



**Recognising and Protecting Aboriginal Knowledge
Associated with
Natural Resource Management**

WHITE PAPER
For Office of Environment and Heritage, NSW

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Executive Summary

The purpose of the draft legislation is to effect a regime for protecting the rights in Knowledge Resources held by Aboriginal Communities in New South Wales. The draft legislation should be responsive to characteristics of these Knowledge Resources and the fact that Aboriginal Knowledge Resources are not adequately protected by existing legislation. The draft legislation would also provide a comprehensive system for dealing with issues relating to Knowledge Resources irrespective of who holds title to land; in particular, the traditional lands and waters of Aboriginal peoples. The proposed regime complies with international treaty obligations for which Australia is a signatory.

The draft legislation was created through a process of: analysing relevant treaties and laws from other countries that address similar issues; discussion and review of the legislative regimes by the Working Party to prepare a first draft; consultation with various Aboriginal Communities to obtain feedback on the first draft and preparation of the final draft from Aboriginal Community responses during the consultation.

This paper provides the background to the proposed draft legislation; including the treaties it complies with, its position in relation to other legislation and the social, environmental and cultural context in which it would operate. As Australia is party to the *Convention on Biological Diversity*, the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS)* to the *Convention on Biological Diversity* and the *United Nations Declaration on the Rights of Indigenous Peoples*, there are international laws to consider.

The benefits for New South Wales in adopting this legislation are addressed in this paper. Lastly, the report acknowledges the work of others who have considered how Aboriginal knowledge and cultural expressions might be protected and how the proposed draft legislation contrasts with their recommended approaches.

Chapter 1: Introduction

What are the concerns that this draft legislation is trying to address?

A major concern of Indigenous people is that their cultural knowledge of plants, animals and the environment is being used by scientists, medical researchers, nutritionists and pharmaceutical companies for commercial gain, often without their informed consent and without any benefits flowing back to them.¹

Often referred to as 'traditional knowledge', this special class of knowledge developed by Indigenous and local peoples around the world has received significant interest in several international legal spheres dealing with the environment, agriculture, health and medicines, intellectual property and trade. In particular, the Secretariat of the *Convention on Biological Diversity* has adopted the following definition:

Traditional knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, and forestry.²

As Stoianoff points out:

the use of the term 'traditional' is not intended to mean unchanging or static or based in the past, rather it refers to the way in which knowledge has been developed, transmitted and preserved within a community. Specifically, the term 'traditional' implies that the knowledge, or for that matter the cultural expression, is imbued with community social norms, customary laws and protocols, cosmology but also connection with the land, environment and location of that community in an integral sense. Importantly, it is necessary to recognise that this knowledge is dynamic, innovative and constantly responding or adapting to the needs of the community, their environment and sense of place."³

What is clear is that traditional custodians of land hold knowledge critical to conservation of biological diversity and natural resource management. While Australia has been slow to deal with formal recognition and protection of such Indigenous knowledge, despite its

¹Terri Janke, *Biodiversity, Patents and Indigenous Peoples* (26 June 2000) <<http://sedosmission.org/old/eng/JankeTerry.htm>>.

² Secretariat of the Convention on Biological Diversity, *Traditional Knowledge Information Portal, Background Material* <<http://www.cbd.int/tk/material.shtml>>.

³ Natalie P Stoianoff, 'Navigating the Landscape of Indigenous Knowledge – A Legal Perspective' (2012) 90 *Intellectual Property Forum* 23, 24-25.

international obligations, other nations and regions have developed significant regimes that recognise such knowledge as part of a living culture that requires access to country. The proposed legislation seeks to address this.

Further, the subset of Indigenous ecological knowledge has become increasingly recognised as a more effective means of managing the Australian landscape particularly since that knowledge has an holistic approach of understanding the seasons, biodiversity, land and water.⁴ An example is the managed burning practices of Indigenous peoples. Such knowledge and associated practices were ignored in Australia during the most part of the last century; to the detriment of the land resulting in extinctions of biodiversity due to wildfires that probably would not have occurred had the traditional land management practices been allowed to continue.⁵ Such attitudes have been changing and the knowledge of Indigenous Elders is being implemented more and more across Australia.⁶

Traditional knowledge is of significant spiritual, cultural and economic value not only to Indigenous and local communities but also to society at large including governments, research institutions and commercial interests.⁷ It is estimated that traditional medicines are relied on by up to 80% of the world's population for primary health care⁸ and there is evidence to suggest that approximately three quarters of the plants used in prescription medicine were originally used in traditional medicine.⁹ The use of traditional knowledge

⁴Commonwealth of Australia, *Caring for Our Country – Outcomes 2008-2013* (2008), 21, 31, 36-37, 39.

⁵ See the Parks Australia page on Uluru-Kata Tjuta National Park's Fire Management at <<http://www.environment.gov.au/parks/uluru/management/programs/fire.html>>.

⁶ For example, The Traditional Knowledge Revival Pathways (TKRP) and the Kuku Thaypan Fire Management Research project, in Cape York.

⁷ Susette Biber-Klemm and Danuta Szymura Berglas, 'Problems and Goals' in Susette Biber-Klemm, Thomas Cottier and Danuta Szymura Berglas (eds), *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives* (CAB International on behalf of the Swiss Agency for Development and Cooperation and the World Trade Institute, 2006) 3, 21; Graham Dutfield, 'Developing and Implementing National Systems for Protecting Traditional Knowledge: A Review of Experiences in Selected Developing Countries' (2000) *UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices*, 7; Krishna Ravi Srinivas, 'Traditional Knowledge and Intellectual Property Rights: A Note on Issues, Some Solutions and Some Suggestions' (2008) 3 *Asian Journal WTO and International Health Law and Policy* 81, 86.

⁸ Katrina Brown, 'Medicinal Plants, indigenous medicine and conservation of biodiversity in Ghana' in Timothy M Swanson (ed), *Intellectual Property Rights and Biodiversity Conservation: an interdisciplinary analysis of the values of medicinal plants* (Cambridge University Press, 1995), 201.

⁹ Jack Kloppenburg Jr, 'No Hunting! Biodiversity, Indigenous Rights and Scientific Poaching' (1991) 15(3) *Cultural Survival Quarterly* 14.

may therefore represent a large saving to companies engaging in pharmaceutical or agricultural research and development¹⁰ and as a result, there are cases where traditional knowledge has been appropriated and exploited through the practice of bio-piracy.¹¹ Bio-piracy is generally defined as the taking of biological resources and/or associated traditional knowledge from indigenous communities without their prior informed consent or the patenting of inventions based on such biological resources and/or associated traditional knowledge without any compensation.¹² The unique biodiversity of indigenous areas in Australia has often been unlawfully 'collected' through 'bio-prospecting', which results in no economic or 'in kind' benefits for Indigenous communities.¹³ This practice is not only offensive to many Indigenous people but it represents the continuing dispossession of these communities and can prevent them from engaging in industries based on their traditional knowledge.¹⁴ Protecting traditional knowledge benefits not only Indigenous and local communities but also the long-term economic security and sustainable development of nations.¹⁵

In addition, there is concern regarding intergenerational loss of knowledge about Country. This is not a new issue but rather a well-recognised issue that is cause for concern for the Knowledge Holders and their communities and the whole of humanity. This concern is borne

¹⁰ Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (South End Press, 1997), 11-16.

¹¹ Daniel F. Robinson, 'Traditional Knowledge and Biological Product Derivative Patents: Benefit-Sharing and Patent Issues Relating to Camu Camu, Kakadu Plum and Acai Plant Extracts' (April 2010) *Traditional Knowledge Bulletin: Topical Issues Series*; Stephen Gray, 'Vampires round the campfire' (1997) 22(2) *Alternative Law Journal* 60; Oliver Krackhardt, 'Beyond the Neem Tree Conflict: Questions of Corporate Behaviour in a Globalised World' (June 2005) 21 *New Zealand Universities Law Review* 347; Margo A Bagley, 'Patently Unconstitutional: The Geographical Limitation on Prior Art in a Small World' (2003) 87 *Minnesota Law Review* 679; Amanda J Landon, 'Bioprospecting and Biopiracy in Latin America: The Case of Maca in Peru' (2007) 22 *Nebraska Anthropologist* 63.

¹² Graham Dutfield, 'Developing and Implementing National Systems for Protecting Traditional Knowledge: A Review of Experiences in Selected Developing Countries' (2000) *UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices*, 8.

¹³ Virginia Marshall, 'Negotiating Indigenous Access and Benefit Sharing Agreements in Genetic Resources and Scientific Interest' (2013) 8/8 *Indigenous Law Bulletin* 14.

¹⁴ Henrietta Fourmile-Marrie, 'Developing a Regime to Protect Indigenous Traditional Biodiversity-Related Knowledge' (2000) 1 *Balayi* 163, 164; Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (South End Press, 1997), 14; Katie O'Bryan, 'The Appropriation of Indigenous Ecological Knowledge: Recent Australian Developments' (2004) 1 *Macquarie Journal of International and Comparative Environmental Law* 29, 32.

¹⁵ Henrietta Fourmile-Marrie, 'Developing a Regime to Protect Indigenous Traditional Biodiversity-Related Knowledge' (2000) 1 *Balayi* 163, 163.

out in the writings of scholars such as Chambers¹⁶, Shiva¹⁷ and Gupta¹⁸ and quantified by scholars such as Haruyama¹⁹ noting the impact of modern western knowledge on the loss of traditional ecological knowledge.

More importantly, the holders of cultural knowledge themselves are concerned about the very same issue as the younger generation is being educated away from Country and therefore spending less time on Country and losing their traditional language in which the culture and the knowledge is maintained through oral tradition.²⁰

Accordingly, there is a strong interest in documenting, recording and recovering knowledge, to make it available for future generations of community members. India achieved this through its Traditional Knowledge Digital Library,²¹ focussed on public domain knowledge in order to prevent inappropriate patents from being granted over such knowledge, and the Anthropological Survey of India. To ensure integrity of the knowledge is maintained, an holistic approach is essential and one that is in keeping with ethical research practices.

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) provides such a framework through its *Guidelines for Ethical Research in Australian Indigenous Studies* which 'are founded on respect for Indigenous peoples' inherent right to self-determination, and to control and maintain their culture and heritage'.²² Meanwhile, various communities are taking matters into their own hands and documenting their knowledge and culture through a variety of mechanisms including digital libraries.²³ In order for these efforts to be successful, communities will require ongoing funding to implement and maintain such databases. What may become necessary in the future is the creation of a

¹⁶ Robert Chambers, *Rural Development: Putting the Last First* (Longman Scientific and Technical, 1983).

¹⁷ Vandana Shiva, *Monocultures of the Mind: Perspectives on Biodiversity and Biotechnology* (Zed Books, 1993).

¹⁸ Anil Gupta, 'The Honey Bee Network: Voices from Grassroots Innovators' [1996] (Spring) *Cultural Survival Quarterly Spring* 57-60.

¹⁹ Takako Haruyama, *Nature of Traditional Ecological Knowledge Loss: A Quantitative Approach* (2004).

²⁰ Digital Learning Futures, *Listening to Wujal Wujal TOs* <<http://www.learningfutures.com.au/listening-wujal-wujal-tos>>.

²¹ CSIR & AYUSH, *About the Traditional Knowledge Digital Library* <<http://www.tkdil.res.in/tkdil/langdefault/common/Abouttkdl.asp?GL=Eng>>.

²² AIATSIS, *Ethics*, <<http://www.aiatsis.gov.au/research/ethics.html>>.

²³ For example the Jarlmadangah Cultural Mapping Program <<http://www.jarlmadangah.com/culturalmapping.html>>; and The Ara Irititja Project which has established a purpose built database for the Anangu people but is also assisting other Aboriginal communities to do the same <http://www.irititja.com/sharing_knowledge/index.html>.

complete digital library or linked libraries for the purpose of supporting protection and access regimes over Indigenous knowledge and cultural property.

But what of the appropriate terminology – to use in describing all the permutations and combinations of knowledge and culture relevant to the aims of the proposed legislation? This document refers to traditional knowledge, traditional ecological knowledge, Indigenous ecological knowledge and cultural knowledge. As will be examined in this White Paper, the expression ‘Knowledge Resources’ was coined, more specifically, ‘Aboriginal Knowledge Resources’, to acknowledge the holistic nature of what the draft legislation is trying to address. It is limited in jurisdiction to New South Wales as the project funded to develop the legislation was focussed on providing a regime that addressed the concerns of Aboriginal Communities in New South Wales. However, doing so does not exclude the possibility of utilising such a legislative regime as a model for other jurisdictions in Australia.

How is the draft legislation proposing to address it?

The draft legislation is designed to recognise and protect Aboriginal Knowledge Resources that are associated with natural resource management in New South Wales. This is in line with the Constitution of New South Wales which ‘acknowledges and honours Aboriginal people as the State’s first people and nations’²⁴ and

recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:

- (a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and
- (b) have made and continue to make a unique and lasting contribution to the identity of the State.²⁵

The draft legislation was formulated through a process of research and consultation. The initial consultation was with a working party that included Aboriginal peoples in their capacities as experts in diverse fields as well as being members of Aboriginal Communities and non-Aboriginal people representing research, pharmaceutical, government and legal

²⁴ *Constitution Act 1902 (NSW)*, s. 2(1).

²⁵ *Constitution Act 1902 (NSW)*, s. 2(2).

sectors. An explanation of the draft provisions and further consultation with Aboriginal Communities provided a community response to the draft legislative framework.

To better understand the origin and purpose of the draft legislation we consider the existing Australian laws, both state and Commonwealth, and the international treaties this proposed draft legislation would need to work with. We also consider what other Australian states and territories have done about providing legislation in their respective jurisdictions for protecting Aboriginal Knowledge Resources that are associated with natural resource management. Further, the historical impact of settler relations and contemporary issues for Aboriginal peoples in New South Wales that inform current responses to Aboriginal Knowledge Resources will be addressed. The diversity of Aboriginal communities is considered in the report so as to analyse the cultural heritage requirements of Aboriginal peoples within the traditional knowledge paradigm and how these needs will be met to satisfy community diversity.

Further, we discuss how the draft legislation complements other Australian reports and initiatives on protecting Aboriginal Knowledge Resources.

Chapter 2: Knowledge Resources and Legal Background

What are Knowledge Resources?

There are various forms of knowledge that have significance to Indigenous Peoples and that are recognised in international instruments. These include traditional knowledge and traditional cultural expressions. *Traditional knowledge* is defined by the World Intellectual Property Organisation (WIPO) as:

knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.²⁶

WIPO acknowledge the lack of an internationally accepted definition of the term. They identify traditional knowledge as occurring in diverse contexts including agricultural, scientific, technical, ecological, medicinal and biodiversity related.²⁷

Traditional cultural expressions are not expressly defined by WIPO but are identified as:

expressions of folklore that may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives...²⁸

Through discussions with Aboriginal Elders of the D’harawal peoples of NSW²⁹ and members of Gamilaroi communities it became apparent that at least in an Aboriginal context there is a need for a term beyond traditional knowledge and traditional cultural expressions to recognise the diverse body of knowledge that is unique to Aboriginal Communities. This knowledge embraces such knowledge described as traditional knowledge. It also embraces traditional cultural expressions that embody traditional knowledge. Aboriginal knowledge that needs to be protected is spiritual and reflects a deep understanding of land and water and how to care for it. The term *Knowledge Resources* has been adopted in this paper and in the draft legislation to identify the body of Aboriginal knowledge for which protection is sought.

²⁶ WIPO, *Traditional Knowledge* <<http://www.wipo.int/tk/en/tk/>>.

²⁷ Ibid.

²⁸ WIPO, *Traditional Cultural Expressions* <<http://www.wipo.int/tk/en/folklore/>>.

²⁹ Aunty Fran Bodkin and Uncle Gavin Andrews.

Legal background

Australia has signed treaty agreements that relate to protecting both the natural environment and the rights of Aboriginal peoples. These agreements include the *Convention on Biological Diversity* 1992,³⁰ the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* to the *Convention on Biological Diversity*³¹ and the *United Nations Declaration on the Rights of Indigenous Peoples*.³² The rights of Aboriginal peoples include rights in relation to the knowledge held by their communities as well as the expression of that knowledge through such things as objects, stories, art, songs and dance.³³

The Convention on Biological Diversity

The Convention on Biological Diversity 1992 (CBD) is an international treaty that recognises the importance of conserving the world's biodiversity and the potential for the sustainable use of biodiversity, socially, environmentally and economically.³⁴ Australia became a Party to the CBD on 18 June 1993.³⁵

The three objectives of the CBD are:

- (i) the conservation of biological diversity,
- (ii) the sustainable use of its components; and
- (iii) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.³⁶

³⁰ *Convention on Biological Diversity*, opened for signature 5 June 1992, 31 ILM 818 (entered into force 29 December 1993) <<http://www.cbd.int/convention/text/>>.

³¹ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* was adopted by the Conference of the Parties to the Convention on Biological Diversity at its tenth meeting on 29 October 2010 in Nagoya, Japan but is yet to come into force <<http://www.cbd.int/abs/about/>>.

³² *United Nations Declaration on the Rights of Indigenous People* GA Res 61/295, UN GAOR, 61st sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) <<https://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1>>.

³³ *Ibid* art 31.

³⁴ *Convention on Biological Diversity, Introduction* <<http://www.cbd.int/intro/default.shtml>>.

³⁵ *Convention on Biological Diversity, List of Parties* <<http://www.cbd.int/intro/default.shtml>>.

³⁶ *Convention on Biological Diversity*, art 1.

Before the CBD, genetic resources were considered the ‘common heritage of mankind’.³⁷ For Indigenous peoples in Australia, such ‘common heritage’ assumes the right to take and use all resources, however, this position dismisses the relationship and authority of Indigenous peoples’ inherent relationship with Country be it land or sea.³⁸ The exploitation of genetic resources to create new products was generally without regard for Aboriginal communities or from where the source material was taken. No tangible benefits were shared with Aboriginal peoples, or for the country or community providing the raw material. Often the traditional knowledge of Indigenous and local communities was used to develop commercialisation opportunities without providing benefits to communities.³⁹

Under the CBD, Australia is required to encourage an equitable sharing of benefits which arise from the use of the knowledge, innovations and practices of Aboriginal communities; and which embody traditional lifestyles relevant for the conservation and sustainable use of biological diversity.⁴⁰

The CBD recognises the “sovereign right” of Nation States over their natural resources, including genetic resources (Article 3). Australia is a recognised Nation State and as such international law considers that the authority to determine access to resources rests with the Australian government, subject to national legislation. State Parties are required to ‘endeavour to create conditions to facilitate’ access to these resources by other Parties to the CBD, but are free to determine whether to regulate access to some, all or none of their genetic resources.⁴¹

³⁷ The notion of common heritage of mankind is an ethical concept that finds that certain things should be freely available for all to use. However the work leading up to initiatives such as the CBD and the Nagoya Protocol clearly recognised that this position created an inequity for some of the world’s most vulnerable people and disregarded the intellectual property of Indigenous communities in their traditional knowledge. As discussed in Virginia Marshall’s ‘Negotiating Indigenous Access and Benefit Sharing Agreements in Genetic Resources and Scientific Research’ (2013) 8(8) *Indigenous Law Bulletin* 14, the situation with respect to water based resources has been more complex with the ‘common heritage of man’ perspective prevailing in some quarters and an international free for all beyond national waters prevailing in others under the *United Nations Convention of the Laws of the Sea* 1982 which does not adequately address scientific research.

³⁸ Virginia Marshall, ‘Negotiating Indigenous Access and Benefit Sharing Agreements in Genetic Resources and Scientific Research’ (2013) 8(8) *Indigenous Law Bulletin* 14.

³⁹ *ibid*

⁴⁰ *Convention on Biological Diversity*, art 8(j)

⁴¹ *Convention on Biological Diversity*, art 15

In Australia, each state or territory government manages access to biological resources within its jurisdiction, with each jurisdiction determining which, if any, genetic resources are regulated.⁴²

When access is regulated, users must obtain the informed consent of the Party providing the resource before accessing the genetic resource. Where access is granted, it must be provided on the basis of mutually agreed terms (by contract). The mutually agreed terms set out how benefits arising from the use of the genetic resource are to be shared.⁴³ However this process is inadequate for ensuring benefits accrue to Indigenous communities with inherent right to resources that are covered under this contractual arrangement. It cannot be understated that agreements made between Aboriginal communities and other parties must be diligent to craft the provisions and schedules to recognise and protect Knowledge Resources and the commercial and non-commercial benefits which should flow to Aboriginal peoples.⁴⁴ Overall consistency is problematic in Australia, and in particular New South Wales in the present context, for Aboriginal Communities.

The Nagoya Protocol

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (the Nagoya Protocol) is a supplementary agreement to the CBD. It provides a framework for implementing fair and equitable sharing of benefits arising out of the use of genetic resources.⁴⁵ The Nagoya Protocol was adopted on 29 October 2010 in Nagoya, Japan. Australia signed the Protocol in January 2012.⁴⁶

⁴² Section 51 of the Australian Constitution defines those matters over which the Commonwealth has powers, with other powers resting with the States under their respective constitutions.

⁴³ *Convention on Biological Diversity*, art 19.

⁴⁴ Virginia Marshall, Terri Janke and Anthony Watson, 'Community Economic Development in Patenting Traditional Knowledge: A Case Study of the Mudjulla TK Project in the Kimberley Region of Western Australia' 8/6 *Indigenous Law Bulletin* 19.

⁴⁵ *Nagoya Protocol*, art 1.

⁴⁶ *Convention on Biological Diversity, Status of Signature, and ratification, acceptance, approval or accession*, <<http://www.cbd.int/abs/nagoya-protocol/signatories/>>.

As well as genetic resources that are covered by the CBD, and the benefits arising from their use, the Nagoya Protocol covers traditional knowledge (TK) associated with genetic resources that are covered by the CBD and the benefits arising from its use.⁴⁷

The Nagoya Protocol addresses TK associated with genetic resources with provisions on access, benefit-sharing and compliance methods. Contracting Parties must take measures to ensure that access is based on prior informed consent, and fair and equitable benefit-sharing, keeping in mind community laws and procedures, as well as customary use and exchange.⁴⁸

Australia has yet to ratify the Protocol. The Australian Government has however released a model with respect to intended implementation of the Nagoya Protocol in Australia.⁴⁹ It appears that in terms of protecting genetic resources originating in Australia the Federal Government is satisfied that existing legislation is sufficient and any changes made to domestic law will not operate retrospectively.⁵⁰

A recent report into access and benefit sharing from an Australian perspective⁵¹ recognises the significant gap in protection under the state jurisdiction and the lack of legislation in most Australian states. Further, the report noted that existing obligations with respect to access and benefit sharing in Australia have so far yielded limited benefits. The report highlights the gap between research on a genetic resource and realisation of a commercial product; identified as a potential impediment to Aboriginal peoples successfully realising a benefit from permitting access to genetic and Knowledge Resources.

⁴⁷ *Nagoya Protocol*, art 3.

⁴⁸ *Ibid* arts 5, 7.

⁴⁹ Australian Government, Department of the Environment, *A Model for Implementing the Nagoya Protocol in Australia* (2014). Allens Linklaters, *Australia Releases Model for Implementing the Nagoya Protocol* <<http://www.allens.com.au/pubs/ip/foip8may14.htm>>. See also Australian Government, Department of the Environment, *The Nagoya Protocol – Convention on Biological Diversity* <<http://www.environment.gov.au/topics/science-and-research/australias-biological-resources/nagoya-protocol-convention-biological>>.

⁵⁰ *Ibid*.

⁵¹ Christian Prip, G Kristin Rosendal, Steinar Andresen and Morten Walloe Tvedt, *The Australian ABS Framework- A Model Case for Bioprospecting?* (2014) FNI Report 1/2014, Access and Benefit Sharing: The ABS Capacity Development Initiative.

The United Nations Declaration on the Rights of Indigenous People

The *United Nations Declaration on the Rights of Indigenous Peoples 2007* was adopted by the United Nations General Assembly in September 2007 and endorsed by Australia in 2009. As a declaration the document is not legally binding⁵² but it provides an internationally recognised standard that addresses long held grievances of Indigenous Peoples around the world with respect to serious mistreatment and disadvantage and recognises the need for affirmative action to address these wrongs. In particular the declaration recognises the need for actions to address human rights violations against Indigenous peoples, to combat discrimination and marginalisation and to realise the cultural, socio-economic and political aspirations of Indigenous Peoples.⁵³ Included within this framework Article 31 provides:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32 provides:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the

⁵² In international law a treaty or convention is legally binding on parties to it whereas a declaration or protocol does not have this status

⁵³ *United Nations Declaration on the Rights of Indigenous Peoples*, Preamble.

approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

WIPO draft agreements

The World Intellectual Property Organisation (WIPO) is creating its own agreements to provide an international legal framework addressing effective protection of traditional knowledge and traditional cultural expressions as well as genetic resources⁵⁴. There have been concerns with regard to the development of these agreements amongst Indigenous Communities.⁵⁵

The fate of these instruments is uncertain. If completed they may give rise to declarations which are non-binding or treaties which are binding on the parties that sign up to them. Thus the form in which these agreements are finalised is significant with regard to the impact they will have.

At present the WIPO instruments are still in draft form and rather complex due to the presence of alternative wordings and options and differing opinions of Nation States. However, the drafts relating to traditional knowledge and traditional cultural expressions each feature a limited number of articles that relate to key principles.

Many of these are common to the principles covered by the Nagoya Protocol but are not necessarily limited to the context of genetic resources.

These instruments deal with:

1. The definition of traditional knowledge, genetic resources and related terms;

⁵⁴ WIPO, *Intergovernmental Committee (IGC)* <<http://www.wipo.int/tk/en/igc/>>.

⁵⁵ See The Center for International Environmental Law, *The Gap Between Indigenous Peoples' Demands and WIPO's Framework on Traditional Knowledge* (September 2007) <http://www.wipo.int/export/sites/www/tk/en/igc/ngo/ciel_gap.pdf>.

2. What should be protected;
3. The scope of protection that should be available;
4. Obtaining approval to access genetic resources and/or traditional knowledge including the need for prior informed consent and agreement on mutually agreed terms with appropriate fair and equitable benefit sharing arrangements set in place;
5. Creation of databases of traditional knowledge;
6. Disclosure requirements;
7. Appointment of a national authority;
8. Dispute resolutions and sanctions;
9. Rights to continue traditional use;
10. Rights of use to deal with emergencies;
11. Education;
12. Development and dissemination of technology;
13. Interaction with other laws;
14. The question of commonly owned property both within Australia and across borders.

