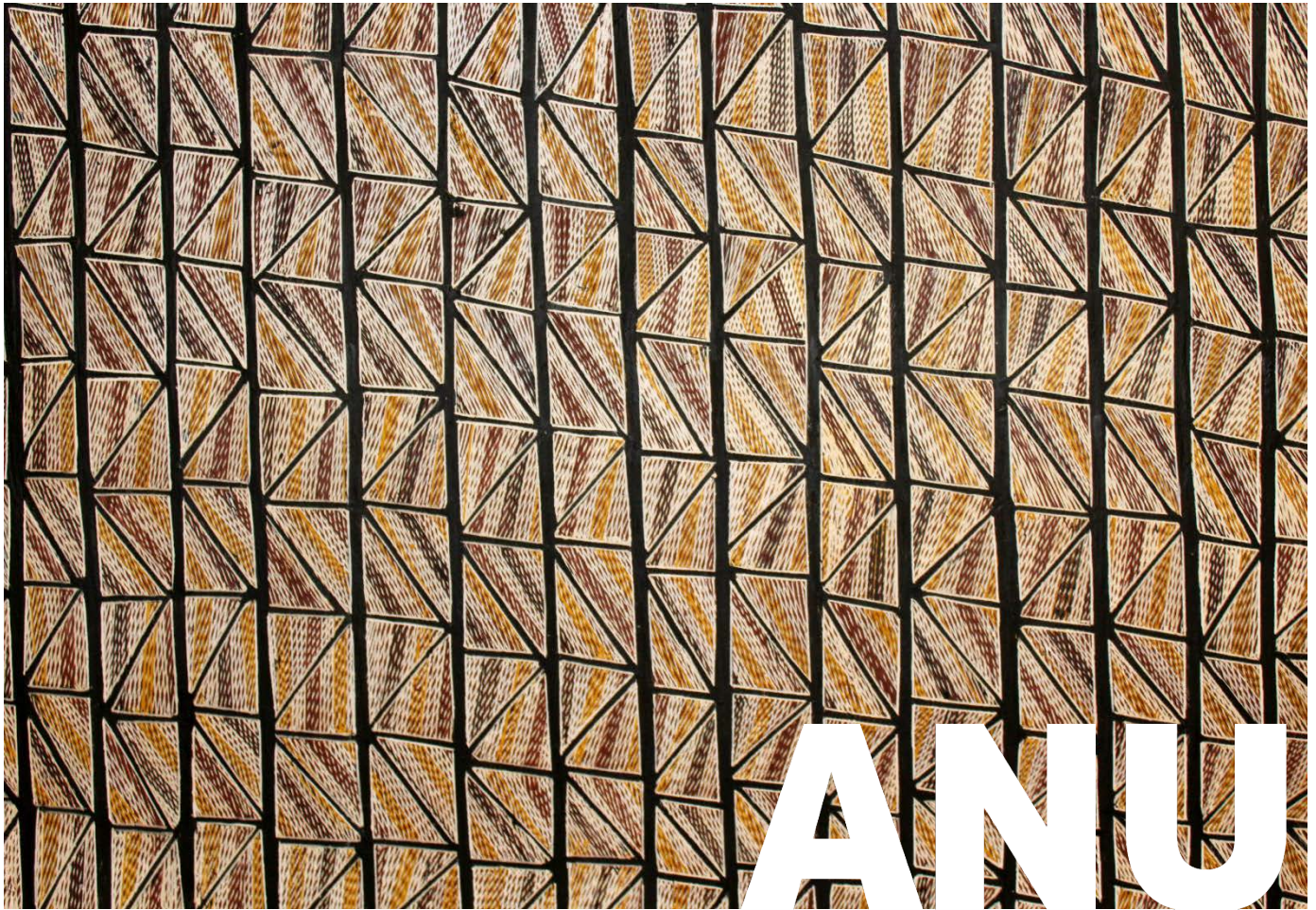




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AN OVERVIEW OF LEGAL INSTRUMENTS AND
OTHER MEASURES TO AID IN THE
PROTECTION AND VALUATION OF
INDIGENOUS KNOWLEDGE

J STRATTON, B BLACKWELL, K BODLE
AND B HUNTER

Centre for
Aboriginal Economic
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An Overview of Legal Instruments and Other Measures to Aid in the Protection and Valuation of Indigenous Knowledge

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Abstract

This paper outlines the legal instruments and other measures used to support the protection of Indigenous Knowledge (IK), with a view to attributing market value to IK. These instruments are categorised as either enforceable instruments or voluntary protocols, standards and guides. Enforceable instruments have a clear connection to market value, typically being tradeable with a cost incurred to protect their attributable IK. While legal costs, patent prices and licence fees are private, it may be possible to gain access to summarised and de-identified data. Non-enforceable rights such as protocols, codes of conduct and certification may involve compensation or payments designed to protect IK. Price premiums may help to capture the market value of attributable IK, but require careful methodological consideration. A diverse range of instruments helps to provide choice to Indigenous Peoples and creates a system that may support the development of social and market norms that encourage the recognition and protection of IK.

Keywords: Indigenous Cultural and Intellectual Property, Indigenous Knowledge, Indigenous business, geographical indications, enforceable instruments, trade marks, patents, protocols, standards.

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Acronyms

AASB	Australian Accounting Standards Board
ACCC	Australian Competition and Consumer Commission
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ANU	Australian National University
CA ANZ	Chartered Accountants Australia & New Zealand
CAEPR	Centre for Aboriginal Economic Policy Research
CASS	College of Arts & Social Sciences
Cth	Commonwealth
CRC	Cooperative Research Centre
FATSIL	Federation of Aboriginal and Torres Strait Islander Languages and Culture
GI	geographical indication
ICIP	Indigenous Cultural and Intellectual Property
IK	Indigenous Knowledge
ILUA	Indigenous Land Use Agreement
IP	intellectual property
NHMRC	
NIAAA	National Indigenous Arts Advocacy Association
PwC	PricewaterhouseCoopers Australia
TO	traditional owner
Vic	Victoria
WIPO	World Intellectual Property Organization
WTP	willingness to pay

