Recognising and Protecting Indigenous Knowledge Associated with Natural Resource Management

Part 1: Background information

The Convention on Biological Diversity

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

Article 1 of the CBD provides that three objectives:

(i) the conservation of biological diversity,

(ii) the sustainable use of its components and

(ii) the fair and equitable sharing of benefits arising from use of genetic resources.

A "genetic resource" is defined in Article 2 of the CBD as any material of plant, microbial or other origin containing functional units of heredity (genes) which is of actual or potential value.

Before the CBD, genetic resources were considered the 'common heritage of mankind'. Their use for creating new products was typically carried out 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 Article 8(j) of the CBD, Australia is required (subject to national legislation) to encourage equitable sharing of benefits arising from the use of the knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

Article 15(1) of 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. Under Article 15(4), where access is granted, it must be provided on the basis of mutually agreed terms (i.e. a contract). The mutually agreed terms set out how benefits arising from the use of the genetic resource are to be shared.

Mega-diverse countries

Australia is one of seventeen countries described as being 'mega-diverse'. This group of countries has less than 10% of the global surface, but support more than 70% of the biological diversity on earth. The countries recognized as mega-diverse are : Australia; The Congo; Madagascar; South Africa; China; India; Indonesia; Malaysia; Papua New Guinea; Philippines; Brazil; Colombia; Ecuador; Mexico; Peru; United States; and Venezuela.

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 utilization of genetic resources under the CBD. The Nagoya Protocol on ABS was adopted on 29 October 2010 in Nagoya, Japan. Australia signed the Protocol in January 2012.

The Nagoya Protocol applies to genetic resources that are covered by the CBD, and to the benefits arising from their utilization. The Nagoya Protocol also covers traditional knowledge (TK) associated with genetic resources that are covered by the CBD and the benefits arising from its utilization.

The objective of the Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.

“Utilization of genetic resources” means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology which in turn encompasses any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.

"Derivative" means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.

The Nagoya Protocol addresses traditional knowledge associated with genetic resources with provisions on access, benefit-sharing and compliance. It also addresses genetic resources where indigenous and local communities have the established right to grant access to them. Contracting Parties are to take measures to ensure these communities' prior informed consent, and fair and equitable benefit-sharing, keeping in mind community laws and procedures as well as customary use and exchange.

A range of tools and mechanisms provided by the Nagoya Protocol are intended to assist contracting Parties including:

- Establishing national focal points (NFPs) and competent national authorities (CNAs) to serve as contact points for information, grant access or cooperate on issues of compliance
- An Access and Benefit-sharing Clearing-House to share information, such as domestic regulatory ABS requirements or information on NFPs and CNAs
- Capacity-building to support key aspects of implementation.

The following is a simplified summary of the key provisions of the Protocol.

Application (Articles 1 to 3)

The Protocol applies to genetic resources in their country of origin and to the benefits arising from the use of those resources. It also applies to traditional knowledge associated with those genetic resources and to the benefits arising from the use of that traditional knowledge.

Relationship with International Agreements and Instruments (Article 4)

The provisions of this Protocol do not affect the rights and obligations under any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.

Countries may develop and implement other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and the Protocol.

The Protocol must be implemented in a mutually supportive manner with other relevant international instruments.

The Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention. Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and the Protocol, it applies instead of the Protocol to that particular arrangement.

Fair and equitable benefit sharing (Articles 5, 9, 10, 11, 12, Annex)

Benefits arising from the use of genetic resources must be shared in a fair and equitable way with the country providing the resources upon mutually agreed terms.

The Protocol recognises that countries may have domestic legislation regarding the established rights of Indigenous and local communities over genetic resources. Countries need to take appropriate measures to ensure that benefits arising from the use of genetic resources that are held by Indigenous and local communities are shared in a fair and equitable way with the communities concerned on mutually agreed terms.

