

# What is Intellectual Property?

Intellectual property provides legal protection for many different forms of human creativity and innovation, ranging from books and films, to new inventions, to brands, to new varieties of plants. Intellectual property grants property rights to people and companies for subject matter that is protected under different intellectual property laws. These rights allow the owner to control the uses of the protected subject matter for a limited time, and to be rewarded when others use it. Intellectual property is a type of property that can be bought, sold, traded or given away.

It is important to distinguish between intellectual property and the physical object(s) to which it relates. For instance, a new plant may contain several types of intellectual property. These may include a patent claiming a method of producing the plant variety; plant breeder's rights for the variety itself; and a trade mark for the name of the plant.

Intellectual property is territorial in nature, which means that rights are granted and enforced on a country-by-country basis. This also means that the specific parameters of intellectual property laws may vary from one country to the next. However, it is also true that many forms of intellectual property have been harmonised internationally, including through a series of treaties administered by the World Intellectual Property Organization and the World Trade Organization, which oversees implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Traditionally, intellectual property is thought to encourage innovation and creativity. This is because exclusive intellectual property rights may enable creators or inventors to receive a return on the intellectual and economic investments that they make to create the protected subject matter. However, intellectual property also involves certain trade-offs. Specifically, it is important to balance the need to promote and reward creation and innovation with the need to ensure freedom of expression, the flow of information, and access to technology.

## What is intellectual property?

Intellectual property is a general term for various legal regimes including: Patents, Plant Breeder's Rights, Geographical Indications, Trade Marks/Passing off, Designs, Breach of Confidence/Trade Secrets, and Copyright.

### Patents

A patent is a set of exclusive rights granted for any device, substance, method, process, or system that is new, inventive, and useful. Patent protection is not automatic, and an application for registration must be made with the national patent office in every country in which protection is sought. To obtain protection, the inventor is required to disclose the invention.

Some countries specifically exclude certain types of inventions from patentability, such as software or computer programmes. Categories of inventions that may be excluded from patentability under international law include plants and animals other than microorganisms.

A patent enables its owner to commercialise the protected invention in the country in which the patent is held for a specified period of time, which is usually 20 years. These commercial rights include the ability to exclude others from making, using, or selling the protected invention.

### Plant breeder's rights

Plant breeder's rights (sometimes known as plant variety rights) were developed as an alternative to patent protection for plants. Plant breeder's rights

allow plant breeders to control the commercial uses of the plant varieties that they develop for a limited period. Plant breeder's rights protection is not automatic, and an application for registration must be made with the national plant breeder's rights office in every country in which protection is sought.

To be registered, a plant variety must be distinct from similar varieties based on at least one characteristic. The variety must also be genetically uniform (consistent from one plant to another) and stable (consistent across generations). Furthermore, the variety cannot have been previously commercially exploited (i.e., it has to be 'new').

The owner of plant breeder's rights has the exclusive right to produce or reproduce, offer for sale, sell, import, and export the propagating material of the protected variety. In most countries, plant varieties from species of trees and vines may be protected for up to 25 years, while all other varieties may be protected for up to 20 years.

### **Geographical indications of origin**

A geographical indication (GI) is a sign that is used on products that have a specific geographical origin and possess qualities or a reputation that are attributable to that origin. To function as a GI, a sign must identify a product as originating in a specific place. Furthermore, the product should possess a quality, reputation, or other characteristic that essentially may be attributed to its place of origin. Well-known examples of GIs are 'champagne' and 'tequila'.

Different countries offer different forms of protection for GIs. For example, in Australia, GIs may only be obtained for wines and spirits, while in European Union countries GIs may be obtained for a range of agricultural products.

### **Trade marks**

Trade marks are 'signs' that distinguish the goods and services of one trader from the goods and services of another. A trade mark acts as a shortcut to allow consumers to efficiently identify the nature, quality, and source of a product or service. The trade marked sign commonly consists of a name and/or logo, but also may be a letter, number, phrase, sound, smell, shape, picture, movement, aspect of packaging, or a combination of these.

A trade mark that is registered under the relevant national law is denoted with ®. Unregistered trade marks are denoted with ™. Protection for registered trade marks is sourced from the relevant national intellectual property legislation. Unregistered trade marks are protected through other laws, such as the common law tort of 'passing off' or unfair competition legislation. Trade mark protection can last forever if renewal fee payments are kept up to date and provided that the mark is actively used in the course of trade.

### **Designs**

Designs law provides protection for the ornamental or aesthetic aspects of a commercial good. A design is what makes a product look the way that it does, and may include the product's shape, configuration, pattern, and ornamentation. Examples include the shape of a rake or the tread pattern on a tyre. Design protection is not automatic, and an application for registration must be made with the national IP office in every country in which protection is sought.