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Introduction

This paper reviews the instruments and other measures relevant to supporting the protection of Indigenous Knowledge (IK) in Australia, with the intention of identifying ways to estimate the market value attributable to IK. The definitions of both IK and market value are contested (in relation to IK, see Janke and Sentina (2018); in relation to market value, see Lind (1998)). Following the World Intellectual Property Organization (WIPO 2015:1), we use the term IK to refer to the 'living body of knowledge that is developed, sustained and passed on from generation to generation within a community [of Indigenous People], often forming part of its cultural or spiritual identity'.¹ We also take a broad view of market value: value is created whenever transactions take place, whether in a traditional private market sense or a quasi-market sense when goods and services are demanded by government, civil society or philanthropists. The focus is on market value, rather than book value, because there is a gap in the literature with respect to markets identified by Janke and Sentina (2018).² We are also conscious of the sharing, new or circular economy which is emerging across the full gambit of traditional industries (Rifkin 2011, 2014). This emerging economy is exciting also for Indigenous businesses, as they continue to permeate these industries and grow (TD Economics 2011; Nana, Khan & Schulze 2015; PwC 2018).

Protecting IK requires a balance between encouraging the creation of new knowledge (and the conservation of ancient knowledge) by rewarding creators (curators), and, where appropriate, sharing knowledge across society to deliver broader benefits (Productivity Commission 2016). Some knowledge is to be shared outside the community while other knowledge is to be always protected and kept from non-community members; this is the essence of appreciating the strategic cultural knowledge that constitutes IK (Marr 2017).³ Kathleen Wallace's painting 'Two Women Learning' (Fig. 1) visually depicts, using ancient symbols, this balancing act that rests with Aboriginal and Torres Strait Islander communities across Australia.

¹ In this paper we use the term Indigenous Knowledge (IK), but could arguably refer to Indigenous Peoples' Knowledge to be explicit about from whom the knowledge has originated. The latter term implies that Indigenous People have a legal right of ownership to knowledge. However, the experience of Indigenous Peoples is that this ownership is not always legally recognised, which is part of the motivation for this project. Given that such knowledge may be considered to be owned by the Indigenous community (or even Indigenous culture as a whole), we will simply refer to IK in the remainder of this paper. Also, we acknowledge that Indigenous practitioners with individual rights may exist outside a given community as an employee or as a business owner and that the enforcement of collective rights in the case of individual practitioners is a significant policy issue (Morphy, H, pers. comm., 10 May 2019).

² Note that the book value is the number on the balance sheet, which is original cost less any depreciation, amortisation or impairment costs.

³ Marr (2017) refers to strategic data or information. In this context, data, information and knowledge are very similar terms and are used interchangeably in this paper.



Figure 1 'Two Women Learning', by Aboriginal artist, Ms Kathleen Wallace, 'illustrates how different people hold different knowledge, different parts of the story, and how they are responsible for keeping that story safe and passing on the knowledge.'

Source: Permission to use obtained from Ninti One Ltd, 2018.

In reviewing the instruments for the protection of IK, we reflect on the need to balance these competing objectives and consider opportunities for improving these instruments so that they better capture market value from IK.

Finally, we consider the market value of IK that may be protected in the future. This consideration is complicated by the fact that the instruments reviewed, and their social settings, are likely to change over time as government and stakeholder groups strike a different balance between these competing objectives. For this reason, we also consider the future role of instruments that are developing or not widely used at the time of writing.

Overview of instruments

The instruments for protecting IK can be divided into two broad categories (Fig. 2):

- legally enforceable instruments, and
- voluntary protocols, standards and guides.

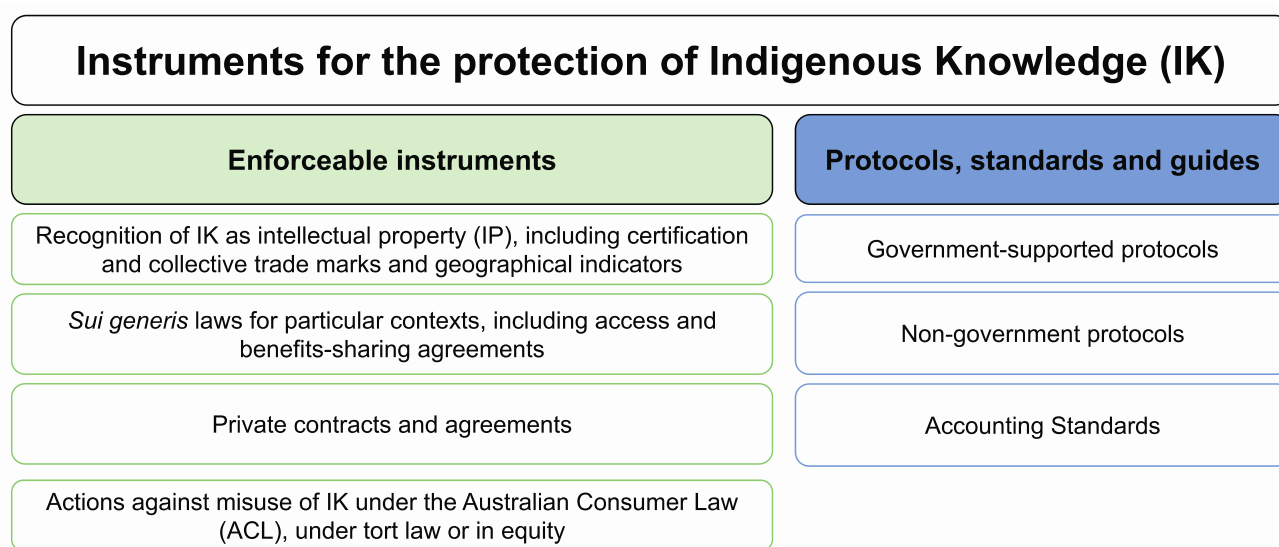


Figure 1. Instruments for the protection of IK

Legal enforceability represents the highest standard of protection. This protection may arise both through statute and/or case law. Although protocols, standards and guides are distinguished as a category by the fact that they are not typically legally enforceable instruments, they may be enforceable in certain situations, such as when they are codified into contracts. In other cases, although these protocols are not legally enforceable, other sanctions may render the instruments effectively mandatory for market participants. This distinction is described in more detail as each instrument is described.