Benefits may include monetary and non-monetary benefits, including:

- Access fees/fee per sample collected or otherwise acquired;
- Up-front payments;
- Milestone payments;
- Payment of royalties;
- Licence fees in case of commercialization;
- Special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity;
- Salaries and preferential terms where mutually agreed;
- Research funding;
- Joint ventures;
- Sharing of research and development results;
- Collaboration, cooperation and contribution in scientific research and development programmes, particularly biotechnological research activities, where possible in the Party providing genetic resources;
- Participation in product development;

- Collaboration, cooperation and contribution in education and training;
- Admittance to *ex situ* facilities of genetic resources and to databases;
- Transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms, including on concessional and preferential terms where agreed, in particular, knowledge and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity;
- Strengthening capacities for technology transfer;
- Institutional capacity-building;
- Human and material resources to strengthen the capacities for the administration and enforcement of access regulations;
- Training related to genetic resources with the full participation of countries providing genetic resources, and where possible, in such countries;
- Access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies;
- Contributions to the local economy;
- Research directed towards priority needs, such as health and food security, taking into account domestic uses of genetic resources in the Party providing genetic resources;
- Institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities;
- Food and livelihood security benefits;
- Social recognition; and
- Joint ownership of relevant intellectual property rights.

Countries must take appropriate measures so that the benefits arising from the use of traditional knowledge associated with genetic resources are shared in a fair and equitable way with Indigenous and local communities holding such knowledge upon mutually agreed terms.

Countries must encourage users and providers to direct benefits arising from the use of genetic resources towards the conservation of biological diversity and the sustainable use of its components.

Global Multilateral Benefit-Sharing Mechanism

Countries must consider the need for and modalities of a global multilateral benefit sharing mechanism to address the fair and equitable sharing of benefits derived from the use of genetic

resources and traditional knowledge associated with genetic resources that occur in trans-boundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism must be used to support the conservation of biological diversity and the sustainable use of its components globally.

Countries must endeavour to support the development by Indigenous and local communities, including women within these communities, of: community protocols in relation to the fair and equitable sharing of benefits arising out of the use of such knowledge; minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the use of traditional knowledge associated with genetic resources; and model contractual clauses for benefit-sharing arising from the use of traditional knowledge associated with genetic resources.

Access to genetic resources and traditional knowledge relating to their use (Articles 6, 7, 11, 12)
The sovereign right of countries over their natural resources is recognised under the CBD and the Protocol. The exercise of those sovereign rights is subject to domestic access and benefit-sharing legislation or regulatory requirements. Taking those domestic arrangements into consideration, access to genetic resources requires the prior informed consent of the country providing the resources, unless otherwise determined by that country.

Prior informed consent
Where Indigenous and local communities have an established right to grant access to genetic resources in a country the country must take steps in accordance with domestic law to ensure that prior informed consent or approval and involvement for access to those genetic resources is obtained from the relevant Indigenous and local communities.

In implementing the requirement for prior informed consent a country must:
(a) Provide for legal certainty, clarity and transparency of their domestic access and benefit-sharing legislation or regulatory requirements;
(b) Provide for fair and non-arbitrary rules and procedures on accessing genetic resources;
(c) Provide information on how to apply for prior informed consent;
(d) Provide for a clear and transparent written decision by a competent national authority, in a cost-effective manner and within a reasonable period of time;

(e) Provide for the issuance at the time of access of a permit or its equivalent as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms, and notify the Access and Benefit sharing Clearing-House accordingly;
(f) Where applicable, and subject to domestic legislation, set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources; and
(g) Establish clear rules and procedures for requiring and establishing mutually agreed terms. Such terms shall be set out in writing and may include, *inter alia*:
(i) A dispute settlement clause;
(ii) Terms on benefit-sharing, including in relation to intellectual property rights;
(iii) Terms on subsequent third-party use, if any; and
(iv) Terms on changes of intent, where applicable.

Access to traditional knowledge
Countries must ensure that traditional knowledge associated with genetic resources that is held by Indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these Indigenous and local communities, and that mutually agreed terms have been established.

Transboundary Cooperation
In instances where the same genetic resources are found *in situ* in more than one country, those countries shall endeavour to cooperate, with the involvement of any Indigenous and local communities concerned, with a view to implementing this Protocol.

