Scoping study on standalone legislation to protect and commercialise Indigenous knowledge

Final report

NINTIONELIMITED

Acknowledgements

We acknowledge Aboriginal and/or Torres Strait Islander Peoples as the Traditional Custodians of our land and its waters. Ninti One and IP Australia wish to pay their respects to Elders, past and present, and to the youth, for the future. We extend this to all Aboriginal and/or Torres Strait Islander people reading this report.

The Review was commissioned by IP Australia. This report was written and researched by Delwyn Everard, Boyd Blackwell and Tim Acker for Ninti One Limited.

Disclaimers

The scoping study on standalone legislation to protect and commercialise Indigenous knowledge Final Report has been compiled using a range of materials and while care has been taken in its compilation, the organisations and individuals involved with the compilation of this document (including the Commonwealth, represented by IP Australia), accept no responsibility for the accuracy or completeness of any material contained in this document. Additionally, the organisations and individuals involved with the compilation of this document (including the Commonwealth) disclaim all liability to any person in respect of anything, and of the consequences of anything done or omitted to be done by any such person in reliance (whether wholly or partially) upon any information presented in this document.

Our logo story

Our logo is based on the painting ‘Two Women Learning’, created by Aboriginal artist Kathleen Wallace. Kathleen was born and raised at Uyetye, on the Todd River – her father’s homeland. Her mother is from Therirrerte. Her grandfather taught her stories of her culture and land from an early age. ‘Two Women Learning’ 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.

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4. There is broad support for standalone legislation that incorporates the features described in this report.
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7. While standalone legislation will provide new legal protection for IK, such reform will deliver more meaningful and effective value to First Nations communities and enterprises if accompanied by a complementary package of policies, resources, support and other reforms.
8. The benefits that will be delivered to First Nations peoples and communities and to Australia as a nation are estimated to outweigh the costs of implementing the reforms and measures set out in recommendations 1–7.

Recommendations

1. That the Australian Government enact standalone legislation creating a new intellectual property right in respect of TCE and TK.
2. That the Australian Government undertake a co-design process for the development of such standalone legislation in partnership with First Nations peoples.
3. That legislation to protect the rights of First Nations peoples in respect of the GR of native flora and fauna continue to be implemented nationally through a coordinated framework of state and federal laws based on the rules for the fair and equitable sharing of the benefits of biodiscovery that are contained in the Nagoya Protocol.
4. That the Australian Government ratify the Nagoya Protocol.
5. That consideration be given during the co-design process to the inclusion of the elements and features suggested in this report.
6. That the Australian Government enact legislation, whether as part of new standalone legislation or by amendment to the Australian Consumer Law, prohibiting the commercial supply of goods or services featuring or purporting to feature TCE which are not produced by Aboriginal or Torres Strait Islander people or with the permission of rights holders, unless labelled as inauthentic.

7. That implementation of new standalone legislation be undertaken in conjunction with the accompanying additional measures and policies identified in this report, to be developed in consultation with Indigenous stakeholders and through shared decision-making.
8. That, in parallel with the co-design process, the Australian Government progress the development of a strategic business case that includes a more detailed cost–benefit analysis and a primary research project surveying Australians to estimate their willingness to pay for reform options and including reliable estimates of the total benefits (both non-market and market benefits).

1. Background

This report, prepared for the Australian Government, details findings and recommendations into the feasibility of standalone legislation to protect Indigenous knowledge (IK), a term used to encompass all Indigenous cultural intellectual property, including traditional knowledge (TK), traditional cultural expressions (TCE) and genetic resources (GR). It is based on 2 propositions: first, that First Nations peoples in Australia are entitled to the rights enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP),[1] the *Convention for the Safeguarding of Intangible Cultural Heritage* (CSICH)[2] and the *Convention on Biological Diversity* (CBD)[3] concerning the maintenance and protection of IK, and, second, that Australia's existing intellectual property laws, even if reformed, would remain inadequate to the task of protecting those rights. These propositions have been developed, and are supported by, extensive research and consultation over many years both internationally and domestically and are now considered beyond question. New laws are required, and it is time to consider what a legislative framework creating meaningful and effective protection for Indigenous cultural rights might look like in Australia and how it is to be achieved.

This report was developed by Ninti One as part of a scoping study commissioned by the Australian Government to examine how standalone legislation could help First Nations peoples protect and commercialise IK. It was undertaken in consultation with the cross-departmental Indigenous Knowledge Working Group, chaired by IP Australia, and in consultation with the Indigenous Expert Reference Group established by IP Australia.

Various international models and examples were considered in developing a model for Australia. That model is set out in detail in the Interim Report: Scoping Study on Stand-alone Legislation to protect and Commercialise Indigenous Knowledge (Interim Report) which proposed the establishment of a new legal framework creating an enforceable communal legal right held by First Nations peoples and covering TK and TCE. It suggested that GR were more effectively protected by separate measures consistent with the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation* (Nagoya Protocol)[4] which is a protocol to the CBD. The Interim Report recommended that this new IK right be complemented by 3 additional measures: first, legislation to prevent trade in inauthentic product misappropriating forms of Indigenous culture; second, the creation of a National Indigenous Knowledge Authority with powers to administer and enforce the new rights on behalf of First Nations owners; and third, programs and policies to support and build the capacity of First Nations enterprise to manage and commercialise IK.

The Interim Report was released for public consultation and comment in October 2022 and a wide range of stakeholders responded.[5] Their comments have been taken into consideration in preparing the final findings and recommendations set out here. In addition, considerable weight has been given to the findings and recommendations of the Productivity Commission in its *First Nations Visual Arts and Crafts: Study Report* (Productivity Commission Report) which was released following the publication of the Interim Report. However, the Productivity Commission Report, while significant and important, is directed primarily to the protection of Indigenous culture as it is expressed through visual arts and crafts, which is only one aspect of IK.

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[1] UNDRIP Article 31

[2] CSICH Article 11

[3] CBD Article 8(j)

[4] https://www.cbd.int/abs/text/

[5] https://consultation.ipaustralia.gov.au/policy/stand-alone-legislation-for-indigenous-knowledge/

2. Findings and recommendations

Finding 1

The feedback received in response to the Interim Report demonstrates support from both Indigenous and non-Indigenous stakeholders for the enactment of standalone legislation by the Australian Government to protect the rights of First Nations peoples in IK.

There is widespread public recognition that Australia is home to the world's oldest continuing living cultures and that the harm caused by inadequate protection damages not only Indigenous communities and Traditional Custodians but Australia as a nation.[6] It undermines efforts to close the gap in living standards between Indigenous and non-Indigenous populations as reflected in the government's commitments under the National Agreement on Closing the Gap. It impacts Australia's international standing and adversely affects its value as a tourist destination.