Instruments for the protection of IK typically have the effect of creating either a market for IK, through generating a tradeable right to the use of knowledge, or an implicit pricing mechanism for IK, such as a price premium or the cost of enforcing protections for IK. In this sense, an economic analysis of these instruments demonstrates their usefulness in developing a methodology for valuing IK.

The two categories of instruments are addressed in turn. The paper ends with some concluding comments.

Legally enforceable instruments

Legally enforceable instruments grant holders of IK rights to use or control IK or undertake action against inappropriate use. With these rights is the power of enforceability, which naturally translates to a cost on the bearer to enforce their right to retain benefit. These costs of enforcement are typically revealed in markets, such as the costs of paying solicitors to settle out of court, or paying a legal team including a barrister to pursue a matter within court.

In Australia, as noted in Fig. 2, there are four main avenues toward legally protecting IK: (i) recognition of IK as intellectual property (IP), including certification and collective trade marks and geographical indications (GIs); (ii) *sui generis* laws for particular contexts; (iii) enforceable private agreements; and (iv) actions against the misuse of IK under the Australian Consumer Law (ACL), in tort or in equity.⁴

Recognition of IK as IP

Recognition of IK as a form of IP grants owners time-limited rights over some aspects of the use and control of their creation (WIPO 2004). Recognition of IP rights includes:

- **copyright regulation**, which protects relevant works and materials such as literature, films, music and art, and related rights such as moral rights, resale rights and performers' rights
- **patents**, which protect inventions
- **trade marks**, which protect distinctive signs or brand names identifying goods or services as produced by a particular firm or in a particular manner
- **designs**, which protect the shape, configuration, pattern or ornamentation giving a product a unique appearance, and
- **plant breeder's rights**, which protect the creation and exploitation of new varieties of plants.

Copyright law is administered by the Department of Communications and the Arts (Cth), whereas the four other types of protection are administered by IP Australia.

A number of barriers to IK being recognised as IP are detailed in Sentina et al. (2018). As WIPO (2018a, 2018b) has noted, IK is often viewed as having passed into the public domain, which removes the possibility of protection through copyright, patents, or designs (although it does not remove the possibility of trade marks). Copyright, designs and patents all require an element of novelty or originality, and an identified owner; these features are often unavailable for IK which has been built up communally over an extended period of time, typically thousands to tens of thousands of years with the difficulty of operating group rights within a market system of individual rights. One key issue is identifying the relevant group of knowledge-holders who are entitled to grant such a right. In addition, copyright requires a 'material form', which prevents oral stories, songs or dances from being protected unless they are recorded such as through a written document (including electronic documents), sound recording, or video. In some cases, this process of recording may vest rights in the researcher, rather than the traditional owner (TO) themselves (Sentina et al. 2018). Plant breeder's rights only extend to new or recently exploited varieties of plant, and there is no requirement for applicants to acknowledge collaboration with Indigenous Peoples in the process of development.

⁴ The discussion of each instrument draws on Sentina et al. (2018), although the categories used differ.

Furthermore, in every case other than trade marks, IP rights accrue to individuals for a limited period of time, whereas Indigenous Peoples often seek communal rights over knowledge in perpetuity (Davis 1997). Although trade marks have no time limit, and can be communally owned, they protect only names and symbols, rather than IK more broadly, and can be removed for non-use. Moreover, in some cases, non-Indigenous businesses have registered trade marks for Indigenous words and symbols without the relevant group's consent, which may prevent an Indigenous person, group or business from registering that name as a trade mark (Janke & Dawson 2012).

Finally, recognising IK as IP requires extensive application processes and legal knowledge with the associated time and cost reducing the accessibility to holders of IK (Davis 1997).⁵ IP Australia has taken some steps towards increasing Indigenous Peoples' awareness of IP protection, such as through the publication of a guide to protecting IP aimed at Indigenous People (IP Australia 2014a). The guide provides a general introduction to IP and directs creators through the process of registering and managing IP rights. The general discussion is complemented by a number of case studies of Indigenous businesses which have successfully used IP to help grow their business (IP Australia 2014a).

IP rights can be traded or licensed, and thus, in some cases, have explicit market prices. However, due to limited transparency in most IP markets, licence agreements are typically private, and prices are rarely observed (Lemley & Myhrvold 2008). In addition, IP instruments that are never sold or licensed still provide value to their holders, in that they protect against others using the IP. This option value should be included in the market value of IK, but would be excluded by solely considering sale prices or licence fees.⁶

Although trade secrets have certain features that differentiate them from other categories of IP rights, and are not registered by IP Australia, they can nonetheless be included within Australia's system of IP law, broadly defined: see, for instance, Davis (1997). Trade secrets have been perceived to be well-suited to the task of protecting IK (Long 2011): in particular, trade secrets are not subject to time limitations. Further, there is no requirement that a trade secret be registered, which may lower the barriers to using trade secrets as a form of protection. Reasonable efforts to keep knowledge secret are required in order to receive protection as a trade secret. However, existing precedents in other contexts under Australian law have referred to cultural knowledge that is well-known within a community as still being kept secret from outsiders (Antons 2009) – see, for instance, *Foster v Mountford*.⁷

Protection of IK as a trade secret would only apply where reasonable efforts have been made towards secrecy. Where knowledge has been restricted to a small group of individuals, this requirement may be satisfied; however, it may not be met in circumstances in which knowledge has been willingly divulged (Long 2011). Moreover, trade secrets protection does not apply where the subsequent discovery is independent of the trade secret holder, unlike the majority of IP instruments. Trade secrets will also only protect commercial value, not broader social or cultural value (Simpson 1997). In part for these reasons, trade secrets may be most relevant to IK in the areas of biodiversity, traditional medicinal knowledge, and environment management practices (Simpson 1997).⁸

⁵ While the IP maintenance costs are small (e.g. IP Australia has estimated that the cost of maintaining a patent over 20 years is around \$8000 (Sentina et al. 2018) there are broader 'costs' associated with acquiring the legal and system/process knowledge.

⁶ Option value is important to estimating the market value of IK. Option value is the value in taking up the option to use a given right, in this case, to enforce an IK protection right, such as through the legal instruments that IP Australia administer.

⁷ (1976) 29 FLR 233.