Where the same traditional knowledge associated with genetic resources is shared by one or more Indigenous and local communities in several countries, those countries shall endeavour to cooperate, with the involvement of the Indigenous and local communities concerned, with a view to implementing the objective of this Protocol.

Traditional Knowledge Associated with Genetic Resources
In implementing their obligations under the Protocol, countries must take into consideration Indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.

Countries, with the effective participation of the Indigenous and local communities concerned, must establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations, including measures as made available through the Access and Benefit-sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the use of such knowledge.

Countries must endeavour to support the development by Indigenous and local communities, including women within these communities, of community protocols in relation to access to traditional knowledge associated with genetic resources.

Special Considerations (Article 8)

In the development and implementation of its access and benefit-sharing requirements, each country must:

(a) Create conditions to promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries. This includes simplified access for non-commercial research purposes, taking into account the need to address a change of intent for such research;

(b) Pay due regard to cases of present or imminent emergencies that threaten or damage human, animal or plant health, as determined nationally or internationally. Countries may take into consideration the need for expeditious access to genetic resources and expeditious fair and equitable sharing of benefits arising out of the use of such genetic resources, including access to affordable treatments by those in need, especially in developing countries;

(c) Consider the importance of genetic resources for food and agriculture and their special role for food security.

National Focal Points and Competent National Authorities (Article 13)

Each country must designate a national focal point on access and benefit-sharing. The national focal point must make the following information available:

(a) For applicants seeking access to genetic resources, information on procedures for obtaining prior informed consent and establishing mutually agreed terms, including benefit-sharing;

(b) For applicants seeking access to traditional knowledge associated with genetic resources, where possible, information on procedures for obtaining prior informed consent or approval and involvement, as appropriate, of Indigenous and local communities and establishing mutually agreed terms including benefit-sharing; and

(c) Information on competent national authorities, relevant Indigenous and local communities and relevant stakeholders.

The national focal point is responsible for liaison with the CBD Secretariat. Each country must designate one or more competent national authorities on access and benefit-sharing. Competent national authorities must, in accordance with applicable national legislative, administrative or policy measures, be responsible for granting access or, as applicable, issuing written evidence that access requirements have been met and be responsible for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms.
A single entity can fulfil the functions of both focal point and competent national authority. If a country designates more than one competent national authority, it must advise the Secretariat, of the respective responsibilities of those authorities.

The Access and Benefit-Sharing Clearing-House and Information-Sharing (Article 14)
An Access and Benefit-sharing Clearing-House is established under the Protocol as part of the clearing-house mechanism under the CBD to serve as a means for sharing of information related to access and benefit-sharing. In particular, it will provide access to information made available by each Country relevant to the implementation of this Protocol.

Without prejudice to the protection of confidential information, each country must make available to the Access and Benefit-sharing Clearing-House any information required by the Protocol, as well as information required by decisions taken by the Parties to the Protocol. The information includes:
(a) Legislative, administrative and policy measures on access and benefit-sharing;
(b) Information on the national focal point and competent national authority or authorities; and
(c) Permits or their equivalent issued at the time of access as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms.

Additional information, if available and as appropriate, may include:
(a) Relevant competent authorities of Indigenous and local communities, and information as so decided;
(b) Model contractual clauses;
(c) Methods and tools developed to monitor genetic resources; and
(d) Codes of conduct and best practices.

Compliance measures and Monitoring (Articles 15, 16, 17, 18 and 29)

Access

Each country must provide that genetic resources used within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other country.

Traditional knowledge

Each country must also provide that traditional knowledge associated with genetic resources used within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of Indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other country where the Indigenous and local communities are located.

Appropriate measures to address situations of non-compliance must also be provided. Countries must, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic requirements.