There are different Nation State opinions regarding how some issues from this list should be addressed, whereas in other instances there is reasonable consensus and it is the specific wording of provisions that remain to be resolved.⁵⁶

Which laws are appropriate?

Laws relating to biodiversity and to some extent access and benefit sharing can be found in particular Australian State and Commonwealth Acts.⁵⁷ As a result the law around access and benefit sharing in Australia is inadequate since not all states and territories have legislation

⁵⁶ WIPO IGC, *The Protection of Traditional Knowledge: Draft Articles*, WIPO Doc WIPO/GTRKF/IC/28/5 (2 June 2014) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=276361>; WIPO IGC, *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO Doc WIPO/GTRKF/IC/28/6 (2 July 2014) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=276220>.

⁵⁷ For example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Biodiscovery Act 2004* (Qld), *Biological Resources Act 2011* (NT).

in place and those states and territories that do have legislation in place have adopted different policy approaches. This situation could be addressed by drafting additional laws to fill the gaps in the existing legislation, however, this would not overcome the complexity and confusion arising from having multiple sources of legislation.

An alternative is to introduce stand-alone (also known as *sui generis*) legislation that deals exclusively with protecting Aboriginal Knowledge Resources that are associated with natural resource management. In terms of access and benefit sharing this would mean developing a single body of legislation that deals with these issues in Australia. The proposed draft legislation is focussed on New South Wales but could be implemented in other Australian states and territories or potentially as Commonwealth legislation (utilising the External Powers provision in the Australian Constitution).

There are arguments for and against adopting a stand-alone model. Advantages of this type of legislation include:

- this approach is supported by the Conference of the Parties to the CBD⁵⁸ and WIPO,⁵⁹
- this approach is encouraged by the United Nations Environment Programme through development of bio-cultural community protocols,⁶⁰
- stand-alone legislation is better suited to take into account needs and expectations of Indigenous and local Communities, protect integrity of traditional knowledge and prevent use that offends Indigenous and local Communities while encouraging acceptable use by third parties;^{60aa}
- stand-alone legislation provides an opportunity to include customary laws.

On the other hand stand-alone legislation:

⁵⁸ Convention on Biological Diversity, 'Conference of the Parties No. 8, Decisions VII/5 'Article 8(j) and Related Provisions'' <<http://www.cbd.int/decision/cop/?id=11017>>.

⁵⁹ WIPO General Assembly, *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 38th (19th Ordinary) sess, Agenda Item 28, UN Doc WIPO/GRTKF/IC/15/REF-DECISION 28 (22 September - 1 October 2009).

⁶⁰ United Nations Environment Program, *Bio-Cultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy* (October 2009) <<http://www.unep.org/communityprotocols/PDF/communityprotocols.pdf>>.

^{60aa} Chidi Oguaman, *International Law and Indigenous Knowledge: Intellectual Property, Plant Biodiversity and Traditional Medicine* (University of Toronto Press, 2006) 217-219

- “may hinder access to affordable knowledge goods”^{60a} and reinforce cultural divide between rights holders and rights users;
- may not provide the level of certainty desired by Indigenous people and stakeholders as there is a lack of consensus on the potential terms and the mechanism for enforcement;
- could result in a watering down of community rights such as Native title;
- may be limited by lack of international recognition and the nature of legislation;
- while going beyond intellectual property rights (IPR), is not prohibited by TRIPS⁶¹ it is uncertain how stand-alone laws, that function beyond IPR and provide different rights, will function in a world dominated by IPR.^{61a}

Australia so far

Australia is a biodiversity ‘hot spot’ and is increasingly being recognised for its potential as a source of food security, pharmaceutical and medicinal genetic resource, and industrial capabilities and know-how. The 1996 *National Strategy for the Conservation of Australia’s Biological Diversity* was developed to fulfil Australia’s obligations under the CBD and has since been replaced by *Australia’s Biodiversity Conservation Strategy 2010–2030*⁶².

Objective 2.8 of the *National Strategy for the Conservation of Australia’s Biological Diversity* provided the need to “ensure that the social and economic benefits of the use of genetic material and products derived from Australia’s biological diversity accrue to Australia”. The 2010-2030 Strategy recognises the significance of Aboriginal peoples’ engagement with biodiversity conservation, but as with the 1996 Strategy does not appear to recognise the need to protect the rights of Aboriginal peoples or to require that economic benefits from access and exploitation of Aboriginal genetic resources and the traditional knowledge that informs biodiversity conservation should be provided to Aboriginal peoples.

^{60a} J. Janewa OseiTutu ‘A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law’ (2011) 15(1) *Marquette Intellectual Property Law Review* 147, 154, 214.

⁶¹ Agreement on Trade Related Aspects of Intellectual Property Rights negotiated in the 1986-94 Uruguay Round of the World Trade Organisation General Agreement on Tariffs and Trade, introduced intellectual property rules into the multilateral trading system for the first time.

^{61a} Srividhya Ragavan, ‘Protection of Traditional Knowledge’ (2001) 2(1) *Minnesota Intellectual Property Review* 1, 26 quoting GRAIN (1997) *Signposts to Sui Generis Rights* <http://www.grain.org/publications/signposts.htm>.

⁶² Australian Government, Department of the Environment, *Australia’s Biodiversity Conservation Strategy 2010–2030* (2010) <www.environment.gov.au/resource/australias-biodiversity-conservation-strategy-0>.

The Commonwealth legislation dealing with access to genetic resources is the *Environment Protection and Biodiversity Conservation Act 1999* (EPBCA). Section 301 of the *EPBC Act* establishes a general framework for compliance and specific regulatory mechanisms on access to genetic resources. Further, s 301 states that ‘the regulations may provide the control of access to biological resources in Commonwealth areas’ and that the regulations may contain provisions on the equitable sharing of benefits arising from the use of biological resources; the facilitation of access; the right to deny access; the granting of access, and the terms and conditions of access. However, this framework only applies with respect to Commonwealth land. State jurisdictions do not have the regulatory framework established for the Commonwealth.

An Inquiry into Access to Biological Resources in Commonwealth Areas was initiated in December 1999. The result of the inquiry was a report containing recommendations on the creation of an ABS system. In order to establish a coherent legal framework Commonwealth, State and Territory Ministers constituting the Natural Resource Management Ministerial Council, endorsed the *Nationally Consistent Approach for Access to and Utilisation of Australia’s Native Genetic and Biochemical Resources* (NCA) on October 11, 2002.

The NCA sets general principles that must be applied when developing or reviewing ABS systems established within Australian jurisdictions. These principles include certainty, transparency and accountability for facilitating bio-discovery; sustainable use of biological resources; and equitable sharing of benefits.

Since existing ownership rights to native biological resources depend on whether they are found in Commonwealth, State or Territory government lands or waters, Indigenous lands, freehold or leasehold lands there are potential inconsistencies and gaps in how access and benefit sharing arrangements operate.

The *Environment Protection and Biodiversity Conservation Regulations 2000* (*EPBC Regulations*) governs access to biological resources in Commonwealth areas. These

regulations require an application to the Department of the Environment (formerly Department of the Environment, Water, Heritage and the Arts) for a permit to access biological resources of native species for research and development of any genetic resources, or biochemical compounds, comprising or contained in the biological resource. Under s 525 of the *EPBC Act*, Commonwealth areas are defined to include 'land owned or leased by the Commonwealth, the Australian coastal sea, continental shelf and waters of the exclusive economic zone'.

Access requires a permit only where access is sought for commercial or potentially commercial purposes and will require a benefit sharing agreement. The free prior informed consent of the owner of the land must be obtained, and where that land is land owned by Indigenous peoples the access provider is the owner of that land. A benefit sharing agreement must provide for the recognition, protection and valuing of any Indigenous peoples knowledge that will be used as part of the access and it must include statements regarding the use of the knowledge and benefits to be provided.

A model access and benefit sharing contract has been provided by the Department of Environment.⁶² In addition to a share in the revenue generated by the use of the genetic resources accessed, the model contract provides for the parties to identify benefits to biodiversity conservation and other non-monetary benefits in line with the *Bonn Guidelines on Access to Genetic Resources and Equitable Sharing of the Benefits Arising out of their Utilization*.⁶³

Where the access is for non-commercial purposes, the applicant need only obtain written permission from the access provider and supply a signed statutory declaration in accordance with the regulations including: stating that the applicant does not intend nor allow the collection to be used for commercial purposes, the party seeking access will report on the results of the research, and will offer a taxonomic duplicate of each sample to an Australian

⁶² Australian Government, *Commonwealth and Access Party Model Benefit-sharing Agreement* (2012) <<http://laptop.deh.gov.au/biodiversity/science/access/model-agreements/>>

⁶³ *Bonn Guidelines on Access to Genetic Resources and Equitable Sharing of the Benefits Arising out of their Utilization* <<http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>>.

public institution that is a taxonomic repository, and will not carry out any research for commercial reasons.

A record of permits that have been issued is provided on the website of Commonwealth Department, the majority of which have been for non-commercial purposes. In Australia's submission to the WIPO IGC in 2010, it was claimed that sixty three permits have been issued under the regulations and currently only seven Access and Benefit Sharing contracts completed for organisations engaged in commercial research, using the government's model contract.

Queensland and the Northern Territory both have legislation in place to deal with access to biological resources. The *Biodiscovery Act 2004* (Qld) does not consider the use of Aboriginal knowledge in its access or benefit sharing provisions, whilst the *Biological Resources Act 2011* (NT) covers both access to the biological resources and associated Aboriginal knowledge.

Challenges for Australia

Approaches to regulating access, benefit sharing, prior informed consent and recognition of traditional knowledge that have been adopted or proposed elsewhere need to be used with caution. The type of legal system in which particular forms of regulation have been created is one issue. Their ability to operate with existing Australian laws is another. Lastly, their suitability for addressing the needs of the diverse Aboriginal Communities of New South Wales and Australia is critical to achieve just outcomes.

It is imperative that Australia's regulation of these issues properly contextualises the relationships of Aboriginal Communities, their traditional lands, the resources derived from Aboriginal lands and waters, knowledge pertaining to the use and management of Aboriginal resources, expressions of that knowledge both tangible and intangible and the culture(s) to which that knowledge belongs. Importantly different communities may hold different views regarding how this knowledge may be used and protected. Correct identification of who is entitled to speak for country is needed. Understanding of what knowledge may or not be publicly shared or under what conditions it may be shared is also

important. An example of this is the adoption of male and female registrars in the draft legislation recognising that a single registrar cannot deal with both men and women's business.

At the same time, knowledge is not static and does not exist in a vacuum. The historic and contemporary relationships and conflict between Aboriginal Communities and other Australians has negatively impacted the continuation of Traditional Knowledge. Nonetheless Aboriginal Traditional Knowledge continues to develop. The term "Knowledge Resources" has been used to describe what the draft legislation protects in order to recognise that the term Traditional Knowledge is potentially inadequate to fully embrace the scope of the knowledge and its manifestations that should be entitled to benefit from the draft legislation.

Aboriginal Communities may differ in who they recognise as part of their community and in how Knowledge Resources are held in the community. For example, willingness to recognise Aboriginal peoples who are not traditional custodians of the lands on which a particular community reside but who look after those traditional lands, may vary between Aboriginal Communities.⁶⁴ The role of Knowledge Holders may also differ between Aboriginal Communities. For example, the extent to which the decision regarding granting access to Knowledge Resources requires endorsement beyond the Knowledge Holder or, may be at the discretion of the community or, its elders rather than the Knowledge Holder *per se*.⁶⁵

Why adopt this model legislation?

As discussed above, stand-alone legislation provides an opportunity to comprehensively address the issues that must be dealt with in order to create a regime that meets our obligations under international treaties. The focus of this draft legislation is New South Wales recognising that at present this state does not have a regime in place to address

⁶⁴ This observation is supported by comments made by participants in the Aboriginal Community consultations conducted as part of the research project that led to the draft legislation.

⁶⁵ Ibid.

these issues. The draft however may serve as a model for effectively dealing with these issues in other states as well as at a national level.

Benefits

Adopting this legislation will benefit Aboriginal Communities by providing formal recognition of their rights to their Knowledge Resources, their rights to control the use of those Knowledge Resources and the right to share in benefits arising from such use.

For the wider community the legislation provides a formal mechanism for dealing with Aboriginal Knowledge Resources and greater certainty regarding rights and obligations that arise when seeking to use Aboriginal Knowledge Resources. A formal mechanism for accessing Knowledge Resources and ensuring that the rights of Aboriginal Communities are respected in turn may enhance opportunities to create innovative products and methodologies for the benefit of the whole community. At a corporate level the legislation provides a clear mechanism for minimum standards of corporate behaviour to be realised through benefit sharing with Aboriginal Communities.

Case studies

The Chuulangun Aboriginal Corporation in Cape York, Queensland has a collaborative research project with researchers from the Quality Use of Medicines and Pharmacy Research Centre at the University of South Australia, examining the pharmacological activities of particular bush medicine plants. This research has produced joint academic publications, and two International Patent Co-operation Treaty Patent Applications, one in relation to anti-inflammatory compounds and the other for an anti-inflammatory extract. The inventors listed on the patent applications include an Elder from the Chuulangun community.⁶⁶ This case demonstrates the mutual benefits that can arise from effective regimes for engaging with Aboriginal Communities and their Knowledge Resources. In this case the Aboriginal Community has become a research partner to the University and are driving the research and commercialisation decisions. Commercial benefit sharing

⁶⁶ Natalie P Stoianoff, 'Navigating the Landscape of Indigenous Knowledge – A Legal Perspective' (2012) 90 *Intellectual Property Forum* 23.

arrangements are in place.⁶⁷ Thus both the University and the Chuulangun Aboriginal Corporation stand to benefit from successful commercialisation of the compounds that have been identified.

On the joint research front, the Tropical Indigenous Ethnobotany Centre within the Australian Tropical Herbarium is an Indigenous-driven initiative with Traditional Owners, the Queensland Government, James Cook University, and the CSIRO.⁶⁸ Its aim is 'to research, record and document cultural plant use and as a result keep traditional and cultural knowledge alive'⁶⁹ thereby answering one of the other concerns identified at the beginning of the paper, namely the interest in abating intergenerational loss of Indigenous knowledge.

⁶⁷ Chuulangun Aboriginal Corporation and University of South Australia <<http://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultation/chuulangun-aboriginal-corporation/>>

⁶⁸ Cairns: Australian Tropical Forest Institute at <<http://www.csiro.au/Portals/About-CSIRO/Where-we-are/Queensland/Cairns.aspx>>.

⁶⁹ Ibid.

Chapter 3: Cultural, Social, Environmental and Economic Context

Aboriginal Peoples of New South Wales

The traditional lands of more than 50 Aboriginal communities fall within the borders of New South Wales including the wide lands of the Wiradjuri and Gamilaroi peoples, small lands of the Dadi Dadi, Meru and Awabakal peoples and many in between.⁷⁰ Many Aboriginal communities represent smaller groupings including clans and language groups.

In 2011 it was estimated that the Aboriginal and Torres Strait Islander population of New South Wales was approximately 208,500; which accounted for 2.9 per cent of the overall population and over 3 per cent of the Aboriginal and Torres Strait Islander population of Australia. The median age of the Aboriginal and Torres Strait Islander population of New South Wales was 21.4 years compared to 38 for all other residents⁷¹. Whilst most Aboriginal peoples resident in New South Wales live in a major city, the proportion of Aboriginal peoples living in outer regional, remote and very remote areas is significantly higher than the proportion of all other residents living in these regions.⁷²

The 2011 census also reports significantly lower engagement with and completion of formal education,⁷³ elevated unemployment,⁷⁴ lower income,⁷⁵ reduced home ownership,⁷⁶ reduced

⁷⁰ New South Wales Health, *New South Wales Area Health Services Aboriginal Nations Map* <http://www.archi.net.au/__data/assets/pdf_file/0004/59422/Aboriginal_Nations_NSW.pdf>.

⁷¹ Australian Bureau of Statistics, *3238.0.55.001 - Estimates of Aboriginal and Torres Strait Islander Australians, June 2011* <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>>..

⁷² Ibid.

⁷³ Australian Bureau of Statistics, *2076.0 - Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011: Education*

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2076.0Main+features302011>>

⁷⁴ Australian Bureau of Statistics *2076.0 - Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011: Labour Force*

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2076.0Main+Features802011>>.

⁷⁵ Australian Bureau of Statistics *2076.0 - Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011: Income*

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2076.0Main+Features602011>>.

⁷⁶ Australian Bureau of Statistics *2076.0 - Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011 : Housing*

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2076.0Main+Features502011>>.

life expectancy,⁷⁷ and higher levels of health issues⁷⁸ for Aboriginal residents compared to non-Aboriginal residents. Although the relevant statistics have shown some improvement in comparison with previous censuses, differences persist.

Around thirty per cent of Aboriginal and Torres Strait Islander adults experience high levels of psychological distress. This is more than double the statistic for non-Indigenous Australians⁷⁹. These statistics highlight the significant issues that affect Aboriginal Communities.

Aboriginal Knowledge

Through the impact of government policies implemented since the time of European arrival, Aboriginal Communities have been denied the right to maintain contact with their traditional lands, their languages and their cultural practices. In New South Wales this assault on Aboriginal peoples has been deepened by the State's status as the place of first contact, and its relatively small land area;⁸⁰ and higher Aboriginal population than other states. These circumstances have led to generations of disenfranchisement and severe disadvantage.

While the present circumstances of Aboriginal peoples of NSW originated with the arrival and activities of Europeans there are ongoing policies and attitudes that have perpetuated disadvantage. Today effectively about 30 per cent of Aboriginal people live within the

⁷⁷ Australian Bureau of Statistics 3302.0.55.003 - *Life Tables for Aboriginal and Torres Strait Islander Australians, 2010-2012*

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookups/3302.0.55.003Media+Release12010>>.

⁷⁸ Australian Bureau of Statistics 4727.0.55.001 - *Australian Aboriginal and Torre Strait Islander Health Survey: First Results, Australia, 2012-13*

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4727.0.55.001main+features802012-13>>.

⁷⁹ Australian Bureau of Statistics 4704.0 - *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, Oct 2010*

<www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/3C18155D35250456CA2574390029C0E5>.

⁸⁰ Ranked fifth of Australia's states and territories and accounting for only about 10% of the land area of the country- see *Area of Australia's States and Territories* <<http://www.ga.gov.au/scientific-topics/geographic-information/dimensions/area-of-australia-states-and-territories>>.

boundary of 10 per cent of the state's land area and that land area also accounts for about 30 per cent of Australia's total population.⁸¹

Policies of segregation,⁸² removal⁸³ and assimilation⁸⁴ have all served as barriers to the unfettered expression of Aboriginal culture. Nonetheless many Aboriginal language groups have succeeded in keeping their culture and language⁸⁵. For Aboriginal peoples land and knowledge are inherently connected and access to traditional lands is an important aspect of cultural expression. However, the well-being of Aboriginal peoples is also connected to their cultural heritage; which requires a right of access to these lands and waters to collect bush medicines and foods and to conduct ceremonies, among other things.

Different Aboriginal Communities may have different views on the role of knowledge and how it is protected. The following explanation is provided by Aunty Fran Bodkin, a D'harawal Elder.

Knowledge in Aboriginal communities is not owned. It is held by Knowledge Holders who have earned the right to hold the knowledge they hold. It is common for knowledge to be held in pieces so that it is the collective knowledge of a number of Knowledge Holders. Some forms of knowledge are gender specific. Some knowledge can be readily shared within the community but other knowledge is secret and cannot be shared. Ultimately secret knowledge may be passed on to another person if the Knowledge Holder finds someone worthy to receive it. Otherwise that knowledge will pass from the Community's consciousness when the Knowledge Holder passes. However knowledge is never lost. It is in the land and there are Knowledge Gatherers within Aboriginal Communities who can draw out knowledge from their Knowledge from the land and from the Community. Misuse of knowledge is a significant wrong and responsibility for misuse rests with any Knowledge Holder who has passed the knowledge on to that person as well as the person directly responsible for the misuse. Knowledge is

⁸¹ World Population Review, *Australia Population 2014*
<<http://worldpopulationreview.com/countries/australia-population/>>.

⁸² *Aborigines Protection Act 1909* (NSW).

⁸³ *Child Welfare Act 1939* (NSW); *Adoption of Children Act 1965* (NSW), *Children (Care and Protection) Act 1987* (NSW).

⁸⁴ See *Aboriginal Societies: The Experience of Contact* at
[http://www.alrc.gov.au/publications/3.%20Aboriginal%20Societies%3A%20The%20Experience%20of%20Cont
act/changing-policies-towards-aboriginal](http://www.alrc.gov.au/publications/3.%20Aboriginal%20Societies%3A%20The%20Experience%20of%20Contact%20changing-policies-towards-aboriginal), [26].

⁸⁵ Creative Spirits, *Aboriginal Languages* <<http://www.creativespirits.info/aboriginalculture/language/>>. Creative Spirits estimate that 20 of an original 70 Aboriginal languages and dialects spoken in NSW are still in use today.

not static. It is influenced by interactions with other communities, by experience with use of the knowledge and by the process of regathering the knowledge when necessary.

Commercialisation of Knowledge Resources

There are already examples of Aboriginal Communities pursuing commercialisation of elements of their traditional knowledge. Three examples of commercialisation activities are provided.

The NSW Yaegl Local Aboriginal Land Council has a contract with Macquarie University to document medicinal plant knowledge and to identify plants with potential in treating antibacterial and antifungal infections. The contract provides for joint ownership and benefit sharing with respect to any commercialisation of the research.⁸⁶

Senior Elder of the Nyikina Mangala community and Professor Ron Quinn AM, leading global expert in natural product discovery and Director of Eskitis Institute, forged a ground-breaking equal partnership, the first of its kind in Australia, between the Jarlmadangah Burru Aboriginal community (JBAC) and Griffith University (GU) to develop an over-the-counter pain medication based on the 'Mudjala' plant. The development of an analgesic product, with no known side-effects, is based upon JBAC and GU equitably sharing the IP and jointly holding international patents to ensure exclusive market access and effect commercialisation outcomes.⁸⁷

Patents have now been registered in Australia, NZ, USA, Japan and India. The partnership is seeking to commercialise the extract in a gel base as an over-the-counter traditional medicine, which would have wide ranging analgesic applications. Topical gels may often be more appropriate for pain relief in the elderly, patients taking multiple medications, and people with post-operative pain.

⁸⁶ Macquarie University, *Unique Indigenous medicine project at Macquarie* (5 June 2008) <<http://www.international.mq.edu.au/globe/2008-23/research>>.

⁸⁷ Paul Marshall, 'Developing a traditional Aboriginal analgesic into an over-the-counter natural remedy' (2014).

JBAC anticipate benefits from royalty income when the product reaches the market, as well as the development of a new rural enterprise based on the harvest, processing and supply of the crude extracts. The latter holds the prospect of sustainable employment 'on country'.

A key ingredient in fostering this strong partnership has been the long-term commitment and guidance provided by the project coordinator, and legal advisors, who have worked pro bono for the community and established trust and cultural understanding.

In 2012 the Chuulangun Aboriginal Corporation in Cape York and the University of South Australia signed a collaboration agreement to commercialise an anti-inflammatory extract and compounds from *Dodonaea polyandra* known as uncha⁸⁸.

However, there are also examples of exploitation where individuals or companies have gained access to knowledge held by Aboriginal Communities and used it for their own benefit, without the communities' permission and without compensation. Examples include the patenting of a Kakadu plum extract by the US cosmetic company Mary Kay Inc.⁸⁹ and the exploitation of Indigenous products such as tea tree and macadamia nuts. It is this unfettered exploitation that this draft legislation seeks to address.

⁸⁸ Verity Edwards 'Healer, uni team up on bush medicine' *The Australian* (online) 19 September 2012 <www.theaustralian.com.au/higher-education/healer-uni-team-up-on-bush-medicine/story-e6frgcjx-1226476801233>.

⁸⁹ Robin Powell and Lindsay Murdoch 'Patent fight erupts over Kakadu plum' *The Sydney Morning Herald* (online) 4 December 2010

<<http://www.smh.com.au/national/patent-fight-erupts-over-kakadu-plum-20101203-18jud.html>>.

Chapter 4: Creating the draft legislation

Traditional custodians of land and waters hold knowledge critical to conservation of biological diversity and natural resource management. Australia has been slow to act in working towards formal recognition and protection of such knowledge, despite Australia's international obligations. Other Nation States have developed significant legislative regimes that recognise Aboriginal knowledge as part of a living culture that requires regulatory protection.

In 2012 the Indigenous Knowledge Forum (IKF) was formed, which initiated a dialogue to identify key elements of a legislative regime that will recognise and protect Indigenous knowledge that is linked with natural resource management. The IKF has also facilitated the engagement of Aboriginal Communities in this process. The first IKF forum provided an opportunity to look at experience in India with developing a similar regime for protecting Indigenous Knowledge in Australia. It also provided an opportunity to engage with Aboriginal Community members so as to enhance an understanding of the context of the Indigenous knowledge. The Forum considered how Indigenous Knowledge could be protected, and listened to Communities who had experience with sharing their knowledge, and discussed expectations and the concerns of Aboriginal Communities in relation to negotiating knowledge sharing arrangements. Participants from State and Federal Government Departments offered insights into the development of government policy and their perspective on knowledge resource regimes.

An outcome of this initial Forum was a commitment to draft a legislative regime to protect Aboriginal knowledge; with participant engagement in establishing a working party. Early discussions around that commitment identified the benefit of gathering further information on existing regimes established in other countries and undertaking Aboriginal Community consultations.

Funding provided by the Aboriginal Communities Funding Scheme of the Namoi Catchment Management Authority (now North West Local Land Services (NWLLS)) enabled valuable

research to be carried out in partnership with UTS, on behalf of the Indigenous Knowledge Forum.

