Indigenous Knowledge Forum: Discussion Paper 1

Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management

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Tamworth, Gunnedah, Walgett, Moree and Narrabri

Consultation Research Team

Chief Investigator: Professor Natalie Stoianoff

Research Associate: Dr Ann Cahill

Advisory Board Member: Virginia Marshall

Research Assistant: Evana Wright

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

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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 Peoples' 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 People 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 People, 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, 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 Ms 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 People 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:

(a) the identity of the parties to the agreement;
(b) the description of the Knowledge Resource permitted to be accessed;
(c) the locality where the Knowledge Resource and/or Genetic Resource is to be collected or the person providing same;
(d) the intended use of the Knowledge Resource;
(e) the relation of the access agreement with existing or future access agreements on the same Knowledge Resource;
(f) the benefit the concerned Aboriginal community shall obtain from the use thereof;
(g) the duration of the access agreement;
(h) dispute settlement mechanisms; and
(i) 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:

(a) show the access permit upon request;
(b) deposit a description of 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 accessed;
(e) 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;
(f) 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;
(g) 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;
(h) recognize the Aboriginal Community from which the Knowledge Resource was accessed in any application for protection of a product developed therefrom;
(i) share the benefit that may be obtained from the utilization of the knowledge accessed to 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.

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:

(a) Access fees/fees per sample collected or otherwise acquired
(b) Up-front payments
(c) Milestone payments
(d) Royalties
(e) License fees in the case of commercialisation
(f) Fees to be paid to trust funds representing interests of Country
(g) Research funding
(h) Joint ventures
(i) Employment Opportunities
(j) Joint ownership of relevant intellectual property rights

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

(a) Sharing of research and development results
(b) Collaboration, cooperation and contribution in research and development programmes
(c) Participation in product development
(d) Collaboration, cooperation and contribution 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) Institutional capacity building
(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 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:

(a) the extent (if any) of the person's power to prevent the use;
(b) the nature of any relationship existing between the person and the person who used the Knowledge Resource;
(c) 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
(d) 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:

(a) an injunction (subject to such terms as the court sees fit)
(b) damages or, at the election of the Aboriginal Community, an account of profits;
(c) a declaration that the Knowledge Resource has been used without prior informed consent;
(d) an order that the defendant make a public apology for the use of the Knowledge Resource without prior informed consent ;
(e) an order that any failure to attribute or false attribution of, or derogatory treatment, of the Knowledge Resource cease or be reversed;
(f) an order for the seizure of any object made, imported or exported contrary to this Act;
(g) 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:

(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 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:

(a) if the infringer is a corporation, 1,000 penalty units; or

(b) 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:

(a) the effect 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 that occurred:

(e) after the act constituting the unauthorised use; or

(f) after that party was informed that it had allegedly made an unauthorised use; and

(g) any benefit shown to have accrued to that party because of the unauthorised use; and

(h) 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:

(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.

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

(a) maintain a Confidential Register of Knowledge Holders
(b) maintain a Public Register of Knowledge Resources and keep it up to date;
(c) maintain a Confidential Register of Knowledge Resources and keep it up to date;
(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) advise parties seeking access of the approval or refusal of their access request;

(h) maintain a Register of Access Agreements and keep it up to date;
(i) assess the validity of Access Agreements;
(j) assist Aboriginal Communities in negotiating access agreements when requested;
(k) administer benefits derived from access to Knowledge Resources for which benefits are to be shared by all Aboriginal Communities;
(l) monitor compliance of authorized user agreements and advise Aboriginal Communities of any violations thereof;
(m) develop standard terms and conditions that may be used in access agreements;
(n) 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.indigenousknowledgeforum.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*