⁸ A conceptually similar but legally distinct instrument relating to breach of confidence is considered in a later section.

Collective and certification trade marks

In its submission to the House of Representatives Standing Committee on Indigenous Affairs *Inquiry into the Growing Presence of Inauthentic Aboriginal and Torres Strait Islander 'Style' Art and Craft Products and Merchandise*, IP Australia (2017) noted that two categories of trade marks may be valuable, but are not currently widely used, in protecting IK: certification trade marks and collective trade marks.

Certification trade marks are used to indicate that a good possesses a particular standard or characteristic (as opposed to an ordinary trade mark, which indicates that the good was produced by a particular seller). They are usually owned by a central body which enforces the trade mark on behalf of producers; for instance, the Heart Foundation's 'Tick' symbol was used to indicate the healthiest food item in a particular category (Hallett 2013). In effect, certification supports a voluntary protocol by creating a legal instrument that distinguishes between compliers and non-compliers (Johnsson 2012).

Some insight into the effectiveness of certification trade marks in protecting IK may be gained by considering the experience of the Label of Authenticity, which operated as a certification trade mark for Indigenous cultural products in the early 2000s (National Indigenous Arts Advocacy Association (NIAAA) 2002; IP Australia 2017). The system was administered by NIAAA, and consisted of either a 'Label of Authenticity' for 'authentic' goods produced by Indigenous individuals, or a 'Label of Collaboration,' where Indigenous artists had licensed non-Indigenous entities to produce the good. Producers using the labels were required to demonstrate 'fair trading terms,' which included a consideration of 'whether the Indigenous person is required to assign their IP rights in the work without additional payment of consideration', giving a direct link to the market value of IK.

The scheme was discontinued in 2003 when the NIAAA ceased operations (IP Australia 2017). Some 160 creators had used the label as of that time (Standing Committee on Environment, Communications, Information Technology and the Arts (Standing Committee) 2007). There were a number of problems with the label: it was criticised as being poorly-promoted and administered; it was difficult to provide an agreed definition of authenticity; the test for Aboriginality was complex, with over 75% of applicants failing to meet the requirements; and the 'tick of approval' was perceived as implying that non-participating producers were selling inauthentic art, even though some legitimate creators chose not to participate for other reasons (Standing Committee 2007; Graber & Lai 2012).

Supply Nation's certification trade marks indicate goods and services which have been either 'certified' or 'verified' as being produced by Aboriginal and Torres Strait Islander businesses (Supply Nation 2018). Supply Nation's certification trade marks do not directly indicate the use of IK, as they relate instead to business ownership: Aboriginal and Torres Strait Islander businesses may use the Supply Nation trade mark even if their products do not directly make use of IK. However, the growth of Supply Nation since its founding in 2009, and its success in promoting Aboriginal businesses (Supply Nation & First Australians Capital 2018), could be considered a possible exemplar for the use of certification trade marks.

The international track record of certification trade marks in protecting Indigenous culture has been mixed. For instance, Canada's Igloo trade mark for the works of Dené, Métis and Inuvialuit Peoples and the United States' Silver Hand trade mark for native Alaskan artists have been viewed in some parts as largely successful (Standing Committee 2007), while also receiving criticism for testing artists' ancestry, rather than their training and cultural status (Wheelersburg & Melvin 2017). In 2017, rights over the Igloo trade mark were transferred from the Canadian Government to the Inuit Art Foundation to allow for greater control among Inuit artists over the usage of the trade mark (Inuit Art Foundation 2017). Ensuring Indigenous Peoples have control over trade marks may represent a preferable approach to preserving cultural knowledge while maximising autonomy (Altman 2018). Likewise, the New Zealand Government disinvested in the 'Māori Made' *Toi Iho* certification

mark in 2009 because it had not increased sales of Māori art, although it has since been taken up by a private foundation of Māori People (Graber & Lai 2012). However, the *Toi Iho* certification mark may have had beneficial effects for both artists and consumers (Johnsson 2012:161). These experiences suggest there may be value in protecting IK through certification trade marks, but that this value may not always be achieved. The various international experiences could be pursued as individual case examples.

Geographical indications (GIs) are one type of certification trade mark put forward as emerging instruments to protect IK. GIs provide producers in an area with the exclusive right to market goods as being produced in that area, and are an accepted part of Australia's certification trade mark system.⁹ They can specify both the location of production, and features of the manner of production (IP Australia 2018).

Although GIs are currently used largely to promote the regional heritage of certain agricultural products (such as 'Parma Ham' or 'Barossa Valley Wine'), they are arguably a natural 'fit' for the requirements of protecting IK (van Caenegem, Cleary & Drahos 2014; Singhal 2008) because:

- unlike the majority of IP regulations, they are designed to protect cultural traditions, rather than encourage innovation
- they create communal, rather than individual, rights
- there is no time limit on the rights created
- they are not freely transferable, instead remaining connected to the group that initiated the rights, and
- they are decentralised, which allows the definition of authenticity to be proposed by the group seeking protection, rather than by legislation.

For these reasons, GIs have been put forward both as a possible current mechanism for the protection of IK, and as a proposed template for new IP regulations aimed specifically at the protection of IK (Sherman & Wiseman 2016).

However, GIs may be ill-suited to protecting IK in some regards. Because GIs are tied to a specific geographic area, they may be unable to accommodate displaced Indigenous Peoples (Singhal 2008).¹⁰ GIs require agreement among the relevant producers around the criteria to be a 'traditional' product; this could lead to a large number of different GIs in areas with different TOs, which would reduce consumer awareness of each GI. GIs have also been accused of inhibiting innovation, rather than facilitating the continued development of IK (Frankel 2011). Most importantly, the protection provided by GIs is limited: non-Indigenous producers would still be able to brand their products as 'Indigenous-style' (Singhal 2008); and the protection applies only to the commercial name used, not IK itself (Frankel 2011).

IP Australia (2018) identifies that GIs for all food products in Australia may be registered as certification trade marks, and that a stand-alone system for protecting GIs also exists but only for wine. Given that there are some Indigenous businesses involved in wine production (Brady 2018; Nicol 2017), it is possible that this stand-alone system could be used by Indigenous businesses to register GIs.