There is enormous untapped potential for First Nations businesses to generate economic and social returns from the commercialisation of IK. This potential is unlikely to be realised without legislated protection. Other intellectual property (IP) rights (such as patents, trademarks and copyright) are able to be commercialised because legislation confers exclusive rights of ownership vested in specific individuals and legal entities. Currently, Australia's IP laws provide only ad hoc and piecemeal protection for IK, and knowledge holders cannot always rely on those laws to prevent cultural misappropriation and exploitation. While IP Australia is investigating how those laws could be strengthened,[7] the fundamental structure of Australia's existing IP laws is a system of individual legal rights with a limited term of protection derived from circumstances of recent originality or novelty. Those laws are inherently ill suited to the protection of the ancient, continuing and evolving cultural knowledge and heritage of First Nations peoples which is communally held and is passed down over many generations.

Recommendation 1

That the Australian Government enact standalone legislation creating a new IP right in respect of TCE and TK.

Finding 2

The implementation of a regime for standalone legislation to recognise and protect the IK rights of First Nations people needs to be guided by the views, priorities and knowledge of First Nations people.

These reforms will be of fundamental importance to all First Nations people. The protection of IK is essential for the prevention of harm from cultural misappropriation and is likely to be regarded as having similar importance to the recognition of native title and the referendum on the Voice to Parliament.

Suggested features for a co-design process are considered in more detail in section 4 of this report.

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[6] See for example, the discussion in A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge

[7] See IP Australia Enhance and Enable Indigenous Knowledge Consultation Report 2021 (Enhance Report 2021).

Recommendation 2

That the Australian Government undertake a co-design process for the development of such standalone legislation in partnership with First Nations peoples.

Finding 3

IK encompasses all the tangible and intangible cultural heritage of First Nations peoples in Australia and is rooted in ancient and enduring connection to Country and its landscapes, waters, flora and fauna. It includes not only TK and TCE but also rights to the GR of the native flora and fauna of traditional lands.

The World Intellectual Property Organization has established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to develop and negotiate international legal instruments for the protection of TK, GR and TCE. Its work is ongoing and incomplete, but its longstanding approach is that the protection of GR and associated TK requires a different legal framework from that suited to the protection of TCE and other aspects of TK.

The scoping study has also proceeded from that starting premise and, while the model in the Interim Report is focused on TK and TCE, the consultation feedback confirmed that the concerns of First Nations people and communities encompassed the full spectrum of IK, including GR. There is, in the Nagoya Protocol, already an internationally accepted model for the fair and equitable sharing of the benefits arising from the utilisation of GR that includes protections for IK associated with GR. Australia has signed but not ratified the Nagoya Protocol; however, a number of state and territory governments have enacted legislation or implemented policies to comply with the Nagoya Protocol or are currently considering doing so.[8]

This report accepts that the Nagoya Protocol is an appropriate starting point for the protection of IK relating to GR and that this aspect of IK requires a rights framework that differs significantly from a rights framework designed for the protection of TK and TCE.

Recommendation 3

That legislation to protect the rights of First Nations peoples in respect of the GR of native flora and fauna continue to be implemented nationally through a coordinated framework of state and federal laws based on the rules for the fair and equitable sharing of the benefits of biodiscovery that are contained in the Nagoya Protocol.

Recommendation 4

That the Australian Government ratify the Nagoya Protocol.

[8] For example, Part 2A of the Biodiscovery Act 2004 (Qld); Chapter 8 of the Protecting Victoria's Environmental Biodiversity 2037 plan; and the Western Australian Government's proposals for a Biodiscovery Bill.

Finding 4

There is broad support for standalone legislation protecting TK and TCE, which incorporates the following features:

- a new IP right that is communally owned, transmitted intergenerationally and not limited by any specific time period
- a definition of IK that encompasses the intangible and tangible aspects of the cultural practices, cultural expressions, resources and knowledge systems that have been and continue to be developed, nurtured and refined as part of expressing cultural identity and that includes, without limitation: story, songlines, ceremonies, languages and traditional land management practices
- a definition of IK that recognises that TK and TCE are not static but living and evolving and capable of adapting over time to contemporary and commercial realities
- automatic vesting of rights with no requirement for registration
- a right that gives rights holders primary decision-making authority over the use and commercialisation of IK
- the requirement for third parties seeking to use IK to secure the free, prior and informed consent of the relevant rights holders with penalties for non-compliance
- recognition that there are many distinct First Nations peoples in Australia, each with distinct and overlapping tangible and intangible cultural heritage, necessitating a process for identifying respective ownership rights and resolving co-ownership issues
- a mechanism for the identification of the appropriate people or representative body to hold the new cultural rights on behalf a particular people and to speak for those people
- protection for secret sacred cultural heritage that prohibits its unauthorised use and maintains confidentiality
- a national IK statutory body that has power to initiate enforcement action against the unauthorised use and misappropriation of IK, including breaches of licence agreements
- the role of the national statutory body to include the identification and initiation of enforcement action in respect of breaches of the disclosure regimes proposed in Recommendation 6
- a means for addressing issues of overlap with existing IP rights held by third parties (such as copyright, trademarks and patents)
- clear statements as to the scope of any statutory licences or appropriate exceptions to the prohibition on use without permission – but not so as to compromise secret sacred TK
- enforcement mechanisms including injunctions, declaratory relief, civil penalties for the breach of cultural rights by third party use without permission, the award of compensatory damages to rights holders and an account of profits made from misappropriation.

Recommendation 5

That consideration be given during the co-design process to the inclusion of the elements and features suggested in this report.

Finding 5

A voluntary authenticity label is unlikely to deliver any tangible benefit in addressing the problem of the misappropriation of TCE through the sale or supply of inauthentic product.

This finding is consistent with that of the Productivity Commission Report, which gave careful consideration to a certification mark scheme and concluded that such a scheme is unlikely to provide comprehensive assistance to consumers to distinguish genuine art and craft product from products made by non-Indigenous people.[9] It considered both the now defunct National Indigenous Arts Advocacy Association scheme launched in 1999 as well as overseas examples, observing that all were hampered by low uptake by First Nations participants and high costs. There are sensitivities around any scheme that may be viewed as placing the onus on First Nations artists to demonstrate Indigeneity and which could imply that those who choose not to participate have some lesser entitlement. It has also been observed that the terminology of *authentic* and *inauthentic* is 'part of a legalistic, Western discourse that bears little resemblance to the way Aboriginal and Torres Strait Islander artists view or discuss art and cultural products.'[10]

For these reasons, this element of the model proposed in the Interim Report is not pursued.

Finding 6

While cultural harm from misappropriation by non-Indigenous businesses for commercial purposes is most prevalent in the arts and crafts industry, it extends much further to other goods and services and commercial activities.

The Interim Report proposed legislation to complement the creation of the new IK right in the form of a prohibition on the sale of goods featuring or incorporating TCE which are not made by, or under licence from, the relevant owners of that TCE, unless those goods are clearly labelled as inauthentic.

The Productivity Commission also recommended the enactment of such legislation related to visual arts and crafts products and concluded that the Australian Consumer Law provided 'a good basis for implementing [such] a disclosure requirement' for both imported and Australian made products.[11]

While the proposal in the Interim Report applied to all goods, not just visual arts and crafts products, the analysis in the Productivity Commission Report as to the mechanisms for implementation of such a scheme is equally applicable.

