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## **Stoianoff, Natalie; Cahill, Ann; Wright, Evana; --- "Indigenous Knowledge: what are the issues?" [2017] UTSLRS 7; (2017) Indigenous knowledge forum: comparative systems for recognising and protecting indigenous knowledge and culture (ed.) Natalie Stoianoff 39**

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### **INDIGENOUS KNOWLEDGE – WHAT ARE THE ISSUES?**

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#### **I INTRODUCTION**

Much has been written about Indigenous knowledge, its nature, its value, the desire to access that knowledge and the need for its protection. Indigenous knowledge has also been the subject of much international debate and law-making in relation to its protection, access with the prior informed consent of the communities that hold that knowledge, and the establishment of benefit-sharing arrangements on mutually agreed terms. However, it should be noted that international debate has often focussed on the broader concept of traditional knowledge encapsulating the knowledge of both Indigenous peoples on the one hand and local communities that might not fit the concept of 'Indigenous' on the other. This raises the need to address the meaning of 'Indigenous knowledge' which requires an understanding of Indigeneity.

This was an issue discussed at the inaugural Indigenous Knowledge Forum held in August 2012 in Sydney Australia which focussed on a comparison between Australian and Indian legal developments:

The forum provided an opportunity for dialogue on comparative issues in Indigenous knowledge and biodiversity in Australia and India from the perspective of intellectual property and biodiversity laws and policies. The forum explored current and future directions regarding the implementation and operation of these laws and policies, particularly with respect to the rights and interests of Indigenous and local peoples. Emphasis was given to Indigenous peoples' activities in formulating their own approaches regarding the protection and use of their knowledge, as well as advocating for rights and recognition, and participation in policy development.<sup>[1]</sup>

It was this forum that led to the development of the research project that was funded by the Aboriginal Communities Funding Scheme of the Namoi Catchment Management Authority (now North West Local Land Services (NWLLS)) to produce the 2014 New South Wales White Paper, *Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management*.<sup>[2]</sup>

This White Paper sought to address the concerns of Aboriginal Australians in New South Wales regarding the use of cultural knowledge without their prior informed consent and without any sharing in the benefits obtained from such use. These concerns are not unique to Aboriginal communities in New South Wales but are the common concerns of Indigenous communities throughout the world not to mention other parts of Australia.

This chapter discusses the question of what is Indigenous knowledge having regard to developments internationally and in Australia. It then considers the cultural, social, environmental and economic context in which Indigenous populations find themselves and the way their knowledge has been treated. Then, through the New South Wales case study offered by the White Paper, this chapter describes the Aboriginal community consultation process and outcomes that informed the final drafting of a model *sui generis* regime for recognising and protecting, in this case, Aboriginal knowledge as it relates to natural resource management.

## II WHAT IS INDIGENOUS KNOWLEDGE?

There is no one definition that encompasses the entire meaning of Indigenous knowledge. In fact, international discourse focusses on the term 'traditional knowledge' which goes beyond that which is referable to Indigenous peoples only and is again too dynamic and diverse to have a single acceptable definition.<sup>[3]</sup> The majority of the chapters in this book focus on the international recognition of traditional knowledge and cultural expressions (and several variations thereof) as defined in a number of international legal instruments such as the *Convention on Biological Diversity 1992*,<sup>[4]</sup> 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),<sup>[5]</sup> the draft treaties of the World Intellectual Property<sup>[6]</sup> and the *United Nations Declaration of the Rights of Indigenous Peoples*<sup>[7]</sup> as well as the *International Treaty on Plant Genetic Resources for Food and Agriculture 2001*<sup>[8]</sup> and several more.<sup>[9]</sup>

However, traditional knowledge is regarded as covering 'knowledge, innovations and practices of indigenous and local communities around the world'<sup>[10]</sup> and thereby encapsulates Indigenous knowledge. The further subset of Indigenous ecological knowledge provides 'an holistic approach of understanding the seasons, biodiversity, land and water'<sup>[11]</sup> and accordingly has implications for the environment, natural resource management, agriculture, natural medicines and other forms of healthcare, trade and intellectual property rights.

In the Australian context, McKemey and White express the nature of this knowledge and its significance to Aboriginal people very clearly:

Aboriginal use of plants over thousands of years has led to an incredibly detailed and intimate knowledge base which is held within Aboriginal culture. In order to survive, Aboriginal people needed to know which plants could be eaten throughout the seasons of the year, which plants could heal diseases and help fix broken bones, which plants could

provide habitat for animals and a reliable place to hunt for meat and eggs, which plants could be used to make tools or shelter and which plants could be used to help people to carry out their spiritual obligations, such as ceremonies or funerals.<sup>[12]</sup>