The research project, *Recognising and Protecting Indigenous Knowledge associated with Natural Resource Management*, aims to:

1. Identify key elements of a regime that will recognise and protect Indigenous knowledge that is associated with natural resource management;
2. Facilitate Aboriginal Community engagement in the process of developing a regime;
3. Develop a draft regime that not only accords with the aims and goals of North West New South Wales Aboriginal Communities but acts as a model for its implementation across other regions in New South Wales (NSW);
4. Produce a discussion paper that would propose the draft regime and be distributed for comment;
5. Conduct community consultations to refine the draft regime into a model that could be implemented in NSW legislation
6. Finalising a 'White Paper' to be delivered to the Office of Environment and Heritage (NSW) (OEHS) by the UTS Indigenous Knowledge Forum and North West Local Land Services

The first phase of the research project

Firstly, a comparative analysis of the Nagoya Protocol and the three draft WIPO agreements was conducted to identify common provisions between the different agreements. In turn these common provisions provided a framework for the draft legislation.

The common provisions identified were:

1. Subject matter of protection, such as traditional knowledge, traditional cultural expressions and genetic resources
2. Definition of Key Terms

3. Scope – what is covered, respect for traditional ownership, respect for sovereignty over genetic resources, moral rights
4. Beneficiaries - who should benefit
5. Access - who speaks for Country, establishing a process for granting or refusing access; including 5a [Free]⁹⁰ Prior Informed Consent – to ensure Traditional Owners are aware of their legal rights and the type of agreements which exist to protect traditional knowledge
- 5b. Mutually Agreed Terms- to ensure the negotiated outcomes are fair and equitable for Aboriginal communities
6. Access to Benefit Sharing- how are benefits under the agreement shared, what types of benefits exist, processes to deal with technology transfer of Knowledge Resources, capacity building of Aboriginal communities
7. Sanctions and remedies- establishing processes to establish a penalty regime, a breach of the agreement and other available remedies
8. Competent Authority- to establish a body to oversee and administer the legislation, provide education support, offer model clauses, establish a Codes of Conduct, and databases
9. Where there is more than one Aboriginal owner- to have a process in place which would address and facilitate situations where traditional knowledge, cultural expressions, genetic resources are common to more than one Aboriginal group
10. Exceptions under the proposed legislative regime – health and environmental emergencies, traditional use by and between Aboriginal Communities, use for conservation purposes
11. Disclosure- information held about Aboriginal knowledge on access agreement registrations, restrictions on database usage, disclosure in intellectual property applications
12. Interaction with existing laws- to avoid conflict with other Australian laws
13. Recognition of requirements of other nations- mutual recognition of rights and ensuring compliance with obligations under treaties

⁹⁰ The Nagoya Protocol refers to prior informed consent while the United Nations Declaration on the Rights of Indigenous Peoples refers to free, prior informed consent. In this draft legislation the term free prior informed consent has been adopted to recognise of the Declaration of the Rights of Indigenous Peoples which requires that Indigenous peoples are to make decisions based upon Free Prior and Informed Consent.

14. Transitional provisions - dealing with existing agreements for access to Aboriginal traditional knowledge

Regional and national legislation in other countries relating to traditional knowledge and genetic resources was examined by using the common provisions, to categorise the types of provisions and to create a database of information on these legislative regimes. Various instruments reflected a number of the common provisions whilst others covered only a few. The most comprehensive legislative responses came from Brazil, Costa Rica, Ethiopia, Peru, India, Kenya and South Africa.

Working party engagement

The information gathered to this point of the project was presented to a Working Party that had volunteered to be involved in drafting the model law and examining the how the common provisions would complement the requirements of Aboriginal Communities in NSW. The Working Party included Aboriginal Community Elders and Aboriginal peoples from different Aboriginal Communities as well as other participants from various backgrounds such as lawyers, NGOs, academics and participants with experience in the development of similar laws in other countries.

The Working Party examined the research material and discussed how these materials could be used in drafting the legislative framework. The Working Party undertook the analysis of the common provisions by teleconference and through face to face meetings. Minutes and supporting documents were prepared at each stage of the review to reflect upon the progress achieved. It should be noted that some participants may characterise their involvement as that of an observer than an active participant in this process and the named participants should not be regarded as necessarily endorsing the final form of the draft legislation.

Participants in the Working Party are: Aunty Fran Bodkin, Uncle Gavin Andrews, Barry Cain, Simon Munro, Chris Celovic, Patricia Adjei, Dr Virginia Marshall, Gerry Turpin, Professor

Natalie Stoianoff, Dr Ann Cahill, Daniel Posker, Francis Kulirani, Evana Wright, Gail Olsson, Judith Preston, Dr Michael Davis, Associate Professor Subramanyam Vemulpad, David Harrington, Omar Khan, Nerida Green and Gail Pearson.

Consultation with Aboriginal communities

A discussion paper was prepared and included the proposed model legislation. The discussion paper was presented at the various venues where consultation took place with Aboriginal Communities. The consultation stages of the research project was conducted in June 2014 by Professor Natalie Stoianoff, Dr Ann Cahill, Evana Wright and Dr Virginia Marshall, in Tamworth, Gunnedah, Walgett, Moree and Narrabri, located in the North West of New South Wales. The aim of the consultative process was to provide Aboriginal communities with an opportunity to discuss and critique the draft legislation.

The draft paper drew various comments from Aboriginal Communities. These comments are reflected in the draft legislation for New South Wales to recognise and protect Aboriginal Knowledge that is associated with Natural Resource Management and presented in this report. The draft presented to the Aboriginal Communities was not formatted in the way proposed legislation is normally formatted. Rather, a simple numbering system based on the 14 draft provisions was provided for community consultations. The Aboriginal Communities consulted were advised that the provisions may require reorganisation and rewording to formulate the final draft; and to reflect not only their comments but those of other Aboriginal Communities consulted, including other submissions received.

The discussion paper was made available through the Indigenous Knowledge Forum website (www.indigenousknowledgeforum.org) which enabled the broadest distribution of the material nationally, and to encourage further submissions. Some additional comments on the discussion paper were received. A copy of the original discussion paper can be found in Appendix 1.

Chapter 5: Aboriginal Community Consultation process and outcomes

Meetings and participants

Meetings took place within the NWLLS between 16 and 20 June 2014 and were organised by the NWLLS. There were four meetings conducted and the number of participants varied between 1 and 12. The meetings were also attended by the consultation team members. The consultation team included two local Aboriginal people employed by NWLLS and OEH and a practising Aboriginal solicitor from Sydney.

Themes emerging from the meetings

The following is a summary of the themes emerging from the meetings. The comments presented here are not intended to be direct quotes but rather a summary of the point made unless a particular participant is identified by number and the comment appears in quotation marks. In some instances what a particular participant had to say is reproduced fairly closely but not as a direct quote. The summary includes observations that relate to the consultation process as well as to the draft legislation. Important background observations that explain attitudes towards the draft legislation are also included.

Consultation process

Importance of not constraining the discussion: there are many issues that impact on the views held by Aboriginal communities to the issues addressed in the draft legislation that community members wished to discuss (meetings 1-4).

Explanation of the consultation process and draft legislation: needs to be clearly provided before initiating the informed consent process as well as providing a clear statement regarding the issues the draft legislation cannot address. There was a lot of frustration here and cynicism regarding what the consultation and draft legislation would achieve (meeting 3).

Participant 9 - *How can we sign something for our knowledge, to protect our knowledge, when really we're not ... not even human beings in our country, so really we got no rights ... we're not recognised in the Constitution as the first Australians, as the real Australians ...*

Other issues that have impacted community reaction to the draft legislation

The overall reaction to the draft legislation and its attempt to address particular rights Aboriginal peoples are concerned about appeared to be positive. However this positive reaction was tempered by cynicism of both the process and potential outcomes because there is a history of ‘fly in and fly outs’ by a cross-section of departments, bodies, researchers, individuals and others that visit Aboriginal communities. This has negatively impacted Aboriginal communities in the past and at present through what is referred to as ‘consultation fatigue’.

Participant 13 About 25 years ago they went around doing the same sort of thing talking about artefacts, trying to stop people doing them and stuff and we signed stuff but if you go down to Darling Harbour or wherever, the airport, all you see is Chinese or Japanese didgeridoos made of pipe so how much real power have we got with this?

The issues identified as impacting community responses were:

- Experience with native title claims and land rights (meetings 1, 2, 3 and 4)
- Misuse of organisations intended for the benefit of Aboriginal peoples (meetings 1, 2, 3 and 4)
- Office of Environment and Heritage –NSW (OEH) reforms (meetings 1, 3 and 4)
- Fracturing of the community, particularly in the eastern part of NSW in “good farming country” (meetings 1, 2 and 4)
- Need for the wider community to respect Aboriginal culture and protect sacred and heritage sites (meetings 1, 2 and 4)
- Coal Seam Gas (CSG) exploration damaging Country (meetings 1, 3 and 4)
- Water rights (meetings 1 and 4)
- Anger and hurt over the way Aboriginal peoples have been mistreated since the arrival of Europeans (meetings 1 and 3)
- Concerns held by community that the consultation meetings may include people who are not from the community being consulted (meetings 2 and 3)
- CSG impact on community (meeting 2)
- Need for constitutional recognition of Aboriginal peoples as Australian (meeting 3)

- NSW Government local decision making initiative⁹¹ (meeting 3)
- Cotton farming (meeting 3)
- Misuse of artworks (meeting 3)

Participant 1: *You had to have a permit to go to town. My father had a permit. You could only go to town after six o'clock at night.*

Participant 3: *We don't know the language from our areas 'cause if we did practice language we were separated from family and taken off the missions and that.*

Participant 2: *There are Acts coming on line now ... and reform to the Land Rights Act that go a long way to explain the fractured nature of New South Wales ... especially over this side of the mountain- e.g. good farming country, basically they've taken it off us first and then how do you reintroduce that culture to the knowledge holders or the knowledge holders reintroduce it to our community ... you see it down family lines, that's usually the main way but we are still in a process of actually still trying to regain some of that culture.*

Understanding the purpose of the legislation

Aboriginal communities provided a range of discussion that reflected their understanding of the draft legislation and the following themes emerged:

- There is a need to make sure the draft legislation uses plain language so that it is easily understood by communities (meeting 1).
- It would be helpful to make it clear where provisions are directed towards Aboriginal Communities and where they are directed towards third parties (meeting 1).
- It is important to avoid prescriptive language where possible, to acknowledge self-determination (meeting 1).
- It is helpful to ensure that Aboriginal Communities are provided with the context in which particular terms and provisions occur in the draft legislation to avoid pre-judging how the provisions might be interpreted (meeting 2).

⁹¹ OCHRE is the NSW Government Plan for Aboriginal Affairs. One of its features is a local decision making process for Aboriginal Communities. It is intended to provide more control for Aboriginal Communities over government services in their Communities. See *Local decision making* <<http://www.aboriginalaffairs.nsw.gov.au/local-decision-making/>>.

- It is important to make sure that it is understood that further detail will be covered in implementing regulations. It is important that Aboriginal communities are involved in formulating the regulations rather than government drafting the regulations without consultation. Therefore time, funds, consultants, supporting documentation and community meetings to formulate these regulations need to be provided (meeting 3).
- The draft legislation needs to include a preamble that recognises Aboriginal peoples of NSW as the First Peoples of NSW with their own laws, customs and practices that contribute to their cultural well-being. The source of Aboriginal knowledge is the land itself and this needs to be recognised. The preamble also needs to recognise the diversity among Aboriginal communities; from far remote to remote to rural and urban communities (meeting 3).

Participant 1: “You need to make it a lot simpler or a lot of people won’t understand what you are talking about”.

Connection to culture and Country

The relationship between the Aboriginal peoples of NSW, their cultural heritage and Country emerged as an important issue when discussing the draft legislation with Aboriginal communities. This relationship informs the context in which many of the provisions would operate with respect to what Knowledge Resources are, how they exist in Aboriginal Communities and their significance for Aboriginal Communities. The spiritual significance of knowledge for Aboriginal peoples and the responsibilities attaching to knowledge and its use must be respected. However the history of European interaction with Aboriginal peoples has significantly impacted the opportunity for Aboriginal peoples to live on their Country and express their culture. This in turn has affected responses to the draft legislation.

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

NSW, as the first contact state, has experienced a significant negative impact upon Aboriginal culture and heritage through foreign-based legislation. The lack of recognition of the negative impact of ongoing colonisation has resulted in limited opportunity for Aboriginal Communities whose traditional lands are within the state of New South Wales to claim native title and maintain a

Participant 1: “NSW is unique as it is the first contact state...”

As European appropriation of land, water and resources increased Aboriginal communities were moved off Country and into missions and other locations. These events have perpetuated dislocation as Aboriginal peoples are forced to travel to larger rural and urban regions in search of jobs, housing and healthcare which may take them off Country. Access to services is also unsympathetic to Aboriginal culture as Aboriginal people are forced to use particular regional services that reflect NSW government regional management but disregard their relation to traditional lands. For example, health care service management can mean that pregnant mothers are forced to use maternity services outside their traditional lands because a health service map says they must attend a particular hospital. This means these mothers experience child birth and their children are born off country, circumstances that reflect a significant lack of cultural sensitivity.

Practice of traditional language was disrupted by children being removed from their families and placed in missions. Many Aboriginal peoples, for example, were not permitted to practice tribal language; and were subject to curfews (meeting 1 and 3).

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

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

In NSW disconnection of Aboriginal peoples from their culture is a significant issue and this affects understanding of connection to Country, maintaining Aboriginal laws and traditional knowledge. However there are Aboriginal peoples within communities who do maintain connection to Country and continue to fulfil their role and responsibilities of traditional custodians (meeting 1).

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

It is important to protect sites and artefacts so that younger community members can be taught. We need to be able to access our traditional lands to do that (meeting 1).

Water sources and the connection to such resources and the cultural landscape for Aboriginal peoples needs to be recognised. Water contamination at one site has impact over a wide region. Land and life depends on water. (meeting 1).

Participant 3: “If we fix the river up, we’ll save our kids”

It is important to understand and protect resources, how they should be used, how they should be respected (meeting 1).

Non Aboriginal Australians focus on geography not on creation (meeting 1).

Dismissal of Aboriginal knowledge as mythology has been a problem in at least some quarters (meeting 1).

There is a process for being permitted on country if not of country- you need to get permission (meeting 2).

Knowledge includes use of introduced plants (meeting 2).

Some secret knowledge can’t be written down (meeting 2).

Communities have the problem that in the past Aboriginal people have been actively told to forget their knowledge so the task of gathering back that knowledge is a challenge for Aboriginal communities. Sometimes this requires access to property that is now privately held (meeting 3).

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

Knowledge is held in pieces, and used for community benefit but knowledge itself is kept secret and then passed on down family lines (meeting 4).

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

“Our blood is in the land.” Participant 3

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

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

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

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

Participant 14- “State conservation areas was a new area that was formed under national parks so that a gas company can go in and bore a hole but we as Aboriginal people can’t go in and pick up a stick.”

Defining Aboriginal Communities

This was probably one of the most contentious issues during the consultation. It relates to a definition appearing in Provision 2. There is a tension between continual connection to Country, displacement (both voluntary and involuntary), active participation in community

and identification with community to attract benefits. From the position of defining beneficiaries from an Aboriginal Community it was recognised clearly that Aboriginal peoples descended from the traditional custodians of the land who live on Country are part of the Community and have a right to benefit from granting access to knowledge. There are differing views however regarding the rights of those not descended from the traditional custodians of the land who live on Country but there is at least some consensus that Aboriginal people who live in and actively participate in the Aboriginal Community should have right to benefit from granting access to knowledge. Although the original draft legislation included recognition of Aboriginal people descended from the traditional custodians of the land who live off Country, the consultation does not appear to have embraced this section of the community as having rights within a particular Community. What emerges is a need for some flexibility for Aboriginal Communities to determine who should benefit in sharing monetary and non-monetary benefits. In contrast, there appears to be a clear recognition within Communities that the right to speak for Community should be held by Aboriginal community members descended from the traditional custodians of the land.

Participant 1: “The issue about who is a traditional person and who isn’t a traditional person is a national issue but more so in New South Wales where there are a lot of people getting around saying ‘I am a traditional owner’... a lot of people don’t know what a traditional person is or who a custodian of country is, whether it is through connection or legally proved connection. It’s a big issue, emerging I think. There’s some people around here arguing over rights to be a traditional owner. They think there is some big benefit in being a traditional owner.”

Participant 5- “I think Native Title has more or less started all the traditional owners because everyone is going for the claim as being the traditional owner so since Native Title it’s been traditional owners this traditional owners that... that’s what I use now in any general discussions- it’s custodian”.

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

Participant 7- “we are really just caretakers of country”

In meeting 2 the question of who are the Elders of an Aboriginal community was also raised by some participants. Participants said words to the effect that some people think they are Elders just because they are old. Some people claim to be part of the community but they come from somewhere else. They are not descended from the traditional custodians of these lands. Some people claim a say with regard to knowledge when they have never even walked the land or claiming to be elders based on age and using that title to dominate others. Loss of use of language has affected this community.

In meeting 3 it was observed that the diversity of Aboriginal communities and the way they interact with each other needs to be recognised. Each community may have a different way of doing things and the regulations need to provide for community protocols to govern how communities make decisions and interface with this legislation.

Meeting 3 also observed that those not descended from traditional country should be included in the definition of community because Aboriginal people have been moved around so much. Even if not descended from traditional custodian Aboriginal people in country still care for country. However when it comes to speaking for country those who are descended from the traditional custodians of the land should be deferred to.

Participant 11 – “In NSW people have been moved around so much... People that are here take care of country even if they are not traditional custodians in the legal definition of the term.”

Participant 14 said words to the effect that if you are not descended from the traditional custodians some will say you don’t have rights even if you have lived in the community for a long time but some elders recognise that it is what you do for community that is important.

Rights to knowledge

Rights are expressed by provision 3. The discussion around this provision focussed on the importance of access to traditional lands and the need to understand that knowledge resources are not just about plant knowledge. It was also emphasised that the rights under consideration have never ceased to exist and that preservation of these rights is paramount.

Participant 4: “It’s inherent, we have never lost our sovereignty.”

Participant 4: “[marine life] are sitting on the water rights of those particular Aboriginal Communities..... It’s not just plants.”

Meeting 3 observed the need for access to traditional land in order to protect knowledge and culture for future generations.

The question of whether an agreement should be reviewed if there is a change in the recipient was also canvassed in relation to past experience with changing entities on gas and mining agreements.

Participant 14- “Some people are good to work with and some are not and that’s the problem with not just in our community but Australia wide. Some people will sell out for a piece of pie because they are not fully aware of all the other things that come in to play and the beauty of some of the communities now is that the younger ones have gone away and gotten educated and have come back to help the older ones understand what is happening in their communities.”

Beneficiaries under an Access to Benefit Sharing Agreement

Beneficiaries are dealt with in provision 4. Overall the reaction of the meetings to the clauses outlining beneficiaries were positive. There were a few comments on this topic in meeting 2 where community expressed some concerns; and meeting 1 identifying that some communities might disagree with the provision because the question of whether benefit should extend to all Aboriginal people in a particular community or only those descended from traditional custodians or descendants of traditional custodians and those actively involved in caring for Country was viewed differently in different communities. Whereas the working party recognised descendants of traditional custodians living outside the Community as potential beneficiaries this view does not appear to have been shared by the participants in the consultation meetings.

The view was expressed that the definition provided in the draft may be contentious in some communities.

Participant 1: “It may or may not be [acceptable] depending on who you ask. Some people wouldn’t agree with it.”

In meeting 2 the importance of ensuring that remote rural communities maintain rights to their knowledge and the benefits flowing from granting access to it rather than their rights being diluted by claims from wider communities without direct connection was raised. The view was expressed that these communities are typically disadvantaged in terms of access to services and therefore need to maintain access to undiluted benefits. The importance of empowering local people was mentioned.

There were various comments made throughout the consultation by way of explaining how community should be defined.

Participant 3 - "Diverse mob of people from country to country but also community to community."

Participant 3 - "It is about our ties to that community... if someone comes to live with us now...they were taken through our rules and explain what our rules mean... you couldn't go here you couldn't go there."

Participant 3 - "All been stolen from our traditional lands."

Participant 3 - "Every one of us has inherent responsibilities and obligations."

Participant 6 - "Even if someone is connected to Coonabarabran and they haven't been back for years, they make them walk on the land to get used to it again before they can work on it."

Participant 7 - "Called re-connecting to country."

Access to Knowledge Resources

Access is dealt with in provision 5 and highlights the concepts of free prior informed consent and mutually agreed terms to allow or deny access. The discussion of the access provisions revealed issues for the Communities consulted around who speaks for knowledge. The question of a knowledge holder passing on without passing their knowledge was also raised.

The need to earn access to knowledge and the need to respect knowledge that should not be passed was emphasised in meeting 1.

Consultation by knowledge holders with the community regarding granting access is necessary (meetings 1, 2 and 3).

Participant 10 "Will the knowledge holder be told how it's going to be developed?"

The importance of protecting knowledge holders was stressed.

Participant 10 “I think that’s an important part of this would be legislation. There are unscrupulous people.”

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

At the same time it was recognised that knowledge holders have obligation to community. There should be an obligation to give correct information- where the wrong person is consulted or a person gives incomplete/inaccurate information this can cause problems. Elders need to be consulted in the decision making process.

Participant 3: “It’s about communal ownership. It’s not about a single person.”

Participant 6 “They still have to go back to the community before the decision is made”

Participant 8 “They still got to come back to the people anyways. They can’t just go off and do it”

Participant 10 “well in this room today we are saying it’s the Elders”

There is a need for Regulations to allow the decision making process to reflect community needs. Needs of one community may be different from those of another community (meeting 2).

There is a need to support Aboriginal Communities in deciding whether to grant access. The potential for a local level of the Competent Authority to provide that support was discussed (meeting 3).

It is important to recognise that younger community members may have some knowledge but they might not have the right to speak for that knowledge resource. There needs to be flexibility to accommodate how this is treated in each community.

Participant 11 - “We find we need lawyers in between us and the mining company or you know a university or someone else who is very well educated and got a lot of resources behind them.”

It is important to make sure that what goes on the register with respect to access agreements does not divulge confidential information. Use confidentiality agreements to protect information is desirable. It is important to bind competent authority officers to confidentiality (meeting 1).

Use of the term “permit” is inflammatory- need to be clear about what this is and who it applies to (meeting 1).

Participant 1: “My father had to have a permit to go to town one time don’t forget.”

Land Council should not be in charge of community benefits under this regime (meeting 3)

Management of knowledge where a Knowledge holder passes on was discussed.

Participant 14 – “What if a knowledge holder passes away but has not given permission for anyone else to have that knowledge to anyone else in their line? It just stays there? [yes- response from a consultation team member] It doesn’t take long for somebody to pick up where someone has left off. For example people not necessarily knowledge holders who have been shown things and pass that on to their children, they see what’s out there. Knowledge is passed down one way or another and some of the younger generation than myself are fully aware of the medicinal plants and foods and bush foods and that and I know that they are showing their children so at the moment which is good and it has opened their eyes.”

Concepts of Benefit sharing

Benefit sharing is dealt with in provision 6. Overall response to the benefit sharing provisions was positive. Key areas of concern relate to the need to allow Aboriginal Communities to make their own decisions about the form of benefit they should receive and how the benefits should be distributed. The importance of guarding against loss of benefits was also noted.

Benefit sharing provisions should not be prescriptive. Communities are diverse. Community should have right to determine how benefits are shared- according to the relevant community’s protocols. Community needs to be able to make an informed decision as to how the benefits should be received (meeting 1 and 4).

Where there is no agreement there needs to be a fall-back position to avoid benefits not being utilised- communities need to consider what their fall-back position should be (meeting 1).

Aboriginal peoples being acknowledged, receiving recognition is an important benefit under the regime (meeting 1).

Concern about sharing benefits with other communities where there is common knowledge-sharing should only be with nearby communities (meeting 2).

You need to protect what you have an obligation to protect- how the community utilises benefits depends on what the community needs (meeting 3).

We need to build capacity of community to come together and make these decisions recognising years of disadvantage, health issues, etc. (meeting 3).

Participant 11 – “There’s needs to be some development for the community to be able to make those decisions fairly too. You know, you’ve got to take into account the years of disadvantage and loss and sickness and the community needs to come to a stage of health which they gradually will presuming this is all in place to make those decisions well as well.”

In here you are saying when knowledge resources are common to more than one community the benefits will be shared so this competent authority has to be the main body that controls every bit of knowledge that comes from all communities in NSW [they need to have access to it] that would be a big database We have a lot of people who are knowledge holders but if this is going to be maintained where does it come into? Government is cutting back on a lot of things (meeting 4).

Participant 2: “You need a fall-back situation if the parties can’t agree... in my view it should go back into a community trust and then it’s up to the community... they’re not arguing about who it’s going to but how it’s going to be used”.

Participant 2: “Acknowledgement... the person using it actually saying where it come from...because Aboriginal people don’t get acknowledgement.”

Participant 9 “whatever you do and whoever you give it to keep it away from the Lands Council”

Participant 14-“Government puts out closing the gap, sets up Medicare locals everywhere else. They are going to be gone in another 6 months. Aboriginal workers that work there they are going to be gone. We have lost a couple up here through OEH the cultural heritage division. Their jobs were gone. We negotiated for those jobs but bang they just took them.”

Sanctions and remedies under the proposed regime

Sanctions and remedies are dealt with in provision 7. Overall the regime for sanctions and penalties outlined in the draft appeared acceptable to the Aboriginal Communities participating in the consultation. There was however some scepticism around enforcement (meeting 4). For the most part the comments provided on this provision by the Aboriginal Communities consulted related to modifications to better suit the needs of Aboriginal Communities including extending the time for taking action and ensuring that there is an appropriate authority to hear these matters. The concept of including a criminal penalty was raised in meeting 4.

The 12 year period for taking action may not be long enough for community (meetings 1 and 3).

Who will be hearing the matter? There is a need for cultural sensitivity in those hearing the matter with sensitivity to the relevant community (meeting 2 and 3).

A tribunal could be useful (meeting 2 and 3).

Mediation needs to be used carefully. There may be times when sending matters straight to mediation will not produce the desired result (meeting 1).

Provision 7.15 is unnecessary (meeting 1)

Need for penalties to be a serious deterrent against abuse (meeting 2).

Guidelines for community impact statements are needed (meeting 3).

There should be a criminal liability (meeting 4).

Participant 4: “You might need to go and have a discussion first. Some people when they are so hot under the collar going and throwing Aboriginal communities into mediation just makes matters worse.”