However, the consultation feedback confirmed not only that the harm suffered by First Nations peoples from cultural misappropriation for commercial purposes goes beyond arts and crafts products to commercial goods more generally but that harm is experienced in respect of commercial activities more broadly including in relation to the provision of services.[12] A mandatory disclosure regime covering both

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[9] Productivity Commission Report, Finding 7.2

[10] Submission of Arts Law Centre of Australia, Copyright Agency and The Indigenous art Code Ltd to the Productivity Commission, at 4.4 - 4.5 https://www.pc.gov.au/__data/assets/pdf_file/0008/336653/sub031-indigenous-arts.pdf

[11] Productivity Commission Report, Finding 7.4 and Recommendation 7.1

[12] The submission by the National Aboriginal and Torres Strait Islander Music Office pointed to the long history of issues around the authenticity and use of Indigenous music by non-Indigenous artists who have failed to consult with, or attribute, the custodians of this cultural material.

goods and services goes further than both the recommendations of the Productivity Commission Report and the proposal in the Interim Report.

Recommendation 6

That the Australian Government enact legislation, whether as part of new standalone legislation or by amendment to the Australian Consumer Law, prohibiting the commercial supply of goods or services featuring or purporting to feature TCE which are not produced by Aboriginal or Torres Strait Islander people or with the permission of rights holders, unless labelled as inauthentic.

Finding 7

While standalone legislation will provide new legal protection for IK, such reform will deliver more meaningful and effective value to First Nations communities and enterprises if accompanied by a complementary package of policies, resources, support and other reforms.

Existing IP laws already provide some protection for IK to the extent that IK is entitled to protection under the laws relating to copyright, trademarks, designs and patents. However, even that degree of protection has proven to be largely inaccessible to First Nations peoples. IP Australia's 2021 consultation on options to enhance the existing system to support First Nations people to benefit from and protect IK received consistent feedback on the difficulties First Nations people experienced in accessing legal protection and the need for education and information for First Nations communities and IK owners about the IP system, what IP can and cannot protect, and the impact of consenting to the commercial use of IK. It found that First Nations people needed more resources to help in negotiating IP agreements and arrangements.[13]

The consultation feedback to the Interim Report confirmed the need for First Nations businesses to be given substantial support to understand and access the benefits flowing from the creation of new IK rights if those rights were to deliver meaningful outcomes.

That feedback endorsed the proposals in the Interim Report for a package of policies and support to accompany new standalone legislation including:

- a national collecting agency that can, at the request of rights holders, assist in negotiating licences and rights agreements and collect and distribute royalties for the permitted use of IK
- the establishment of a database system, managed in accordance with cultural protocols, that can be used by rights users to identify and contact protected IK and its owners
- support to rights holders to understand, access, use and enforce the new cultural rights
- a program of public education and a marketing and communication strategy to inform potential users of the necessity to seek the permission of rights holders and to encourage the public to seek out goods and services that are ethically sourced and produced with the free, prior and informed consent of rights holders
- enhanced border protection measures to deter trade in inauthentic product
- capacity-building programs to support First Nations enterprise and business development including, in particular, in the commercialisation of IK to generate economic returns for, and to benefit, First Nations communities
- the additional recommendations of the Productivity Commission Report which looked across the broader cultural industries rather than just the visual arts and crafts industry including a national

[13] Enhance Report 2021, 4.

Indigenous Cultural and Intellectual Property strategy, strengthening the Indigenous Art Code and artist support services, an evaluation of existing funding arrangements, supporting First Nations workforce development and increased opportunities within the nation's public cultural institutions.

Recommendation 7

That implementation of new standalone legislation be undertaken in conjunction with the accompanying additional measures and policies identified in this report, to be developed in consultation with Indigenous stakeholders and through shared decision-making.

Finding 8

The benefits that will be delivered to First Nations peoples and communities and to Australia as a nation are estimated to outweigh the costs of implementing the reforms and measures set out in recommendations 1–7.

This is evidenced by the cost–benefit analysis discussed in more detail in section 3 of this report. However, further primary research in the form of a non-market valuation study is required in order to estimate the total benefits accurately.

Recommendation 8

That, in parallel with the co-design process, the Australian Government progress the development of a strategic business case that includes a more detailed cost–benefit analysis (CBA) and a primary research project surveying Australians to estimate their willingness to pay for reform options and including reliable estimates of the total benefits (both non-market and market benefits).

3. The cost–benefit analysis

3.1 Background

During the scoping study, an initial CBA was undertaken to assess the benefits and costs of implementing standalone legislation to protect IK on its own and as the cornerstone of the more comprehensive package of reforms and policies described in the Interim Report. The full CBA report is provided in Appendix 1.

The initial CBA considered a growing collection of options. These options were compared with the base case of business as usual.[14] The options considered were:

- standalone legislation on its own
- standalone legislation together with a mandatory disclosure regime for inauthentic product
- the addition of well-resourced central authority
- the complete package including Indigenous business capacity building.

3.2 Findings

This initial strategic CBA sets the groundwork for a more detailed CBA beyond this project. The CBA has assessed the market benefits of the proposed model and does not include non-market benefits. The CBA results are therefore conservative. While capturing the non-market benefits for protecting culture are difficult,[15] they are important to include as part of next steps beyond this project.

For these reasons, the CBA has clearly identified that there is need for primary research on the willingness to pay by all Australians for the options of reform. To fill this knowledge gap, a non-market valuation survey should be undertaken using state-of-the-art methods such as choice modelling and best–worst scaling.[16] Such methods can obtain reliable, valid and defendable estimates of the economic benefits of the reform options to all Australians.

A business case development process should be undertaken by the Australian Government (including a more detailed CBA) that occurs throughout the life of the reforms. This would better meet the Australian

[14] Comparison with the base case is required under the guidelines (OBPR 2020; Department of Finance 2021, 2006) to ensure that the options considered provide an improvement in the wellbeing or welfare of people.

[15] Blackwell, BD, Bodle, K, Hunt, J, Hunter B, Stratton, J and Woods, K (2019) Methods for estimating the market value of Indigenous Knowledge, Final Report to IP Australia, CAEPR, ANU, Canberra. https://www.ipaustralia.gov.au/tools-and-research/professional-resources/data-research-and-reports/publications-and-reports/2022/09/21/04/32/the-market-value-of-indigenous-knowledge

[16] Ibid.

Government's Investment Framework[17] and other state jurisdictional investment requirements.[18] This has always been the intention of the CBA prepared in this report: it would be the first step, in a range of steps, that tests the investment worth of a package of reforms for the people of Australia, including First Nations people.

The results of the initial CBA are presented below in Table 1 and Figure 1. They demonstrate that the package of policy options has the highest benefit above costs (i.e. net present value [NPV]) of $1.8 billion in 2023 Australian dollars. The complete package also presents good value for money invested with a benefit–cost ratio (BCR) of 2:1.