But it should be noted that this knowledge is ever evolving in response to the needs of community and country, and is integral to 'community social norms, customary laws and protocols, cosmology but also connection with the land'.<sup>[13]</sup> Accordingly, the knowledge base may be different from one community to the next. Further, Indigenous knowledge takes on a spiritual dimension and with it a responsibility on the part of a knowledge holder and their community. This is a responsibility to look after that knowledge and apply it respectfully and ensure it is shared in accordance with cultural law. Often this requires that the knowledge is only disclosed to specific individuals within a community but is otherwise secret knowledge that is not intended to be in the public domain. Accordingly, we argue, the very nature of Indigenous knowledge does not make it part of the common heritage of humanity, as the UNESCO *Universal Declaration on Cultural Diversity (2001)* might suggest at Article 1. Instead, this knowledge ought to be respected and not misappropriated by others. The difficulty is that should that knowledge enter the public domain without the prior informed consent of the knowledge holder or their Indigenous community, the impact can be culturally devastating for the community. This was the fear in *Foster v Mountford and Rigby Ltd*<sup>[14]</sup> where secret rituals were to be revealed in a publication of an anthropological book about an Aboriginal community had the action for breach of confidence not been successful. Alternatively, the result could be significant economic loss to the community as in 'the patenting of the Kakadu plum extract by the US cosmetic company Mary Kay Inc'.<sup>[15]</sup> This raises the need to find a mechanism for such knowledge to be formally recognised and protected under modern economic laws requiring consideration of the cultural, social, environmental and economic context in which Indigenous communities find themselves.

### **III CULTURAL, SOCIAL, ENVIRONMENTAL AND ECONOMIC CONTEXT**

The United Nations Permanent Forum on Indigenous Issues explains what is meant by the term 'indigenous', noting that there are several elements to understanding this term, namely:

- Self- identification as indigenous peoples at the individual level and accepted by the community as their member.
- Historical continuity with pre-colonial and/or pre-settler societies
- Strong link to territories and surrounding natural resources
- Distinct social, economic or political systems
- Distinct language, culture and beliefs
- Form non-dominant groups of society
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.<sup>[16]</sup>

Wrapped up in this understanding is a recognition that these First Nation communities became dominated by later arrivals of people with 'different cultures or ethnic origins'

through 'conquest, occupation, settlement or other means'.<sup>[17]</sup> The United Nations Permanent Forum on Indigenous Issues has estimated that Indigenous communities account for more than 370 million people '[s]pread across the world from the Arctic to the South Pacific' having 'retained distinct characteristics...clearly different from those of other segments of the national populations'.<sup>[18]</sup> They include the *Saami* of Scandinavia, several Indigenous peoples or First Nations within North and South America (for example the *Inuit* of Canada, *Aymaras* of Bolivia and *Navajo* of USA), *Māori* of New Zealand and *Aboriginal and Torres Strait Islanders* of Australia. It should be noted that in some countries the term 'Indigenous' is not utilised but may be replaced with terms such as 'tribes, first peoples/nations, aboriginals, ethnic groups, *adivasi*, *janajati*'.<sup>[19]</sup> However described, what sets these communities apart from the dominant society is that in '[p]racticising unique traditions, they retain [distinct] social, cultural, economic and political characteristics'.<sup>[20]</sup>

Part of this distinctiveness is the growing recognition of the value of Indigenous culture and knowledge.

'Indigenous peoples are the holders of unique languages, knowledge systems and beliefs and possess invaluable knowledge of practices for the sustainable management of natural resources.'<sup>[21]</sup>

The focus of the White Paper was on Aboriginal knowledge associated with natural resource management. The Australian Government claims to have worked in partnership with Indigenous Australians to manage Australia's environment and cultural heritage.<sup>[22]</sup> In fact there are numerous programs and initiatives engaging Indigenous Australians in natural resource management.<sup>[23]</sup> The recognition of the significance of their contribution to a sustainable future is aptly stated by McKemey and White:

Aboriginal people have lived in Australia for over 40,000 years, or since the beginning of the Dreamtime or Creation Era. In fact, Aboriginal culture is the oldest living culture in the world today. Over these many years, Aboriginal people lived with the land, taking everything they needed for their survival (medicine, food, shelter, clothing, spirituality) from the earth and the elements. Plants and animals were carefully harvested to ensure there was enough food left for the next generation. Totems and kinship rules meant that Aboriginal people lived sustainably, not taking more than they needed from the earth. Aboriginal people had a responsibility to look after their totem (usually an animal) and the habitat in which it lived (plant, water and so on).<sup>[24]</sup>

Equally, the connection to cultural heritage through rights of access to traditional lands and waters in order to collect bush foods and medicines, fish and conduct ceremonies contributes to the well-being of Aboriginal peoples.<sup>[25]</sup> However, as the White Paper notes, 'since the time of European arrival, Aboriginal Communities have been denied the right to maintain contact with their traditional lands, their languages and their cultural practices'.<sup>[26]</sup> The resultant impact on the well-being of Aboriginal peoples has been profound with 'grief, suffering and loss' being inflicted by 'the laws and policies of successive parliaments and governments'<sup>[27]</sup> and has 'led to intergenerational loss of knowledge and culture through displacement from the land of their ancestors and separation from family and community'.<sup>[28]</sup>

Despite the injustices that Indigenous Australians have endured, there are examples of communities that have been able to embrace their ecological and medicinal knowledge as

well as their cultural expressions and work within Western legal constructs to develop long term benefits for their communities. However these have not been without difficulties and have relied upon the ethical behaviour of the organisations with which they have partnered. Examples of successful partnerships have been provided in the White Paper.<sup>[29]</sup> By contrast, there have been many more examples where such valuable knowledge has been misappropriated by industry and exploited through the development of patents or plant variety/breeders rights without the prior informed consent of the knowledge holders and their communities and without any benefit flowing back to those knowledge holders and their communities.<sup>[30]</sup>

The next section of this chapter shines a light on the concerns of the New South Wales Aboriginal communities consulted in the preparation of the White Paper. The results of these consultations confirm the sense of marginalisation, dispossession and injustice still felt by members of these communities today but equally confirm the strong connection to Country and the importance of access to Country for the well-being of Aboriginal peoples whether on Country or otherwise.