There is substantial evidence from the European Union to suggest that consumers take GI certification into account when choosing between products, and that GIs create a positive price premium (Török & Moir 2018). However, the evidence is more mixed regarding whether this price increase is realised as a benefit to producers; in some cases, it appears that the positive price effect is captured by retailers, rather than producers, or that the increase in prices is largely offset by the increased cost of certification and compliance (Török & Moir

⁹ Certification trade marks are one route to creating a GI in Australia; the other applies only to wines.

¹⁰ Also, a geographical area may become highly contested.

2018).¹¹ The share of the price premium provided to producers likely depends on particular structures of the market, including features such as producers' relative bargaining power and the elasticities of supply and demand. For this reason, caution is required when using international evidence to consider the effects of GIs in the context of Indigenous cultural goods.

As an alternative to certification trade marks (including GIs), collective trade marks indicate membership of an association (IP Australia 2014b). An association of Indigenous creators could apply for such a collective trade mark, which would then certify that the creator was a member of that association.

Of the 324 collective trade marks listed as registered and protected on IP Australia's publicly accessible Trade Mark database, only three trade marks are explicitly associated with Indigenous Peoples and appear to draw on Indigenous cultural symbols. Two of these trade marks are associated with a charitable organisation working with Indigenous students (IP Australia 2019b, 2019c); the third is associated with a motorcycle club (IP Australia 2019d). It is possible that there are other collective trade marks which incorporate the use of IK, but do not explicitly identify themselves as such.

There are a number of international examples of the use of collective trade marks to protect IK (IP Australia 2017). In New Zealand, a local association can create a 'collectively owned' trade mark in the absence of an official GI system (WIPO 2003; Overton & Heitger 2008;). It is possible that a local organisation, such as a recognised TO organisation, could also be used to register a certification trade mark for certain cultural products in Australia.

If either certification trade marks or collective trade marks were to become a common way of protecting IK in certain goods, then the price premium associated with trade marked goods could be used to indicate the market value of IK. However, this would be an indirect estimate of the market value of IK, as it would indicate consumers' willingness to pay (WTP) for goods that are certified as treating IK appropriately, rather than their WTP for IK itself. Some process of adjustment would be required to estimate the desired value.

Sui generis laws protecting IK in particular contexts

Whereas statutory recognition of IK as IP creates broad rights to the use and control of IK (and therefore the capacity to trade or obtain commercial gain from IK in markets), various pieces of legislation at the Commonwealth and State level grant control of IK in particular contexts. For instance:

- **cultural heritage laws** protect areas, objects, and/or intangible heritage of significance to Traditional Knowledge and Traditional Cultural Expression
- **biodiversity laws** regulate access to biological resources and associated Traditional Knowledge, and, in some cases, require benefits sharing agreements in return for the use of the genetic resource and/or Traditional Knowledge, and
- **museums and archives laws** exempt certain material from publication; for instance, the *Archives Act 1983* (Cth) leaves scope to protect some forms of secret knowledge (Sentina et al. 2018).

As Janke and Sentina (2018) note, these laws provide only for particular manifestations of IK, not IK more broadly.

In some cases, *sui generis* laws may give rise to a monetary value for IK. For instance, the Victorian Government's *Aboriginal Heritage Amendment Act 2016* (Vic) allows TOs to register 'intangible cultural

¹¹ These costs also apply to all other instruments where certification and compliance apply; for example, patents and trade marks involve application and renewal fees and can be viewed as defensive costs revealing some portion of the underlying good's market value.

heritage¹² on the Victorian Aboriginal Heritage Register. Individuals wishing to use that heritage for commercial purposes are obliged to seek the permission of the representative group of TOs, which may include entering into an Aboriginal Intangible Heritage Agreement involving compensation (Aboriginal Victoria 2016) with fines for individuals and corporations of up to \$0.27m to \$1.5m respectively (Parkin 2017). For example, O’Faircheallaigh (2008) reviews 41 agreements finding that they have the potential to protect Indigenous cultural heritage where underlying weaknesses for Aboriginal people in the bargaining process are addressed (Gibson & O’Faircheallaigh 2015; Blackwell & Fordham 2018). Janke (2018a, 2018b) finds that *sui generis* law is needed for the better recognition of Indigenous Cultural and Intellectual Property rights but has not occurred in Australia, leaving Aboriginal and Torres Strait Islander Peoples to work within existing laws, often using agreements and protocols for recognition of their rights (Gibson & O’Faircheallaigh 2015; Blackwell & Fordham 2018). These agreements have the legal effect of contracts (Australian Copyright Council 2016), which are considered in the next section.

Similarly, biodiversity laws such as access and benefits-sharing regimes may also facilitate the valuation of IK. For instance, the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) Part 8A includes among its purposes ‘recognising the special knowledge held by Indigenous persons about biological resources’ and ‘ensuring the equitable sharing of the benefits arising from the use of biological resources’.¹³ Where Indigenous Peoples’ land is held under lease by the Commonwealth,¹⁴ or a native title determination has been made with respect to that land,¹⁵ then an applicant for a commercial permit for access to biological resources will be required to enter into a benefit-sharing agreement with the relevant Indigenous group, unless special circumstances apply. The benefits-sharing agreement must provide recognition of and valuation for IK to be used in accessing the biological resources, including a formal statement regarding any use of IK.¹⁶

The scope of this legislation may expand in future due to Australia’s implementation of the Nagoya Protocol, an international agreement implementing the third objective of the *Convention on Biological Diversity 1992*, which is ‘the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources’. The Australian Government has signed the Protocol and is preparing for the implementation of the Protocol (Janke & Sentina 2018; Department of Environment and Energy 2019).

Existing legislation in Australia satisfies most requirements of the Protocol (Matheson & Bull 2014). However, it is anticipated that full implementation may require new legislation. This could include new protective instruments including to ensure that holders of IK associated with genetic resources have given free, prior and informed consent prior to its use (Art 7, Nagoya Protocol), and that where this consent is given IK holders share in the benefits (Art 12, Nagoya Protocol) (Smith & Collings 2011).