Table 1: Cost–benefit analysis results

Option	Short description	Benefits ($m)	Costs ($m)	Benefits less costs (NPV, $m)	Value for money invested (BCR)
1. Base case	Existing IP, consumer and cultural protection laws	0	0	0	0
2. Rights regime	New Indigenous rights regime	1,749	690	1,059	2.5:1
3. 2 + product protection	2 plus mandatory disclosure regime for inauthentic product	2,844	1,272	1,572	2.2:1
4. 3 + central authority	3 plus central Indigenous authority with enforcement powers and licensing role	3,392	1,729	1,663	2:1
5. 4 + business competitiveness	4 plus capacity-building policies supporting Indigenous enterprise and IK commercialisation	3,502	1,747	1,755	2:1

[17] Department of Finance (2006) Handbook of cost-benefit analysis. Australian Government. https://webarchive.nla.gov.au/awa/20080726194641/http://www.finance.gov.au/publications/finance-circulars/2006/01.html; Department of Finance (2021) Developing a Business Case. Australian Government. https://www.finance.gov.au/government/commonwealth-investment-framework/commonwealth-investments-toolkit/developing-business-case; Office of Best Practice Regulation (2020) Cost-benefit analysis guidance note: Regulation, Best Practice Regulation Compliance Reporting. Australian Government. https://oia.pmc.gov.au/sites/default/files/2021-06/cost-benefit-analysis_0.pdf

[18] For example, see NSW Treasury (2017) NSW Government Guide to Cost-Benefit Analysis. New South Wales Government. https://www.treasury.nsw.gov.au/finance-resource/guidelines-cost-benefit-analysis and NSW Treasury (2018) Business Case Guidelines Overview. New South Wales Government. https://www.treasury.nsw.gov.au/sites/default/files/2018-08/Summary%20of%20TPP18-06%20Business%20Case%20Guidelines.pdf

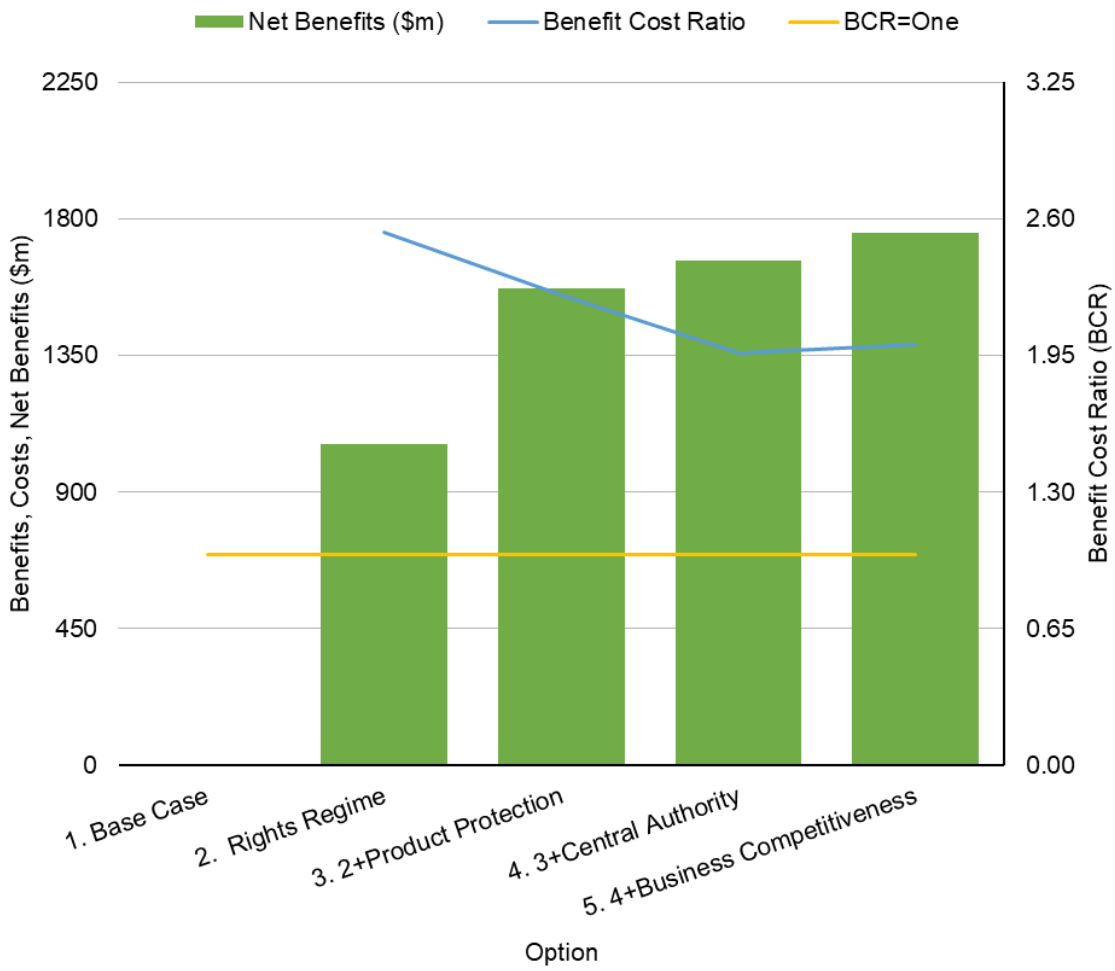

Figure 1: CBA results – Benefits above costs ('net benefits') and benefit–cost ratio of each option

The figure shows that Option 5 – the complete package has the highest net benefit of options (left-hand axis) with a similar value for money invested, that is, a similar benefit–cost ratio (right hand axis).

3.3 Distributional and sensitivity analyses

The distributional analysis undertaken in the CBA considered the benefits (and costs) flowing to each of the key stakeholders:

- Indigenous business
- Australian consumers or constituents generally
- the Australian Government – funding costs and cost savings.

shows that option 5 – the complete package of options – provides the broadest amount of benefits to all stakeholders.

A sensitivity analysis was also undertaken. This is to see how sensitive the CBA results are to changes in the key inputs such as costs and benefits. Costs were increased 20% and benefits were decreased 20%. A shorter timeframe of analysis was also used along with a higher discount rate – together these mean that

that the overall benefits are further reduced. These adjustments resulted in option 3 delivering just slightly higher benefits above costs; however, the packaged option still delivered positive results (benefits above costs and good value for money invested). The results of the sensitivity analysis show that a longer term timeframe for analysis (i.e. 20 years instead of 10 years) allows the large initial upfront costs to be more than covered by the benefits over a longer time period. This is because the longer time period better reflects the intention of the reforms to be for the long term. More detail of these analyses is provided in Appendix 1.