#### IV ABORIGINAL COMMUNITY CONSULTATION PROCESS AND OUTCOMES

A crucial step in the development of the draft legislation for recognising and protecting Aboriginal knowledge proposed in the White Paper was the Aboriginal community consultation process that took place between 16 and 20 June 2014 in the Namoi Catchment area of New South Wales. This was organised by the research partner and funding body, the North West Local Land Service (NWLLS). Four meetings took place, each in a different town and hosted at the premises of either the Local Aboriginal Land Council or other Aboriginal Community meeting place. A discussion paper had been prepared by the Working Party on the project for distribution to the communities. This discussion paper explained the purpose of the proposed legislation and then explained the meaning and operation of each key provision proposed. The research employed to develop this discussion paper and carry out the community consultations in order to develop the White Paper utilised an action research methodology with an Indigenous research paradigm.

Action research methodology emphasises cooperative or collaborative inquiry<sup>[31]</sup> whereby all active participants are fully involved in research decisions as co-researchers<sup>[32]</sup> hence the members of the Working Party were researching together and thereafter submitted that research for testing through community consultations in the form of focus groups. In order to produce the White Paper, the Working Party applied an Indigenous research paradigm encompassing epistemologies (ways of knowing) through stories, narrative and reflection, connectedness to Country, culture and spirituality in a collaborative and interdisciplinary process – this proved successful as a means of ensuring deeper understanding of the concerns of community, especially the knowledge-holders charged with protecting the knowledge of the community.<sup>[33]</sup> The community consultations were conducted by the authors of this chapter together with a representative from the Advisory Board of the Indigenous Knowledge Forum (who was also a member of the Working Party and a practicing Aboriginal solicitor from the Southern Highlands) and two local Aboriginal people employed by NWLLS and the Office of Environment and Heritage.

The Aboriginal community consultations or focus group sessions were conducted under Human Research Ethics Committee approval and in accordance with Chapter 4.7 of the *National Statement on Ethical Conduct in Human Research* (2007).<sup>[34]</sup> Accordingly, informed consent was necessary for the results of the consultations to be analysed and

reported. Two types of informed consent were utilised in accordance with those recommended by Australian Institute for Aboriginal and Torres Strait Islander Studies under its *Guidelines for Ethical Research in Australian Indigenous Studies*, namely, an oral form of consent and a signed written consent. For meetings 1, 2 and 3 the consultations commence with an oral form of consent and then many of the participants also signed written consent forms. At meeting 4, written consent was obtained at the beginning.

At meetings 1, 2 and 3 the distributed discussion paper was supplemented by a PowerPoint presentation to assist in working through the background to the project and the draft legislation. The participant in meeting 4 indicated familiarity with the background to the draft legislation and so no PowerPoint presentation was utilised, instead the consultation worked through the draft legislation in the discussion paper.

Chapter Five of the White Paper documents and summarises the outcomes of the Aboriginal community consultation process addressing the various themes that arose and providing examples of participant comments. These comments while appearing as quotations in the White Paper were not always direct quotations but were a fairly close representation of the comments received from the participants in each of the meetings. Themes emerging from the meetings dealt with: the consultation process, the understanding of the proposed legislation, connection to culture and Country, defining Aboriginal Communities, the rights to knowledge, beneficiaries under an Access and Benefit Sharing Agreement, access to the knowledge, concepts of benefit sharing, sanctions and remedies under the proposed regime, the competent authority to administer the regime, multiple “owners” of particular knowledge, exceptions and databases, among others. The following provides a summary of a number of the themes emerging from the meetings in order to give a sense of communities’ observations, concerns and expectations of the draft legislation.

#### A. Consultation process

It is important to recognise the consultations were not only an opportunity for consideration and comment on the White Paper project but also gave an opportunity to community members to raise a variety of other concerns that impacted on their views about their own circumstances as an Indigenous community living in a Western dominated society. Accordingly, it was important that discussion was not constrained but enabled participants to vent and express those concerns, even though they were not related to the scope of the White Paper. However, at one of the meetings it was noted that ‘[t]here was a lot of frustration ... and cynicism regarding what the consultation and draft legislation would achieve’.<sup>[35]</sup> This is a reflection on the issue of Australian Indigenous communities having a long history of ‘fly in and fly out’ consultations ‘by a cross-section of departments, bodies, researchers, individuals and others’ resulting in the negative impact of ‘consultation fatigue’.<sup>[36]</sup>

Despite this, there was a positive reaction to the draft legislation and the rights of Aboriginal peoples it attempts to address. The White Paper, however, identified the list of issues raised during the consultations that needed to be aired and no doubt had an impact in the responses to the draft legislation. These are:

- Experience with native title claims and land rights (meetings 1, 2, 3 and 4)
- Misuse of organisations intended for the benefit of Aboriginal peoples (meetings 1, 2, 3 and 4)



