



A Pluralistic Approach to Indigenous Knowledge Protection: Designing an Australian Model

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UTS Library Seminar

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- A brief history of International developments
- Development of the Model Law
- Methodology
- Research Team and Research Processes
- Outcomes
- Further research and the development of the ARC Linkage Garuwanga Project
- Further reflections on methodology

Introduction

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- **Developing nations recognised the need for the intellectual property protection of folklore** for some time being ‘a means of self-expression and social identity. All the more so, since, in those countries, folklore is truly a living and still developing tradition, rather than just a memory of the past’.

UNESCO-WIPO World Forum On The Protection Of Folklore, Phuket, Thailand, April 8 to 10, 1997.

- Starting with the **1967 Stockholm Conference** the introduction of Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention was supposedly ‘an attempt to introduce copyright protection for folklore...at the international level’. But copyright was recognised as not adequate for the protection of folklore.
- Committee of Governmental Experts, convened by WIPO and UNESCO at WIPO headquarters in **Geneva in 1982**, which adopted what are called "**Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions**"

Historical Introduction

- The inclusion of performers of expressions of folklore in the definition of performers for the *WIPO Performances and Phonograms Treaty* adopted in Geneva on 20 December, 1996 but only entered into force 20 May, 2002
- Meanwhile, UNESCO introduces the *Convention for the Safeguarding of the Intangible Cultural Heritage 2003*, which entered into force on 20 April 2006
- **Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture** and the establishment of the *Model Law For The Protection Of Traditional Knowledge And Expressions Of Culture 2002* – yet another UNESCO initiative
- WIPO General Assembly established the **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore** (IGC or Intergovernmental Committee) in 2000 out of its work with UNEP

Historical Introduction

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- WIPO General Assembly adopted a set of 45 recommendations, divided into 6 clusters, to enhance the development dimension of the Organization's activities
- The WIPO Development Agenda established in Oct 2007 is more about bringing developing nations in line with IP systems of the developed nations and hence achieve harmonisation through legal transplant and 'capacity building' and less about the actual economic development of developing nations.
- The only mention of the protection of Folklore and Traditional Knowledge is in Recommendation 18 of Cluster B: Norm-setting, flexibilities, public policy and public domain:
 - To urge the IGC to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.

WIPO Development Agenda?

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WIPO and UNESCO back at that 1997 meeting recognised the importance of folklore to developing nations and the need to protect this cultural heritage particularly since:

‘Folklore is commercialized without due respect for the cultural and economic interests of the communities in which it originates. And, in order to better adapt it to the needs of the market, it is often distorted or mutilated. At the same time, no share of the returns from its exploitation is conceded to the communities who have developed and maintained it.’

Meanwhile, Indigenous communities even in developed nations have been experiencing the same issues:

‘A major concern of Indigenous people is that their cultural knowledge of plants, animals and the environment is being used by scientists, medical researchers, nutritionists and pharmaceutical companies for commercial gain, often without their informed consent and without any benefits flowing back to them.’

Terri Janke,

Biodiversity, Patents and Indigenous Peoples (26 June 2000)

Background

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- Commissioned by the Namoi Catchment Management Authority (now North West Local Land Services), under the NSW Office of Environment and Heritage, to prepare a White Paper on *Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management*

The Model Law Project

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This Project set out to:

1. identify key elements of a regime that would recognise and protect Indigenous knowledge associated with natural resource management;
2. facilitate Aboriginal Community engagement in the process of developing a regime;
3. develop a draft regime that not only accorded with the aims and goals of North West New South Wales Aboriginal Communities but would be a model for implementation in other regions in New South Wales (NSW);
4. produce a Discussion Paper through which the draft regime could be distributed for comment;
5. conduct community consultations to refine the draft regime into a model that may be implemented through NSW legislation by finalising a White Paper to be delivered by the UTS Indigenous Knowledge Forum and North West Local Land Services to the Office of Environment and Heritage (NSW) (OEH).