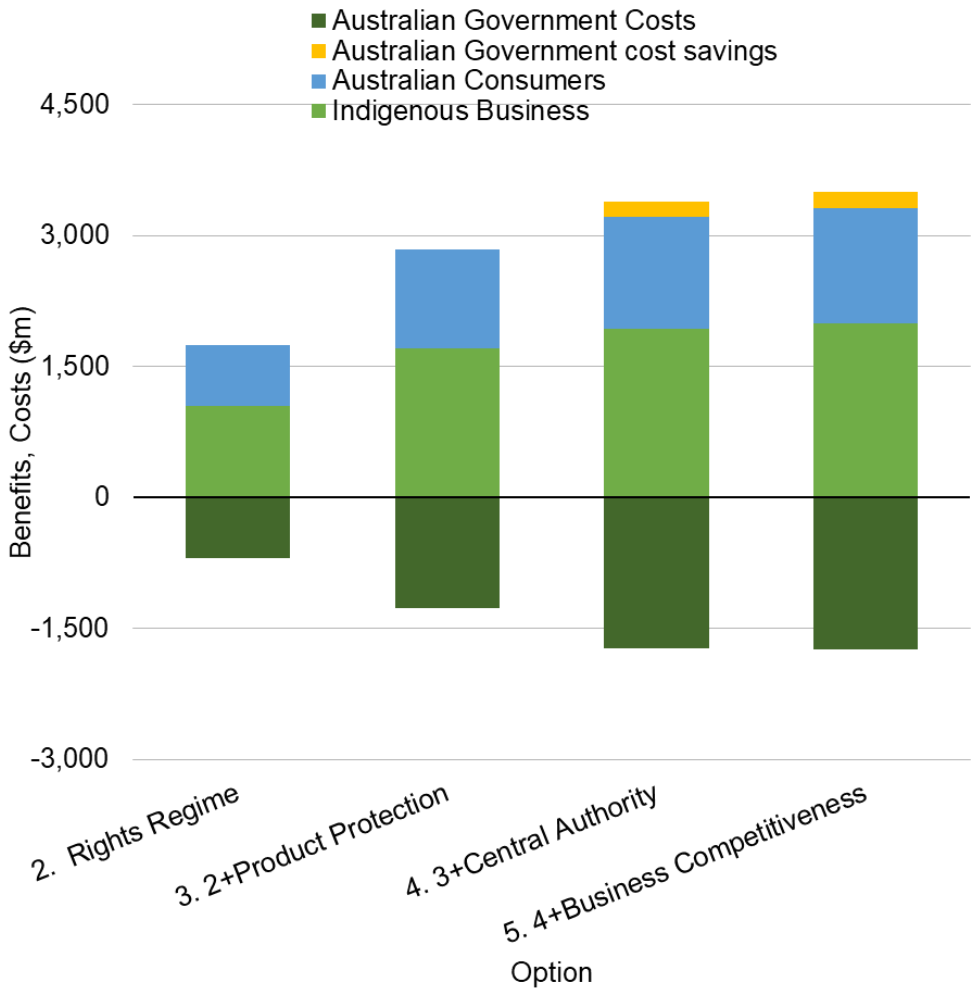

Figure 2: Distributional analysis – spread of benefits to stakeholders including funding cost and cost savings to the Australian Government

4. The co-design process

A meaningful and effective process that truly engages the many and varied voices of First Nations Australians will involve, at a minimum, a comprehensive and targeted communication strategy to raise awareness, face-to-face public meetings not only in each state capital but also in regional and remote First Nations communities and the involvement of Indigenous leaders and voices in all aspects of design, delivery and facilitation.

Consideration should be given to the following features as part of the co-design process.

- Establishment of an Indigenous Knowledge Co-Design Group with participation by Indigenous leaders, Elders, lawyers and cultural heritage experts drawn from different regions and language groups and with track records of relevant work and advocacy. This group could assist in designing an agenda and set of principles and questions about the proposed standalone law, which address the matters identified in Recommendation 5 and any other relevant issues (consultation agenda).
- Establishment of a webpage with information about the co-design process and opportunities to participate. The website could feature the consultation agenda and contain examples, case studies, relevant resources and clear explanations. The website should have a feedback/comments section with alternative contact options, in order to encourage contributions at any point, by any interested person or entity, by a variety of means.
- A 'roadshow' of face-to-face community meetings in each state and territory, including in regional and remote locations. This is intended to ensure inclusivity and access by a broad range of First Nations communities and organisations and to draw on diverse experiences.[19]
- The meetings to be hosted by local First Nations community organisations[20] and be well promoted to First Nations people, communities and stakeholder organisations through direct contact, social media, community radio and Indigenous networks (such as NITV, Desart and prescribed body corporates).
- The meetings to be open to all but prioritising participation by First Nations contributors.
- The Indigenous Knowledge Co-Design Group to assist in the delivery of the consultation meetings and lead discussions at those meetings, allowing opportunities for all voices to be heard.
- The Indigenous Knowledge Co-Design Group to review its membership periodically, including post–road show and to consider the inclusion of new members identified through the co-design process. Where appropriate, in order to maximise local networks and participation, additional panel members with specialised and/or local knowledge could be appointed for consultations in particular regions.
- In consultation with the Indigenous Knowledge Co-Design Group, and after a reasonable period of time to ensure ample opportunity for consideration and input from First Nations stakeholders, discussion outcomes would be collated and a detailed cultural rights framework developed which is incorporated into a consultation report. The report should include details about how the new right could work and how it would intersect with existing IP rights and other related existing or proposed legislative reforms (such as to the Australian Consumer Law, state and federal biodiversity legislation and existing cultural heritage legislation). This report would be made available through the networks established through the co-design process and written public submissions invited.

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[19] The recent consultations by the Western Australian Government with Aboriginal stakeholders about the state's proposed biodiscovery legislation involved meetings in 7 locations throughout the state https://www.wa.gov.au/organisation/department-of-jobs-tourism-science-and-innovation/wa-biodiscovery-bill-consultation-workshops

[20] As was the case with the Indigenous Art Code consultation process undertaken by the Australia Council and the ACCC in 2009.

- Concurrent with the above activities, a non-market valuation study could be undertaken that is Indigenous-led and which can inform a more detailed cost–benefit study.
- After a reasonable period of public consideration, a national 'convention' could be convened which is attended by First Nations delegates nominated by the Indigenous Knowledge Co-Design Group and identified through the co-design process, as well as government policymakers and IP experts. This convention would consider the final consultation report and the public submissions and formulate a joint view on the draft rights framework.
- Parliament, working with the Indigenous Knowledge Co-Design Group, would prepare draft legislation for further public feedback and comment.