- Office of Environment and Heritage –NSW (OEH) reforms (meetings 1, 3 and 4)
  - Fracturing of the community, particularly in the eastern part of NSW in “good farming country” (meetings 1, 2 and 4)
  - Need for the wider community to respect Aboriginal culture and protect sacred and heritage sites (meetings 1, 2 and 4)
  - Coal Seam Gas (CSG) exploration damaging Country (meetings 1, 3 and 4)
  - Water rights (meetings 1 and 4)
  - Anger and hurt over the way Aboriginal peoples have been mistreated since the arrival of Europeans (meetings 1 and 3)
  - Concerns held by community that the consultation meetings may include people who are not from the community being consulted (meetings 2 and 3)
  - CSG impact on community (meeting 2)
  - Need for constitutional recognition of Aboriginal peoples as Australian (meeting 3)
  - NSW Government local decision making initiative<sup>[37]</sup> (meeting 3)
  - Cotton farming (meeting 3)
  - Misuse of artworks (meeting 3).<sup>[38]</sup>
- B. Understanding the purpose of the legislation**

While it was recognised that the draft legislation was providing a principles approach, the consultations indicated it must be made clear that details will be provided in implementing regulations and that Aboriginal communities will be involved in formulating those regulations.<sup>[39]</sup> Plain language was considered crucial so that the legislation is easily understood and it must be made clear ‘where provisions are directed towards Aboriginal Communities and where they are directed towards third parties’.<sup>[40]</sup> Further, prescriptive language should give way to opportunities for self-determination and the context of terms and provisions needs to be provided.<sup>[41]</sup> To this end it was recognised that a preamble would be necessary, one which recognises: ‘Aboriginal peoples of NSW as the First Peoples of NSW with their own laws, customs and practices that contribute to their cultural well-being’; ‘diversity among Aboriginal communities’ from urban through to far remote communities; and that the land itself is the source of Aboriginal knowledge.<sup>[42]</sup>

### **C.Connection to culture and Country**

The significance of the connection between Aboriginal culture and Country is considered in quite some detail in Chapter 5 of the White Paper. It speaks volumes for the well-being of the community and its members. The following selection of comments from the participants in the consultations tells this story with great authenticity:

Participant 11 - “The knowledge is there and because Aboriginal people may be temporarily disconnected from it doesn’t mean that it’s not there. And they’ve also got a right as Aboriginal people to have it.”

Participant 1: “Loss of identity and loss of cultural knowledge and it is getting worse as our people are becoming more westernised.”

Participant 1: “Kids are growing up not knowing anything about their history...”

Participant 2: "We are still in a process of trying to regain some of that culture".

Participant 3: "If we fix the river up, we'll save our kids"

Participant 14- "We share a lot of the knowledge. Round here there are masses of medicinal plants. You would be surprised what has been found. A lot of it has been through survey work. A lot of it has been through knowledge work, knowledge that people know because they have grown up here and it's shared around and a lot of it's because other people have come to the community and they have similar plants in their community so they know what these plants are so they then share it with their families so it's going through the families but it's not getting to the point where it's put out publicly and I think a lot of the knowledge holders and the people who are aware of it don't tell too many people about it because they know what can happen. It's there for a purpose and it's there for our purpose but that's how we grew up by eating different things we never got sick."

Participant 11 - "People have been forced away from the lands and made to feel ashamed of their knowledge and actively told to forget their knowledge and then organisations like this one that's tried with limited resources to try and sort of gather back that knowledge and look after it. But it's a losing battle. Then governments and others think ok well because Aboriginal people don't live on that property now or manage it actively at the moment then that's just up for grabs."

Participant 14- "Plants from where you are born work better for you. Not everyone goes home. If we used the stuff from here it would still work. It just feels more comfortable when it comes from home."

Participant 3- "Our blood is in the land."

Participant 14- "When people used to see that I wasn't well they would say you need to go home and touch the dirt. It would make you feel better."

Participant 3- "We get worried about councils and national parks because they spray and we don't have access to traditional lands and stuff but some of these things grow on the side of the road so when we're accessing land through the land councils maybe land could be set aside so we can start growing the plants so we can go there and gets them and nobody else knows where it is. Particularly when people are living off country come home they know they can go to this place and just grab it- it's part of their traditional practice."

Participant 14- "We have a shared knowledge and it is shared by everybody if we know there is something that can help somebody we will give it to them or tell them what to do. It's communal knowledge not one person owns it."

Participant 14- "State conservation areas was a new area that was formed under national parks so that a gas company can go in and bore a hole but we as Aboriginal people can't go in and pick up a stick." [\[43\]](#)

#### **D. Defining Aboriginal Communities**

Participant 1: "The issue about who is a traditional person and who isn't a traditional person is a national issue but more so in New South Wales where there are a lot of people getting around saying 'I am a traditional owner'... a lot of people don't know what a



traditional person is or who a custodian of country is, whether it is through connection or legally proved connection. It's a big issue, emerging I think. There's some people around here arguing over rights to be a traditional owner. They think there is some big benefit in being a traditional owner."<sup>[44]</sup>

As with the difficulty in providing a workable definition for Indigenous knowledge, the definition of what constitutes an Aboriginal community has proven to be the most contentious during the consultation.<sup>[45]</sup> Should the definition be restricted to 'Aboriginal peoples descended from the traditional custodians of the land who live on Country'?<sup>[46]</sup> Should the definition include Aboriginal people descended from the traditional custodians of the land who no longer live on Country? What about Aboriginal people living on another community's Country and actively participating in that community?