Competent Authority

The competent authority is dealt with in provision 8. For the most part concerns focussed around what form the competent authority would take, how it would be funded and what would happen if it were wound up. The example of ATSIC and funds going into consolidated revenue was raised. The need for the competent authority to include a local administrative level was a common theme. There was also a call for the competent authority to be independent of existing bodies.

The competent authority needs to be independent of existing structures relating to native title etc. How is it going to be funded? (meeting 2, 3 and 4)

Ensuring Aboriginal representation is important (meeting 2 and 3).

Different tiers to the authority are needed to provide for local engagement. Community involvement is important. Involvement of younger people in the process would be good (meeting 2).

Defining boundaries for local competent authority would be important (meeting 3).

Avoiding loss of databases and benefits if the Competent Authority dissolves is important. It is important to specify what happens if the Competent Authority dissolves. It was suggested that funds in the Competent Authority should be distributed within a prescribed period and that consideration should be given to vesting provisions. Knowledge should go back to community it came from (meeting 1 and 4).

Concern was expressed regarding the Competent Authority holding databases (meeting 3).

The need for an appeal process was raised (meeting 1).

In relation to assessing validity of access agreements the need to avoid “tick box” situations was raised (meeting 1 and 3).

Register of access agreements is important (meeting 3).

Participant 4: Assessing validity needs to be more than just tick a box. To my mind it's about the principles and how you got to that decision.”

Participant 3”I am worried that this will get incorporated into OEH stuff”

Participant 13 “They will water it down”

Participant 4 “Their working party is non-Aboriginal”

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

Multiple “owners” of a Knowledge Resource

Provision 9 deals with circumstances where more than one Community has a claim to a particular Knowledge Resource or, or where no owner is found.

The question of what should happen where no “owner” is identified was considered problematic. There was no clear agreement on what provision 9.1 should look like but there was clearly strong debate about the relevance of the provision. It was concluded that this was an alternative form of provision 9.3 from an earlier draft and that 9.1 should be deleted since the relevance of a provision relating to a lack of ownership was questionable (meeting 1).

Concern was expressed that there could be family vendettas involved in the decision making process about access so agreement wouldn’t be reached and a community might miss out on benefits because one group of family members wanted to prevent another group from getting benefit. However the situation where there might be dire consequences for one group if knowledge was disclosed /shared was also recognised as a problem. There may be need for an arbitration process or objection procedure to be heard by the Registrar to ensure that disputes can be resolved but access can be prevented where disclosure would be harmful to one or more communities (meeting 2).

Participant 1: I think that could be reworded a fair bit.”

Participant 5 “This could cause a big stink”

Participant 5 “But I agree if it’s for protecting a community”

Participant 5 “We can work through problems

Participant 14- “This will happen a lot.”

Exceptions to the proposed regime

Exceptions are dealt with in provision 10 and relate to permitted use for particular purposes such as environmental protection and in emergencies. For the most part there was little indication of specific problems with the exceptions provisions. At meeting 2 a number of observations were made.

The possibility of unrelated communities having input into or using local cultural knowledge as a consequence of these provisions was seen as a problem (meeting 2).

Importance of water to Aboriginal Communities was raised in terms of environmental protection provisions (meeting 2).

Potential for this provision to be useful in giving communities access to funding was observed (meeting 2).

Databases

Databases are addressed at provision 11 and deal with both confidential and non-confidential information. A common concern was about abuse of databases both public and confidential and the information that is held on the record.

In the past information on databases has been abused (meeting 1 and 3)

Participant 13 "You are going to have all this knowledge in one spot and it's only got to get in the wrong hands of someone"

Participant 11 "[this community] have had problems with the AIMS register being on the internet"

There are ethical issues with regard to what has been published and put on databases so far (meeting 1 and 2)

Knowledge holders have a responsibility to protect the knowledge. Senior lawmen and women need to decide what should go in the database. There is a need for sensitivity around who says what should go in a database (meeting 1 and 2).

Importance of local database for knowledge resources (meetings 3 and 4)

Protocols need to be established around how databases and information in them are used.

This is important with respect to patent office use too (meeting 1 and 2)

Who is viewing the database(s) should be visible (meeting 1)

There is a need to ensure CA employees must keep confidentiality (meeting 2).

Knowledge holders' database needs to be locally held because the list of holders would change over time (meeting 3).

Participant 11 "That would be changing all the time so it needs to be locally held"

Participant 3: "All them accesses in the process should be visible as well."

Participant 14- "It's similar to what we're doing at the moment. ... If people want to see that information or find that information then they also have to come to us and discuss it. ... So as we go through you've got to have a certain sort of clearance to get what you need so that's why if this works that way then these people would all have to get permission to get the knowledge. ... there are a lot of medicinal and food plants, bush tucker plants ..."

Hierarchy of laws

Provision 12 deals with the relationship between this and other legislation. The only substantive discussion was in meeting 3 which considered it important that the proposed legislation should not be undermined by other laws.

Participant 1: "That will require a lot more input."

Other nations

Provision 13 deals with recognising the requirements of other nations. No issues were raised.

Transitional provisions

Transitional provisions are described in provision 14 and outline how to respond to agreements made before the legislation would be enacted. There were no concerns raised by the consultation in relation to the transitional provisions.

Community was interested in being able to use this to address some past acts that they are not happy about (meeting 3).

Participant11 “There would be a backlog of stuff to deal with”

Procedural considerations

Informed consent

At meeting 1 the oral version of informed consent was used with one participant signing a written consent.

At meeting 2 the oral version of informed consent was used in the beginning but most participants did sign a written consent. One male participant did not provide informed consent and as far as possible his comments have been quarantined from this analysis.

At meeting 3 the oral form of informed consent used. Some written consents were received.

At meeting 4 a written consent was executed.

Discussion materials used during meeting

At meetings 1, 2 and 3 a power point presentation was used alongside the discussion paper to work through the draft and the background to it. At meeting 4 the discussion paper only was used and the participant requested the consultation commence with the draft legislation, on the basis of being familiar with the background to the draft legislation.

Chapter 6: Critique of the project and proposed legislation

The scope of Aboriginal community consultation

Limitations on available resources have necessarily constrained the scope of consultation with Aboriginal Communities in the north-west of New South Wales. The views reflected in this paper therefore do not necessarily coincide with the views of all Aboriginal Communities within this state. Ideally other Aboriginal Communities should have the opportunity to discuss the proposed legislation.

The draft legislation was primarily constructed through a process of analysing available legislation in other jurisdictions. Due to resource limitations this process relied upon particular databases and their available content at the time of analysis. There may be other legislation that is also relevant to this draft but that was not considered as it was not included in the database.

The Working Party members who volunteered their time to participate in the preparation of the draft legislation reflect a diversity of expertise and this has assisted the drafting process. Not all members were able to attend every meeting, however communications were regularly shared through emails and teleconferencing.

Other approaches

The approach adopted in the draft legislation is a focus on the relationship between Aboriginal Knowledge Resources and natural resource management, with a view to drafting a regime for New South Wales. Some of the other states have developed their own regimes for addressing issues relating to some of the issues covered by the various treaties Australia has signed. There are also particular instruments that operate at a Federal level that are relevant to these issues. The draft legislation addresses a gap in New South Wales law; and potentially in the laws of other states and territories.

The themes explored within this paper are not unique. Experts such as Terri Janke have made significant contributions to this area⁹². There have also been government initiatives at the Federal level such as IP Australia's Dreamshield project which showcases Aboriginal peoples' use of intellectual property systems such as the partnerships between Jarlmadangah Burru Aboriginal Community and Griffith University⁹³ and Finding the Way Consultation⁹⁴ which examines the assumptions underpinning intellectual property protection and their relevance to Aboriginal peoples. This consultation is being undertaken with a view to understanding whether existing intellectual property laws need to be amended to adequately protect Aboriginal Knowledge.

Rationale for the current proposal

The previous work of other individuals and interest groups raises the question: why is there a need for this draft legislation? A response would be that other research has generally focused on existing Australian legislation, particularly those designed to protect various forms of intellectual property. However regimes that protect intellectual property typically require an identified "creator" of the relevant property and typically offer only a limited period of protection. These features are inconsistent with the nature of Knowledge Resources and the protection that is required for them. Thus existing intellectual property laws are inappropriate for protecting Knowledge Resources. A further consideration is that Knowledge Resources may have elements that are already fairly well known and this in turn may impinge on their suitability to be protected under a patent. Where an Aboriginal Knowledge Resource comprises of secret knowledge, disclosure through patenting or publication would be inappropriate.⁹⁵

⁹² See for example Terri Janke, *New Tracks: Indigenous intellectual property* (2012), *ICIP rights and policy* (2012), *Beyond Guarding Ground* (2012), *Writing up Indigenous Research* (2012) <<http://terrijanke.com.au/index.php/publications/>>

⁹³ IP Australia, *Dream Shield* <<http://www.ipaustralia.gov.au/understanding-intellectual-property/ip-for-business/indigenous-business/dream-shield/>>.

⁹⁴ IP Australia, *Have your say on Indigenous Knowledge* <<http://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultation/have-your-say/>>.

⁹⁵ Virginia Marshall, Terri Janke and Anthony Watson, 'Community Economic Development in Patenting Traditional Knowledge: A Case Study of the Mudjulla TK Project in the Kimberley Region of Western Australia' (2013) 8/6 *Indigenous Law Bulletin* 19.

The draft legislation follows key provisions of existing and proposed international treaties that Australia needs to or will need to satisfy. Thus this proposed legislation is consistent with the international context in which Australian legislation needs to operate. As *sui generis* legislation, it is consistent with prevailing views regarding appropriate legislative strategies for protecting traditional knowledge and has capacity to embrace unique rights.

Finally the draft seeks to provide a regime that is responsive to the needs of Aboriginal Communities by providing a framework that protects their Knowledge Resources and their right to determine how and when they are commercially exploited. At the same time the draft legislation provides scope for self-determination in articulating how the legislation would be specifically implemented in each Aboriginal Community.

It should be noted that as a result of the consultations, the numbering system from the Discussion Paper version to the one contained in this document has changed.

Chapter 7: The Draft Legislation and accompanying explanations

Preamble- Recognising the arrival and impact of the British and subsequent migration on Aboriginal Peoples of New South Wales, their Knowledge, and their connection to Country

During the consultation the views expressed by the participants were frequently underpinned by reference to the context in which this Act would operate. This context comprises the ongoing disadvantage experienced by Aboriginal peoples as well as challenges faced within communities and in their interactions with non-Aboriginal groups. Many stories were shared, emphasising the importance of connection to Country, cultural heritage and spiritual and physical well-being. These contributions are recognised throughout the preamble.

Aims

The legislation aims to achieve a number of outcomes for the benefit of Aboriginal Communities and Country. With regard to (h), this aim would be effective in Commonwealth legislation. In terms of NSW state legislation this concept could only be captured in terms of the Act presenting a deterrent to filing unauthorised patents and through the Competent Authority, for example, having a role in opposing the grant of unauthorised patents.

Preamble- Recognising the impact of European arrival on the Knowledge and connection to Country of Aboriginal Peoples in New South Wales

Aboriginal peoples are the First Peoples of New South Wales. Many Aboriginal peoples are from diverse language groups, with their own unique laws, customs, practices and heritage.

The connection of the Aboriginal peoples in New South Wales to their traditional lands was substantially impacted by the arrival of the British First Fleet and the Western and European convicts, settlers and migrants who followed thereafter. As New South Wales was the first colonised region, Aboriginal peoples have suffered substantial and ongoing disruption to their long held Aboriginal sovereignty and the connection with their traditional lands, waters and resources. This has led to human suffering that was exacerbated by government and

non-government policies that forcibly removed Aboriginal peoples from their families and cultural relationships.

In many cases Aboriginal peoples have been frustrated in their efforts to reassert their connection to their traditional territories. Nonetheless the laws, customs and culture of Aboriginal peoples still exist and are integral to their cultural, spiritual and physical well-being. Aboriginal laws, customs and culture include traditional knowledge that is held within Aboriginal communities, and ancestral creation stories.

Today, Aboriginal communities include those who are descendants of the traditional custodians of the land on which they reside, as well as Aboriginal peoples who are descended from the traditional custodians of other lands. Aboriginal peoples who are not descended from the traditional custodians of the land on which they reside may still be engaged in caring for Country. These communities reside in diverse circumstances from far remote to rural and urban environments.

This complex history creates different challenges for Aboriginal communities – for example in decision making processes, exercising access to resources and access to a broad range of services. The diverse composition and circumstances of Aboriginal communities needs to be recognised in statutory law that acknowledges and ensures the legal rights of the Aboriginal peoples in relation to their traditional knowledge which is defined in the Act as Knowledge Resources.

Aims of the Act

This Act aims to:

- (a) promote respect and protection of Knowledge Resources for Aboriginal Communities;
- (b) promote the fair and equitable distribution of the benefits derived from the use of Knowledge Resources;
- (c) promote the use of Knowledge Resources for the benefit of Aboriginal Communities, Knowledge Holder and Country;
- (d) ensure that the use of the Knowledge Resources is with the free prior informed consent of Knowledge Holders and of their respective Aboriginal Communities;

- (e) promote the strengthening and development of Aboriginal Communities to use customary laws and practices and to share and distribute benefits generated under this Act;
- (f) promote protection of Country and resources on Country;
- (g) promote connection with Country for Aboriginal people for their cultural and spiritual well-being;
- [(h) to prevent patents being granted for inventions made or developed from Knowledge Resources of Aboriginal Communities without clearly identifying the rights of Aboriginal Communities to such Knowledge Resources.]

Section 1- What the Act relates to

Section 1 explains the purpose of the Act, why it is necessary and the situations it applies to. Essentially this would recognise that Aboriginal Communities have a right to protect their Knowledge Resources, determine who can use them and the requirements to approve or reject use, and provide a process for benefit-sharing that will flow to Aboriginal Communities. The section also provides for moral rights in relation to Knowledge Resources. 'Moral rights' as a legal concept exist in many countries, including in Australia, in relation to copyright materials and provide the authors of such material the right to be attributed as the author, the right that someone else should not be falsely attributed as the author, and the right of integrity (or, in other words, the right to not have the work treated in a derogatory manner). It is intended that moral rights in this Act would have the same meanings and scope, as far as is relevant to Aboriginal Communities and their Knowledge Resources, as they do in Part IX of the Copyright Act 1968 (Cth) for authors and their copyright works.

The community consultation gave rise to clarifying amendments to the proposed provisions and enhanced the reference to, and the interrelationship between, knowledge, culture, Country and the spiritual, cultural and physical well-being of Aboriginal peoples.

Section 1- Purpose of this Act

Knowledge Resources

(1) This Act relates to Knowledge Resources of Aboriginal Communities.

The Rights of Aboriginal Communities over their Knowledge Resources

(2) Aboriginal Communities have the inherent right to maintain, control, protect and develop their Knowledge Resources;

(2A) Aboriginal Communities have certain moral rights in a Knowledge Resource:

- (a) The right of attribution; and
- (b) The right against false attribution; and
- (c) The right of integrity.

(3) Rights identified in subsection 1(2) and (2A) are not transmissible by assignment, by will, or by devolution by operation of law.

(4) The protection provided by this Act may not be interpreted in such a way as to impede the preservation, use and development of Knowledge Resources in an Aboriginal Community.

(5) Aboriginal communities that create, hold or preserve Knowledge Resources have the right to:

- (a) prevent unauthorised persons from:
 - (i) the use or carrying out of tests, research or investigations relating to Knowledge Resources; and
 - (ii) the disclosure, broadcast or rebroadcast of data or information that incorporates or constitutes such Knowledge Resources; and
- (b) derive benefit from economic exploitation by authorised persons of Knowledge Resources held by the Aboriginal Community as provided in this Act.

(6) Any person using or commercially exploiting a Knowledge Resource shall ensure that their activities conform to this Act.

(7) Subject to the provisions of Section 9 of this Act, an Aboriginal Community may access prescribed Country for the purpose of managing that Aboriginal Community's Knowledge Resources.

Section 2. Definitions of key terms used in the Act

To ensure that key terms used in the legislation are explained in clear and plain language, a glossary has been provided to explain the meaning of those terms. The glossary also includes an explanation of Aboriginal concepts. During the consultation the concepts that generated significant debate were the definition of an Aboriginal Community, the concept of a Competent Authority and the definition of who speaks for Knowledge Resources on Country. The definition of Aboriginal Community was a contentious issue because of past experiences in Aboriginal Communities such as colonisation methods forced upon Aboriginal peoples and the appropriation of lands and waters by the Crown. Another issue raised in the consultations is where Aboriginal people may not be descended from the traditional custodians of the land but seek to claim participation in decision-making.

Section 2. Definitions of key terms used in this Act

(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

Aboriginal Community means a group of Aboriginal People connected by where they live and/or ancestry and includes descendants of the traditional custodians of Country who continue to reside on Country, descendants of the traditional custodians of Country who no longer reside on Country and Aboriginal peoples who reside on Country but are not descendants of the traditional custodians of Country.

Access Agreement means a written agreement entered into pursuant to subsection 4(8) and containing provisions that address the matters listed in subsection 4(12).

Access Approval means such written approval or certificate granted by the Competent Authority in accordance with the regulations to this Act.

Benefits include those monetary benefits and non-monetary benefits described in subsections 5(4) and 5(5) respectively.

Benefit Sharing means a process whereby an Aboriginal Community receives monetary and/or non-monetary return for sharing Knowledge Resources under a written agreement approved by the relevant Knowledge Holder(s).

Competent Authority means the organisation responsible for administering this Act and regulations under this Act and is independent of other authorities. The Competent Authority will include representatives of Aboriginal Communities and provides for local, regional and state administration of this Act.

Country refers to the lands and waters of New South Wales including marine territory of New South Wales.

Cultural Expressions include music, dance, songs, stories, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and **narratives**.

Free prior informed consent means a procedure through which the Knowledge Holder(s) of a Knowledge Resource in one or more Aboriginal Communities receive full and open disclosure of all relevant information prior to making contractual negotiations and entering into a written agreement.

Genetic resource means genetic material of a biological resource containing genetic information having actual or potential value for humanity and including its derivatives;

Knowledge Holders means members of Aboriginal Communities entrusted with responsibility for Knowledge Resources of the Community;

Knowledge Resource(s) means bodies of knowledge held by Aboriginal Communities relating to the use, care and understanding of Country and the resources found on Country. Knowledge Resources include cultural heritage, traditional knowledge and traditional Cultural Expressions, as well as manifestations of Aboriginal sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. Knowledge resources include 'law knowledge' and 'cultural knowledge' of an Aboriginal Community and knowledge of observing ecological

interactions between plants, animals, medicines, foods and seasonal cycles which relate to genetic resources. Genetic resources may exhibit different properties in different locations and environments.

Mutually Agreed Terms (MATs) means terms and conditions on which both parties agree under a written agreement to ensure the Access and Benefit Sharing (ABS) process is effective, transparent, and legally binding. Mutually agreed terms set out the way in which the contracting parties and third parties can obtain access or permission to collect, study, or commercially use Knowledge Resources.

Person has the meaning ascribed to it in section 2C of the Acts Interpretation Act 1901 (Cth).

Prescribed Country means Country that is prescribed in the regulations to this Act.

Prescribed court means such court as is prescribed in the regulations to this Act.

Prescribed tribunal means such tribunal as is prescribed in the regulations to this Act.

Registered Knowledge Resource means a Knowledge Resource that is contained on a register maintained by the Competent Authority.

State means the state of New South Wales.

Use includes any of the following acts:

(a) Where the Knowledge Resource is a product:

- (i) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or
- (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.

(b) Where the Knowledge Resource is a process:

- (i) making use of the process beyond the traditional context; or
- (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or

(c) When the Knowledge Resource is used for research and development leading to profitmaking or commercial purposes.

Section 3. Beneficiaries

The section sets out who should be entitled to claim a benefit under an Access Agreement. It also recognises that part of the responsibilities of Aboriginal Communities to preserve, develop and manage their Knowledge Resources for the benefit of future generations requires access to Country. However, such access is regulated under other legislation administered by the Office of Environment and Heritage and hence the need for prescription.

Section 3. Knowledge Resources and Beneficiaries

(1) The custodianship of a Knowledge Resource is vested in the Knowledge Holder(s) of the Aboriginal Community holding the Knowledge Resource.

(2) A Knowledge Resource protected under this Act is communal property held by the Aboriginal Community that is a custodian for the Knowledge Resource and not an individual person or persons within that Aboriginal Community, even if only one member of the Aboriginal Community holds that Knowledge Resource.

(3) Subject to Section 5(2) of this Act, any Benefits derived from use of a Knowledge Resource shall be for the benefit of the Aboriginal Community that holds the Knowledge Resource.

(4) A Knowledge Resource may be held by two or more Aboriginal Communities and each Aboriginal Community that holds the Knowledge Resource is entitled to benefit from use of the Knowledge Resource.

(5) Aboriginal Communities may preserve, develop and manage their Knowledge Resources for the benefit of future generations and shall be permitted access to Prescribed Country for this purpose.

Section 4. Access to the Knowledge Resource(s)

Where a person seeks to use a Knowledge Resource then the initial step is that access must be approved by the relevant Knowledge Holder(s). Prior to the negotiation stage a process for full disclosure of the project, identifying business interests (directors, business registration in Australia or other) and its purpose in seeking access and use of Aboriginal Knowledge Resources and the intention to enter into a formal agreement, enables an Aboriginal Community to give free prior informed consent. It is important to ensure that the Aboriginal Community has access to independent legal advice to assist them to formalise their rights, maintain confidentiality of information, determine terms and conditions, and establish community benefits that are fair and equitable in the draft agreement and final document.

In view of community consultations reference has been included to each Community having the right to say who should provide prior informed consent beyond relevant Knowledge Holder(s). The exclusion of confidential information from the Access Agreement register was also recognised as important.

Section 4. Access - who speaks for Knowledge Resources and the process for granting or refusing access

- (1) Access to a Knowledge Resource requires free prior informed consent of the Aboriginal Community holding the Knowledge Resource.
- (2) Aboriginal Communities have the right to regulate access to their Knowledge Resources including:
 - (a) the right to give free prior informed consent for access to their Knowledge Resources;
 - (b) the discretion to refuse access where the intended access is deemed by the Aboriginal Community as detrimental to the integrity of their cultural or natural heritages;
 - (c) the discretion to withdraw or place restriction on the free prior informed consent if the Aboriginal Community determines the access to be detrimental to their socio-economic life or their natural or cultural heritage;

(3) A party seeking to use a Knowledge Resource must apply to the Competent Authority for a determination as to whether permission of one or more Aboriginal Communities must be obtained for access to the Knowledge Resource to be granted.

(4) A determination may be made by the Competent Authority based on databases of Knowledge Resources held by or accessible to the Competent Authority.

(5) A request for access must be made by the Competent Authority to the relevant Knowledge Holder(s).

(6) The relevant Knowledge Holder(s) must be part of the decision making process in the Aboriginal Community regarding whether access is to be granted.

(7) Free Prior informed consent must be provided to the Competent Authority by the Aboriginal Community and the relevant Knowledge Holder(s) in order for access to be granted.

(8) Access to a Knowledge Resource requires written Access Approval granted by the Competent Authority based on free prior informed consent of the Aboriginal Community and the relevant Knowledge Holder(s) and an Access Agreement evidencing that free prior informed consent to access has been granted on mutually agreed terms.

(9) A person may apply to the Competent Authority to search its registers to determine whether any Registered Knowledge Resources exist in relation to specified subject matter.

(10) The regulations may provide for the types of searches that a person may request the Competent Authority to perform pursuant to subsection 4(9).

Mutually agreed terms

(11) An Aboriginal Community shall receive a fair and equitable share from any Benefits arising out of the use of a Knowledge Resource accessed.

(12) An Access Agreement shall include the following:

- (a) the identity of the party or parties to the agreement;
- (b) the description of the Knowledge Resource to be accessed under the Access Agreement;
- (c) the coordinates of the locality of the Knowledge Resource and/or Genetic Resource;

- (d) the intended use of the Knowledge Resource;
- (e) the relationship of the Access Agreement with existing or future Access Agreements on the same Knowledge Resource;
- (f) the benefits for Aboriginal community from granting access to the Knowledge Resource;
- (g) the duration of the Access Agreement;
- (h) a dispute settlement process; and
- (i) the obligations the Knowledge Resource recipient shall have under this Act.

(13) A person who is permitted to access to a Knowledge Resource shall have the following obligations:

- (a) To show the Access Approval upon request;
- (b) deposit a description of the Knowledge Resource accessed with the Competent Authority;
- (c) submit regular status reports on the research;
- (d) inform the Competent Authority in writing of all the findings of the research and development based on the Knowledge Resource accessed;
- (e) not to transfer the Knowledge Resource to any other third party or to use for any purpose other than specified in the Access Agreement;
- (f) An Access Approval is not permitted to be transferred to third parties;
- (g) not to apply for a patent or any other intellectual property protection over the Knowledge Resource without the permission of the Aboriginal Community;
- (h) ensure attribution of the Aboriginal Community from which the Knowledge Resource was accessed in any oral or written material;
- (i) share the benefit that may be obtained from the use of the Knowledge Resource accessed with the Aboriginal Community;
- (j) respect all relevant laws;
- (k) respect the cultural practices, traditional values and customs of the Aboriginal Community holding the Knowledge Resource;
- (l) observe the terms and conditions of the Access Agreement.

(14) Sufficient details of an Access Agreement to identify the Access Agreement shall be entered in a register kept by the Competent Authority and no confidential information shall be included in this register.

Section 5. Benefit sharing

As well as defining who should receive benefits it is important to identify what those benefits should be.

Community consultations revealed the importance of Aboriginal Communities having flexibility to decide what benefits should be comprised of and how they should be distributed within the Aboriginal Community. However, where there is more than one Community entitled to benefits, there may need to be a guideline or formula prescribed for the Competent Authority to exercise in the process of distribution.

Section 5. Benefit sharing

(1) Aboriginal Communities shall receive fair and equitable Benefit(s) under an Access Agreement.

(2) The Benefit(s) are to be applied to the collective benefit of the Aboriginal Community and Country.

(3) An Aboriginal Community may establish a process according to their Community protocols or laws for determining what Benefit(s) should be part of an Access Agreement and how they will be distributed amongst members of the Community.

(4) Monetary Benefit(s) may include, but not be limited to:

- (a) Access fees/fees per sample collected or as specified in the agreement;
- (b) Up-front payments;
- (c) Milestone payments;
- (d) Royalties;
- (e) License fees;

- (f) Research funding;
- (g) Joint ventures;
- (h) Employment opportunities;
- (i) Joint ownership of relevant intellectual property rights.

