁹ The only two countries that have made significant attempts to incorporate traditional community involvement in the decision-making process for protection of traditional knowledge are the Cook Islands and Vanuatu. The approaches of each nation demonstrate that it is possible to design a system that allows the traditional knowledge holders a significant voice. How well each system works is however not clear at this stage and further research is necessary to determine if the processes are effective. Despite the differences between the jurisdictions under consideration, the experience of Vanuatu and the Cook Islands may be used to inform the design and implementation of a Competent Authority for the protection of traditional knowledge in Australia.⁷⁰ However, a major concern, even for Vanuatu which has ratified the Nagoya Protocol, is that the legislation is only effective inside each country's borders and therefore will not protect traditional knowledge from exploitation by multinationals overseas. Nor, due to distance and other logistical issues, does either system allow ease of access to the many Pacific Islanders who live overseas.

⁶²Wright, Stoianoff and Martin, above n 11, 13.

⁶³Food and Agriculture Organization of the United Nations, FAOLEX Data Base, Brazil, 20 May 2015 <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC149058/>.

⁶⁴Cristina Maria do Amaral Azevedo, 'Regulation to access to genetic resources and associated traditional knowledge in Brazil' (2005) 5 *Biota Neotropica* 19, 24.

⁶⁵Manuela da Silva and Danilo Ribeiro de Oliveira, 'The new Brazilian legislation on access to the biodiversity (Law 13,123/15 and Decree 8772/16)' (2018) 49 *Brazilian Journal of Microbiology* 1.

⁶⁶Ibid.

⁶⁸Ibid 4.

⁶⁹For example, UTS-Indigenous Knowledge Forum and North West Local Land Services, above n 12, 46, 48–9.

⁷⁰For literature supporting the use of legal transplants, even where there are significant differences between the jurisdictions under consideration, see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974); George Mousourakis, 'Transplanting Legal Models Across Culturally Diverse Societies: A Comparative Law Perspective' (2010) 57 *Osaka University Law Review* 87.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: The authors would like to acknowledge that this article draws on research that was generously funded by an Australian Research Council Linkage Grant awarded to researchers from the Faculty of Law at the University of Technology Sydney, School of Business at the University of New South Wales and the partner investigators of four Indigenous partner organisations for the project entitled 'Garuwanga: Forming a Competent Authority to protect Indigenous knowledge' (LP160100146).

Fiona Martin is a professor in the UNSW Business School, University of New South Wales, Sydney.

Ann Cahill is a research associate with the ARC Linkage Project, Garuwanga: Forming a Competent Authority to protect Indigenous knowledge.

Evana Wright is a lecturer in the Faculty of Law, University of Technology Sydney.

Natalie Stoianoff is a professor in the Faculty of Law, University of Technology Sydney, and chair of the Indigenous Knowledge Forum Committee.