Monitoring

Each country must take appropriate steps to monitor and enhance transparency about the use of genetic resources. These measures must include:

(a) The designation of one or more checkpoints, as follows:

(i) Designated checkpoints would collect or receive, as appropriate, relevant information related to prior informed consent, to the source of the genetic resource, to the establishment of mutually agreed terms, and/or to the utilization of genetic resources, as appropriate;

(ii) Each country must require users of genetic resources to provide the information specified above at a designated checkpoint. Each country must take appropriate, effective and proportionate measures to address situations of non-compliance;

(iii) the information, including from internationally recognized certificates of compliance where they are available, will, without prejudice to the protection of confidential information, be provided to relevant national authorities, to the country providing prior informed consent and to the Access and Benefit-sharing Clearing-House, as appropriate;

(iv) Checkpoints must be effective and should have functions relevant to implementation of subparagraph (a). They should be relevant to the utilization of genetic resources, or to the collection

of relevant information at, *inter alia*, any stage of research, development, innovation, pre-commercialization or commercialization.
(b) Encouraging users and providers of genetic resources to include provisions in mutually agreed terms to share information on the implementation of such terms, including through reporting requirements; and
(c) Encouraging the use of cost-effective communication tools and systems.

A permit or its equivalent issued in accordance with the Protocol and made available to the Access and Benefit-sharing Clearing-House, will constitute an internationally recognized certificate of compliance.

An internationally recognized certificate of compliance will serve as evidence that the genetic resource which it covers has been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the country providing prior informed consent.

The internationally recognized certificate of compliance must contain the following minimum information when it is not confidential:
(a) Issuing authority;
(b) Date of issuance;
(c) The provider;
(d) Unique identifier of the certificate;
(e) The person or entity to whom prior informed consent was granted;
(f) Subject-matter or genetic resources covered by the certificate;
(g) Confirmation that mutually agreed terms were established;
(h) Confirmation that prior informed consent was obtained; and
(i) Commercial and/or non-commercial use.

Mutually agreed terms
Countries must encourage providers and users of genetic resources and/or traditional knowledge associated with genetic resources to include provisions in mutually agreed terms to cover, where appropriate, dispute resolution including:
(a) The jurisdiction to which they will subject any dispute resolution processes;
(b) The applicable law; and/or

(c) Options for alternative dispute resolution, such as mediation or arbitration.

Each country must ensure that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdictional requirements, in cases of disputes arising from mutually agreed terms.

Each country must take effective measures, as appropriate, regarding:
(a) Access to justice; and
(b) The utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards.

Model Contractual Clauses (Article 19)
Each country must encourage, as appropriate, the development, update and use of sectoral and cross-sectoral model contractual clauses for mutually agreed terms.

Codes of Conduct, Guidelines and Best Practices and/or Standards (Article 20)
Each country must encourage, as appropriate, the development, update and use of voluntary codes of conduct, guidelines and best practices and/or standards in relation to access and benefit-sharing.

Awareness-Raising (Article 21)
Each country must take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit-sharing issues. These measures may include:
(a) Promotion of the Protocol, including its objective;
(b) Organization of meetings of Indigenous and local communities and relevant stakeholders;
(c) Establishment and maintenance of a help desk for Indigenous and local communities and relevant stakeholders;
(d) Information dissemination through a national clearing-house;
(e) Promotion of voluntary codes of conduct, guidelines and best practices and/or standards in consultation with indigenous and local communities and relevant stakeholders;
(f) Promotion of, as appropriate, domestic, regional and international exchanges of experience;
(g) Education and training of users and providers of genetic resources and traditional knowledge associated with genetic resources about their access and benefit-sharing obligations;

(h) Involvement of indigenous and local communities and relevant stakeholders in the implementation of the Protocol; and
(i) Awareness-raising of community protocols and procedures of Indigenous and local communities.

Capacity (Article 22)

Countries must cooperate in capacity-building, capacity development and strengthening of human resources and institutional capacities to effectively implement the Protocol in developing countries, in particular the least developed countries and small island developing States among them, and countries with economies in transition, including through existing global, regional, subregional and national institutions and organizations. In this context, countries should facilitate the involvement of Indigenous and local communities and relevant stakeholders, including non-governmental organizations and the private sector.
The need of developing countries, in particular the least developed countries and small island developing States among them, and countries with economies in transition for financial resources in accordance with the relevant provisions of the Convention must be taken fully into account for capacity-building and development to implement the Protocol.