(5) Non-monetary Benefit(s) may include but not be limited to:

- (a) Sharing of research and development results;
- (b) Collaboration, cooperation and partnership in research and development programmes;
- (c) Participation in product development;
- (d) Collaboration, cooperation and partnership in education and training;
- (e) Transfer to beneficiaries of knowledge and technology that makes use of the Knowledge Resource;
- (f) Access to products and technologies developed from the use of the Knowledge Resource;
- (g) Capacity building within the Aboriginal Community;
- (h) Resources to strengthen the capacities for the administration and enforcement of access regulations;
- (i) Contributions to the local economy;
- (j) Research directed to priority needs;
- (k) Provision of equipment, infrastructure and technology;
- (l) Protection of Country.

(6) Where Knowledge Resources are common to more than one Aboriginal Community the Benefit(s) shall be shared by those communities. Where no particular Aboriginal Community can be identified as the source of a particular Knowledge Resource, then Benefit(s) shall be paid to the Competent Authority and the Competent Authority shall be responsible for distributing those Benefit(s) to Aboriginal Communities of New South Wales in a prescribed manner within the prescribed period.

(7) The Competent Authority shall provide technical and legal support to Aboriginal Communities in negotiating Benefit Sharing arrangements and/or an Access Agreement on request.

Section 6. Sanctions and remedies- dealing with breaches

The Act needs to include a deterrent against disregarding it. This deterrent is in the form of a mechanism for dealing with breaches of the Act that have consequences. These consequences are in the form of sanctions and remedies. Sanctions are essentially penalties applied against an offender whereas remedies are compensations made to the parties affected by the breach. The penalties and remedies are intended to be of sufficient weight that they will not be treated as a cost of doing business by parties seeking to use Knowledge Resources in research or for commercial gain.

Following the community consultation the period for taking action has been extended to 20 years in order to allow adequate time for Aboriginal Communities to identify and seek redress for any breaches.

The possibility of a tribunal rather than a court has been included and the need for the court or tribunal to have relevant expertise in Aboriginal Culture has been identified. These recommendations reflect the need to ensure that matters are heard in an environment and by an authority with sufficient understanding of the significance and the nature of the rights that need to be protected. Such a tribunal or court may be the Land and Environment Court of NSW due to its jurisdiction in Aboriginal land rights matters and the existence of Aboriginal Commissioners.

Section 6 Sanctions and remedies

(1) A person who uses or authorises another person to use a Knowledge Resource without the free prior informed consent and approval of the Aboriginal Community that holds that Knowledge Resource infringes that Aboriginal Community's inherent rights in the Knowledge Resource.

(2) In determining whether a person has authorised another party to use a Knowledge Resource without the free prior informed consent of the Aboriginal Community, the prescribed court or prescribed tribunal must, amongst other things, take into account:

- (a) the extent (if any) of the first person's power to prevent the use of the Knowledge Resource;
- (b) the nature of any relationship existing between the first person and the person who used the Knowledge Resource;
- (c) the nature of any relationship existing between the first person and the Aboriginal Community or Knowledge Holder(s) and any obligations owed by the first person to the Aboriginal Community or Knowledge Holder(s) and
- (d) whether the first person took any reasonable steps to prevent or avoid the use.

(3) A person who uses a Knowledge Resource but did not know and could not reasonably have been expected to know that they were using a Knowledge Resource commits an innocent act of infringement and shall not be liable to pay damages.

(4) An Aboriginal Community whose inherent rights in a Knowledge Resource have been infringed, may bring infringement proceedings against the person that committed the infringement before a prescribed court or a prescribed tribunal within 20 years from the day the infringement occurred.

(4A) The judge of the prescribed court or prescribed tribunal must be trained in the culture of the relevant Aboriginal Community.

(5) The prescribed court or prescribed tribunal shall, unless it considers in the circumstances otherwise, refer by order, the matter for mediation and may do so with or without the consent of the parties.

(6) Mediation is to be undertaken by a mediator agreed to by the parties or where agreement is not possible, appointed by the prescribed court or prescribed tribunal.

(7) The parties shall participate in the mediation in good faith.

(8) An order for mediation does not prevent the Aboriginal Community from seeking, and obtaining, an interlocutory injunction.

(9) A prescribed court or prescribed tribunal may grant an order for any of the following remedies:

- (a) an injunction (subject to such terms as the court sees fit)
- (b) subject to subsection (10), damages or, at the election of the Aboriginal Community, an account of profits;
- (c) a declaration that the Knowledge Resource has been used without free prior informed consent;
- (d) a public apology ;
- (e) an order for the seizure of any object made, imported or exported contrary to this Act; and
- (f) such other orders as the prescribed court or prescribed tribunal considers appropriate.

(9A) Where an action for infringement is brought under subsection (4) in respect of a Knowledge Resource that is not a Registered Knowledge Resource, the prescribed court or prescribed tribunal must not award any of the remedies provided for in subsection (9) unless it appears to the prescribed court or prescribed tribunal that it is just, equitable and reasonable to do so having regard to all the relevant circumstances. Factors relevant to the consideration of whether and what remedies are just, equitable and reasonable include, but are not limited to, the *bona fides* of the infringer, the financial investment made by the infringer in relation to the act or acts constituting use of the Knowledge Resource, and the due diligence undertaken by the infringer to determine the existence of relevant Knowledge Resources.

(10) Where the Knowledge Resource infringed is a Registered Knowledge Resource, the prescribed court or prescribed tribunal must, at the election of the Aboriginal Community, award the Aboriginal Community:

- (a) if the infringer is a corporation, 10,000 penalty units;
- (b) or otherwise, 1,000 penalty units, for each act of infringement,

instead of damages.

Note: One penalty unit is \$110

(11) In the case of a person who commits an innocent act of infringement, the prescribed court or prescribed tribunal may award the Aboriginal Community:

- (a) if the infringer is a corporation, 1,000 penalty units; or
- (b) otherwise, 100 penalty units; for each act of infringement

if it appears just, equitable and reasonable to do so having regard to all the relevant circumstances.

Note: One penalty unit is \$110

(12) A prescribed court or prescribed tribunal may award an additional amount in an assessment of damages where the prescribed court or prescribed tribunal considers it appropriate to do so having regard to:

- (a) the impact on the Aboriginal Community of the unauthorised use of their Knowledge Resource; and
- (b) the flagrancy of the unauthorised use; and
- (c) the need to deter similar unauthorised use; and
- (d) the conduct of the unauthorised user; and
- (e) any benefit shown to have accrued to the infringer because of the unauthorised use; and
- (f) any other relevant matters.

(13) For the purposes of determining the impact of the unauthorised use on the Aboriginal Community the prescribed court or prescribed tribunal may have regard to a community impact statement.

(14) A community impact statement is a statement setting out the impact on the Aboriginal Community of the unauthorised use of their Knowledge Resource.

(15) A defendant in infringement proceedings by way of counter-claim, or an interested person may apply to the prescribed court or prescribed tribunal for a declaration that a

purported Knowledge Resource does not exist or does not belong to a specified Aboriginal Community.

(16) Before making a declaration under this section the prescribed court or prescribed tribunal must satisfy itself that all Aboriginal Communities likely to be affected by the declaration proposed to be made are parties to the proceeding.

(17) It is an offence to access or use a confidential Knowledge Resource belonging to one or more Aboriginal Communities without the free prior informed consent of all Aboriginal Communities who have recorded their interest in the Knowledge Resource in the Confidential Knowledge Resource Register.

Penalty:

- (a) (i) if the infringer is a corporation, 1,000 penalty units; or
(ii) otherwise, 100 penalty units;
for each act of infringement; or
- (b) 2 years imprisonment, or both.

Note: One penalty unit is \$110

(17A) A person previously found guilty under subsection (17) is liable to a maximum term of 5 years imprisonment and a penalty of 10,000 penalty units for each subsequent offence proven in relation to the access or use of the confidential Knowledge Resource.

(18) Where a Knowledge Holder, an Aboriginal Community, or any other person threatens a person with proceedings under this legislation, a person aggrieved may apply to a prescribed court or prescribed tribunal for:

- (a) a declaration that the threats are unjustifiable; and
- (b) an injunction against the continuance of the threats; and
- (c) the recovery of any damages sustained by the applicant as a result of the threats.

(18A) A person infringes the moral rights of an Aboriginal Community in a Knowledge Resource if the person:

- (a) uses the Knowledge Resource without attributing ownership; or

(b) falsely attributes ownership of the a Knowledge Resource; or

(c) subjects the Knowledge Resource to a derogatory treatment.

(18B) Where the moral rights of an Aboriginal Community in a Knowledge Resource Act have been infringed, the Aboriginal Community may bring proceedings in a prescribed court or a prescribed tribunal, within 6 years of the date of infringement, for:

(a) a public apology;

(b) an injunction against the continuation of the infringement of moral rights; and

(c) the recovery of any damages sustained.

(19) Penalties paid under subsection (17) are to be paid into an account administered by the Competent Authority to be held in trust for its operations.

(20) If a person has applied to the Competent Authority to search for Registered Knowledge Resources with respect to specified subject matter, then:

(a) if the Competent Authority notifies the person that there are no Registered Knowledge Resources relating to that subject matter; or

(b) if the Competent Authority notifies the person that one or more Registered Knowledge Resources exist in relation to that subject matter and the person obtains the free prior informed consent of the Aboriginal Communities who are recorded as the owner of those Registered Knowledge Resources to use those Registered Knowledge Resources;

that person cannot be held to have infringed any Knowledge Resources that exist with respect to that subject matter if the act or acts that would otherwise constitute an infringement are done in good faith and in reliance on the information provided by the Competent Authority.

Section 7. The Competent Authority

There is a recognised need for an entity to administer the proposed legislation. Ideally this body should be independent. Community consultations highlighted concern regarding the functions of this entity being administered by one or more existing agencies and the need for the Competent Authority to include a local or regional community agency to administer the Knowledge Holder registers and provide for Community Knowledge databases. The need for confidential information to be protected was also noted as was the need to have an appeal process and a process for ensuring benefits under the control of the Competent Authority are applied and are not lost if the Authority is wound up.

Section 7. Competent Authority

(1) There shall be an independent Competent Authority for administering the provisions of this Act comprising local, regional and state level administrations.

(2) The Competent Authority shall

- (a) maintain a Confidential Register of Knowledge Holders;
- (b) maintain a Public Register of Knowledge Resources and regularly update the information;
- (c) maintain a Confidential Register of Knowledge Resources and regularly update the information;
- (d) receive requests for determination or access in relation to Knowledge Resources;
- (e) render determinations in relation to determination requests;
- (f) liaise with Knowledge Holders in relation to access requests to ascertain whether access will be granted or refused;
- (g) notify parties seeking access of the approval or refusal of the request;
- (h) assist Aboriginal Communities in negotiating Access Agreements, by request;
- (i) evaluate compliance of Access Agreements;
- (j) maintain a Register of Access Agreements and regularly update the information;
- (k) administer shared Benefit(s) for Aboriginal Communities which are derived from

- access to Knowledge Resources as prescribed in the regulations;
- (l) monitor compliance with Access Agreements and advise Aboriginal Communities of any violations;
 - (m) provide model(s) of agreement as a guide for Aboriginal Communities;
 - (n) develop and monitor compliance in a Code of Ethics and Best Practices;
 - (o) provide training to the prescribed court or prescribed tribunal;
 - (p) respond to requests by any person to search the registers it maintains to determine if any Registered Knowledge Resources exist in respect of specified subject matter.

(3) There shall be a female Registrar to administer women's Knowledge Resources and a male Registrar to administer men's Knowledge Resources.

(4) All officers of the Competent Authority are required to maintain confidentiality of information provided to the Competent Authority.

(5) An Appeal from a decision of the Competent Authority shall be heard by a prescribed court or prescribed tribunal.

(6) Shared Benefit(s) administered by the Competent Authority must be made payable to Aboriginal Communities within the prescribed period.

(7) If the Competent Authority ceases to exist any outstanding monetary Benefit(s) held by the Competent Authority must be transferred to the prescribed Aboriginal Authority.

Section 8. Multiple Community owners

Some Knowledge Resources may be held by more than one Aboriginal Community. The Act needs to address what should happen when this situation arises. It also needs to address what should happen where there is disagreement between Aboriginal Communities regarding whether access should be granted.

Options for resolving benefit sharing disputes are needed.

Section 8. Knowledge Resources held by more than one Aboriginal Community

(1) Where a Knowledge Resource is connected to more than one Aboriginal Community then all Aboriginal Communities that hold the Knowledge Resource must agree to permit access to the Knowledge Resource before access can be granted and any Benefit(s) arising from permitted use shall be shared among all Aboriginal Communities that hold the Knowledge Resource.

(2) Where a dispute exists and remains unresolved between Aboriginal Communities on rights to a Knowledge Resource and no agreement can be made between the Aboriginal Communities within a prescribed period then the Competent Authority shall be considered Trustee for the monies arising from Benefit(s) accrued from an Access Agreement and shall be responsible for distributing such Benefit(s) arising under the Access Agreement.

(3) The Aboriginal Communities concerned may elect before the prescribed period has elapsed to submit to arbitration before the male or female registrar of the Competent Authority.

Section 9. Exceptions

There may be exceptional circumstances where use of Knowledge Resources without the need to seek approval should be permitted and exemptions in the Act should be included to deal with such situations. One example is to ensure that Aboriginal Communities can continue to use their own Knowledge Resources for traditional purposes or as revitalised knowledge. There are other situations where use of Knowledge Resources may also be permitted such as in emergencies or environmental conservation. This is considered necessary so that the entire community can benefit from disease prevention or eradication and environmental protection.

During the community consultation the importance of sustaining the health of water resources was recognised as necessary for community well-being. Communities also identified the need for any use permitted under this provision to be recorded with the Competent Authority.

Section 9. Exceptions

(1) Any use by Aboriginal Communities of their Knowledge Resources in accordance with their laws, customs and practices does not give rise to any criminal or civil liability under this Act.

(2) There is no legal restriction under this Act on customary use and exchange of Knowledge Resources between Aboriginal Communities.

(3) The State has the obligation to avoid any risk or danger which threatens the permanence of ecosystems and to prevent, reduce or restore environmental damage which threatens life or its quality. Aboriginal Communities recognise damage to water resources as a threat to quality of life.

(4) When threat to an ecosystem exists or environmental damage exists in the ecosystem, the State can, subject to subsection (6), utilise Knowledge Resources to repair, restore, recuperate and rehabilitate it.

(5) In cases of threat to human, plant or animal health the State can, subject to subsection (6), utilise Knowledge Resources to address the threat.

(6) Use of Knowledge Resources to address environmental or health threats should be in consultation with Knowledge Holders to avoid misuse of the Knowledge Resource(s) concerned, provide prescribed compensation to the relevant Aboriginal Communities and must be registered with the Competent Authority.

Section 10: Knowledge Resource Registers and disclosure

Some Knowledge Resources may, in the view of Aboriginal Communities, need to remain secret and not to be disclosed without permission from the Aboriginal Community and the relevant Knowledge Holder(s). This raises important issues with respect to gathering information and holding such information on a register. The Act makes provision for both Knowledge Holders and Knowledge Resources to be recorded with some registers being maintained as confidential. Provision has also been included for separate female and male registers to deal separately with women and men's business.

Community consultations recommended that the Knowledge Holder register should be administered by a local competent authority or a local administration of the competent authority formed within the Aboriginal Community where the Knowledge Resource is held. This local organisation could also maintain Community Knowledge Resource registers. The involvement of the Aboriginal Community in deciding what goes into registers was seen as important. It is likely the proposed local Competent Authority or administration would need to be a regional Competent Authority or branch from a resourcing perspective.

Section 10: Registers and disclosure

- (1) The identity of Knowledge Holder(s) and an indication of the type of Knowledge Resource(s) held may be entered into a Confidential Knowledge Holder Register. The indication of the type of Knowledge Resource(s) shall be provided to a female Registrar for women's Knowledge Resources and a male Registrar for men's Knowledge Resources. The Knowledge Holder must agree to have their identity recorded in the register before those details are placed on record.
- (2) The Confidential Knowledge Holder Register shall be administered by local or regional administrations of the Competent Authority
- (3) Knowledge Resources may be entered in three types of register:

- (a) Public Knowledge Resources Register;
- (b) Confidential Knowledge Resources Register; and
- (c) Community Knowledge Resources Registers.

(4) The inclusion of Knowledge Resources in one or more of these registers is by agreement of the relevant Knowledge Holder(s) and Aboriginal Community, in accordance with community protocols for the Aboriginal Community.

(5) The Confidential Knowledge Holder Register, Public Knowledge Resources Register and the Confidential Knowledge Resources Register shall be maintained by the Competent Authority.

(6) The purposes of the Registers shall be the following:

- (a) to enable the Competent Authority to liaise with Aboriginal Communities regarding the granting or refusal of access to their Knowledge Resources;
- (b) to preserve and safeguard the Knowledge Resources and existing and future rights;
- (c) to provide the Competent Authority with information that enables the Competent Authority to defend the interests of Aboriginal Communities.

(7) The Public Knowledge Resources Register shall contain Knowledge Resources in the public domain and shall be made available for public inspection.

(8) The Confidential Knowledge Resource Register may not be divulged to third parties and others who do not have authorisation of the Competent Authority and the Aboriginal Communities to access the Knowledge Resource(s) recorded in it.

(9) Information in the Confidential Knowledge Resource Register may only be disclosed to a third party if disclosure is approved by the relevant Knowledge Holder(s) and the male Registrar and the female Registrar.

(10) Any Aboriginal Community may apply to the Competent Authority for the registration of Knowledge Resources held by it in the Public Knowledge Resources Register or in the Confidential Knowledge Resources Register.

(11) The Competent Authority shall send the information entered in the Public Knowledge Resources Register to the main patent offices of the world in order that it may be treated as prior art in the examination of the novelty and inventiveness of patent applications.

(12) Aboriginal Communities may organise Community Knowledge Resources Registers in accordance with their laws, practices and customs. The Competent Authority will provide technical assistance for the development of Community Knowledge Resources Registers on the request of the Aboriginal Communities. Community Knowledge Resource Registers may be deposited with the local or regional or state administrations of the Competent Authority.

(13) The contents of the Community Knowledge Resource Registers maintained under subsection (12) must be transmitted to the Competent Authority on a regular basis and will then be included in the Public Knowledge Resources Register or the Confidential Knowledge Resources Register as appropriate.

(14) A Knowledge Resource recorded on a Community Knowledge Resource Register only becomes a Registered Knowledge Resource when transmitted to the Competent Authority and included in one of its registers pursuant to subsection (13).

Section 11. Interaction with existing laws

There need to be rules that define how the Act works with laws that are already in place so that the different laws do not conflict with each other. No changes to this provision have been made after the consultation.

Section 11. Interaction with existing laws

(1) No law, regulation, directive or practice shall, in so far as it is inconsistent with this Act have effect with respect to matter provided for by this Act.

(2) The Competent Authority may draft regulations necessary for the proper implementation of this Act.

Section 12. Mutual recognition of rights and ensuring compliance

There is also a need to ensure that the new law can work with agreements we might have with other countries. No changes to this provision have been made after the consultation.

Section 12. Mutual recognition of rights and compliance

(1) An access to Knowledge Resources under an agreement with other states, territories or countries shall be made in accordance with the conditions and procedure specified in the relevant agreement.

Section 13 Transitional provisions

This new law also needs to have rules to deal with any Access Agreements entered into before it becomes law. No changes to this provision have been made after the consultation.

However, concern was expressed as to whether Knowledge Resources that have entered the public domain already as a result of past research and other actions carried out without due regard to cultural practice or without permission would be covered by the operation of the proposed legislation. It was noted that the content of the public domain may not be sufficient to reveal or destroy the potential value of the relevant Knowledge Resource(s). Meanwhile it was acknowledged that the proposed legislation should not be retrospective except as indicated in section 13.

Section 13. Transitional provisions and existing uses

(1) Access Agreements made prior to the coming into force of this Act shall be amended and harmonized with the provisions of this Act.

Chapter 8: Case study- an example of how the legislation would operate in practice

In order to illustrate the effect of this legislation the following hypothetical example is provided. The names of individuals, the Aboriginal Community and the Knowledge Resource involved are fictitious and provided for the purpose of illustration only. The example reflects detail that has not yet been settled that would be covered by the regulations under the legislation and as such is one version of how the legislation could operate.

Example:

The Knowledge Resource and the Knowledge Holder

The Western Hills Aboriginal Community of New South Wales uses Lizard Bush in treating sinus infections experienced by members of their community when westerly winds blow across the central Australian deserts bringing dust and pollen from distant regions. There is a particular type of Lizard Bush that is used for this purpose and details of the type of Lizard Bush and where it grows are known by Western Hills Elder Aunty Alice Hills. Aunty Alice knows that the Lizard Bush works best when it grows on a particular type of land and when certain other plants are nearby. She is also the only member of the community who knows how to prepare the medicine from the Lizard Bush used to treat sinus infections.

Aunty Alice is elderly and as yet has not passed her knowledge on to any other member of the community. The community respect her decision to wait until she is ready to do so but at the same time are worried that they may lose this knowledge if Aunty Alice passes without sharing it. Some members of the community are interested in the potential to use this knowledge to create a commercial product for the benefit of their community. Aunty Alice recognises the merit of their position but has a different concern. The river on which the community lives has been polluted by run off from surrounding farms and Aunty Alice would like to see the river rehabilitated. She believes that if the river recovers her community will flourish. If the knowledge were to give rise to a commercial product she would like to see the benefit channelled into fixing the river. All are in agreement, however, that they would not want someone outside their community to learn this knowledge and use it without the community's approval, and particularly without the community

benefitting. Aunty Alice is also concerned because unless the right Lizard Bush is used and prepared in the right way the medicine produced can be poisonous.

The Elders of the community discuss this issue with Aunty Alice. They all agree that it would be a good idea to record the knowledge to protect it. Aunty Alice insists however that the knowledge must be kept secure and only made available with her permission.

Discussion with the Competent Authority

Uncle Terry West another Elder of the community contacts the regional office of the Competent Authority⁹⁶. Uncle Terry speaks to local male registrar Steven Wallace who advises him that the knowledge can be recorded in databases administered by the Competent Authority⁹⁷. Since the Western Hills Aboriginal Community does not have its own knowledge database he suggests that this is probably the best way to go about recording the information. He advises Uncle Terry that the community can place details on the Public Register of Knowledge Resources⁹⁸ that indicate that a plant from their region has medicinal properties. He advises that including details of the species of plant that has this property on the register is probably not a good idea. If this is a new and unrecorded use, even if the species is known for other purposes or even for this purpose in other areas, recording species details on the Public Register of Knowledge Resources presents a risk of that Knowledge Resource being used without permission. He explains that unfortunately some bio-prospecting companies can and do trawl databases to identify species with activity and then investigate that activity across accessible species.

The community can also enter Aunty Alice Hills name on the Knowledge Holder Register⁹⁹ as the holder of that Knowledge Resource for their community. Aunty Alice's name will not be published and if anyone enquires about gaining access to this knowledge the Competent Authority will contact Aunty Alice and discuss with her whether she is willing to allow access. Steven also explains that there is a Confidential Register of Knowledge Resources¹⁰⁰

⁹⁶ The Competent Authority is the organisation that administers the Act and its operations are specified in Section 7 of the Act

⁹⁷ Under section 7(3) of the Act the Competent Authority has a male and a female registrar and under section 7 (2) the Competent Authority is responsible for looking after the databases used to record details of Knowledge Resources and Knowledge Holders

⁹⁸ See section 7(2)(b)

⁹⁹ See section 7(2)(a)

¹⁰⁰ See section 7(2)(c)

and if Aunty Alice is happy to do so the Knowledge Resource can be recorded there. She can include instructions regarding who may access the confidential Knowledge Resource if she dies.

Uncle Terry takes this information back to the community and Aunty Alice and the other Elders agree that the Knowledge Resource should be recorded using the Competent Authority's databases. An entry is made in the Public Register of Knowledge Resources that identifies the Western Hills Aboriginal Community as the custodians of a Knowledge Resource relating to treatment of sinus infections. Aunty Alice Hills' name is entered on the Confidential Register of Knowledge Holders as the holder of this Knowledge Resource for their community. Aunty Alice will deal with the Competent Authority directly in relation to recording her knowledge in the Confidential Knowledge database.

Recording Confidential knowledge Resources in the Confidential Knowledge Resources Register

Aunty Alice meets with the regional female registrar from the Competent Authority, Glenys Marsh, and records a confidential description of the details of the Knowledge Resource. This information includes the name of the species of Lizard Bush used and its characteristics. Aunty Alice and Glenys chat about the prospects of Aunty Alice being able to pass on the Knowledge Resource. Aunty Alice advises Glenys that she has been passing on pieces of knowledge to her niece Ellen Hills who has shown a keen interest in bush medicine and a good understanding of how to identify and prepare medicinal materials. Ellen is a responsible young woman in her early twenties who has attended a regional university, qualified as an early childhood educator and has returned to the community where she now works in the community operated day care centre. Aunty Alice hopes to pass the Lizard Bush knowledge to Ellen in time. Glenys asks Aunty Alice what she would like to happen with the knowledge if she dies before she passes it on to Ellen. Aunty Alice considers this carefully and says she would like the record on the confidential database to be destroyed if that happens because the dangers of misuse of the information mean that it should only be passed on by her. Glenys enters this instruction on the database. They discuss the fact that if Ellen is taught this knowledge that she too should be entered on the Knowledge Holder database. Aunty Alice agrees to this but says that if anyone wants to access the knowledge

while she is still alive and able to be involved in decision making then any decision would need to be made by her and Ellen together if they are both registered as Knowledge Holders. Glenys advises Aunty Alice that if Ellen is added to the register the entry can be annotated to record this instruction.

A new Knowledge Holder

Time passes and in due course Aunty Alice shares the Knowledge Resource with Ellen. Ellen's name is entered on the confidential Knowledge Holders' register alongside Aunty Alice's name with respect to this Knowledge Resource together with the instruction that while Aunty Alice is still alive and able to be involved in decision making that any decision regarding access to this resource would need to be made by her and Ellen together. Ellen also wants to enter an instruction on the confidential knowledge database that if she dies without sharing the knowledge the data relating to this knowledge resource should be destroyed.