Increased global use of benefits-sharing agreements could give rise to a means of valuing IK, through monitoring the magnitude of payments in these agreements. However, although the Nagoya Protocol includes the creation of an Access and Benefit-Sharing Clearing-House through which countries can share information on genetic resource access and benefit-sharing (Art 14, Nagoya Protocol), it is likely that individual benefits-sharing agreements would remain private, as discussed above. Where the information from these private agreements is amalgamated so no individual agreement holder can be identified, this could help to estimate the

¹² ‘Aboriginal intangible heritage’ is defined in s.79B *Aboriginal Heritage Act 2006* (Vic) to include ‘any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge,’ and any intellectual creation or invention derived from this knowledge, but does not include anything that is widely known to the public.

¹³ rr 8A.01(c) and 8A.01(b) *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

¹⁴ r 8A.04(1)(c) *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

¹⁵ r 8A.04(1)(i) *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

¹⁶ rr 8A.08(h)-8A.08(j) *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

value of IK as the World Bank has previously done with private royalty agreements in mining (see Blackwell & Dollery 2013).

Contracts and agreements

Indigenous Peoples can also make private agreements to protect IK. These agreements are then treated as legally enforceable private contracts, which can provide Indigenous Peoples with access to a means of enforcing their rights to IK. State governments have also negotiated Indigenous Land Use Agreements (ILUAs) with Indigenous Peoples which include provisions around using resources in the course of Traditional Cultural Expressions, which are one form of IK (WIPO 2015).

Where these contracts and agreements include clauses calculating compensation to TOs on the basis of their IK, they can be used to value IK. Again, although some native title agreements and ILUAs are public, contracts and agreements are typically confidential, which makes assessing the magnitude of returns difficult. However, there may be ways to gain access to this information, particularly where the magnitudes are aggregated across a population of agreements and individual TOs cannot be identified. Of course, this would require approval by the parties to these agreements. For an example of the use of individual native title determinations as case studies, see Quicke, Dockery and Hoath (2017); for a broadly analogous situation, see the World Bank's reporting on private mining agreements with Indigenous Peoples (Blackwell & Dollery 2013).

Actions against misuse of IK under the Australian consumer law, in tort or in equity

Even where there has been no other recognition of IK, certain actions in statute or general law may prevent others from misusing IK. These actions include:

- **actions for passing off** under common law, which can prevent firms from misrepresenting goods as being Indigenous
- **actions for misleading and deceptive representations or conduct** under the Australian consumer law (*Competition and Consumer Act 2010* (Cth)). This includes actions taken against traders who falsely market products by creating an impression that they are made by Indigenous persons (through a combination of artwork and words such as 'hand painted,' 'handcrafted,' 'Aboriginal Art,' and 'Australia',¹⁷ and
- **breach of confidence actions for misuse of private information**, which can prevent individuals from releasing confidential information about IK. These actions may arise from breach of contract (where there has been an agreement about the use of private information) or in equity.

In these cases, the choice to pursue legal action indicates that the expected benefits provided through protected use of IK are at least as great as the expected costs of preventing misuse, including legal costs. For this reason, the cost of preventing misuse could provide an indicative lower bound measure of the benefit associated with legal protection of IK through the relevant instrument. However, it may not necessarily represent a lower bound of *market value*: in some cases, the primary benefit of taking action may be to avoid cultural offence, rather than to protect economic value (Martin 2014). An example of IK attribution is given in Box 1.

¹⁷ See, for example, *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595.

Box 1 Hypothetical example of attribution of market value to IK

Assume an artefact was sold in a tourism store at an airport, indicating that it was a genuine Aboriginal artefact when in fact it had been mass produced from a factory overseas, using the IK encapsulated in a very similar but more expensive, genuine product. The owner of the genuine product takes action against the owner of the fake good for the tort of passing off. Assume the legal costs involved along with other costs of bringing a case before the courts amount to \$45 000. The actual market value of the fake product is \$200 000 to date, that is, sales of 50 000 products at \$4 per item. The genuine item sells for \$30 and sales of 5000 have occurred over the same period. In this case, the \$45,000 cost to bring a case before the courts is below both the genuine and fake product actual market value of sales to date and therefore provides a lower bound or minimum value of protecting the genuine product.

Of course, courts can award damages, and in this case assume the court awards damages of \$200 000 to the genuine product owner. The award of \$200 000 to the appellant is a measure of the 'market value' to the real owner of taking action for passing off.

Some measure of the good's value would be attributable to IK. If we assume, for the purposes of this example, that 85% of the good's value can be attributed to IK, and that the full value of the piece of IK is represented in the legal action, then the 'market value' of IK ranges between the proxy from costs (85% of \$45 000) of \$38 250 to (85% of \$200 000) \$170 000 for the damages awarded through the courts.

Voluntary protocols, standards and codes

As an alternative to legally enforceable instruments, voluntary protocols, codes of conduct and certification schemes encourage, but typically do not mandate, appropriate treatment of and compensation for the use of IK. This section first considers these codes in broad terms, and then specifically considers accounting standards, which have particular relevance to estimating the market value of IK.

Over the last two decades, a large number of these codes have been published, some of which are outlined in Table 1 in relation to art, research and language.

Voluntary protocols may provide effective protection for IK if they become accepted norms and there are strong incentives for compliance (Janke & Dawson 2012). In particular, certification as having followed the protocol assures consumers that the goods purchased have treated IK appropriately; moreover, it can avoid the 'market for lemons' problem that arises when asymmetric information leaves consumers uncertain about the quality of a product, drives high-quality producers out of the market, and lowers the overall market price (Akerlof 1970).

In the long run, these instruments may also contribute to the development of institutions and norms that create a strong social expectation of compliance. North (1991:97) describes how 'institutions' can contribute to the evolution of market value:

Institutions are the humanly devised constraints that structure political, economic and social interaction... They evolve incrementally, connecting the past with the present and the future; history in consequence is largely a story of institutional evolution in which the historical performance of economies can only be understood as part of a sequential story.