Appendix 1: Cost–benefit analysis of standalone legislation of intellectual property for Indigenous knowledge options

Executive summary

An initial cost–benefit analysis (CBA) was undertaken to assess the benefits and costs of options of elements that could form part of standalone legislation for a new intellectual property (IP) right for Indigenous knowledge (IK). The results of the CBA demonstrate that option 5, which combines all elements identified in the Interim Report as a package of policy options, has the highest net present value (NPV) of $1.8 billion in 2023 Australian dollars and an equivalent benefit–cost ratio (BCR circa 2:1) compared with other options. Option 5 also provides the broadest set of benefits to stakeholders as shown through the distributional analysis. The sensitivity analysis demonstrated the importance of a longer term timeframe for analysis (20 instead of 10 years). This initial strategic CBA sets the groundwork for a more detailed CBA as a later step when options are further developed and as part of a strategic business case process. This initial CBA has assessed the market benefits of the options and does not include non-market benefits and is therefore conservative. Future work should focus on these additional benefits, including undertaking a non-market valuation study, and any impacts for future generations as part of a more detailed CBA.

Introduction

This brief report provides a summary of the analysis undertaken as a first step in preparing a strategic CBA analysis of options being considered for the standalone legislation for IK. This analysis meets the Commonwealth guidelines (OBPR 2020; Department of Finance 2006, 2021) on preparing CBAs and forms an initial assessment of costs and benefits of the various options identified as part of the broader project. The assessment has also been undertaken conscious of a broader set of guidelines in Australian jurisdictions and best practice more generally (e.g. NSW Treasury 2017, 2018).

This CBA focuses on the market benefits of reform options and is therefore conservative. While it is difficult to estimate the non-market benefits for protecting culture (e.g. see Blackwell et al. 2018) they are important to include as part of next steps beyond this project. This CBA has clearly identified that there is need for primary research, to fill a knowledge gap, on the non-market benefits for the options of reform through a willingness to pay study of all Australians. The study should be led by Australia's globally leading non-market valuation researchers in unison with First Nations' peoples.

Table App 1 summarises the elements assessed in this short report. Table App 2 provides how each of these elements are combined to form options (provided in the main report).

Table App 1: Elements of standalone legislation

Elements	Title	Description
A	Base case	Business as usual: existing IP, consumer laws and cultural heritage protection laws
B	New IP rights	New Indigenous IP rights regime
C	Authentic product	Specific measures aimed at inauthentic product
D	Central regulatory authority	Central regulatory authority over Indigenous IP
E	Indigenous business competitiveness	Measures to support competitiveness of Indigenous business

Table App 2: Options of standalone legislation assessed relative to base case

Option	Elements	Description
1. Base case	A-A	Option 1 is generic and is the base case assessed against itself, thus resulting in nil change
2. Rights regime	B-A	(2) New IP rights regime assessed against the base case
3. 2 + product protection	B+C-A	(3) 2 + authentic product protection assessed against the base case
4. 3 + central authority	B+C+D-A	(4) 3 + central authority assessed against the base case
5. 4 + business competitiveness	B+C+D+E-A	(5) 4 + business competitiveness support: complete package of policy initiatives assessed against the base case

Note: Assessment relative to the base case is central to the CBA approach (OBPR 2020; Department of Finance 2006, 2021; New Treasury 2017) to determine if policy improves wellbeing.

Method

The CBA has been prepared with the input of IP Australia and as part of the review of elements that could form part of standalone legislation for IK (Everard 2021; Everard & Blackwell 2022). This included a series of presentations to the IP Australia team, broader IK working and expert groups and the Productivity Commission. Furthermore, there has been a consultation process lead by IP Australia which included questions about the costs, benefits and risks of standalone legislation for IK elements as part of the Interim Report (Ninti One Limited 2021).

In following the Commonwealth CBA guidelines (OBPR 2020; Department of Finance 2006, 2021) as well as the broader best practice literature on undertaking CBA (e.g. NSW Treasury 2017), the CBA has been prepared undertaking the various necessary steps:

- problem identification, element and options identification and refinement (part of the broader Ninti One project)
- scoping of costs and benefits for each element and option
- quantification of costs and benefits using estimates from the literature (see Table App 4 and Table App 5)

- discounting these benefits and costs over time for each option using a discount rate of 7% and time period of 20 years
- distributional analysis to identify how broad stakeholder groupings are impacted by the policy initiatives
- sensitivity analysis of the CBA results given changes in key assumed inputs (e.g. discount rates and time periods, size of costs and benefits, etc.).

Results

Table App 3 sets out the NPV of costs, benefits, net benefits (benefits less costs) and BCRs for each of the options using a time period of 20 years and discount rate of 7%. Option 5, the combined package of policy initiatives, provides the highest NPV of $1.8 billion (2023 Australian dollars), with total benefits at $3.5 billion and total costs at over $1.7 billion. Option 5 also has a commensurate BCR of other options at close to 2:1. Figure App 1 presents these results in graphical format.

Table App 3: Summary CBA results relative to base case, 2023 AUD, 20 years, 7% discount rate

Option	Short description	Benefits ($m)	Costs ($m)	NPV ($m)	BCR (:1)
1. Base case	Existing IP, consumer and cultural protection laws	-	-	-	-
2. Rights regime	New Indigenous rights regime	1,749	690	1,059	2.5
3. 2 + product protection	2 plus mandatory disclosure regime for inauthentic product	2,844	1,272	1,572	2.2
4. 3 + central authority	3 plus central Indigenous authority with enforcement powers and licensing role	3,392	1,729	1,663	2.0
5. 4 + business competitiveness	4 plus capacity-building policies supporting Indigenous enterprise and IK commercialisation	3,502	1,747	1,755	2.0

Table App 4: Summary of benefit estimates, 2023 Australian dollars

Element	Benefit title	Measurement	Calculation	Estimate ($m/yr)	Adjustments	Sources
New IP rights regime	Better protect and realise benefits	Increased producer surplus (PS) and consumer surplus (CS) to Indigenous businesses and people	8% increase of current level of expenditure in Indigenous business (Blackwell et al. 2019 informed assumption)	181	Profit assumed to represent 40% of expenditure	Evans et al. (2021)
Authentic product	Overcome asymmetry in consumption and production of goods and services	Increased CS and PS to suppliers and purchasers of genuine goods	3% of current level of expenditure in Indigenous business (OECD/EUIPO 2019)	113	Higher mark-up for authentic goods assumed to be 67% of expenditure	Evans et al. (2021)
Authority	Benefits to Indigenous business	Increase of Indigenous business created through agency that supports powers to assert, protect and enforce IK rights	2% of current level of expenditure in Indigenous business	43	Profit assumed to represent 40% of expenditure	Evans et al. (2021)
Authority (cont'd)	Cost saving from centralised agency	Reduction from first year of expected running costs given IP Australia exists	30% of expected new agency costs	14	Agency costs assumed 20% of average recent yr IP Australia expenditures	DISER (2020); AHOR (1904)
Business competitiveness	Increased sale of Indigenous business goods and services	Increased CS and PS to suppliers and purchasers of goods	1% of current level of expenditure in Indigenous business	11	Lower level of mark-up (20%) assumed given increased competitiveness	Evans et al. (2021)