Request for Access [Section 4]

Twelve months later Steven Wallace at the Competent Authority receives an enquiry from Dr Ted Morris from Central University who works as a researcher in the respiratory group in the Department of Medicine. Ted is working on treatment for infectious sinusitis that is resistant to current pharmaceutical treatments and he is interested in any information that the Competent Authority can provide him regarding knowledge held by Aboriginal Communities that might assist his research. Steven advises Ted that a search of the Public Knowledge Resource register can be carried out to see whether any knowledge resources relating to treatment of infectious sinusitis have been recorded and that if Ted wishes an advertisement can be placed in the Competent Authority's newsletter to let Aboriginal Communities know about his research interests. He advises Ted that it is also possible to search the public register for information concerning use of particular plants that is in the public domain where particular species are linked to the symptoms they treat.

Ted asks Steven whether he would need to get permission to use knowledge of a plant where the plant species is listed on the public register. Steven explains that by registering

the plant knowledge a community is claiming that knowledge as theirs so Ted would need to seek permission to use it. The advantage of doing so is an opportunity to access more specific knowledge about the plant and at the same time to share any benefit arising from commercial use of the knowledge with the Aboriginal community that holds that knowledge. Steven points out that particular strains of a plant may need to be used and that if the wrong strain is used or the material is prepared in the wrong way it could be harmful so collaborating with the Aboriginal community holding the knowledge is highly desirable. Ted decides to search the public database and advises Steven that he will take out the advertisement if he has no luck with the search. Steven provides Ted with details of how to access the public register search facility online. There is a fee for searching which is paid online by credit card to the Competent Authority. The fees paid are used in covering the Competent Authority's operating costs.

Ted carries out the search and amongst the search results is the entry that indicates that the Western Hills Aboriginal Community has medicinal knowledge relating to treating sinus infections. The site carries a notice that advises Ted that if he is interested in accessing any knowledge identified by the search he must contact the Competent Authority who will liaise with the community to determine if access to this knowledge will be permitted. Ted rings Steven and informs him he has found an interesting result. He tells Steven that he thinks the Western Hills Aboriginal Community might have some useful knowledge and that he is interested in going to see them but had seen on the search report that he needed to go through the Competent Authority. Steven explains that this is correct. There is a procedure that needs to be followed because particular people in a community should be approached but their identity is not made public. The Competent Authority has details of who must be contacted regarding particular knowledge and will approach the community on behalf of the person requesting access¹⁰¹. Based on the community response the Competent Authority will advise Ted regarding whether or not access will be possible¹⁰². Ted fills out the online request for access and pays the fee for this service. The online form requires details of who Ted is, where he is from and what his interest in this knowledge is.

¹⁰¹ Section 4(3), (4) and (5); section 7(2)(d) and (f)

¹⁰² Section 7(2)(g)

Free prior informed consent [section 4 (1)]

The request is actioned by Glenys who cross references the knowledge record with the confidential Knowledge Holders register and notes that both Aunty Alice and Ellen Hills are listed as Knowledge Holders for this Knowledge Resource. Glenys contacts Aunty Alice and advises her about the request and the details concerning the person making the request¹⁰³. Aunty Alice advises that she will discuss the request with Ellen and the Community Elders and let her know their decision.

Aunty Alice and Ellen discuss the request and agree they have some concerns because of the risk of the knowledge not being used correctly. They take their concerns to the Elders of the community and it is agreed that Uncle Terry will ask for further information about the person making the request¹⁰⁴. The Competent Authority is able to organise a search of public records for the community for a fee. The search shows that Ted is a relatively junior researcher but one who has had a stellar career to date. His research is funded in part by a large pharmaceutical company that has had a good record of positive dealings with Aboriginal Communities in the past. They have also had a very good safety, customer education and social responsibility record with respect to their pharmaceutical products. This information is taken back to the Community and it is decided that initial discussions about access can take place¹⁰⁵.

Aunty Alice and Ellen provide joint approval to the Competent Authority and this approval is countersigned by the Community Elders¹⁰⁶. Uncle Terry discusses with Glenys how the Access Agreement will be negotiated. Glenys advises that the Competent Authority has a model contract that the community can use if they wish. There is also some educational material available explaining key issues that the community needs to consider. Glenys also provides Uncle Terry with contact details for an Aboriginal Communities' forum that shares experience that different Communities have gained with entering into access agreements. Glenys suggests that the community may want to engage the services of a solicitor

¹⁰³ Section 4(1) and (6)]

¹⁰⁴ Section 4(1) and (6)

¹⁰⁵ Section 4(7)

¹⁰⁶ Sections 4(6) and (7)

experienced in these matters. The forum has details of solicitors the communities have used.

Access Request accepted

Glenys sends a notification to Ted advising that the Community and Knowledge Holders have given approval for negotiation of an Access Agreement to commence¹⁰⁷. The community contact for the matter will be Uncle Terry West. Ted advises the University legal office that he has received initial consent from the Western Hills Aboriginal Community regarding access to a Knowledge Resource he would like to carry out research on.

The Access Agreement

In the meantime Uncle Terry has talked to members of the forum who have advised him of the importance of using a solicitor with expertise in this area who has the time to take on a community consultation. Effective consultation takes time and commitment. Uncle Terry is advised that if the Western Hills community have solicitors who have trust within the community an alternative is to use those solicitors and provide them with contact details of solicitors with experience in this area to provide specialist support.

Based on this advice the community selected a solicitor with expertise in access and benefit sharing agreements and started to think about what benefits they would like to receive in return for sharing this knowledge. The solicitor chosen by the community is Alan Green a solicitor who has successfully negotiated a number of access agreements on behalf of Aboriginal Communities. Alan meets with Aunty Alice and Ellen to gain an understanding of the general nature of the knowledge in question and how that knowledge might be shared. It is agreed that in the first instance prepared plant samples could be provided for testing and evaluation. If that process is successful then samples with details of how to prepare them could be provided and finally details of the required growing conditions could be provided if necessary. Protecting the transferred information by confidentiality agreements is discussed and agreed upon. Alan explains to the community that in the early stages the

¹⁰⁷ Section 4(8)

benefits to the community are likely to be small but if the project progresses successfully then more significant benefits could follow. He explains that the payments can be arranged as “milestones” with a first payment for successful completion of the first stage etc.¹⁰⁸

Terms and Benefits

The community decides that they want nothing to be published about this research without their approval and acknowledgement of their community as the provider of the Knowledge. They want to receive monetary payment for the information and materials provided in the initial phases that can be paid into a community fund that the community uses for community projects such as their recent successful project to develop a community day care centre. The community is advised by their solicitor that remuneration will need to be negotiated with the researchers recognising that until it is known whether a commercial outcome is possible monetary benefits may need to be modest to meet the research team’s budget. The solicitor identifies other non-monetary benefits that could be included at this stage such as assistance with developing their knowledge database or the right to use the research results for other purposes¹⁰⁹.

The community want the right to approve and be co-owners of any patent applications. The community will also be seeking opportunity to be the producer of the plant material and other involvement in the production of the medicine to create jobs for their community. Any royalties received will be used for the establishment of a fund to restore the river in accordance with Aunty Alice’s wishes.

The solicitors negotiate the Access Agreement¹¹⁰ and it is finally signed and sent to the Competent Authority which issues an Access Approval and enters details of the Access Agreement on the Access Agreement Register¹¹¹. This process has taken 6 months to complete. The initial testing phase is scheduled to take 12 months and if that is successful the second phase is scheduled for a further 12 months. If an active compound is to be isolated the research may take 2-3 years. From there the process for testing and obtaining

¹⁰⁸ Section 5

¹⁰⁹ Section 5(5)

¹¹⁰ Section 4(10)

¹¹¹ Section 4(12)

approval to market the medicine might easily take another 5 years. The agreement is likely to operate over a long period and it is likely to be a long time before the community sees significant benefit and then only if the project is successful. However in spite of this the community is happy to proceed recognising the potential benefit for the community.

General Consultation

This White Paper proposes a model law for implementing a regime that recognises and protects Aboriginal knowledge associated with natural resource management. Appendix 2 takes that model law and presents it as a Draft Bill. It should be noted that such legislation would not be complete without a comprehensive set of regulations to implement the regime. To this end it is acknowledged that there are gaps in the model that require further investigation, for example, the form and nature of the Competent Authority and governance processes, the way the databases are to be formed and managed and the administration processes for access and benefit-sharing including guidance on mutually beneficial terms. Current examples of each of these aspects in regimes already in operation around the world can serve as guidance for such further investigation and development. However, it is recognised that the implementation of the proposed regime must be fit for New South Wales and broader Australian purposes and relevant to the Aboriginal peoples of this Country.

Submissions should be forwarded to: either Dr Ann Cahill by email ann2@bigpond.com or Professor Natalie Stoianoff by email Natalie.Stoianoff@uts.edu.au

Submissions close: 30 November 2014

APPENDIX 1

Indigenous Knowledge Forum: Discussion Paper 1



Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management

**Discussion Paper for Aboriginal Communities Consultation 16-20 June 2014
Tamworth, Gunnedah, Walgett, Moree and Narrabri**

Consultation Research Team

Chief Investigator: Professor Natalie Stoianoff

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We acknowledge the countries of Afghanistan, Angola, Argentina, Brazil, Chile, China, Ecuador, Ethiopia, Hong Kong, India, Kenya, Malaysia, Peru, Philippines, South Africa and Vanuatu whose laws relating to traditional knowledge, cultural expressions and genetic resources provided useful examples of laws upon which our model could draw. In particular, the laws of Brazil, Costa Rica, Ethiopia, Peru, India, Kenya and South Africa provided relevant alternatives to inform the Working Party in developing the model law.

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Chief Investigator: Professor Natalie Stoianoff & Research Associate: Dr Ann Cahill

15 June 2014

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Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management

Introduction & Aims

Traditional custodians of land hold knowledge critical to conservation of biological diversity and natural resource management. Australia has been slow to deal with formal recognition and protection of such knowledge, despite its international obligations. Other nations and regions have developed significant regimes that recognise such knowledge as part of a living culture that requires access to country.

This project has set out to:

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

Background

Australia has signed agreements that relate to protecting both the natural environment and the rights of Aboriginal peoples. These agreements include the *Convention on Biological Diversity*, the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS)* to the *Convention on Biological Diversity* and the *United Nations Declaration on the Rights of Indigenous People*. The rights of Aboriginal peoples include rights in relation to the knowledge held by their communities as well as the expression of that knowledge through such things as objects, stories, art, songs and dance. The purpose of this project was to

develop a model law to present to the New South Wales government that is about Aboriginal rights under these agreements.

The Convention on Biological Diversity

The Convention on Biological Diversity (CBD) is an international treaty that recognises the importance of conserving the world's biodiversity and the potential that sustainable use of biodiversity holds socially, environmentally and economically. Australia became a Party to the CBD on 18 June 1993.

The three objectives of the CBD are:

- (i) the conservation of biological diversity,
- (ii) the sustainable use of its components and
- (ii) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

Before the CBD, genetic resources were considered the 'common heritage of mankind'.

Their use for creating new products was typically without regard for the communities from which the source material was drawn. No benefits for the country or community providing the material were generated. Sometimes traditional knowledge of Indigenous and local communities was used in developing those new products again without providing benefit to those communities.

Under the CBD, Australia is required to encourage equitable sharing of benefits arising from the use of the knowledge, innovations and practices of Aboriginal communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

The CBD recognises the "sovereign right" of States over their natural resources, including genetic resources. On this basis it considers that the authority to determine access to these resources rests with the State, subject to national legislation. Parties are required to 'endeavour to create conditions to facilitate' access to these resources by other Parties to the CBD, but are free to determine whether to regulate access to some, all or none of their

genetic resources.

Under the Australian Constitution, each state or territory government manages access to biological resources in its jurisdiction under its own laws, with each jurisdiction determining which, if any, genetic resources are regulated.

When access is regulated, users must obtain the informed consent of the Party providing the resource before accessing the genetic resource. Where access is granted, it must be provided on the basis of mutually agreed terms (that is a contract). The mutually agreed terms set out how benefits arising from the use of the genetic resource are to be shared.

The Nagoya Protocol

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity* is a supplementary agreement to the CBD. It provides a framework for implementing fair and equitable sharing of benefits arising out of the use of genetic resources. The Nagoya Protocol was adopted on 29 October 2010 in Nagoya, Japan. Australia signed the Protocol in January 2012.

As well as genetic resources that are covered by the CBD, and the benefits arising from their use, the Nagoya Protocol covers traditional knowledge (TK) associated with genetic resources that are covered by the CBD and the benefits arising from its use.

The Nagoya Protocol addresses traditional knowledge associated with genetic resources with provisions on access, benefit-sharing and compliance. Contracting Parties must take measures to ensure that access is based on prior informed consent, and fair and equitable benefit-sharing, keeping in mind community laws and procedures as well as customary use and exchange.

WIPO draft agreements

The World Intellectual Property Organisation (WIPO) is creating its own agreements to

provide an international legal framework addressing effective protection of traditional knowledge and traditional cultural expressions as well as genetic resources.

The final fate of these instruments is uncertain. If completed they may give rise to declarations which are non-binding or treaties which are binding on the parties that sign up to them.

At present the WIPO instruments are still in draft form and rather complex due to the presence of alternative wordings and options. However the drafts relating to traditional knowledge and traditional cultural expressions each feature a small number of articles that relate to key principles.

Many of these are common to the principles covered by the Nagoya Protocol but are not necessarily limited to the context of genetic resources.

These instruments deal with:

1. the definition of traditional knowledge, genetic resources and related terms;
2. what should be protected;
3. the scope of protection that should be available;
4. obtaining approval to access genetic resources and/or traditional knowledge including the need for prior informed consent and agreement on mutually agreed terms with appropriate fair and equitable benefit sharing arrangements set in place;
5. creation of databases of traditional knowledge;
6. disclosure requirements;
7. appointment of a national authority;
8. dispute resolutions and sanctions;
9. rights to continue traditional use;
10. rights of use to deal with emergencies;
11. education;
12. development and dissemination of technology;
13. interaction with other laws;
14. the question of commonly owned property both within Australia and across borders.

There are different opinions regarding how some issues from this list should be addressed whereas in other instances there is reasonable consensus and it is the specific wording of provisions that remain to be resolved.

Type of law

Laws relating to biodiversity and to some extent access and benefit sharing can be found in particular Australian State and Commonwealth Acts. These laws have been put in place where there is an overlap between these issues and the issues with which a particular Act deals. As a result the law around access and benefit sharing in Australia is currently confusing and incomplete. Importantly the law we have so far is inadequate for Australia to meet its obligations under the Nagoya Protocol.

This situation could be addressed by creating additional law to fill the gaps in the existing legislation but that would not overcome the complexity and confusion arising from having multiple pieces of legislation that might need amending if the provisions of the Protocol are modified.

An alternative is to have what is known as a piece of *sui generis* legislation. This Latin term means “of its own kind”. In terms of access and benefit sharing this would mean having stand-alone legislation that deals with these issues throughout Australia.

Australia so far

Australia’s biodiversity is increasingly being recognised as a potential source of food, pharmaceutical, medicinal and industrial products. The 1996 *National Strategy for the Conservation of Australia’s Biological Diversity* was developed to fulfill Australia’s obligations under the CBD and has since been replaced by *Australia’s Biodiversity Conservation Strategy 2010–2030*.

Objective 2.8 of the *National Strategy for the Conservation of Australia’s Biological Diversity*: “Ensure that the social and economic benefits of the use of genetic material and products derived from Australia’s biological diversity accrue to Australia”.

Section 301 of the *Environment Protection and Biodiversity Conservation Act of 1999* (EPBCA) establishes a general framework for future, more specific regulations on access to

genetic resources. The section states that “the regulations may provide the control of access to biological resources in Commonwealth areas” and, further, that these regulations may contain provisions on the equitable sharing of benefits arising from the use of biological resources; the facilitation of access; the right to deny access; the granting of access, and the terms and conditions of such access.

An Inquiry into Access to Biological Resources in Commonwealth Areas was initiated in December 1999. The result of the Inquiry was a report containing recommendations on the creation of an ABS system. In order to establish a coherent legal framework Commonwealth, State and Territory Ministers constituting the Natural Resource Management Ministerial Council, endorsed the *Nationally Consistent Approach for Access to and Utilisation of Australia’s Native Genetic and Biochemical Resources* (NCA) on October 11, 2002. The NCA sets general principles that must be applied when developing or reviewing ABS systems established within Australian jurisdictions. These principles include certainty, transparency and accountability for facilitating bio-discovery; sustainable use of biological resources; and equitable sharing of benefits.

Existing ownership rights to native biological resources depend on whether they are found in Commonwealth, State or Territory government lands or waters, Indigenous lands, freehold or leasehold lands.

The *Environment Protection and Biodiversity Conservation Regulations 2000* (EPBC Regulations) governs access to biological resources in Commonwealth areas. These regulations require an application to the Department of the Environment (formerly Department of the Environment, Water, Heritage and the Arts) for a permit to access biological resources of native species for research and development of any genetic resources, or biochemical compounds, comprising or contained in the biological resource. According to section 525 of the EPBC Act, Commonwealth areas are defined to include land owned or leased by the Commonwealth, the Australian coastal sea, continental shelf and waters of the exclusive economic zone.

Access requires a permit but only access for commercial or potentially commercial purposes will require a benefit sharing agreement and then it must be obtained with the prior informed consent of the owner of the land where that land is Indigenous people's land and the access provider is the owner of that land. A benefit sharing agreement must provide for the recognition, protection and valuing of any Indigenous peoples knowledge that will be used as part of the access and it must include statements regarding the use of the knowledge and benefits to be provided. A model access and benefit sharing contract has been provided by the Department of Environment. In addition to a share in the revenue generated by the use of the genetic resources accessed, the model contract provides for the parties to identify benefits to biodiversity conservation and other non-monetary benefits in line with the *Bonn Guidelines on Access to Genetic Resources and Equitable Sharing of the Benefits Arising out of their Utilization* (<http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>).

Where the access is for non-commercial purposes, the applicant need only obtain written permission from the access providers and provide a statutory declaration in accordance with the regulations including stating that the applicant does not intend nor allow the collection to be used for commercial purposes, will report on the results of the research, will offer a taxonomic duplicate of each sample to an Australian public institution that is a taxonomic repository, and will not carry out any research for commercial reasons.

A record of permits that have been issued is provided on the website of Commonwealth Department, the majority of which have been for non-commercial purposes. In Australia's submission to the WIPO IGC in 2010, it was claimed that sixty three permits have been issued under the regulations and currently only seven Access and Benefit Sharing contracts completed for organisations engaged in commercial research and following the government's model contract. It should also be noted that this regime only covers Commonwealth areas. This means that State areas and privately held land are the subject of different regulations, if any.

Queensland and the Northern Territory both have legislation in place to deal with access to biological resources. The *Biodiscovery Act 2004* of Queensland does not consider the use of

traditional or Indigenous knowledge in its access or benefit sharing provisions while the Northern Territory's *Biological Resources Act, 2011* covers both access to the biological resources and associated Indigenous knowledge.

Challenges for New South Wales and Australia

In analysing approaches to regulating access, benefit sharing, prior informed consent and recognition of traditional knowledge that have been adopted or proposed elsewhere we need to be mindful of the extent to which the assumptions on which those approaches are based apply in Australia.

It is imperative that our regulation of these issues properly encapsulates the relationship between Aboriginal Communities, their traditional lands, the resources derived from those lands, knowledge pertaining to the use and management of those resources, expressions of that knowledge both tangible and intangible and the culture(s) to which that knowledge belongs. Importantly different communities may hold different views regarding how this knowledge may be used and protected. Correct identification of who is entitled to speak for country and knowledge is equally important as is respect for the fact that some knowledge may not be shared.

At the same time, knowledge is not static and does not perpetuate in a vacuum. The interaction between Aboriginal communities and other Australians has impacted development of Traditional knowledge as has the passage of time. Many Aboriginal peoples also have other cultural ancestry that may impact their views regarding Traditional knowledge.

As a result we have used the term "Knowledge Resources" to describe what the draft legislation protects. We have attempted to say what Knowledge Resources encompass. We have also considered the way in which Aboriginal Communities may be defined and their composition. Attention has been paid to the way in which Knowledge Resources are held in Aboriginal Communities and the importance of Knowledge Holders as the community members who speak for Knowledge Resources.

Our project

The research project *Recognising and Protecting Indigenous Knowledge associated with Natural Resource Management* is supported by the Aboriginal Communities Funding Scheme of the Namoi Catchment Management Authority (now North West Local Land Services (NWLLS)). The research is being carried out through UTS and on behalf of the Indigenous Knowledge Forum.

In the first part of our research we compared the Nagoya protocol and the three draft WIPO agreements to identify common provisions between the different agreements that would ideally be reflected in draft legislation for Australian use. The identified common provisions are:

1. Subject matter of protection- traditional knowledge, traditional cultural expressions, genetic resources
2. Definition of terms- key terms used in the draft
3. Scope- what is covered, respect for traditional ownership, respect for sovereignty over genetic resources, moral rights
4. Beneficiaries- who should benefit
5. Access - who speaks for country, process for granting or refusing access including
 - a. Prior informed consent - ensuring traditional owners are aware of their rights and significance of agreements made
 - b. Mutually agreed terms- ensuring the bargaining process is fair and equitable
6. Benefit sharing- how are benefits shared, what types of benefit, dealing with technology transfer, capacity building
7. Sanctions and remedies- dealing with breaches
8. Competent authority-establishment of a body to administer the legislation, deal with education, model clauses, codes of conduct, databases
9. No single owner- addressing situations where traditional knowledge, cultural expressions, genetic resources are common to more than one group
10. Exceptions – emergencies, traditional use, conservation
11. Disclosure-permits, databases, disclosure in intellectual property applications
12. Interaction with existing laws- avoiding conflict with other laws

13. Recognition of requirements of other nations- mutual recognition of rights and ensuring compliance
14. Transitional provisions- existing uses

Rather than drafting legislation from scratch we then considered regional and national legislation around the world relating to traditional knowledge and genetic resources and used our common provisions to categorise the provisions of the national and regional legislation we examined. We created a database of these laws. A number of the laws identified covered many of the common provisions while others covered only a few at best. The laws that had good coverage were from Brazil, Costa Rica, Ethiopia, Peru, India, Kenya and South Africa.

We presented our data to a working party who had volunteered to be involved in the second stage of our research, drafting the model law. This working party included Aboriginal elders and other Aboriginal peoples, lawyers, academics and participants with experience in the development of similar laws in other countries.

The working party considered our research data and discussed issues relating to drafting this law. They worked in groups on different common provisions and met a number of times to continue the discussion. Documents were prepared at each stage that summarised and reflected the progress made. Participants in the working party were:

Aunty Fran Bodkin, Uncle Gavin Andrews, Uncle Barry Cain, Simon Munro, Chris Selevik, Patricia Adjei, Virginia Marshall, Gerry Turpin, Professor Natalie Stoianoff, Dr Ann Cahill, Daniel Posker, Francis Kulirani, Evana Wright, Gail Olsson, Judith Preston, Dr Michael Davis, Associate Professor Subra Vemulpad, Dr David Harrington, Omar Khan, Nerida Green and Gail Pearson.

Based on this process the following model legislation was prepared for consultation with Aboriginal Communities in the third stage of our research being conducted by Professor Natalie Stoianoff, Dr Ann Cahill, Mrs Evana Wright and Mrs Virginia Marshall, in June 2014 in the towns of Tamworth, Gunnedah, Walgett, Moree and Narrabri in North West New South Wales. We are trying to find out what Aboriginal people think about the draft legislation.

That information will be used to prepare a second discussion paper to be given to the New South Wales government and may also be used to make changes to the draft legislation.

Draft legislation

Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management

The following comprise a series of recommendations for the drafting of key provisions in a model law for New South Wales to recognise and protect Aboriginal Knowledge that is associated with Natural Resource Management. Accordingly, it does not contain references to the regular inclusions in New South Wales or indeed Australian legislation such as title and commencement and the numbering system, rather it focusses on those provisions that impact the way such a piece of *sui generis* legislation would operate to attain the aims of this project. It should be noted, also, that the following recommendations may not appear in the final version of the model law in the same manner but may require revision to ensure coherency and consistency in meaning.

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

Explanation

This first provision sets out why this Act has been drafted. It helps with interpreting the Act and understanding what situations it applies to. Essentially this Act would recognise that Aboriginal Communities have a right to protect their traditional knowledge, say who can use it and share in benefits that come from letting others use it.

1.1 This Act relates to Knowledge Resources Connected to Country which comprise bodies of knowledge held by Aboriginal Communities and relating to use, care and understanding of Country. These Knowledge Resources are held in safekeeping by knowledge holders within an Aboriginal Community on behalf of and for the benefit of the Aboriginal Community. Knowledge resources also comprise cultural expressions of an Aboriginal Community and knowledge pertaining to genetic resources. The genetic resources may vary in their expression or yield of substances of interest depending on the environment in which the genetic resources are found. Knowledge of required environment is part of the Knowledge Resource pertaining to a genetic resource. Knowledge held by knowledge holders may be shared with those deemed worthy to receive the knowledge. Both knowledge holders and knowledge recipients bear responsibility for ensuring knowledge is not misused.

1.2 The State of New South Wales recognizes the rights and power of Aboriginal Communities to control and share or not share their Knowledge Resources as they see fit.

1.3 Knowledge Resources form part of the cultural heritage of Aboriginal Communities. Because they form part of the cultural heritage, the rights of Aboriginal Communities in their Knowledge Resources cannot be taken away or overturned.

1.4 This Act aims to:

- (a) promote respect for and the protection, preservation, wider application and development of the Knowledge Resources of Aboriginal Communities;
- (b) promote the fair and equitable distribution of the benefits derived from the use of those Knowledge Resources;
- (c) promote the use of those Knowledge Resources for the benefit of Aboriginal Communities;
- (d) ensure that the use of the Knowledge Resources takes place with the prior informed consent of knowledge holders of the Aboriginal Communities;
- (e) promote the strengthening and development of the potential of Aboriginal Communities and use of their customary laws with respect to sharing and distribution of collectively generated benefits under the terms of this Act;
- (f) avoid situations where patents are granted for inventions made or developed on the basis of Knowledge Resources of Aboriginal Communities without account being taken of the rights of Aboriginal Communities to those Knowledge Resources.