To be registrable, the design must be new and distinctive. Once registered, the design receives protection for a limited period of time. For example, in Australia registration protects a design for five years, and it can be renewed for an additional five years.

### **Confidential information**

Confidential information is information that is not publicly available, that the law protects from misuse or improper disclosure by a person who is under an obligation to keep it confidential (or secret). Registration is not required to receive protection for confidential information. Confidential information is not property, but you can control access to it, and license its use or transfer it to another person.

Confidential information is protected through the law of breach of confidence. To maintain an action for breach of confidence, it is necessary to show that the information is confidential; that it was disclosed in circumstances in which there was an explicit or implied obligation of confidence; and that there has been an unauthorised use of the information.

## Copyright

Copyright is a set of exclusive rights granted by the government to protect the particular form, way, or manner in which information or concepts are expressed. This means that copyright does not protect ideas, concepts, styles, techniques, or information, but rather the form in which these things are expressed. Other subject matter that is not able to be protected with copyright includes names, titles, and slogans, people, and people's images.

Copyright protects different types of expressive creations, including literary, musical, artistic, dramatic, film, and broadcasting works. Copyright protection arises automatically when an original work is created. To be eligible for copyright protection, a work must be original and be reduced to a material form.

Copyright allows the owner to exclude others from reproducing, adapting, distributing, performing, or displaying the work in public. The term of protection varies from country to country, but it generally lasts for the life of the creator plus 70 years.

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**Australian Government**  
**Department of Industry,  
Science and Resources**

**AusIndustry**  
Cooperative Research  
Centres Program

# Plant Breeder's Rights

Plant breeder's rights, sometimes known as plant variety rights, are a form of intellectual property designed to protect new varieties of plants. Plant breeder's rights allow plant breeders to control the commercial uses of the plant varieties that they develop for a limited period. Plant breeder's rights are designed to encourage plant breeding and innovation, while also making improved plant varieties openly available to anyone after the period of protection ends. From the grower's perspective, it is important to understand whether a plant variety that you purchase is protected, because if so, the permissible uses of the variety will be limited.

The international system of plant breeder's rights was established by the 1961 International Convention for the Protection of New Varieties of Plants (UPOV Convention). Today, countries follow one of two versions of the UPOV Convention, namely the 1978 or 1991 versions. UPOV 1978 contains more exceptions for growers, recognising a 'farmer's privilege' that allows farmers to save and re-plant the propagating material of protected varieties from prior harvests, and to freely exchange propagating material with other farmers. UPOV 1978 also provides exemptions to plant breeder's rights for non-commercial research, and for the development of new plant varieties.

UPOV 1991 is a 'stronger' form of intellectual property, because it expanded the scope of protection to a broader range and to different categories of plant varieties. UPOV 1991 also extended the periods of protection. UPOV 1991 allows members to recognise a version of the farmers' privilege within their territories. As of December 2019, there were 76 members of the UPOV Convention, including two intergovernmental organisations. Fifty-nine of these members adhered to UPOV 1991, and 17 members followed UPOV 1978.

Like other forms of intellectual property, plant breeder's rights are territorial in nature. This means that plant varieties need to be registered in the country in which protection is sought with plant breeder's rights granted and enforced under the legal system of that country. The duration of plant breeder's rights is generally 25 years for trees and vines and 20 years for all other plants. The protection period starts from the date on which the plant breeder's rights are granted.

## How can a variety be protected with plant breeder's rights?

To be eligible for protection with plant breeder's rights, a plant variety must have a breeder and be new, distinct, uniform and stable as defined by the UPOV Convention.

<b>Breeder</b>	A breeder is a person who has bred or discovered and developed a plant variety, or their employer or contractor who has commissioned the work, and their respective successors in title.
<b>New</b>	A variety is generally considered new if it has not been sold (with the breeder's consent) beyond the allowable time period.
<b>Distinct</b>	Distinctness is shown by comparing the variety with the most similar variety or varieties of common knowledge. Quantitative and qualitative differences between the new and existing varieties must be established and recorded. To be 'clearly distinguishable', the new variety must have at least one characteristic that differentiates it from similar varieties of common knowledge.
<b>Uniform</b>	The requirement that the variety be uniform means that a variety must be sufficiently consistent (i.e., from one plant to another) in those characteristics that make it distinct.
<b>Stable</b>	A variety must remain true to description after repeated propagation or reproduction (i.e., from one generation to another).

## How do you apply for plant breeder's rights?

To obtain plant breeder's rights protection, applicants must follow an administrative process that tests and evaluates whether the variety complies with the requirements for protection. Costs may include fees for the application, examination, and issuance of a certificate. There also may be an annual maintenance fee.