Table App 5: Summary of cost estimates, 2023 Australian dollars

Element	Cost title	Measurement	Calculation	Estimate (OPEX $m/yr, $m upfront)	Adjustments	Sources
New IP rights regime	Cost of designing and implementing the law	Capital expenditure (CAPEX)	One Bill as % of new Bills/yr x cost of running Australian Parliament	7.8	Nil	Cost of Parliament: The Age (2004); Acts/yr: PEO (2021)
New IP rights regime (cont'd)	Cost of managing the law	Operational expenditure (OPEX)	30% of current IP Australia expenses	71	Used average of 2019 and 2020 costs	DISER (2020)
Authentic product	Cost of designing and implementing prohibition law	CAPEX	As above	7.8	As above	As above
Authentic product (cont'd)	Admin cost of managing the prohibition law	OPEX	As above but 10% of current IP Australia expenses	22	As above	As above
Authentic product (cont'd)	Product labelling cost	OPEX	Equivalent to Australian Made cost x value of Indigenous business	11	0.2% (1c for $5) of value of goods sold	Deloitte (2015), Evans et al. (2021)
Authentic product (cont'd)	Cost of regulatory regime compliance	OPEX	5% of ACCC budget	27	5% calculated from infringement of origin breaches	ACCC (2021, 2020)
Authority	Cost of designing and implementing new authority	CAPEX	Equivalent cost to creation of Patent Office	2.3	Adjusted for inflation, exchange rates and time (Official Inflation Data 2021; Pounds Sterling Live 2021)	Australia House of Representatives (1904)
Authority (cont'd)	Cost of running new authority	OPEX	20% of current IP Australia expenses	47	Used average of 2019 and 2020 costs	DISER (2020)
Business competitiveness	Cost of designing and implementing support services unit	Assumed negligible – part of current business development	NA	0	Nil	NA
Business competitiveness (cont'd)	Cost of running support services unit	Staffing cost	Average salary + on-costs x 10 staff	1.8	On-costs 1.4 x salary	Assumed salary base

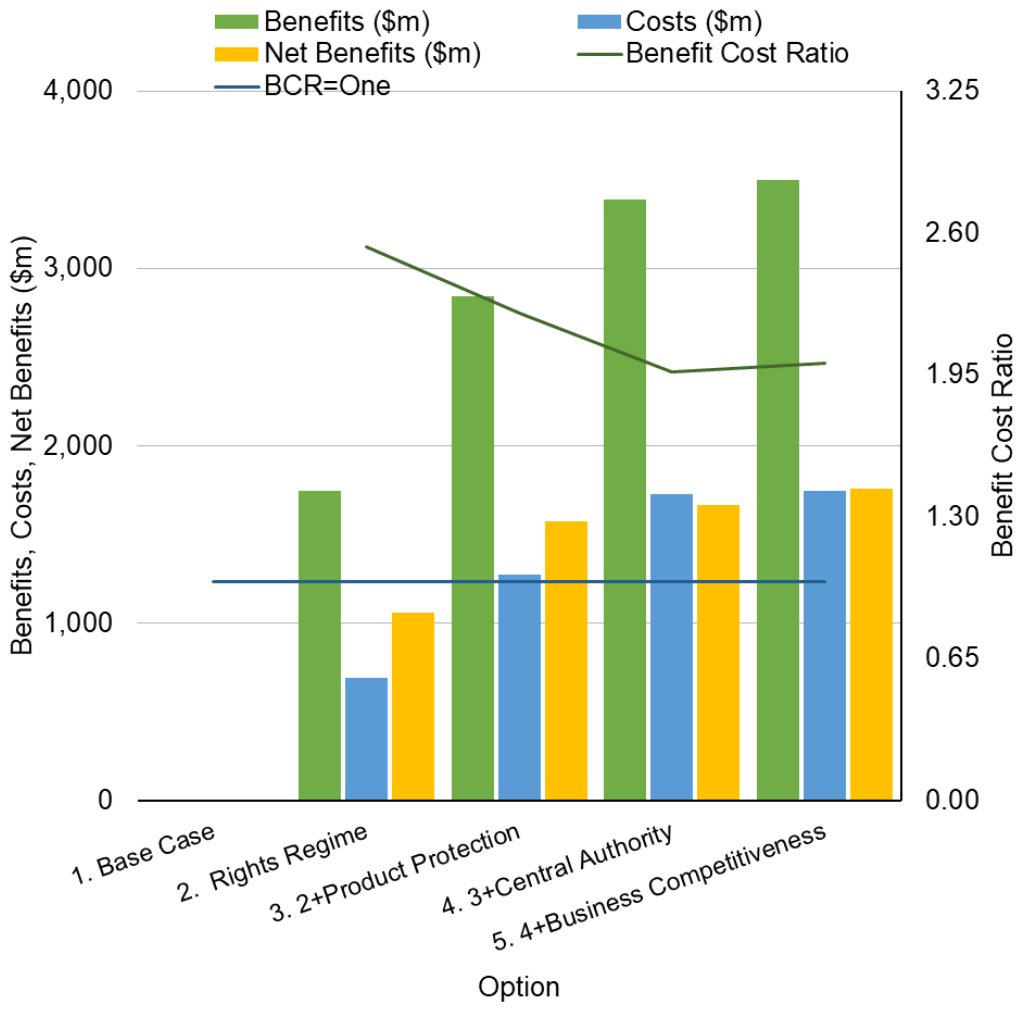

Figure App 1: CBA results, 2023 Australian dollars, 20-year period, 7% discount rate

Figure App 2 presents the distributional analysis. Option 5 provides the broadest set of stakeholders with the greatest level of benefits relative to the increase in costs. This reflects the overall observation of option 5 having the highest NPV. Australian consumers (or constituents) and Indigenous businesses are the main beneficiaries, with some cost savings to the Australian Government resulting from the broad set of policy initiatives. These beneficiaries benefit sufficiently to outweigh the costs of implementing the package of initiatives to the Australian Government or taxpayers. Option 5 therefore results in an improvement in social welfare as well as an improvement in economic efficiency for the Australian economy.