Provision 2. Definitions of key terms used in this Act

Explanation

To make sure the meaning of particular terms used in the Act is understood a dictionary can be provided that explains the meaning of those terms. Sometimes we have used new terms to help make the things this Act will do clear.

2.1 An **Aboriginal Community** comprises descendants of the traditional custodians of Country who continue to reside in Country, descendants of the traditional custodians of Country who no longer reside in Country and Aboriginal peoples who reside in Country but are not descendants of the traditional custodians of Country.

2.2 **Benefit sharing** is a process by which an Aboriginal Community receives monetary and/or non-monetary return for sharing Knowledge Resources.

2.3 **Competent Authority** is the organisation responsible for administering this Act

2.4 **Cultural expressions** include music, dance, songs, stories, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives.

2.5 **Genetic resource** means genetic material of a biological resource containing genetic information having actual or potential value for humanity and including its derivatives;

2.6 **Knowledge Holders** are members of Aboriginal Communities entrusted with responsibility for Knowledge Resources of the Community and from whom prior informed consent for access to Knowledge Resources for which they are responsible must be received

2.7 **Knowledge Resources** are bodies of knowledge held by Aboriginal Communities relating to use, care and understanding of Country, held in safekeeping by knowledge holders within an Aboriginal Community on behalf of and for the benefit of the Aboriginal Community and in relation to natural resource management. Knowledge resources also comprise cultural expressions of an Aboriginal Community and knowledge pertaining to genetic resources. The genetic resources may vary in their expression or yield of substances of interest depending on the environment in which the genetic resources are found. Knowledge of required environment is part of the Knowledge Resource pertaining to a genetic resource.

2.8 **Mutually agreed terms** (MATs) are terms and conditions on which both parties agree which make the Access and Benefit Sharing (ABS) process effective, transparent, and legally binding. Mutually agreed terms specify the way in which users can obtain access or permission to collect, study, or commercially use Knowledge Resources.

2.9 **Prior informed consent** is a procedure through which Knowledge Holders in Aboriginal Communities, properly supplied with all the required information, allow access to a Knowledge Resource under mutually agreed terms.

2.10 **State** means the state of New South Wales

Provision 3. What this Act covers

Explanation

This provision sets out more particularly the rights that the Act is designed to protect. The first part of this provision is taken from the *United Nations Declaration on the Rights of Indigenous Peoples*.

3.1 Aboriginal Communities have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

3.2 Traditional knowledge rights are not transmissible by assignment, by will, or by devolution by operation of law.

3.3 The protection provided by this Act may not be interpreted in such a way as to impede the preservation, use and development of Knowledge Resources in an Aboriginal Community.

3.4 Aboriginal communities that create, develop, hold or preserve Knowledge Resources are guaranteed the right to:

3.4.1 have the origin of the access to Knowledge Resources mentioned in all publications, uses, exploitation and disclosures;

3.4.2 prevent unauthorized third parties from:

- (a) using or carrying out tests, research or investigations relating to Knowledge Resources;
- (b) disclosing, broadcasting or re-broadcasting data or information that incorporate or constitute Knowledge Resources;

3.4.3 derive benefit from economic exploitation by third parties of Knowledge Resources the rights in which are owned by the Aboriginal Community as provided in this Act.

3.5 Any person using or economically exploiting Knowledge Resources shall ensure that his or her activities conform to the standards laid down in this Act and the regulations under it.

Provision 4. beneficiaries- who should benefit

Explanation

This provision sets out more particularly the rights that the Act is designed to protect. The first part of this provision is taken from the *United Nations Declaration on the Rights of Indigenous Peoples*.

4.1 The custodianship of a Knowledge Resource is vested in the Knowledge Holder(s) of the Aboriginal Community holding the Knowledge Resource.

4.2 A Knowledge Resource protected under this Act belongs to the Aboriginal Community that holds the Knowledge Resource and not to a particular individual or individuals within that Aboriginal Community, even if only one member of the community holds that Knowledge Resource.

4.3 Benefit associated with use of Knowledge Resources shall be directed to the Aboriginal Community that holds the Knowledge Resource.

4.4 A Knowledge Resource may belong to two or more Aboriginal Communities and in that case each Aboriginal Community is entitled to benefit from use of a Knowledge Resource they have each agreed may be accessed.

4.5 The present generations of Aboriginal Communities shall preserve, develop and administer their Knowledge Resources for the benefit of future generations as well as for their own benefit.

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

Explanation

In order to be able to use a Knowledge Resource access must be approved by the relevant Knowledge Holder(s). This process is called prior informed consent. It is important to ensure that Knowledge Holders are aware of their rights and the significance of agreements made. It is also important to make sure that any agreement made is fair. Proposed Section 5B.5 refers to an access permit this can be adjusted to refer to an access agreement instead.

5A. Prior informed consent - ensuring knowledge holders are aware of their rights and significance of agreements made

5A.1 A party seeking access to a Knowledge Resource or determination of whether a proposed activity will use a Knowledge Resource must apply to the Competent Authority for access or determination.

5A.2 Access requires prior informed consent of the Aboriginal Community holding the Knowledge Resource.

5A.3 Prior informed consent must be provided to the Competent Authority by the relevant Knowledge Holder(s) on behalf of the Aboriginal Community in order for access to be granted.

5A.4 A request for access must be made by the Competent Authority to the relevant Knowledge Holder(s).

5A.5 A determination may be made by the Competent Authority based on databases of Knowledge Resources held by or accessible to the Competent Authority.

5A.6 Where a determination identified a relevant Knowledge Resource the party seeking the determination must apply for access before using the Knowledge Resource.

5B. mutually agreed terms- ensuring the bargaining process is fair and equitable

5B.1 The right of Aboriginal Communities to regulate access to their Knowledge Resources shall include the following:

5B.1.1 the right to give prior informed consent for access to their Knowledge Resources;

5B.1.2 when exercising the right to give prior informed consent, the right to refuse consent when they believe that the intended access will be detrimental to the integrity of their cultural or natural heritages;

5B.1.3 the right to withdraw or place restriction on the prior informed consent they have given for access to their Knowledge Resources where they find that such consent is likely to be detrimental to their socio-economic life or their natural or cultural heritages;

5B.2 No person shall access a Knowledge Resource unless in possession of written access permit granted by the Competent Authority based on prior informed consent of the concerned Aboriginal Community.

5B.3 The concerned Aboriginal Community shall obtain a fair and equitable share from the benefits arising out of the utilization of Knowledge Resources accessed.

5B.4 An access agreement shall specify, among other things, the following issues:

- (j) the identity of the parties to the agreement;
- (k) the description of the Knowledge Resource permitted to be accessed;
- (l) the locality where the Knowledge Resource and/or Genetic Resource is to be collected or the person providing same;
- (m) the intended use of the Knowledge Resource;
- (n) the relation of the access agreement with existing or future access agreements on the same Knowledge Resource;
- (o) the benefit the concerned Aboriginal community shall obtain from the use thereof;
- (p) the duration of the access agreement;
- (q) dispute settlement mechanisms; and
- (r) the obligations the access permit holder shall have under this Act.

5B.5 A person who shall be given an access permit shall have the following obligations:

- (m) show the access permit upon request;
- (n) deposit a description of Knowledge Resource accessed with the Competent Authority;
- (o) submit regular status reports on the research;
- (p) inform the Competent Authority in writing of all the findings of the research and development based on the knowledge accessed;
- (q) not to transfer the Knowledge Resource accessed to any other third party or to use same for any purpose other than that originally intended, without first notifying to and obtaining written authorization from the Competent Authority;
- (r) not to transfer to third parties the access permit or the rights and obligations there under without obtaining the consent of the Competent Authority to that effect;
- (s) not apply for a patent or any other intellectual property protection over the Knowledge Resource accessed without first obtaining explicit written consent from the Competent Authority;
- (t) recognize the Aboriginal Community from which the Knowledge Resource was accessed in any application for protection of a product developed therefrom;
- (u) share the benefit that may be obtained from the utilization of the knowledge accessed to the Aboriginal Community;
- (v) respect all relevant laws;
- (w) respect the cultural practices, traditional values and customs of the Aboriginal community holding the Knowledge Resource;
- (x) observe the terms and conditions of the access agreement.

5B.6 Access agreements shall be entered in a register kept for the purpose of this section by the Competent Authority.

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

Explanation

As well as defining who should receive benefits it is important to identify what those benefits should be and how they should be shared amongst the people who are to benefit

6.1 Aboriginal Communities shall have the right to share fairly and equitably in any benefit arising out of the utilization of their Knowledge Resources. The share in benefit is to be applied to the collective benefit of the Community. The share in benefit shall be applied primarily to securing advancement of the Community.

6.2 The benefits shall be as agreed between the parties prior to access.

6.3 The kind and the amount of the benefit to be shared by the Aboriginal Community from access to a Knowledge Resource shall be determined case by case in each specific access agreement to be signed. Benefits may be monetary and/or non-monetary.

6.4 Monetary benefits may include but not be limited to:

- (j) Access fees/fees per sample collected or otherwise acquired
- (k) Up-front payments
- (l) Milestone payments
- (m) Royalties
- (n) License fees in the case of commercialisation
- (o) Fees to be paid to trust funds representing interests of Country
- (p) Research funding
- (q) Joint ventures
- (r) Employment Opportunities
- (s) Joint ownership of relevant intellectual property rights

6.5 Non-monetary benefits may include but not be limited to:

- (m) Sharing of research and development results
- (n) Collaboration, cooperation and contribution in research and development programmes
- (o) Participation in product development
- (p) Collaboration, cooperation and contribution in education and training
- (q) Transfer to beneficiaries of knowledge and technology that makes use of the Knowledge Resource
- (r) Access to products and technologies developed from the use of the Knowledge Resource
- (s) Institutional capacity building
- (t) Resources to strengthen the capacities for the administration and enforcement of access regulations
- (u) Contributions to the local economy
- (v) Research directed to priority needs
- (w) Provision of equipment, infrastructure and technology support

6.6 Where Knowledge Resources are common to more than one Community the benefits shall be shared by those communities. Where no particular Community can be identified as the source of a particular Knowledge Resource, then benefits shall be paid to the Competent Authority and the

Competent Authority shall be responsible for distributing those benefits to Aboriginal Communities of New South Wales collectively.

6.7 The Competent Authority shall provide technical and legal support to Aboriginal Communities in the negotiation of benefit sharing arrangements where requested.

Provision 7. Sanctions and remedies- dealing with breaches

Explanation

The Act needs to provide a way of dealing with situations where the rules set out in the Act have been broken. This can deter people from breaking the rules and providing help to Communities who have been harmed by the rules being broken.

7.1 It is an infringement of the rights conferred on Aboriginal Communities under section 3 of this Act for a person to use or to authorise another person to use a Knowledge Resource without the prior informed consent and approval of the Knowledge Holder(s) of that Knowledge Resource.

7.2 In determining whether or not a person has authorised another person to use a Knowledge Resource without the prior informed consent and approval of the Knowledge holder, the matters that must be taken into account include the following:

- (e) the extent (if any) of the person's power to prevent the use;
- (f) the nature of any relationship existing between the person and the person who used the Knowledge Resource;
- (g) the nature of any relationship existing between the person and the Aboriginal community or Knowledge Holder and any obligations owed by the person to the Aboriginal community or Knowledge holder; and
- (h) whether the person took any reasonable steps to prevent or avoid the use.

7.3 A person who uses a Knowledge Resource but did not know and could not reasonably have been expected to know that they were using a Knowledge Resource commits an innocent act of infringement shall not be liable to pay damages.

7.4 The Aboriginal Community whose rights under this Act have been infringed, may bring infringement proceedings against the person who committed the infringement in a prescribed court within 12 years from the day the infringement occurred.

7.5 The court shall, unless it considers in the circumstances that it would be inappropriate to do so, refer, by order, the proceedings for mediation by a mediator and may do so either with or without the consent of the parties to the proceedings.

7.6 The mediation is to be undertaken by a mediator agreed to by the parties or appointed by the court.

7.7 It is the duty of each party to proceedings that have been referred for mediation, to participate, in good faith, in the mediation.

7.8 The Aboriginal Community retains the right to seek, and obtain, an interlocutory injunction on an urgent basis.

7.9 A court may grant all or any of the following remedies:

- (g) an injunction (subject to such terms as the court sees fit)
- (h) damages or, at the election of the Aboriginal Community, an account of profits;
- (i) a declaration that the Knowledge Resource has been used without prior informed consent;
- (j) an order that the defendant make a public apology for the use of the Knowledge Resource without prior informed consent ;
- (k) an order that any failure to attribute or false attribution of, or derogatory treatment, of the Knowledge Resource cease or be reversed;
- (l) an order for the seizure of any object made, imported or exported contrary to this Act;
- (m) such other orders as the court considers appropriate in the circumstances.

7.10 The Court must, at the election of the Aboriginal Community, award the Aboriginal Community:

- (c) if the infringer is a corporation, 10,000 penalty units;
- (d) or otherwise, 1,000 penalty units, for each act of infringement, instead of damages.

Note: One penalty unit is currently \$110

7.11 In the case of a person who commits an innocent act of infringement, the Court must, at the election of the Aboriginal Community, award the Aboriginal Community:

- (c) if the infringer is a corporation, 1,000 penalty units; or
- (d) otherwise, 100 penalty units; for each act of infringement, instead of damages.

Note: One penalty unit is currently \$110

7.12 A court may include an additional amount in an assessment of damages, or an award, if the court considers it appropriate to do so having regard to:

- (g) the effect on the Aboriginal Community of the unauthorised use of their Knowledge Resource; and
- (h) the flagrancy of the unauthorised use; and
- (i) the need to deter similar unauthorised use; and
- (j) the conduct of the unauthorised user that occurred:
- (k) after the act constituting the unauthorised use; or
- (l) after that party was informed that it had allegedly made an unauthorised use; and
- (m) any benefit shown to have accrued to that party because of the unauthorised use; and
- (n) all other relevant matters.

7.13 For the purposes of determining the effect of the unauthorised use on the Aboriginal Community the court may have regard to a community impact statement.

7.14 A community impact statement is a statement setting out the impact on the Aboriginal Community of the unauthorised use of their Knowledge Resource.

7.15 An Aboriginal Community may apply to a prescribed court for a declaration that a Knowledge Resource exists in relation to that Community.

7.16 An interested person may apply to a prescribed court for a declaration that a purported Knowledge Resource does not exist or does not belong to a specified Aboriginal Community.

7.17 Before making a declaration under this section the court must satisfy itself that all Aboriginal communities likely to be affected by the declaration proposed to be made are parties to the proceeding.

7.18 Where a Knowledge Holder, an Aboriginal Community, or any other person threatens a person with proceedings under this Act, a person aggrieved may apply to a prescribed court for:

- (d) a declaration that the threats are unjustifiable; and
- (e) an injunction against the continuance of the threats; and
- (f) the recovery of any damages sustained by the applicant as a result of the threats.

Provision 8. competent authority-establishment of a body to administer the legislation, deal with education, model clauses, codes of conduct, databases

Explanation

This provision ensures that there is an administrative body responsible for the things that need to happen under this Act. This provision establishes that body and describes what it does.

8.1 There shall be a Competent Authority for administering the provisions of this Act.

8.2 The Competent Authority shall

- (q) maintain a Confidential Register of Knowledge Holders
- (r) maintain a Public Register of Knowledge Resources and keep it up to date;
- (s) maintain a Confidential Register of Knowledge Resources and keep it up to date;
- (t) receive requests for determination or access in relation to Knowledge Resources;
- (u) render determinations in relation to determination requests;
- (v) liaise with Knowledge Holders in relation to access requests to ascertain whether access will be granted or refused;
- (w) advise parties seeking access of the approval or refusal of their access request;
- (x) maintain a Register of Access Agreements and keep it up to date;
- (y) assess the validity of Access Agreements;

- (z) assist Aboriginal Communities in negotiating access agreements when requested;
- (aa) administer benefits derived from access to Knowledge Resources for which benefits are to be shared by all Aboriginal Communities;
- (bb) monitor compliance of authorized user agreements and advise Aboriginal Communities of any violations thereof;
- (cc) develop standard terms and conditions that may be used in access agreements;
- (dd) develop and monitor compliance to Code of Ethics and best standard practices for users and owners; issue advisory guidelines for the purposes of this Act.

8.3 There shall be a female Registrar to deal with women's Knowledge Resources and a male Registrar to deal with men's Knowledge Resources.

Provision 9. no single owner- addressing situations where traditional knowledge, cultural expressions, genetic resources are common to more than one group

Explanation

Some Knowledge Resources might be found in more than one Aboriginal Community. The Act needs to address what should happen if that occurs. It also needs to address what should happen where there is disagreement as to which community a Knowledge Resource is associated with or where no community can be identified.

9.1 Where no particular Aboriginal Community can be identified as connected to a particular Knowledge Resource or no agreement can be reached as to which Aboriginal Community is connected to a particular Knowledge Resource then the Competent Authority shall be considered Trustee for that Resource with benefits arising from the use of that Resource being applied to Aboriginal Communities collectively.

9.2 Where a Knowledge Resource to which this Act applies is connected to more than one Aboriginal Community then each Aboriginal Community connected to the Knowledge Resource must agree to access to the Knowledge Resource before access can be granted and must share in the benefit arising from its use.

9.3 Where a dispute between Aboriginal Communities exists in relation to a claim to connection to a particular Knowledge Resource but no agreement can be reached between the Communities within a prescribed period then the Competent Authority shall be considered Trustee for the Knowledge Resource and shall be responsible for distributing benefits arising from access to the Knowledge Resource to Aboriginal Communities collectively.

Provision 10. exceptions – emergencies, traditional use, conservation

Explanation

There may be situations where use of Knowledge Resources should be permitted without following the process set down in this Act. An important example is ensuring that Aboriginal Communities can

continue to use their own Knowledge Resources. However there are other situations where use of Knowledge Resources might be permitted without following the process set down in this Act-such as dealing with emergencies or environmental conservation.

10.1 Any use by Aboriginal Communities of their Knowledge Resources in accordance with their customary laws and practices does not give rise to any criminal or civil liability under this Act.

10.2 No legal restriction shall be placed by this Act on customary use and exchange of Knowledge Resources by and between Aboriginal Communities.

10.3 The State has the obligation to avoid any risk or danger which threatens the permanence of ecosystems and to prevent, reduce or restore environmental damage which threatens life or deteriorates its quality.

10.4 When threat to an ecosystem exists or environmental damage exists in the ecosystem, the State can, subject to section 10.6, utilise Knowledge Resources to repair, restore, recuperate and rehabilitate it.

10.5 In cases of threat to human, plant or animal health the State can, subject to section 10.6, utilise Knowledge Resources to address the threat.

10.6 Use of Knowledge Resources to address environmental or health threats should be in consultation with Knowledge Holders to avoid misuse of the Knowledge Resource(s) concerned.

Provision 11: Registers and disclosure

Explanation

An important aspect of this law is ensuring that Knowledge Resources that are secret are not disclosed without permission. One of the issues that needs to be addressed is what information should be recorded. In the draft we have made provision for both Knowledge Holders and Knowledge Resources to be recorded with some registers being confidential.

11.1 The identity of Knowledge Holders and an indication of the type of Knowledge Resource(s) they hold may be entered in a Confidential Knowledge Holder Register. The indication of the type of Knowledge Resource(s) shall be provided to a female Registrar for women's Knowledge Resources and a male Registrar for men's Knowledge Resources.

11.2 Knowledge Resources may be entered in three types of register:

- (a) Public Knowledge Resources Register;
- (b) Confidential Knowledge Resources Register;
- (c) Local Knowledge Resources Registers.

11.3 The Confidential Knowledge Holder Register, Public Knowledge Resources Register and the Confidential Knowledge Resources Register shall be maintained by the Competent Authority.

11.4 The purposes of the Registers shall be the following, as the case may be:

- (a) to enable the Competent Authority to liaise with Aboriginal Communities regarding the grant or refusal of access to their Knowledge Resources;
- (b) preserve and safeguard the Knowledge Resources and their rights therein;
- (c) to provide the Competent Authority with such information as enables it to defend the interests of Aboriginal Communities where their Knowledge Resources are concerned.

11.5 The Public Register shall contain Knowledge Resources in the public domain.

11.6 The Confidential Knowledge Resource Register may not be consulted by third parties.

11.7 Information in the Confidential Knowledge Resource Register may only be disclosed to a third party if disclosure is approved by the relevant Knowledge Holder, the male Registrar and the female Registrar.

11.8 Any Aboriginal Community may apply to the Competent Authority for the registration of Knowledge Resources possessed by it in the Public Register or in the Confidential Register.

11.9 With a view to its opposing pending patent applications, disputing granted patents or otherwise intervening in the grant of patents for goods or processes produced or developed on the basis of Knowledge Resources the Competent Authority shall send the information entered in the Public Register to the main patent offices of the world in order that it may be treated as prior art in the examination of the novelty and inventiveness of patent applications.

11.10 Aboriginal Communities may organize local registers of Knowledge Resources in accordance with their practices and customs. The Competent Authority shall lend technical assistance in the organization of such registers at the request of the Aboriginal Communities.

Provision 12. interaction with existing laws- avoiding conflict with other laws

Explanation

There need to be rules that define how a new Act works with laws that are already in place so that the different laws don't conflict with each other.

12.1 No law, regulation, directive or practice shall, in so far as it is inconsistent with this Act, have effect with respect to matter provided for by this Act.

12.2 The Competent Authority may issue regulations necessary for the proper implementation of this Act.

Provision 13. recognition of requirements of other nations- mutual recognition of rights and ensuring compliance

Explanation

There is also a need to ensure that the new law can work with agreements we might have with other countries.

13.1 An access to Knowledge Resources under an agreement with other states, territories or countries to which New South Wales is a party shall be made in accordance with the conditions and procedure specified the relevant agreement.

Provision 14. transitional provisions- existing uses

Explanation

This new law also needs to have rules to deal with any access agreements entered into before it becomes law. This provision says that the old agreements need to be consistent with this law.

14.1 Access agreements made prior to the coming into force of this Act shall be revised and harmonized with the provisions of this Act.

14.2 The access to Knowledge Resources under agreements concluded prior to the coming into force of this Act shall be suspended until they are revised and harmonized with the provisions of this Act.

Consultations & Submissions

This Discussion Paper will be made available through the Indigenous Knowledge Forum website (www.indigenouknowledgeforum.org) enabling the broadest distribution nationally and encouraging submissions from all interested parties.

Meanwhile Aboriginal Community consultation meetings will be held at Tamworth, Gunnedah, Walgett, Moree and Narrabri in North West NSW during the week 16 – 20 June 2014. These consultations will enable the draft regime to be refined into a model capable of application at a State or Federal level, through legislative implementation. The outcome of community consultations will be published on the website of the Indigenous Knowledge Forum.

Utilising the results of the consultations, a 'White Paper' will be prepared and delivered to the NSW Government at the Second Sydney Forum to be held in September 2014. Other relevant government departments in each State and at Federal level will be provided with copies and a pdf will be made available on the Indigenous Knowledge Forum Website.

Submissions should be sent by 31 July 2014 to either Dr Ann Cahill by email ann2@bigpond.com or Professor Natalie Stoianoff by email Natalie.Stoianoff@uts.edu.au

APPENDIX 2- Protection of Aboriginal Knowledge Resources Bill 2014

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Part 1 Preliminary

Preamble: Recognising the impact of European arrival on the Knowledge and connection to Country of Aboriginal Peoples in New South Wales

Aboriginal peoples are the First Peoples of New South Wales. Many Aboriginal peoples are from diverse language groups, with their own unique laws, customs, practices and heritage.

The connection of the Aboriginal peoples in New South Wales to their traditional lands was substantially impacted by the arrival of the British First Fleet and the Western and European convicts, settlers and migrants who followed thereafter. As New South Wales was the first colonised region, Aboriginal peoples have suffered substantial and ongoing disruption to their long held Aboriginal sovereignty and the connection with their traditional lands, waters and resources. This has led to human suffering that was exacerbated by government and non-government policies that forcibly removed Aboriginal peoples from their families and cultural relationships.

In many cases Aboriginal peoples have been frustrated in their efforts to reassert their connection to their traditional territories. Nonetheless the laws, customs and culture of Aboriginal peoples still exist and are integral to their cultural, spiritual and physical well-being. Aboriginal laws, customs and culture includes traditional knowledge that is held within Aboriginal communities, and ancestral creation stories.

Today, Aboriginal communities include those who are descendants of the traditional custodians of the land on which they reside, as well as Aboriginal peoples who are descended from the traditional custodians of other lands. Aboriginal peoples who are not descended from the traditional custodians of the land on which they reside may still be engaged in caring for Country. These communities reside in diverse circumstances from far remote to rural and urban environments.

This complex history creates different challenges for Aboriginal communities – for example in decision making processes, exercising access to resources and access to a broad range of services. The diverse composition and circumstances of Aboriginal communities needs to be recognised in statutory law that acknowledges and ensures the legal rights of the Aboriginal peoples in relation to their traditional knowledge which is defined in the Act as Knowledge Resources.

Aims of the Act

This Act aims to:

- (a) promote respect and protection of Knowledge Resources for Aboriginal Communities;

- (b) promote the fair and equitable distribution of the benefits derived from the use of Knowledge Resources;
- (c) promote the use of Knowledge Resources for the benefit of Aboriginal Communities, Knowledge Holder and Country;
- (d) ensure that the use of the Knowledge Resources is with the free prior informed consent of Knowledge Holders and of their respective Aboriginal Communities;
- (e) promote the strengthening and development of Aboriginal Communities to use customary laws and practices and to share and distribute benefits generated under this Act;
- (f) promote protection of Country and resources on Country;
- (g) promote connection with Country for Aboriginal people for their cultural and spiritual well-being;
- (h) [prevent patents being granted for inventions made or developed from Knowledge Resources of Aboriginal Communities without clearly identifying the rights of Aboriginal Communities to such Knowledge Resources.]

1 Purpose of this Act

Knowledge Resources

- (1) This Act relates to Knowledge Resources of Aboriginal Communities.