The Model Law Project

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- In order to fill the gap in NSW legislation for the recognition and protection of Aboriginal Knowledge, this Project was carried out in three stages utilising the experience of other jurisdictions, Australia's international obligations, and most importantly, the active participation of Aboriginal communities to develop a model law that addresses the major concern identified by Terri Janke:
 - Stage 1: Comparative Framework
 - Stage 2: Drafting a Regime
 - Stage 3: Aboriginal Community Consultation

Methodology & Research Plan 9

- Collected and analysed legislative and policy regimes already in existence in other parts of the world.
- Key criteria in each regime were identified and then compared to international obligations.
- This provided the comparative framework upon which a standard-setting model could be developed to ensure the recognition and protection of Indigenous knowledge as part of a living culture.
- A Comparative Study Report was produced.

Stage 1: Comparative Framework

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- The countries of Afghanistan, Angola, Argentina, Brazil, Chile, China, Ecuador, Ethiopia, Hong Kong, India, Kenya, Malaysia, Peru, Philippines, South Africa and Vanuatu whose laws relating to traditional knowledge, cultural expressions and genetic resources provided useful examples of laws upon which our model could draw.
- In particular, the laws of Brazil, Costa Rica, Ethiopia, Peru, India, Kenya and South Africa provided relevant alternatives to inform the Working Party in developing the model law.
- Mapping against key requirements of the:
 - *Convention on Biological Diversity*,
 - *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity*,
 - *United Nations Declaration on the Rights of Indigenous People*, and the
 - Draft Model Laws of the Intergovernmental Committee of the WIPO.

Outcomes of the Comparative Study 11

- A working party (WP) met three times in Sydney during Stage 2 .
- The WP utilised the Comparative Study Report to develop a draft regime that meets the elements of supporting a living Aboriginal culture with improved access to Country through recognition and protection of Indigenous knowledge about Country.
- A Discussion Paper comprising the Comparative Study Report and Draft Regime was produced.

Stage 2: Drafting a Regime

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UTS Research Team:

- Chief Investigator: **Professor Natalie Stoianoff**
- Advisory Board Member: **Dr Virginia Marshall**
- Research Associate: **Dr Ann Cahill**
- Research Assistant:& PhD student : **Evana Wright**

And:

- **Aunty Fran Bodkin** (Mount Annan Botanic Gardens & Dharawal Traditional Descendants and Knowledge holders Circle),
- **Uncle Gavin Andrews** (Banyadjaminga, Dharawal Traditional Descendants and Knowledge holders Circle),
- **Barry Cain** (Aboriginal Heritage Conservation Officer OEH),
- **Simon Munro** (formerly Senior Strategic Land Services Officer (Aboriginal Communities) of NWLLS now Tamworth Local Land Council),
- **Chris Celovic** (Team Leader, Strategic Partnerships and Investment NWLLS),
- **Patricia Adjei** (Copyright Agency Ltd),
- **Dr Virginia Marshall**, Solicitor and Acting Chair, Indigenous Issues Committee, Law Society of NSW
- **Gerry Turpin** (Australian Tropical Herbarium),
- **Daniel Posker** (Senior Assoc Herbert Smith Freehills),



- **Francis Kulirani** (former Deputy Director Anthropological Survey of India),
- **Gail Olsson** (formerly of traditional knowledge work programme, Pacific Islands Forum Secretariat),
- **Judith Preston** (Law School Macquarie University),
- **Dr Michael Davis** (Dept of History Sydney University),
- **Peter Fitzpatrick** (Solicitor, Herbert Smith Freehills),
- **Associate Professor Subramanyam Vemulpad** (Macquarie University Indigenous Bioresources Research Group),
- **David Harrington** (Macquarie University Indigenous Bioresources Research Group),
- **Omar Khan** (Medicines Australia),
- **Nerida Green** (Ministerial Division OEH) and
- **Gail Pearson** (Business Law School, University of Sydney)

Working Party Members

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- The use, transmission and retention of knowledge is based upon a perception of truth, which is, in itself a most important law.
- The First truth is what you see – how you perceive the truth.
- The Second Truth is what others see – how others perceive the same truth.
- The third truth is what is – inclusive of all perceptions.
- The fourth truth that must be considered is that there was a time when that particular truth did not exist, but pathways were in place to allow that truth to come into being – its history.

- The fifth truth is that there will be a time when that truth will no longer exist, but having existed, it will have set into place pathways for other truths to come into existence – consequences.
- Thus, for anyone to be able to consider a truth, one must take into consideration, not only what one perceives to be the truth, but also how others perceive it.
- However, its history, or how this idea, this object, or action came into being, and the possible consequences of it having existed, must also be taken into consideration...
- There are also very strict laws regarding the passage of knowledge...