Table 1 Voluntary protocols, standards and codes – some examples

Area	Producing body (date published)	Name of code	Description	Reference to payment or compensation for the use of IK
Art	National Association for the Visual Arts and the Australia Council for the Arts (2009)	The Indigenous Art Code	Standards for dealings between art dealers and Indigenous artists; dealers and artists can become signatories to the Code. It is now administered by Indigenous Art Code Ltd, a public company in its own right.	The Code describes standards for process of art dealers paying artists, but no discussion of level of payment, or broader community compensation.
	The Australia Council for the Arts (2007a–2007e)	Protocols for Producing Indigenous Australian Visual Arts; Protocols for Producing Indigenous Australian Music; Protocols for Producing Indigenous Australian Writing; Protocols for Producing Indigenous Australian Media Arts; Protocols for Producing Indigenous Australian Performing Arts	Protocols for various forms of art; applicants for funding from the Australia Council for the Arts who are working with Indigenous artists are required to comply with the relevant protocol.	The Protocols refer to payment for copyright owners, and describe the possibility of broader benefits-sharing arrangements.
	Screen Australia (Janke 2009)	Pathways & Protocols: A filmmaker's guide to working with Indigenous People, culture and concepts	Protocols for filmmakers working with Indigenous People or depicting Indigenous culture or country; filmmakers working with Screen Australia are required to comply with the protocols.	The Protocols advise that Indigenous People should share in benefits from the use of their images, stories, dances or knowledge, by direct payment or other assistance (e.g. skills development). In some cases, a royalty is recommended.
	Arts NSW (2011)	Aboriginal Arts and Cultural Protocols 2011	Protocols for people working with the NSW Aboriginal arts sector; used to assess funding applications for some arts programs. The Protocols are administered by Create NSW, the successor body to Arts NSW.	No discussion of compensation.
	Museums Australia (2000)	Previous Possessions, New Obligations: Policies for Museums in Australia and Aboriginal and Torres Strait Islander Peoples	The policies set out certain aspects of museums' obligations regarding Aboriginal or Torres Strait Islander objects. The document is also referred to in Museums Australia's Code of Ethics (1999).	The policies state that museums are obliged to account for the views of Aboriginal communities in the treatment of Aboriginal objects, and that museums should actively promoted the employment of Aboriginal and Torres Strait Islander Peoples. There is no discussion of payment for objects.
	Arts Tasmania (2009)	Respecting Cultures: Working with the Tasmanian Aboriginal Community and Aboriginal Artists	This guide provides certain standards for working with Aboriginal artists and community members.	One of the principles included in the guide is the principle of 'Proper Returns', which encourages discussions of IP protection and informing Aboriginal individuals of the potential for commercial returns. Another principle encourages written and informed consent for use of material.
	City of Melbourne (2007)	Code of Practice for galleries and retailers of Indigenous Art	The Code, written by Terri Janke for the City of Melbourne, guides galleries and retailers in displaying Indigenous art and interacting with Indigenous artists.	The Code emphasises fairness and transparency in commercial terms, including prompt payment. The Code also prohibits selling forged or fake Indigenous art.

Research	Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) (2012)	Guidelines for Ethical Research in Australian Indigenous Studies	Principles for ethical research into Indigenous Australian issues; all research sponsored by AIATSIS must comply with Guidelines.	The Guidelines require that Indigenous People involved in research benefit from the research. This includes people who contribute IK, who 'should receive fair and equal benefits'. In particular, 'certain cultural information is owned and may need to be paid for'.
	National Health and Medical Research Council (NHMRC) (2018a, 2018b)	Ethical conduct in research with Aboriginal and Torres Strait Islander Peoples and communities	Guidelines for ethical research; compliance is a condition of NHMRC funding.	The Guidelines include a principle of reciprocity, which requires that Aboriginal and Torres Strait Islander People benefit from research, and that the benefits be fairly distributed among the community.
		Keeping research on track II	Practical guide to general guidelines above, aimed at Indigenous People and communities participating in research.	The guide notes that holders of IK have not had their rights adequately recognised in the past, and that they deserve a fair and equitable share of benefits derived from the use of IK.
	Kimberley Land Council (2011a, 2011b)	Kimberley Land Council Research Protocol	Protocol for conducting research within the Kimberley; the Kimberley Land Council will only support research if the Protocol is followed.	The Protocol states that researchers must 'demonstrate a commitment to negotiating fully and equitably with Aboriginal People involved in the research,' including holders of IK.
		Kimberley Land Council Intellectual Property and Traditional Knowledge Policy	Policy for conducting research within the Kimberley; the Kimberley Land Council will only support research if the Protocol is followed.	The Policy states that researchers must gain free, prior and informed consent when using IK, including providing information about the effect of the research on any IP rights, and the details of fair and equitable compensation.
		Collaborative Science on Kimberley Saltwater Country – A Guide for Researchers (Lincoln et al. 2017)	Guide for researchers working with land and sea managers in the Kimberley Region. The document was prepared by Mosaic Environmental.	The Guide gives examples to assist researchers to understand the role IK can play in research. The Guide also contains information around forming an agreement with project participants, including terms relating to IP.
	Desert Knowledge Cooperative Research Centre (CRC) (2007)	Desert Knowledge CRC Protocol for Aboriginal Knowledge and Intellectual Property	Protocol for researchers working in Aboriginal communities, with guidance on how to generate resources from IP (e.g. through benefit-sharing).	The Protocol comments that Aboriginal People whose knowledge benefits a research project should be able to negotiate compensation.
Language	The Federation of Aboriginal and Torres Strait Islander Languages and Culture (FATSIL) (2004)	FATSIL Guide to Community Protocols for Indigenous Language Projects	Protocols for people working with Indigenous language, e.g. schools working with the local Indigenous community to develop a language program, community-based and academic linguists.	No discussion of compensation.

However, the success of these protocols relies on other institutional features to ensure their acceptance; otherwise, producers may choose not to comply (Australian Competition and Consumer Commission (ACCC) 2011). In particular, the market will only sustain a positive price premium for certified products if consumers are both willing to pay for certification, and able to differentiate between goods that are certified as being Indigenous by an appropriate body, and goods which merely purport to be Indigenous. The Arts Law Centre of Australia (2012:5) has commented that the success stories of compliance 'are quantitatively outweighed by circumstances in which protocols have been ignored and cultural sensitivities trampled upon'.

For this reason, institutional development and voluntary protection of IK may be of more significance to its future market value than its present market value, as social norms around appropriate treatment of IK continue to develop. Voluntary protocols may also have other beneficial long-run effects, such as increasing public awareness of IK (ACCC 2011). In some cases, codes have been expressly written with the hope that they may be incorporated into statute in the future (Pham & Janke 2009).