The Rights of Aboriginal Communities over their Knowledge Resources

- (2) Aboriginal Communities have the inherent right to maintain, control, protect and develop their Knowledge Resources;
- (3) Aboriginal Communities have certain moral rights in a Knowledge Resource:
 - (a) The right of attribution; and
 - (b) The right against false attribution; and
 - (c) The right of integrity.
- (4) Rights identified in subsections (2) and (3) are not transmissible by assignment, by will, or by devolution by operation of law.
- (5) The protection provided by this Act may not be interpreted in such a way as to impede the preservation, use and development of Knowledge Resources in an Aboriginal Community.
- (6) Aboriginal communities that create, hold or preserve Knowledge Resources have the right to:
 - (a) prevent unauthorised persons from :
 - (i) the use or carrying out of tests, research or investigations relating to Knowledge Resources; and
 - (ii) the disclosure, broadcast or rebroadcast of data or information that incorporates or constitutes such Knowledge Resources; and
 - (b) derive benefit from economic exploitation by authorised persons of Knowledge Resources held by the Aboriginal Community as provided in this Act.
- (7) Any person using or commercially exploiting a Knowledge Resource shall ensure that their activities conform to this Act.

- (8) Subject to Part 8 of this Act, an Aboriginal Community may access prescribed Country for the purpose of managing that Aboriginal Community's Knowledge Resources.

2 Definitions of key terms used in this Act

- (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

Aboriginal Community means a group of Aboriginal People connected by where they live and/or ancestry and includes descendants of the traditional custodians of Country who continue to reside on Country, descendants of the traditional custodians of Country who no longer reside on Country and Aboriginal peoples who reside on Country but are not descendants of the traditional custodians of Country.

Access Agreement means a written agreement entered into pursuant to subsection 6(6) and containing provisions that address the matters listed in subsection 8(1).

Access Approval means such written approval or certificate granted by the Competent Authority in accordance with the regulations to this Act.

Benefits include those monetary benefits and non-monetary benefits described in subsections 10(1) and 11(1) respectively.

Benefit Sharing means a process whereby an Aboriginal Community receives monetary and/or non-monetary return for sharing Knowledge Resources under a written agreement approved by the relevant Knowledge Holder(s).

Competent Authority means the organisation responsible for administering this Act and regulations under this Act and is independent of other authorities. The Competent Authority will include representatives of Aboriginal Communities and provides for local, regional and state administration of this Act.

Country refers to the lands and waters of New South Wales including marine territory of New South Wales

Cultural Expressions include music, dance, songs, stories, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives.

Free prior informed consent means a procedure through which the Knowledge Holder(s) of a Knowledge Resource in one or more Aboriginal Communities receive full and open disclosure of all relevant information prior to making contractual negotiations and entering into a written agreement.

Genetic resource means genetic material of a biological resource containing genetic information having actual or potential value for humanity and including its derivatives;

Knowledge Holders means members of Aboriginal Communities entrusted with responsibility for Knowledge Resources of the Community;

Knowledge Resource(s) means bodies of knowledge held by Aboriginal Communities relating to the use, care and understanding of Country and the resources found on Country. Knowledge Resources include cultural heritage, traditional knowledge and traditional Cultural Expressions, as well as manifestations of Aboriginal sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. Knowledge resources include 'law knowledge' and 'cultural knowledge' of an Aboriginal Community and knowledge of observing

ecological interactions between plants, animals, medicines, foods and seasonal cycles which relate to genetic resources. Genetic resources may exhibit different properties in different locations and environments.

Mutually Agreed Terms (MATs) means terms and conditions on which both parties agree under a written agreement to ensure the Access and Benefit Sharing (ABS) process is effective, transparent, and legally binding. Mutually agreed terms set out the way in which the contracting parties and third parties can obtain access or permission to collect, study, or commercially use Knowledge Resources.

Person has the meaning ascribed to it in section 2C of the Acts Interpretation Act 1901 (Cth).

Prescribed Country means Country that is prescribed in the regulations to this Act.

Prescribed court means such court as is prescribed in the regulations to this Act.

Prescribed tribunal means such tribunal as is prescribed in the regulations to this Act.

Registered Knowledge Resource means a Knowledge Resource that is contained on a register maintained by the Competent Authority.

State means the state of New South Wales.

Use includes any of the following acts:

- (a) Where the Knowledge Resource is a product:
 - (i) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or
 - (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.
- (b) Where the Knowledge Resource is a process:
 - (i) making use of the process beyond the traditional context; or
 - (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or
- (c) When the Knowledge Resource is used for research and development leading to profitmaking or commercial purposes.

Part 2 Knowledge Resources and Beneficiaries

3 Custodianship

- (1) The custodianship of a Knowledge Resource is vested in the Knowledge Holder(s) of the Aboriginal Community holding the Knowledge Resource.
- (2) A Knowledge Resource protected under this Act is communal property held by the Aboriginal Community that is a custodian for the Knowledge Resource and not an individual person or persons within that Aboriginal Community, even if only one member of the Aboriginal Community holds that Knowledge Resource.

4 Benefit

- (1) Subject to Section 9(2) of this Act, any Benefits derived from use of a Knowledge Resource shall be for the benefit of the Aboriginal Community that holds the Knowledge Resource.
- (2) A Knowledge Resource may be held by two or more Aboriginal Communities and each Aboriginal Community that holds the Knowledge Resource is entitled to benefit from use of the Knowledge Resource.
- (3) Aboriginal Communities may preserve, develop and manage their Knowledge Resources for the benefit of future generations and shall be permitted access to Prescribed Country for this purpose.

Part 3 Access - who speaks for Knowledge Resources and the process for granting or refusing access

5 Consent

- (1) Access to a Knowledge Resource requires free prior informed consent of the Aboriginal Community holding the Knowledge Resource.
- (2) Aboriginal Communities have the right to regulate access to their Knowledge Resources including:
 - (a) the right to give free prior informed consent for access to their Knowledge Resources;
 - (b) the discretion to refuse access where the intended access is deemed by the Aboriginal Community as detrimental to the integrity of their cultural or natural heritages;
 - (c) the discretion to withdraw or place restriction on the free prior informed consent if the Aboriginal Community determines the access to be detrimental to their socio-economic life or their natural or cultural heritage;

6 Seeking access

- (1) A party seeking to use a Knowledge Resource must apply to the Competent Authority for a determination as to whether permission of one or more Aboriginal Communities must be obtained for access to the Knowledge Resource to be granted.
- (2) A determination may be made by the Competent Authority based on databases of Knowledge Resources held by or accessible to the Competent Authority.
- (3) A request for access must be made by the Competent Authority to the relevant Knowledge Holder(s).
- (4) The relevant Knowledge Holder(s) must be part of the decision making process in the Aboriginal Community regarding whether access is to be granted.
- (5) Free Prior informed consent must be provided to the Competent Authority by the Aboriginal Community and the relevant Knowledge Holder(s) in order for access to be granted.

- (6) Access to a Knowledge Resource requires written Access Approval granted by the Competent Authority based on free prior informed consent of the Aboriginal Community and the relevant Knowledge Holder(s) and an Access Agreement evidencing that free prior informed consent to access has been granted on mutually agreed terms.
- (7) A person may apply to the Competent Authority to search its registers to determine whether any Registered Knowledge Resources exist in relation to specified subject matter.
- (8) The regulations may provide for the types of searches that a person may request the Competent Authority to perform pursuant to subsection 4(9).

7 Mutually agreed terms

- (1) An Aboriginal Community shall receive a fair and equitable share from any Benefits arising out of the use of a Knowledge Resource accessed.

8 Access Agreements

- (1) An Access Agreement shall include the following:
 - (a) the identity of the party or parties to the agreement;
 - (b) the description of the Knowledge Resource to be accessed under the Access Agreement;
 - (c) the coordinates of the locality of the Knowledge Resource and/or Genetic Resource;
 - (d) the intended use of the Knowledge Resource;
 - (e) the relationship of the Access Agreement with existing or future Access Agreements on the same Knowledge Resource;
 - (f) the benefits for Aboriginal community from granting access to the Knowledge Resource;
 - (g) the duration of the Access Agreement;
 - (h) a dispute settlement process; and
 - (i) the obligations the Knowledge Resource recipient shall have under this Act.
- (2) A person who is permitted to access to a Knowledge Resource shall have the following obligations:
 - (a) To show the Access Approval upon request;
 - (b) deposit a description of the Knowledge Resource accessed with the Competent Authority;
 - (c) submit regular status reports on the research;
 - (d) inform the Competent Authority in writing of all the findings of the research and development based on the Knowledge Resource accessed;
 - (e) not to transfer the Knowledge Resource to any other third party or to use for any purpose other than specified in the Access Agreement;
 - (f) An Access Approval in not permitted to be transferred to third parties;
 - (g) not to apply for a patent or any other intellectual property protection over the Knowledge Resource without the permission of the Aboriginal Community;

- (h) ensure attribution of the Aboriginal Community from which the Knowledge Resource was accessed in any oral or written material;
 - (i) share the benefit that may be obtained from the use of the Knowledge Resource accessed with the Aboriginal Community; respect all relevant laws;
 - (j) respect the cultural practices, traditional values and customs of the Aboriginal Community holding the Knowledge Resource;
 - (k) observe the terms and conditions of the Access Agreement.
- (3) Sufficient details of an Access Agreement to identify the Access Agreement shall be entered in a register kept by the Competent Authority and no confidential information shall be included in this register.

Part 4 Benefit sharing

9 Application of benefits

- (1) Aboriginal Communities shall receive fair and equitable benefit(s) under an Access Agreement.
- (2) The Benefit(s) are to be applied to the collective benefit of the Aboriginal Community and Country.
- (3) An Aboriginal Community may establish a process according to their Community protocols or laws for determining what Benefit(s) should be part of an Access Agreement and how they will be distributed amongst members of the Community.

10 Monetary benefits

- (1) Monetary Benefit(s) may include, but not be limited to:
 - (a) Access fees/fees per sample collected or as specified in the agreement;
 - (b) Up-front payments;
 - (c) Milestone payments;
 - (d) Royalties;
 - (e) License fees;
 - (f) Research funding;
 - (g) Joint ventures;
 - (h) Employment opportunities;
 - (i) Joint ownership of relevant intellectual property rights

11 Non-monetary benefits

- (1) Non-monetary Benefit(s) may include but not be limited to:
 - (a) Sharing of research and development results;
 - (b) Collaboration, cooperation and partnership in research and development programmes;
 - (c) Participation in product development;
 - (d) Collaboration, cooperation and partnership in education and training;

- (e) Transfer to beneficiaries of knowledge and technology that makes use of the Knowledge Resource;
 - (f) Access to products and technologies developed from the use of the Knowledge Resource;
 - (g) Capacity building within the Aboriginal Community;
 - (h) Resources to strengthen the capacities for the administration and enforcement of access regulations;
 - (i) Contributions to the local economy;
 - (j) Research directed to priority needs;
 - (k) Provision of equipment, infrastructure and technology;
 - (l) Protection of Country.
- (2) Where Knowledge Resources are common to more than one Aboriginal Community the Benefit(s) shall be shared by those communities. Where no particular Aboriginal Community can be identified as the source of a particular Knowledge Resource, then Benefit(s) shall be paid to the Competent Authority and the Competent Authority shall be responsible for distributing those Benefit(s) to Aboriginal Communities of New South Wales in a prescribed manner within the prescribed period.
- (3) The Competent Authority shall provide technical and legal support to Aboriginal Communities in negotiating Benefit Sharing arrangements and/or an Access Agreement on request.

Part 5 Sanctions and remedies

12 Infringement

- (1) A person who uses or authorises another person to use a Knowledge Resource without the free prior informed consent and approval of the Aboriginal Community that holds that Knowledge Resource infringes that Aboriginal Community's inherent rights in the Knowledge Resource.
- (2) In determining whether a person has authorised another party to use a Knowledge Resource without the free prior informed consent of the Aboriginal Community, the prescribed court or prescribed tribunal must, amongst other things, take into account:
 - (a) the extent (if any) of the first person's power to prevent the use of the Knowledge Resource;
 - (b) the nature of any relationship existing between the first person and the person who used the Knowledge Resource;
 - (c) the nature of any relationship existing between the first person and the Aboriginal Community or Knowledge Holder(s) and any obligations owed by the first person to the Aboriginal Community or Knowledge Holder(s) and
 - (d) whether the first person took any reasonable steps to prevent or avoid the use.

13 Innocent infringement

- (1) A person who uses a Knowledge Resource but did not know and could not reasonably have been expected to know that they were using a Knowledge

Resource commits an innocent act of infringement and shall not be liable to pay damages.

14 Infringement proceedings

- (1) An Aboriginal Community whose inherent rights in a Knowledge Resource have been infringed, may bring infringement proceedings against the person that committed the infringement before a prescribed court or a prescribed tribunal within 20 years from the day the infringement occurred.
- (2) The judge of the prescribed court or prescribed tribunal must be trained in the culture of the relevant Aboriginal Community.
- (3) The prescribed court or prescribed tribunal shall, unless it considers in the circumstances otherwise, refer by order, the matter for mediation and may do so with or without the consent of the parties.
- (4) Mediation is to be undertaken by a mediator agreed to by the parties or where agreement is not possible, appointed by the prescribed court or prescribed tribunal.
- (5) The parties shall participate in the mediation in good faith.
- (6) An order for mediation does not prevent the Aboriginal Community from seeking, and obtaining, an interlocutory injunction.
- (7) A prescribed court or prescribed tribunal may grant an order for any of the following remedies:
 - (a) an injunction (subject to such terms as the court sees fit)
 - (b) subject to section 15, damages or, at the election of the Aboriginal Community, an account of profits;
 - (c) a declaration that the Knowledge Resource has been used without Free prior informed consent;
 - (d) a public apology;
 - (e) an order for the seizure of any object made, imported or exported contrary to this Act; and
 - (f) such other orders as the prescribed court or prescribed tribunal considers appropriate.
- (8) Where an action for infringement is brought under subsection (1) in respect of a Knowledge Resource that is not a Registered Knowledge Resource, the prescribed court or prescribed tribunal must not award any of the remedies provided for in subsection (7) unless it appears to the prescribed court or prescribed tribunal that it is just, equitable and reasonable to do so having regard to all the relevant circumstances. Factors relevant to the consideration of whether and what remedies are just, equitable and reasonable include, but are not limited to, the *bona fides* of the infringer, the financial investment made by the infringer in relation to the act or acts constituting use of the Knowledge Resource, and the due diligence undertaken by the infringer to determine the existence of relevant Knowledge Resources.

15 Remedies for infringement

- (1) Where the Knowledge Resource infringed is a Registered Knowledge Resource, the prescribed court or prescribed tribunal must, at the election of the Aboriginal Community, award the Aboriginal Community:
 - (a) if the infringer is a corporation, 10,000 penalty units;
 - (b) or otherwise, 1,000 penalty units, for each act of infringement,

instead of damages.

Note: One penalty unit is \$110

- (2) In the case of a person who commits an innocent act of infringement, the prescribed court or prescribed tribunal may award the Aboriginal Community:

- (a) if the infringer is a corporation, 1,000 penalty units; or
- (b) otherwise, 100 penalty units; for each act of infringement,

if it appears just, equitable and reasonable to do so having regard to all the relevant circumstances.

Note: One penalty unit is \$110

- (3) A prescribed court or prescribed tribunal may award an additional amount in an assessment of damages where the prescribed court or prescribed tribunal considers it appropriate to do so having regard to:
- (a) the impact on the Aboriginal Community of the unauthorised use of their Knowledge Resource; and
 - (b) the flagrancy of the unauthorised use; and
 - (c) the need to deter similar unauthorised use; and
 - (d) the conduct of the unauthorised user; and
 - (e) any benefit shown to have accrued to the infringer because of the unauthorised use; and
 - (f) any other relevant matters.
- (4) For the purposes of determining the impact of the unauthorised use on the Aboriginal Community the prescribed court or prescribed tribunal may have regard to a community impact statement.
- (5) A community impact statement is a statement setting out the impact on the Aboriginal Community of the unauthorised use of their Knowledge Resource.

16 Declarations of non-existence

- (1) A defendant in infringement proceedings by way of counter-claim, or an interested person may apply to the prescribed court or prescribed tribunal for a declaration that a purported Knowledge Resource does not exist or does not belong to a specified Aboriginal Community.
- (2) Before making a declaration under this section the prescribed court or prescribed tribunal must satisfy itself that all Aboriginal Communities likely to be affected by the declaration proposed to be made are parties to the proceeding.

17 Offences

- (1) It is an offence to access or use a confidential Knowledge Resource belonging to one or more Aboriginal Communities without the free prior informed consent of all Aboriginal Communities who have recorded their interest in the Knowledge Resource in the Confidential Knowledge Resource Register.

Penalty:

- (a)
 - (i) if the infringer is a corporation, 1,000 penalty units; or
 - (ii) otherwise, 100 penalty units;for each act of infringement; or
- (b) 2 years imprisonment, or both.

Note: One penalty unit is \$110

- (2) A person previously found guilty under subsection (1) is liable to a maximum term of 5 years imprisonment and a penalty of 10,000 penalty units for each subsequent offence proven in relation to the access or use of the confidential Knowledge Resource.
- (3) Penalties paid under this section 17 for offences against this Act to be paid into an account administered by the Competent Authority to be held in trust for its operations.

18 Consequences of requesting searches of Registers

- (1) If a person has applied to the Competent Authority to search for Registered Knowledge Resources with respect to specified subject matter, then:
 - (a) if the Competent Authority notifies the person that there are no Registered Knowledge Resources relating to that subject matter; or
 - (b) if the Competent Authority notifies the person that one or more Registered Knowledge Resources exist in relation to that subject matter and the person obtains the free prior informed consent of the Aboriginal Communities who are recorded as the owner of those Registered Knowledge Resources to use those Registered Knowledge Resources;

that person cannot be held to have infringed any Knowledge Resources that exist with respect to that subject matter if the act or acts that would otherwise constitute an infringement are done in good faith and in reliance on the information provided by the Competent Authority.

19 Unjustified threats

- (1) Where a Knowledge Holder, an Aboriginal Community, or any other person threatens a person with proceedings under this legislation, a person aggrieved may apply to a prescribed court or prescribed tribunal for:
 - (a) a declaration that the threats are unjustifiable; and
 - (b) an injunction against the continuance of the threats; and
 - (c) the recovery of any damages sustained by the applicant as a result of the threats.

20 Moral Rights

- (1) A person infringes the moral rights of an a Aboriginal Community in a Knowledge Resource if the person:
 - (a) uses the Knowledge Resource without attributing ownership; or
 - (b) falsely attributes ownership of the a Knowledge Resource; or
 - (c) subjects the Knowledge Resource to a derogatory treatment.
- (2) Where the moral rights of an Aboriginal Community in a Knowledge Resource Act have been infringed, the Aboriginal Community may bring proceedings in a prescribed court or a prescribed tribunal, within 6 years of the date of infringement, for:
 - (a) a public apology;
 - (b) an injunction against the continuation of the infringement of moral rights; and
 - (c) the recovery of any damages sustained.

Part 6 Competent Authority

21 Creation

- (1) There shall be an independent Competent Authority for administering the provisions of this Act comprising local, regional and state level administrations.

22 Functions

- (1) The Competent Authority shall
 - (a) maintain a Public Register of Knowledge Resources and regularly update the information ;
 - (b) maintain a Confidential Register of Knowledge Resources and regularly update the information;
 - (c) receive requests for determination or access in relation to Knowledge Resources;
 - (d) render determinations in relation to determination requests;
 - (e) liaise with Knowledge Holders in relation to access requests to ascertain whether access will be granted or refused;
 - (f) notify parties seeking access of the approval or refusal of the request;
 - (g) assist Aboriginal Communities in negotiating Access Agreements, by request;
 - (h) evaluate compliance of Access Agreements ;
 - (i) maintain a Register of Access Agreements and regularly update the information;
 - (j) administer shared Benefit(s) for Aboriginal Communities which are derived from access to Knowledge Resources as prescribed in the regulations;
 - (k) monitor compliance with Access Agreements and advise Aboriginal Communities of any violations ;
 - (l) provide a model(s) of agreement as a guide for Aboriginal Communities;
 - (m) develop and monitor compliance in a Code of Ethics and Best Practices;
 - (n) provide training to the prescribed court or prescribed tribunal;
 - (o) respond to requests by any person to search the registers it maintains to determine if any Registered Knowledge Resources exist in respect of specified subject matter.
- (2) There shall be a female Registrar to administer women's Knowledge Resources and a male Registrar to administer men's Knowledge Resources.
- (3) All officers of the Competent Authority are required to maintain confidentiality of information provided to the Competent Authority.
- (4) Appeal of decisions
- (5) An Appeal from a decision of the Competent Authority shall be heard by a prescribed court or prescribed tribunal.

23 Payments

- (1) Shared Benefit(s) administered by the Competent Authority must be made payable to Aboriginal Communities within the prescribed period.
- (2) If the Competent Authority ceases to exist any outstanding monetary Benefit(s) held by the Competent Authority must be transferred to the prescribed Aboriginal Authority.

Part 7 Knowledge Resources held by more than one Aboriginal Community

24 Access

- (1) Where a Knowledge Resource is connected to more than one Aboriginal Community then all Aboriginal Communities that hold the Knowledge Resource must agree to permit access to the Knowledge Resource before access can be granted and any Benefit(s) arising from permitted use shall be shared among all Aboriginal Communities that hold the Knowledge Resource.

25 Disputes

- (1) Where a dispute exists and remains unresolved between Aboriginal Communities on rights to a Knowledge Resource and no agreement can be made between the Aboriginal Communities within a prescribed period then the Competent Authority shall be considered Trustee for the monies arising from Benefit(s) accrued from an Access Agreement and shall be responsible for distributing such Benefit(s) arising under the Access Agreement.
- (3) The Aboriginal Communities concerned may elect before the prescribed period has elapsed to submit to arbitration before the male or female registrar of the Competent Authority.

Part 8 Exceptions

26 Traditional use

- (1) Any use by Aboriginal Communities of their Knowledge Resources in accordance with their laws, customs and practices does not give rise to any criminal or civil liability under this Act.
- (2) There is no legal restriction under this Act on customary use and exchange of Knowledge Resources between Aboriginal Communities.

27 Environmental damage

- (1) The State has the obligation to avoid any risk or danger which threatens the permanence of ecosystems and to prevent, reduce or restore environmental damage which threatens life or its quality. Aboriginal Communities recognise damage to water resources as a threat to quality of life.

- (2) When threat to an ecosystem exists or environmental damage exists in the ecosystem, the State can, subject to subsection (4), utilise Knowledge Resources to repair, restore, recuperate and rehabilitate it.
- (3) In cases of threat to human, plant or animal health the State can, subject to subsection (4), utilise Knowledge Resources to address the threat.
- (4) Use of Knowledge Resources to address environmental or health threats should be in consultation with Knowledge Holders to avoid misuse of the Knowledge Resource(s) concerned, provide prescribed compensation to the relevant Aboriginal Communities and must be registered with the Competent Authority.

Part 9 Registers and disclosure

28 Confidential register

- (1) The identity of Knowledge Holder(s) and an indication of the type of Knowledge Resource(s) held may be entered into a Confidential Knowledge Holder Register. The indication of the type of Knowledge Resource(s) shall be provided to a female Registrar for women's Knowledge Resources and a male Registrar for men's Knowledge Resources. The Knowledge Holder must agree to have their identity recorded in the register before those details are placed on record.
- (2) The Confidential Knowledge Holder Register shall be administered by local or regional administrations of the Competent Authority.

29 Types of register

- (1) Knowledge Resources may be entered in three types of register:
 - (a) Public Knowledge Resources Register;
 - (b) Confidential Knowledge Resources Register; and
 - (c) Community Knowledge Resources Registers.
- (2) The inclusion of Knowledge Resources in one or more of these registers is by agreement of the relevant Knowledge Holder(s) and Aboriginal Community, in accordance with community protocols for the Aboriginal Community.

30 Maintenance

- (1) The Confidential Knowledge Holder Register, Public Knowledge Resources Register and the Confidential Knowledge Resources Register shall be maintained by the Competent Authority.
- (2) The purposes of the Registers shall be the following:
 - (a) to enable the Competent Authority to liaise with Aboriginal Communities regarding the granting or refusal of access to their Knowledge Resources;
 - (b) to preserve and safeguard the Knowledge Resources and existing and future rights;
 - (c) to provide the Competent Authority with information that enables the Competent Authority to defend the interests of Aboriginal Communities .
- (3) The Public Knowledge Resources Register shall contain Knowledge Resources in the public domain and shall be made available for public inspection.

31 Confidentiality

- (1) The Confidential Knowledge Resource Register may not be divulged to third parties and others who do not have authorisation of the Competent Authority and the Aboriginal Communities to access the Knowledge Resource(s) recorded in it.
- (2) Information in the Confidential Knowledge Resource Register may only be disclosed to a third party if disclosure is approved by the relevant Knowledge Holder(s) and the male Registrar and the female Registrar.

32 Registration

- (1) Any Aboriginal Community may apply to the Competent Authority for the registration of Knowledge Resources held by it in the Public Knowledge Resources Register or in the Confidential Knowledge Resources Register.

33 Publication as patent prior art

- (1) The Competent Authority shall send the information entered in the Public Knowledge Resources Register to the main patent offices of the world in order that it may be treated as prior art in the examination of the novelty and inventiveness of patent applications.

34 Community registers

- (1) Aboriginal Communities may organise Community Knowledge Resources Registers in accordance with their laws, practices and customs. The Competent Authority will provide technical assistance for the development of Community Knowledge Resources Registers on the request of the Aboriginal Communities. Community Knowledge Resource Registers may be deposited with the local or regional or state administrations of the Competent Authority.
- (2) The contents of the Community Knowledge Resource Registers maintained under subsection (1) must be transmitted to the Competent Authority on a regular basis and will then be included in the Public Knowledge Resources Register or the Confidential Knowledge Resources Register as appropriate.
- (3) A Knowledge Resource recorded on a Community Knowledge Resource Register only becomes a Registered Knowledge Resource when transmitted to the Competent Authority and included in one of its registers pursuant to subsection (2).

Part 10 Miscellaneous

35 Interaction with existing laws

- (1) No law, regulation, directive or practice shall, in so far as it is inconsistent with this Act have effect with respect to matter provided for by this Act.
- (2) The Competent Authority may draft regulations necessary for the proper implementation of this Act.

36 Mutual recognition of rights and compliance

- (1) An access to Knowledge Resources under an agreement with other states, territories or countries shall be made in accordance with the conditions and procedure specified in the relevant agreement.

37 Transitional provisions and existing uses

- (1) Access Agreements made prior to the coming into force of this Act shall be amended and harmonized with the provisions of this Act.