Participant 11 – "In NSW people have been moved around so much... People that are here take care of country even if they are not traditional custodians in the legal definition of the term."<sup>[47]</sup>

The consultations revealed different viewpoints according to the implications of such definition. For example, where Aboriginal people are 'not descended from the traditional custodians of the land' where they live but actively participate in that community, some participants indicated that such individuals would be classed as part of the relevant community and entitled to share in benefits arising from access to that community's knowledge.<sup>[48]</sup>

Participant 7- "we are really just caretakers of country"<sup>[49]</sup>

Conversely, some consultations showed that where descendants from traditional custodians of the land no longer lived on Country they were not welcome to share in the benefits accruing to that community.<sup>[50]</sup> Clearly there needs to be flexibility in the way communities define themselves and in what context they do so, in other words, they are entitled to self-determination and this should be reflected in any legislation that purports to deal with the rights of Indigenous Australians. However, there was consensus through the consultations that 'the right to speak for Community should be held by Aboriginal community members descended from the traditional custodians of the land':<sup>[51]</sup>

Participant 7 said words to the effect that traditional owners should have first rights over anybody. The key group is the first mob with respect to each area. You need proven connection to country- proven direct lineage to the particular area. Aboriginal communities aren't all the one clan. There are differences in how clans, and members of clans are described.<sup>[52]</sup>

## **E. Rights to knowledge**

Participant 4: "It's inherent, we have never lost our sovereignty."<sup>[53]</sup>

The consultations emphasised that rights to knowledge about Country 'never ceased to exist and that preservation of these rights is paramount'.<sup>[54]</sup> The participants also confirmed that access to traditional lands and waters is crucial for the protection of knowledge and culture for the benefit of future generations.<sup>[55]</sup>

## F. Beneficiaries under an Access and Benefit Sharing Agreement

Concerns were expressed as to how broadly the term 'beneficiary' was to be cast. This relates to how the Aboriginal community is to be defined. The issue relates to the potential for dilution of rights to benefits flowing from the granting of access to knowledge should claims be made by descendants of traditional custodians living outside the Community.<sup>[56]</sup> The preference expressed was that benefits should flow only to those descendants of traditional custodians actively involved in caring for Country.<sup>[57]</sup> In this way 'remote rural communities' would 'maintain rights to their knowledge and the benefits flowing from granting access to' that knowledge rather than having those rights diluted by claims from community members/descendants no longer on Country or without direct connection to Country.<sup>[58]</sup>

## G. Access to Knowledge

The process of granting access to third parties seeking Indigenous knowledge about, for example, a medicinal plant, needs to comply with the requirement of free prior informed consent and, where granted, made upon mutually agreed terms.<sup>[59]</sup> The consultations emphasised the need to identify who speaks for the knowledge within a community but also recognised the need for that knowledge holder to go back to the community and consult its Elders before a decision could be made.<sup>[60]</sup>

Participant 3: "It's about communal ownership. It's not about a single person."<sup>[61]</sup>

It was further recognised that these knowledge holders may be Elders in the community and need to be protected and provided ample opportunity and legal representation to consider what access to the relevant knowledge would mean for the community and for the knowledge.<sup>[62]</sup>

Participant 11 - "We need to protect our elders and help give them a strong voice. I would imagine that they have a team that are acting with them and for them which would include legal advisors and advocates. And also, they would need an amount of time to achieve prior informed consent so they fully understand what it is about and that would probably be a number of meetings with people that are helping them to understand and think about the thing for as long as it takes until they are comfortable with what is going to happen and, you know, what they then decide to do."<sup>[63]</sup>

Regulations could be utilised to reflect community needs in the decision-making process but it was recognised that the '[n]eeds of one community may be different from those of another community'.<sup>[64]</sup> A local level Competent Authority could provide support to Aboriginal Communities as they decide whether or not to grant access to their knowledge. This would assist in addressing the potential disparity in power between the Community and an organisation seeking access. However participants noted the need to make use of confidentiality agreements to protect the knowledge/information, including binding the officers of the Competent Authority.<sup>[65]</sup> Also raised was the need to 'make sure that what goes on the register with respect to access agreements does not divulge confidential information'.<sup>[66]</sup>

Other concerns raised included:

- a discussion about what transpires when a knowledge holder passes and their knowledge remains on the database. Is there a successor to that knowledge holder? What happens if there is no successor?
  - What type of organisation or body will administer or manage community benefits under the draft legislation?.
- H. Concepts of Benefit sharing**

A key issue for communities was to have the right to ‘make their own decisions about the form of benefit they should receive and how the benefits should be distributed’.<sup>[67]</sup> It was important to recognise that communities are not homogeneous but have their own laws and protocols that will assist them to determine how to share the benefits arising from access to their knowledge. Even so the need to ‘build capacity of community to come together and make these decisions recognising years of disadvantage, health issues, etc.’ was acknowledged along with the need to guard against the loss of benefits.<sup>[68]</sup>

Concern was raised where the members of the community cannot agree on the benefit sharing arrangements:

- Participant 2: “You need a fall-back situation if the parties can’t agree... in my view it should go back into a community trust and then it’s up to the community... they’re not arguing about who it’s going to but how it’s going to be used”;
- Participant 9 “whatever you do and whoever you give it to keep it away from the Lands Council”.<sup>[69]</sup>

## **I. Sanctions and remedies under the proposed regime**

The consultations confirmed acceptance of both criminal and civil sanctions and remedies against those who would misappropriate Aboriginal culture and knowledge, despite scepticism around enforcement of community rights over culture and knowledge.<sup>[70]</sup> Penalties need to be a ‘serious deterrent against abuse’ and there should be ‘[g]uidelines for community impact statements’.<sup>[71]</sup> Caution was expressed over the use of mediation.<sup>[72]</sup>

The nature of the authority that will have jurisdiction over actions of this nature was also an important consideration. Some considered a tribunal would be appropriate and that there would be ‘a need for cultural sensitivity in those hearing the matter with sensitivity to the relevant community’.<sup>[73]</sup> Another issue of concern was the limitation period for taking action against an infringer.<sup>[74]</sup> The draft legislation suggested a 12 year limitation period, however, the consultations considered this not long enough for a community to be able to bring an action.<sup>[75]</sup>

## **J. Competent Authority**

As with any administrative system the draft legislation requires some body, government or otherwise, to take responsibility for the operation of that system. Under the Nagoya Protocol a Competent National Authority has the responsibility

for granting access or, as applicable, issuing written evidence that access requirements have been met (in regards to genetic resources and/or traditional knowledge) and be responsible for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms.<sup>[76]</sup>

The consultations raised concerns about the form that such a competent authority would take. It needs to be independent of existing bodies or structures and it needs to have Aboriginal representation.<sup>[77]</sup>

Participant 3- “I am worried that this will get incorporated into OEH stuff”<sup>[78]</sup>

Participant 14- “When you go to country you’ve got to be mindful of what’s out there and if government can change these things through negotiations. This is something that we have to be wary of. If we get this through and part of it is through a competent authority then who is going to be in charge of that competent authority.”<sup>[79]</sup>

Consideration was also given to the importance of different tiers of administration to ensure that there was local community engagement and the involvement of younger members of the community.<sup>[80]</sup> This would require the ‘[d]efining [of] boundaries for [each] local competent authority’.<sup>[81]</sup>

Concerns were also raised regarding the funding of the authority and ‘what would happen if it were wound up’ with participants citing the example of the Aboriginal and Torres Strait Islander Commission (ATSIC) and the fact that its funds were subsumed into the Commonwealth’s consolidated revenue.<sup>[82]</sup> Preference was given to ensuring funds were distributed among the relevant communities within a prescribed period and that ‘consideration should be given to vesting provisions’.<sup>[83]</sup> Associated with this was concern that the competent authority would hold databases, hence, should the authority wind-up it was considered important to avoid the loss of those databases and benefits accruing from access and ensure they reach the relevant communities.<sup>[84]</sup> This then raised the need for a register of access agreements, a process for assessing the validity of such agreements and an appeal process in regard to that assessment:

Participant 4: Assessing validity needs to be more than just tick a box. To my mind it’s about the principles and how you got to that decision.”<sup>[85]</sup>

## **K. Multiple “owners” of registered knowledge**

The White Paper anticipated a situation where more than one community could claim rights over particular knowledge.<sup>[86]</sup> This was acknowledged as a real issue by many participants in the consultations. Does access to the knowledge require all potential knowledge-holder communities to agree or is it sufficient for one community to agree to access and enter into a benefit sharing agreement to the exclusion of the others? Could family vendettas impact the decision-making?<sup>[87]</sup> What happens if the access or disclosure of the knowledge would cause harm to one or more communities claiming rights over that knowledge? In the latter situation one of the consultations advanced the idea that where disclosure would amount to harm to a community then disclosure ought to be denied.<sup>[88]</sup> In other situations an objection or arbitration process might be necessary and could be heard by the Registrar of the relevant database.<sup>[89]</sup> That brings this chapter to the issue of databases under the White Paper proposal.

## L.Databases

The White Paper proposes a variety of databases be established to enable Aboriginal knowledge to be gathered, stored and preserved for the benefit of communities and their knowledge holders and to enable them to control access to their knowledge and on what terms.<sup>[90]</sup> Mechanisms are suggested for both confidential and public or non-confidential information but concern was expressed about the potential for abuse of the databases. Participant 13 expressed the following: 'You are going to have all this knowledge in one spot and it's only got to get in the wrong hands of someone...'.<sup>[91]</sup> Accordingly, it was considered important that the knowledge holders' database be held locally rather than centrally by a national competent authority in order to deal with the change in the list of such knowledge holders with the progression of time.<sup>[92]</sup>

Also, as knowledge holders (senior law men and women) have responsibility to protect the knowledge, they need to have the power to decide what is stored, taking into account sensitivities around the knowledge, and establish protocols for the use of the databases and the information stored in them.<sup>[93]</sup> For example, staff in a Competent Authority (or whatever local body is established to carry out that responsibility) need to be under a non-disclosure obligation and the system should display and record who is accessing and using a database at any one time.<sup>[94]</sup> Some communities were already operating on such a basis independently as Participant 14 intimated:

It's similar to what we're doing at the moment. ... If people want to see that information or find that information then they also have to come to us and discuss it. ... So as we go through you've got to have a certain sort of clearance to get what you need so that's why if this works that way then these people would all have to get permission to get the knowledge... there are a lot of medicinal and food plants, bush tucker plants ...<sup>[95]</sup>

## V CONCLUSIONS

This chapter has considered the meaning of Indigenous knowledge, the context in which Indigenous populations find they are operating in the sphere of knowledge protection and the results of the community consultations dealing with a potential legislative regime that aims to protect Indigenous knowledge and enables the operation of an access and benefit sharing system. International fora have been engaged in bringing the issue of recognition and protection of Indigenous/traditional knowledge to the front of the stage in a number of legal instruments. Perhaps the most significant of these instruments is the Nagoya Protocol which Australia has signed but is yet to ratify. That instrument, which has entered into force on 12 October 2014, attempts to bring greater legal certainty and transparency to the issue of access and benefit sharing in the exploitation of genetic resources and associated traditional knowledge. It does so by introducing obligations that encourage compliance, among the Parties to the Protocol, with domestic legislation or regulation that deals with access and benefit sharing on mutually agreed terms. The White Paper discussed in this chapter addresses the need for such domestic legislation in Australia and the process undertaken in developing such a legal regime was achieved with participation of a sample of interested Aboriginal communities. The consultation process discussed in this chapter brings to the fore the issues of concern of Aboriginal communities in north western New South Wales. While the authors do not suggest that these communities speak for any other Indigenous communities in Australia, their views do serve as an example of the issues that need to be considered in the formulation of any domestic legislation or regulatory regime

designed to accommodate the requirements of the Nagoya Protocol and, more importantly, protect the rights of Indigenous Australians.

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<sup>[1]</sup> Indigenous Knowledge Forum, *Report on the Indigenous Knowledge Forum 2012*, <http://www.indigenousknowledgeforum.org/publications>

<sup>[2]</sup> UTS-Indigenous Knowledge Forum & North West Local Land Services, 2014, *Recognising and Protecting Aboriginal Knowledge associated with Natural Resource Management*, White Paper for the Office of Environment and Heritage, 1-137 <[http://www.indigenousknowledgeforum.org/components/com\\_content/models/forms/white\\_paper.pdf](http://www.indigenousknowledgeforum.org/components/com_content/models/forms/white_paper.pdf)> (the White Paper).

<sup>[3]</sup> “Given this highly diverse and dynamic nature of traditional knowledge it may not be possible to develop a singular and exclusive definition of the term. However, such a singular definition may not be necessary in order to delimit the scope of subject matter for which protection is sought. This approach has been taken in a number of international instruments in the field of intellectual property” see WIPO at Doc WIPO/GRTKF/IC/1/3 at para 65.

<sup>[4]</sup> Convention on Biological Diversity, opened for signature 5 June 1992, 31 ILM 818 (entered into force 29 December 1993) <<http://www.cbd.int/convention/text/>> .

<sup>[5]</sup> 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, came into force on 12 October 2014 and currently has 80 Parties (89 Ratifications) (92 Signatures ) <<http://www.cbd.int/abs/about/>> .

<sup>[6]</sup> WIPO Intergovernmental Committee, The Protection of Traditional Knowledge: Draft Articles, 31st sess, WIPO/GRTKF/IC/31/4 (13 May 2016); WIPO Intergovernmental Committee, Consolidated Document Relating to Intellectual Property and Genetic Resources, 28th sess, WIPO/GRTKF/IC/28/4 (2 June 2014); and WIPO Intergovernmental Committee, The Protection of Traditional Cultural Expressions: Draft Articles, 28th sess, WIPO/GRTKF/IC/28/6 (2 June 2014).

<sup>[7]</sup> United Nations Declaration on the Rights of Indigenous People GA Res 61/295, UN GAOR, 61st sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) <<https://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1>>.

<sup>[8]</sup> entered into force in 2004.

<sup>[9]</sup> For a comprehensive list and discussion about the relevant international instruments see Natalie Stoianoff & Alpana Roy, ‘Indigenous Knowledge And Culture In Australia — The Case For Sui Generis Legislation’, *Monash University Law Review* (Vol 41, No 3), 753-768.

<sup>[10]</sup> Secretariat of the Convention on Biological Diversity, *Traditional Knowledge Information Portal, Background Material* <<http://www.cbd.int/tk/material.shtml>> .

<sup>[11]</sup> The White Paper, above n 2, 2.

<sup>[12]</sup> Michelle McKemey and Harry White, *Bush Tucker, Boomerangs and Bandages: Traditional Aboriginal Plant Use in the Border Rivers and Gwyder Catchments*, Border Rivers-Gwyder Catchment Management Authority, New South Wales, 2011, 7.

<sup>[13]</sup> Natalie P Stoianoff, ‘Navigating the Landscape of Indigenous Knowledge – A Legal Perspective’ (2012) 90 *Intellectual Property Forum* 23, 24-25.

<sup>[14]</sup> (1976) 14 ALR 71.

<sup>[15]</sup> The White Paper, above n 2, 27.

<sup>[16]</sup> UN Permanent Forum on Indigenous Issues Fact Sheet, Who are indigenous peoples?