One way to encourage compliance may be through subsidies via government assistance; for instance, compliance with the Australia Council and Screen Australia protocols is a prerequisite for receiving government funding, which is seen as one reason behind their success (Janke & Sentina 2018). Increased government willingness to support these protocols may increase their scope in the future.

Where some producers, but not others, are certified to be following protocols, the price difference between certified and non-certified goods or services would indicate consumers' marginal WTP for certification, reflecting appropriate treatment of IK. While giving some insight into the market value of IK, this measure would only provide a lower bound estimate, because marginal WTP for certification would not account for the value IK contributes to the non-certified product, even if that value has not been acknowledged by the producer. Furthermore, wide adoption and acceptance of certification as a mark of authenticity of IK would be reflected in an increase in the marginal WTP for certification.

Accounting standards for the valuation of intangible capital

Alternatively, the protection of IK through a legal instrument could be revealed through the valuations prepared on the accounts of an organisation in accordance with accounting standards. These standards set out obligations for 'reporting entities,' including whether reporting entities are obliged to include intangible assets on their balance sheets. The standards also set out the methods for valuing any intangible asset. Wild (2013) argues that IP within tourism falls within the scope of International Public Sector Accounting Standards that are based on International Financial Reporting Standards. While cultural IP could be classified as a cultural asset, defined by particular 'historic, artistic, scientific, technological, geophysical or environmental qualities' (Accounting Standards Board 2006:para. 5), it is likely to be difficult to directly match income streams to such assets (Bodle et al. 2018).

Whereas International Public Sector Accounting Standards are limited to the public sector, frameworks established by the Australian Accounting Standards Board (AASB) are applicable to both the public and private sectors. As noted in Fig. 3, AASB 138 (para. 18) permits items to be recorded as intangible assets on a balance sheet if the item meets both the asset definition and the recognition criteria.

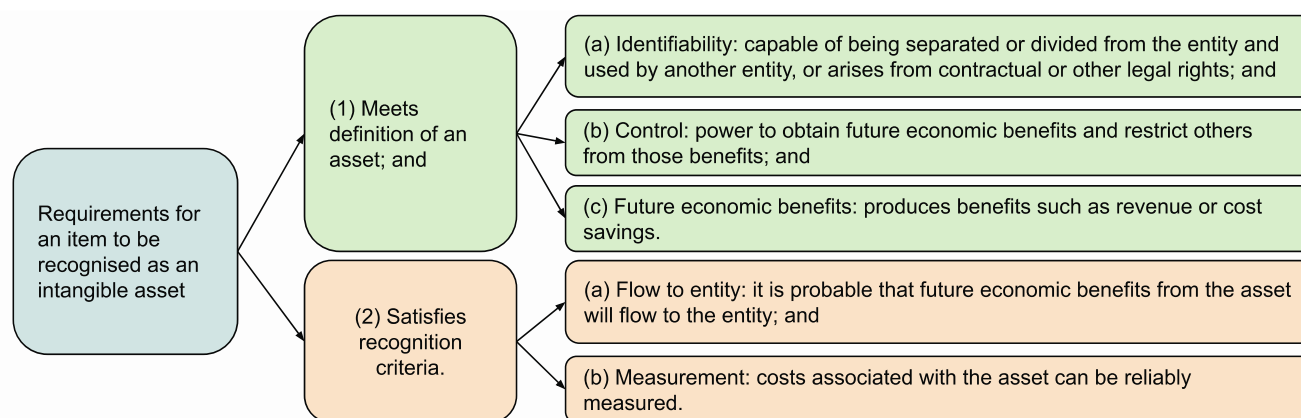


Figure 1. AASB 138 requirements for an item to be recognised as an intangible asset

Source: AASB 138; Bodle et al. 2018.

These criteria may be difficult for IK to satisfy. IK is typically only partially excludable and non-separable, which creates difficulties in the identifiability and control tests of the asset definition requirement (Bodle et al. 2018). In addition, the difficulty of attributing economic benefits to IK is a central impediment to it satisfying the recognition criteria. This creates the problem that the costs associated with ‘acquired or purchased’ IK are included on balance sheets, whereas the asset value created by IK is excluded (Bodle et al. 2018).

Where IK does satisfy these requirements – for instance, through being capitalised as an asset through a trade mark or patent – then AASB 138 becomes relevant (IP Australia 2019a). In that case, the failure of a reporting entity’s accountants to include IK would need to be disclosed in the notes to the financial statements if deemed ‘material’ or be justified to fellow professional accountants. The ‘enforcement’ of these accounting standards needs to be considered as part of changing the traditional accounting standards to incorporate Indigenous methodologies when accounting for IK. In such cases, the ‘naming and shaming’ of managers, severe reprimands, fines and loss of membership from the accounting professional bodies and reporting non-compliance in peer-reviewed publications are possible enforcement measures under the current system of self-regulation (CPA Australia 2019; Chartered Accountants Australia & New Zealand (CA ANZ) 2019). More extreme cases of misrepresentation of the accounts, such as under criminal law, can be prosecuted or pursued through the courts.¹⁸

¹⁸ For example, for the Enron and Arthur Anderson collapses see Chaney & Philipich (2002); for other United States firm analyses see Brown et al. (2013) and Wilson & Grimland (1990); in Australia, see Clarke & Dean (2014).

Conclusion

This paper has outlined two broad groupings of instruments that can be used to protect IK: legally enforceable instruments and voluntary instruments. Enforceable instruments have a clear connection to market value, as they are typically tradeable, and therefore give rise to a market value. Moreover, considerable expense is incurred to protect the relevant IK through the legally enforceable instrument, which gives a lower bound for market value. The methodological problem is gaining indications of prices or costs, which are typically not available to the public, though one could envisage that these could be presented in an anonymous or non-identifying way, to ascertain indicative market value. Voluntary instruments such as protocols, codes of conduct and certification are more difficult, though they may have compensation or payments associated with them, which imply a 'market' value. Having a diverse range of instruments helps to provide a system of rights to Indigenous People and would allow them to choose those rights which are most useful to them in any given situation. A diversity of rights may also aid in developing social and cultural settings that encourage society to do the 'right thing' in recognising and protecting IK.

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