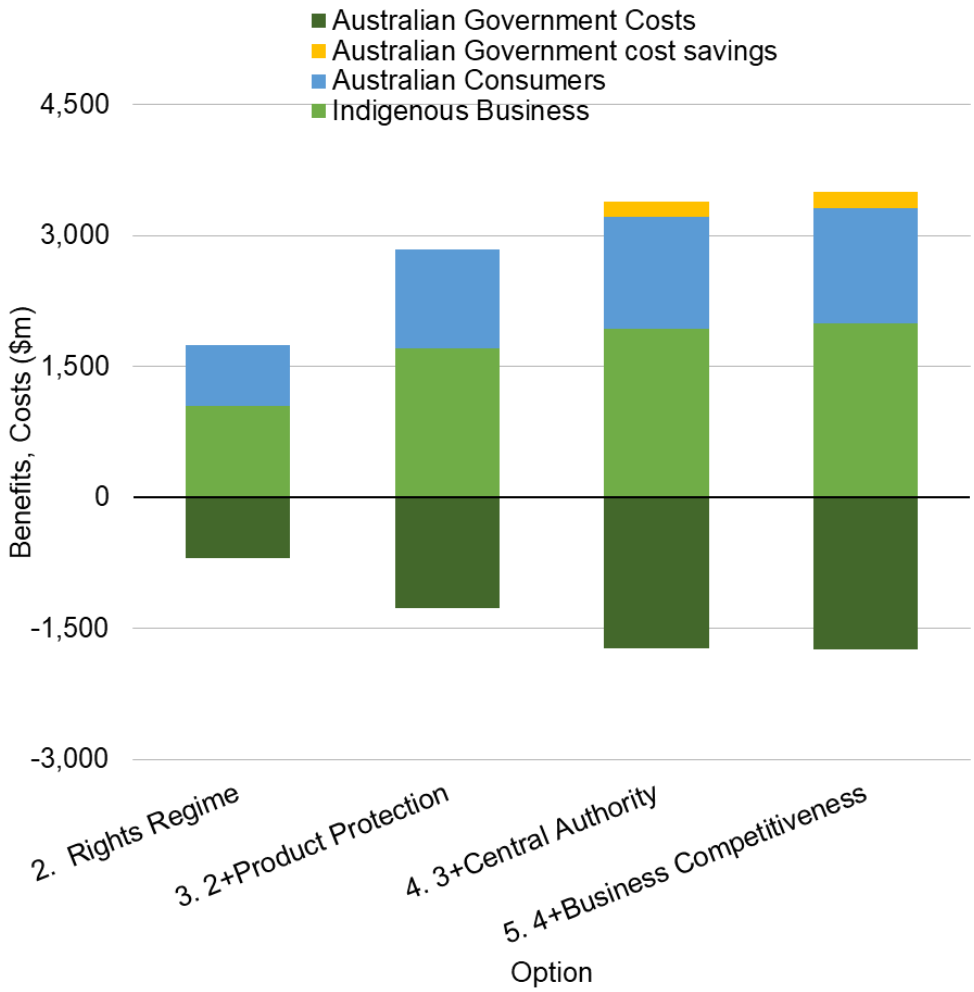

Figure App 2: Distributional analysis

For the sensitivity analysis, costs were increased by 20% and benefits decreased by 20%, along with a shorter timeframe of analysis of 10 years and discount rates of 3% and 10%. The ranking of the options changes. Figure App 3 shows the results of the sensitivity testing using the harshest discount rate for future benefits of 10% and period of 10 years. In this case, option 3 has the highest NPV, which includes a rights regime plus product protection. However, these results should be viewed with caution because the central authority involves a higher cost to benefit ratio than other options, and without a long-term view for the package of policy initiatives required through option 5, the CBA results suggest a different ranking of options. Given IK and standalone legislative reforms have a long-term view, the shorter period for analysis should not be given as much weight as the longer period of analysis.

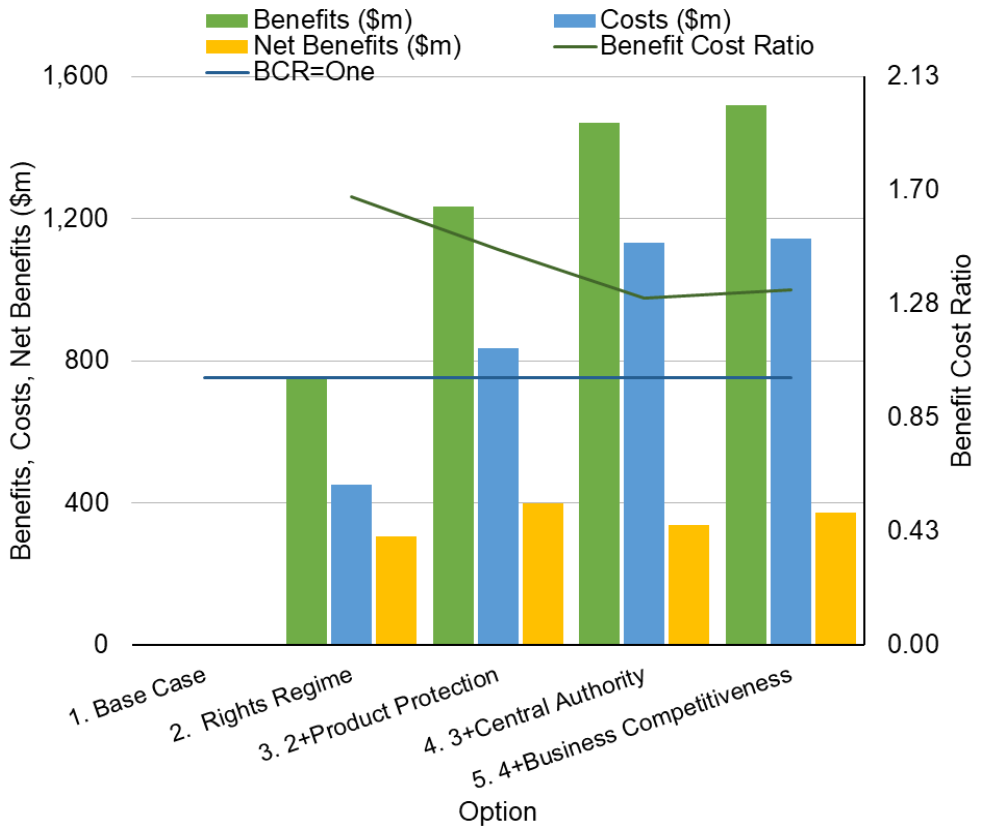

Figure App 3: Sensitivity analysis, shorter period of 10 years, higher discount rate of 10%

Recommendations

Option 5, which includes all options in a combined package of policy initiatives (rights regime, product protection, central agency and business competitiveness support), provides the highest NPV and equivalent BCR compared with all other options. It also provides the broadest set of benefits to stakeholders. The sensitivity analysis found that there is need to take a longer term view (20 years rather than 10 years) when assessing the options for implementing a package of policy initiatives in order for the large upfront costs to be defrayed by the benefits that accrue over the long term.

This is an initial strategic CBA, and a further detailed CBA should be undertaken as part of the next phase of work. This would include an assessment of the non-market benefits (and costs and risks) for each of the options as they are further developed in partnership with Aboriginal and Torres Strait Islander peoples. This would entail a willingness to pay or non-market valuation survey of the Australian population, using leading non-market valuation researchers from Australia in conjunction with First Nations peoples. Special attention in a detailed CBA should also be given to future generations, again especially First Nations peoples. With these refinements included, further sensitivity testing should be undertaken, to see if the finding of the need for a longer time period of analysis continues to hold.

The more detailed CBA and the primary research of a willingness to pay or non-market valuation survey should form part of the Australian Government's initiation of the preparation of a strategic business case process. This process should be followed to ensure that the economic and financial aspects of the reforms meet the Australian Government's Investment Framework (Department of Finance 2021, 2006; OBPR 2020) as well as other state or territory related requirements (e.g. NSW Treasury 2017, 2018).

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