Aunty Fran Bodkin

The basis of all Knowledge is truth

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Provision 1. What this Act relates to and what it aims to do

Provision 2. Definitions of key terms used in this Act

Provision 3. What this Act covers

Provision 4. Beneficiaries- who should benefit

Provision 5. Access - who speaks for Knowledge Resources
and the process for granting or refusing access

Provision 6. Benefit sharing- how are benefits shared, what
types of benefit, dealing with technology
transfer, ‘capacity building’

Provision 7. Sanctions and remedies- dealing with breaches

14 provisions were identified

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- Provision 8. competent authority-establishment of a body to administer the legislation, deal with education, model clauses, codes of conduct, databases
- Provision 9. no single owner- addressing situations where traditional knowledge, cultural expressions, genetic resources are common to more than one group
- Provision 10. exceptions – emergencies, traditional use, conservation
- Provision 11. Registers and disclosure
- Provision 12. interaction with existing laws- avoiding conflict with other laws
- Provision 13. recognition of requirements of other nations- mutual recognition of rights and ensuring they are complied with
- Provision 14. transitional provisions- existing uses

14 provisions continued

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- The Discussion Paper was distributed through the NWLLS to the Aboriginal Communities of the North West NSW region and other interested parties.
- Consultation sessions were held in June 2014 in key locations in the North West region, including Tamworth, Gunnedah, Walgett and Narrabri, and the proposed model was explained and discussed.
- The consultations enabled the draft regime to be refined into a model that could be implemented through the creation of legislation.
- To this end a draft White Paper proposing the legislation was prepared and refined with the further assistance of the WP.
- At the Second Indigenous Knowledge Forum the White Paper was delivered to OEH.

Stage 3: Aboriginal Community Consultation

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The draft legislation aims to:

- Protect knowledge held by Aboriginal Communities
- Ensure that Aboriginal Communities have the right to control the knowledge they hold
- Ensure that others can only use that knowledge with the prior informed consent of the community
- Ensure that where others are given permission to use the knowledge that Aboriginal Communities get benefits back for sharing their knowledge

What the draft Legislation is about

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- What is knowledge?
- Who should speak for the knowledge?
- Who should benefit from the knowledge being shared with others?
- Should there be particular types of benefit?
- What should happen if there are disagreements?
- What sort of organisation should look after these matters?
- What sort of databases (if any) are appropriate?
- What should happen if knowledge is owned by more than one community?

Issues discussed in formulating the Draft

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- Assisted with:
 - refining the draft legislation, and
 - the development of the White Paper into a document that provides adequate explanation and justification for the regime crafted.
- Together with the further advice and recommendations of the Working Party assisted with refining the:
 - background material,
 - draft legislation including the model Bill, and
 - development of a case study to demonstrate the operation of the draft legislation
- Recognition there are gaps and that regulations would be required to fill those gaps for the proper operation of the draft law.

- The proposed legislative ‘Competent Authority’ would provide the governance framework for administering a legal regime covering the creation, maintenance and protection of community knowledge databases.
- However community consultation raised concerns about the form such an authority would take, its independence from government, how it would be funded and wound up, local Aboriginal representation and engagement.

Competent Authority

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- In 2009, an independent *National Indigenous Cultural Authority*, as the appropriate form of a Competent Authority was proposed.
 - Terri Janke (2009), *Beyond guarding ground: a vision for a National Indigenous Cultural Authority*
- This was reinforced in 2013 by the **National Congress of Australia's First Peoples** espousing such a regime and **identifying various characteristics** whereby the Authority should be:
 - independent from government with its own
 - legal status,
 - board of governance,
 - constitution and
 - representing members.
 - **National Congress of Australia's First Peoples, The Call for a National Indigenous Cultural Authority, 2013.**
- The board would be elected from its grass-roots membership base but also allow for the necessary skills based director representation.
- The Congress recognised a need for further research, funding and support to investigate how to best to establish an Authority with the above characteristics.