As a basis for appropriate measures in relation to the implementation of the Protocol, developing countries, in particular the least developed countries and small island developing States among them, and countries with economies in transition should identify their national capacity needs and priorities through national capacity self-assessments. In doing so, such countries should support the capacity needs and priorities of Indigenous and local communities and relevant stakeholders, as identified by them, emphasizing the capacity needs and priorities of women.

In support of the implementation of the Protocol, capacity-building and development may address the following key areas:
(a) Capacity to implement, and to comply with the obligations of, the Protocol;
(b) Capacity to negotiate mutually agreed terms;
(c) Capacity to develop, implement and enforce domestic legislative, administrative or policy measures on access and benefit-sharing; and
(d) Capacity of countries to develop their endogenous research capabilities to add value to their own genetic resources.

Measures may include:

(a) Legal and institutional development;
(b) Promotion of equity and fairness in negotiations, such as training to negotiate mutually agreed terms;
(c) The monitoring and enforcement of compliance;
(d) Employment of best available communication tools and Internet-based systems for access and benefit-sharing activities;
(e) Development and use of valuation methods;
(f) Bio-prospecting, associated research and taxonomic studies;
(g) Technology transfer, and infrastructure and technical capacity to make such technology transfer sustainable;
(h) Enhancement of the contribution of access and benefit-sharing activities to the conservation of biological diversity and the sustainable use of its components;
(i) Special measures to increase the capacity of relevant stakeholders in relation to access and benefit-sharing; and
(j) Special measures to increase the capacity of indigenous and local communities with emphasis on enhancing the capacity of women within those communities in relation to access to genetic resources and/or traditional knowledge associated with genetic resources.

Information on capacity-building and development initiatives at national, regional and international levels, should be provided to the Access and Benefit-sharing Clearing-House with a view to promoting synergy and coordination on capacity-building and development for access and benefit-sharing.

Technology Transfer, Collaboration and Cooperation (Article 23)

Countries must collaborate and cooperate in technical and scientific research and development programmes, including biotechnological research activities, as a means to achieve the objective of the Protocol. Countries undertake to promote and encourage access to technology by, and transfer of technology to, developing countries, in particular the least developed countries and small island developing States among them, and countries with economies in transition, in order to enable the development and strengthening of a sound and viable technological and scientific base for the attainment of the objectives of the Convention and the Protocol. Where possible and appropriate these collaborative activities will take place in and with a country or the countries providing genetic resources that is the country or are the countries of origin of such resources or a country or countries that have acquired the genetic resources in accordance with the Convention.

Financial Mechanism and Resources (Article 25)

The financial mechanism of the Convention is the financial mechanism for the Protocol. Countries must also take into account the needs of developing countries, in particular the least developed countries and small island developing States among them, and of countries with economies in transition, in their efforts to identify and implement their capacity-building and development requirements for the purposes of the implementation of the Protocol.

Developed countries may also provide, and the developing countries and the countries with economies in transition avail themselves of, financial and other resources for the implementation of the provisions of the Protocol through bilateral, regional and multilateral channels.

WIPO initiatives

At the same time the World Intellectual Property Organisation (WIPO) is pursuing its own instruments to provide an international legal framework addressing effective protection of traditional knowledge and traditional cultural expressions in particular but also 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. An informal report suggests that the drafts relating to traditional knowledge and traditional cultural expressions are more likely to be finalised than the draft relating to genetic resources which are covered by the Nagoya Protocol.

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. dealing with commonly owned property both within Australia and across borders.

It is fair to say that there are divergent 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.

Key concepts under instruments dealing with indigenous knowledge and/or genetic resources

There are a number of common concepts that arise in both the Nagoya Protocol and the WIPO documents that are likely to be of key importance to Aboriginal and Torres Strait Islander people. These issues arise in the context of genetic resources found on land over which Aboriginal and Torres Strait Islander peoples have title and also in relation to use of traditional knowledge and traditional cultural expressions of Aboriginal and Torres Strait Islander people.