<[http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf)> accessed 8 November 2016.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid

[21] Ibid.

[22] Australian Government Indigenous Australians Caring for Country (2015) Retrieved 19 July 2015,

from <http://www.environment.gov.au/indigenous/>

[23] Natalie P. Stoianoff, 'Ensuring a Sustainable Future through Recognizing and Protecting Indigenous Ecological Knowledge', in V. Mauerhofer (ed.), *Legal Aspects of Sustainable Development*, Springer 2016, 109.

[24] Michelle McKemey and Harry White, *Bush Tucker, Boomerangs and Bandages: Traditional Aboriginal Plant Use in the Border Rivers and Gwyder Catchments*, Border Rivers-Gwyder Catchment Management Authority, New South Wales, 2011, 7.

[25] The White Paper, above n 2, 25.

[26] Ibid.

[27] Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008, 167–73 ('Sorry Speech' of the former Australian Prime Minister, the Honourable Kevin Rudd).

[28] Stoianoff & Roy above n 9, 783.

[29] The White Paper, above n 2, 26-27.

[30] See generally Daniel Francis Robinson, *Identifying and Preventing Biopiracy in Australia: Patent trends for plants with Aboriginal uses*, Submission to IP Australia regarding their consultation on Indigenous Knowledge and its protection <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_daniel\\_robinson.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_daniel_robinson.pdf)> accessed 9 November 2016.

[31] John Heron, *Co-operative Inquiry: Research into the Human Condition* (London, Sage, 1996).

[32] Peter Reason & Bradbury, *Handbook of Action Research*, 2nd Edition. London: Sage, 2007.

[33] Ewa Czaykowska-Higgins, 'Research Models, Community Engagement, and Linguistic Fieldwork: Reflections on Working within Canadian Indigenous Communities', *Language Documentation & Conservation* Vol. 3, No. 1 June 2009.

[34] Approval Number - UTS HREC REF. NO. 2014000058. The White Paper is about giving legislative force to Chapter 4.7 of the *National Statement on Ethical Conduct in Human Research* (2007) (Updated May 2015) (<https://www.nhmrc.gov.au/book/national-statement-ethical-conduct-human-research>), as the principles and themes contained in Chapter 4.7 are an integral part of recognising and protecting Indigenous knowledge. From its inception to its execution, the White Paper project followed the key principles and themes provided in the guidelines being research merit and integrity (paragraphs 4.7.1 4.7.4), justice (paragraphs 4.7.5 4.7.6), beneficence (paragraphs 4.7.7 4.7.9) and respect (paragraphs 4.7.10 4.7.12).

[35] The White Paper above n 2, 33.

[36] Ibid, 34.

[37] OCHRE is the NSW Government Plan for Aboriginal Affairs. One of its features is a local decision making process for Aboriginal Communities. It is intended to provide more control for Aboriginal Communities over government services in their Communities. See *Local decision making* <<http://www.aboriginalaffairs.nsw.gov.au/local-decision-making/>> .

[38] The White Paper above n 2, 34-35.

- [39] *Ibid*, 36.
- [40] *Ibid*, 35.
- [41] *Ibid*, 36,
- [42] *Ibid*.
- [43] *Ibid*, 36-39.
- [44] *Ibid*, 40.
- [45] *Ibid*, 39.
- [46] *Ibid*, 40.
- [47] *Ibid*, 41.
- [48] *Ibid*, 40.
- [49] *Ibid*, 41.
- [50] *Ibid*, 40.
- [51] *Ibid*.
- [52] *Ibid*.
- [53] *Ibid*, 41.
- [54] *Ibid*.
- [55] *Ibid*, 42.
- [56] *Ibid*.
- [57] *Ibid*.
- [58] *Ibid*, 43.
- [59] *Nagoya Protocol, Article 7; UN Declaration on the Rights of Indigenous Peoples, Article 11.2.*
- [60] *The White Paper above n 2, 43.*
- [61] *Ibid*, 44.
- [62] *Ibid*.
- [63] *Ibid*.
- [64] *Ibid*.
- [65] *Ibid*, 45.
- [66] *Ibid*.
- [67] *Ibid*.
- [68] *Ibid*, 46.
- [69] *Ibid*.
- [70] *Ibid*, 47.
- [71] *Ibid*.
- [72] *Ibid*.
- [73] *Ibid*.
- [74] *Ibid*.
- [75] *Ibid*.
- [76] *Nagoya Protocol, Article 13.2.*
- [77] *The White Paper n2, 48.*
- [78] *Ibid. OEH stands for the NSW Office of Environment and Heritage.*
- [79] *Ibid*, 49.
- [80] *Ibid*, 48.
- [81] *Ibid*.
- [82] *Ibid*.
- [83] *Ibid*.
- [84] *Ibid*.
- [85] *Ibid*.
- [86] *Ibid*, 49.
- [87] *Ibid*.
- [88] *Ibid*.

[\[89\]](#) *Ibid.*

[\[90\]](#) *Ibid*, 79-81.

[\[91\]](#) *Ibid*, 50.

[\[92\]](#) *Ibid*, 51.

[\[93\]](#) *Ibid*, 50.

[\[94\]](#) *Ibid*, 51.

[\[95\]](#) *Ibid.*

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