Prior Work

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- Community consultations confirmed support for an entity to administer the proposed regime, and reinforced the importance its independence.
- The consultations emphasised ‘concern regarding the functions of this entity being administered by one or more existing agencies’ while acknowledging ‘the need for the Competent Authority to include a local or regional community agency to administer the Knowledge Holder registers and provide for Community Knowledge databases’.
 - White Paper 2014

What the Community Consultations for the Model Law revealed

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- Consultations also noted a ‘need for confidential information to be protected’, that ‘an appeal process’ be established as well as ‘a process for ensuring benefits under the control of the Competent Authority are applied and are not lost if the Authority is wound up’.
- The consultations revealed community mistrust of government based organisations and the failings of past Indigenous bodies to be able to fulfil community expectations.
 - White paper 2014

What the Community Consultations for the Model Law revealed

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- There are a variety of legal structures suitable for a Competent Authority.
- These include:
 - Commonwealth Aboriginal and Torres Strait Islander Corporations,
 - corporations under s.57A of the Corporations Act 2001, including incorporated and unincorporated associations,
 - trust arrangements involving such organisations,
 - statutory bodies and Aboriginal Land Councils.

Identifying suitable structures

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- To build on the work of the White Paper, the project *Garuwanga : Forming a Competent Authority to protect Indigenous knowledge* was developed.
- Garawanga is the D'harawal word for Dreaming Cycle
- Funding has been awarded from the Australian Research Council Linkage Grant Scheme from 2016 – 2019 to carry out this project.

Garuwanga Project

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- Partner Investigators (Pis):
 - Ms Frances Bodkin, D’harawal Traditional Knowledge holders and Descendants Circle
 - Mr Gavin Andrews, Banyadjaminga Swaag Incorporated
 - Dr Virginia Marshall, Triple BL Pty Ltd
 - Dr Anne Poelina, Madjulla Association
- The Partner Organisations (POs) in the Garuwanga project illustrate a variety of demographics between Indigenous communities in Australia from the high density urban communities in Sydney to the remote communities of Western Australia.
- University Chief Investigators (CIs)
 - Prof Natalie Stoianoff, UTS
 - A/Prof Dr Fiona Martin, UNSW
 - Prof Andrew Mowbray, UTS
- Research Associate: Evana Wright
- PhD Student: Neva Collings (Yuin country South Coast of NSW)

Investigators

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- **Garuwanga**
- Utilising the same methodology as for the White Paper we will be:
 - identifying the key features of the variety of Legal Structures utilised by other nations employing a competent authority governance framework
 - evaluating those Legal Structures through a Research Roundtable followed by Community Consultation and finally
 - recommending a legal structure that addresses the issues raised through those consultations.

Aims of the Project

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- The use of mixed modes of research applied in a structured way
- *The underpinning of the project by an action research methodology* which emphasises cooperative or collaborative inquiry whereby all active participants are fully involved in research decisions as co-researchers hence the CIs, PIs and members of the POs are researching together through the mechanism of the Research Roundtable (RR) and thereafter the community consultations.
- *Applying 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 has proven successful under the White Paper process as a means of ensuring deeper understanding of the concerns of community, especially the knowledge-holders charged with protecting the knowledge of the community.
- *Empowering Aboriginal communities through direct involvement in the research* process and achieving community-led solutions through axiologies (ways of doing) and ontologies (ways of being), once again through the Research Roundtable (RR) and community consultation process.
- *Further developing the model of respect, engagement and reciprocity for Aboriginal and non-Aboriginal researchers* to work together to solve a problem utilising the NHMRC Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research and the IATSIS 2012 Guidelines for Ethical Research in Australian Indigenous Studies as models for legal research and a mechanism for self-determination.

Methodological Framework

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- Comparative Study of existing forms of competent authorities.
- Considering governance from the PO perspective.
- Identifying evaluative criteria for good governance.

Progress

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- To understand the nature of the framework proposed and the role the Competent Authority would have in that framework have a read of the White Paper:
 - <https://www.indigenousknowledgeforum.org/white-paper>
- Details about the Garuwanga Project can be found at:
 - <https://www.indigenousknowledgeforum.org/garuwanga-forming-a-competent-autho>

Indigenous Knowledge Forum 31

- We also produced an edited volume of papers further exploring the variety of legal regimes around the world: *Indigenous Knowledge Forum - Comparative Systems for Recognising and Protecting Indigenous Knowledge and Culture* (LexisNexis, 2017) details can be found at:
 - <https://www.indigenousknowledgeforum.org/publications>



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