- Prior informed consent
- Mutually agreed terms
- Fair and equitable benefit sharing
- More than one “owner”
- Dispute resolution
- Data management
- Right to continue traditional use

Type of law

Provisions relating to biodiversity in general and to some extent access and benefit sharing can be found in particular Australian State and Commonwealth Acts where there is an overlap between these issues and the subject matter a particular Act deals with. As a result the law round access and benefit sharing in Australia is confusing, piecemeal 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 legislation to plug 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 *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.

Under Australia's Constitution the Federal Parliament can make laws only on certain matters. However Sections 51 and 52 of the Australian Constitution which enumerate the legislative powers of the Commonwealth Parliament encompass the following subject matter:

s51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) trade and commerce with other countries, and among the States;

…

(ix) quarantine;

….

(xviii) copyrights, patents of inventions and designs, and trade marks;

…

(xxvi) the people of any race for whom it is deemed necessary to make special laws;

…

(xxix) external affairs;

….

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws; …

52. Exclusive powers of the Parliament

The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;

….

The external affairs provision would encompass Commonwealth legislation implementing the Nagoya Protocol. Other provisions identified above are also potentially relevant. Thus it is possible for Australia to have national legislation as well as state legislation on these issues.

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 in response to 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 regulations on access to biological 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. 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. Access to biological resources in Commonwealth areas is governed by the *Environment Protection and Biodiversity Conservation Regulations 2000* (EPBC Regulations). Under the EPBC Regulations, those seeking access must apply to the Department of the Environment, Water, Heritage and the Arts (DEWHA) 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. Commonwealth areas are defined in section 525 of the EPBC Act to include land owned or leased by the Commonwealth, the Australian coastal sea, continental shelf and waters of the exclusive economic zone.

If the biological resources are for commercial or potentially commercial uses, the permit will not be granted until the applicant has entered into a benefit-sharing agreement with the provider of the biological resources. The regulations require the prior informed consent of any Indigenous owner or native title holder, where access is sought on Indigenous people's land. A benefit sharing agreement must provide for reasonable benefit-sharing arrangements, including protection for and valuing of any Indigenous knowledge to be used. DEWHA has developed model contracts as a guide to assist parties developing benefit-sharing agreements. Benefits are as determined by the parties to the contract, and can include contributions to conservation and scientific knowledge or any other agreed benefit as well as any revenue generated by the commercialisation of IP related to the genetic resource where this is relevant. Applicants for permits for non-commercial purposes must provide a statutory declaration 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.

There is a record of permits that have been issued and samples collected under those permits. As at 10 February 2010, sixty three permits had been issued through the Protected Areas Policy Section under Part 8A of the EPBC Regulations for non-commercial purposes. Further, the EPBC Regulations also provide a mechanism to exempt existing regimes that are consistent with the EPBC Regulations' purpose to minimise duplication. Agreements that bring existing permit arrangements within this benefit-sharing policy have been made with the Great Barrier Reef Marine Park Authority, the Austrian National Botanic Gardens, the Australian Institute of Marine Sciences and the Australian Antarctic Division. In total, over 400 permits have been issued under Part 8A of the EPBC Regulations

and other regimes accredited under the Regulations. There are currently seven ABS contracts completed for organisations engaged in commercial research. Four of these are with Australian Public Institutions and three with foreign research organisations. A further three contracts are under consideration (with Australian research institutions). The mutually agreed terms for benefit-sharing followed the model contracts provided by DEWHA closely. DEWHA continues to work with state and territory jurisdictions to ensure their approaches are nationally consistent.

In addition to the legislation covering Commonwealth land, the Queensland and Northern Territory Governments have legislation in place, with Victoria and Tasmania recently implementing measures to implement Australia's nationally consistent approach to ABS.

Challenges for Australia and NSW

Australia is a signatory of the Nagoya Protocol so any legislation we enact should be compliant with the Protocol. At the same time we need to be mindful that one or more of the WIPO instruments may also need to be complied with.

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 Torres Strait Islanders, 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 clans 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 Indigenous communities and Australians who are not of Aboriginal or Torres Strait Islander background has impacted development of Traditional knowledge. Many Indigenous Australians also have other cultural ancestry that may impact their views regarding Traditional knowledge.