## What is the scope of plant breeder's rights

Plant breeder's rights give the owner (initially, the breeder) a number of rights. Plant breeder's rights owners have exclusive rights to:

- produce or reproduce the propagating material;
- sell the material or offer it for sale; and
- import or export the material.

While these rights primarily relate to propagating material, they also may apply to harvested material, products obtained from harvested material, and to varieties derived from the protected variety.

## How do you know if a variety is protected with plant breeder's rights?

In some countries, plant breeder's rights protected varieties are denoted by a plant

breeder's rights logo. Lists of plant breeder's rights protected varieties may be available from national plant breeder's rights offices and websites.

## Exceptions to plant breeder's rights

An important feature of the plant breeder's rights system is that the interests of breeders, growers, and researchers all have been accommodated through the use of exceptions or limitations to the scope of protection. Exceptions may cover uses of the protected variety for:

- private or non-commercial purposes;
- experimental purposes;
- plant breeding; and
- re-planting, using farm saved seed.

## Plant breeder's rights and contracts

Plant breeder's rights and the contracts that growers sign when they buy planting material are not directly related. Plant breeder's rights are a form of intellectual property that allows plant breeders to control the use of the propagating material of the varieties that they develop. In contrast, contracts deal with how plant varieties are commercialised, whether or not they are protected with plant breeder's rights. Commercial agreements may include details including pricing, terms of trade, and supply chain structures (*see* Fact Sheet 19: Closed Loop Contracts).

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# What is a Patent?

A patent is a legally enforceable right granted by a national or a regional intellectual property authority for new and useful inventions. Patents cannot be obtained for artistic creations, discoveries, mathematical models, plans, schemes, or purely mental processes.

The traditional rationale for patents is that because they grant inventors a temporary monopoly to use the invention, they promote innovation. Patents also encourage inventors to disclose their inventions, rather than keeping them secret. A challenge for the patent system is to ensure the grant of temporary monopolies to foster research and development while at the same time enabling patent holders to benefit from their innovation and investment.

Patent rights are not automatic. You must apply to the national or regional intellectual property office in each separate jurisdiction where you seek patent protection. This process can be expensive, given that it entails application fees and annual maintenance fees, in addition to legal fees and possibly costs associated with the translation of documents into other languages. The maximum period of patent protection in most countries is 20 years from the date on which the patent application is filed.

Patent rights are limited to the jurisdiction in which they are granted. There is no such thing as a single worldwide patent. Certain international legal frameworks facilitate the process of patent application in multiple countries. These laws include the *Paris Convention* and the *Patent Cooperation Treaty*. These treaties are administrative rather than substantive, which means that you must apply for and have a patent in each country where you want to exercise exclusive rights in the invention.

After a patent has expired, any person can use the invention and can benefit from the disclosures made in the patent application. Furthermore, anyone can access the disclosed information, and produce and market the invention in any country where a patent has not been granted. This is true even while active granted patents exist to protect the invention in other countries. Due to the limited scope of patent rights, it is important for inventors to decide whether patenting is the best option to protect their inventions. An alternative strategy involves trade secrets, which offer perpetual protection, provided that the secret is maintained. Another alternative is to place the invention into the 'public domain' by publishing details about the invention. Doing so prevents others from obtaining a patent for the same invention, while allowing others to use the invention freely.

## Criteria for patent protection

To obtain a patent, an invention must satisfy several criteria, the precise definitions of which vary from country to country. However, in general an invention must demonstrate:

- Patentable subject matter;
- Novelty;
- Inventive step; and
- Utility (usefulness or industrial applicability).

As far as patentable subject matter is concerned, generally, countries make patents available for inventions in all fields of technology, provided that they are new, inventive, and useful.

However, countries may exclude certain categories of inventions from patentability, including where it is necessary to protect '*ordre public*' or morality. For instance, an invention may not be patented if doing so would harm human, animal, or plant life or health, or would result in serious prejudice to the environment.

Furthermore, some countries exclude certain specific categories of inventions from patentability. These may include diagnostic, therapeutic, and surgical methods for the treatment of humans or animals. Additionally, many countries exclude from patentability plants and animals other than microorganisms, and essentially biological processes



for the production of plants or animals (other than non-biological and microbiological processes).

An invention is novel if the invention has not been publicly disclosed prior to the date of the patent application anywhere in the world. This means that it is crucial for inventors to maintain confidentiality if they discuss the invention with anyone before the patent application is filed and published. Written confidentiality agreements are strongly recommended if the inventor discusses the invention with other people.

In most countries, it is possible to conduct ‘reasonable trial or experiment’ on an invention prior to filing a patent application without destroying novelty, but care needs to be taken in doing so. It is strongly recommended that inventors obtain specific advice about any research trial, particularly if the trial will occur in a place that is publicly accessible.

In some countries, the law recognises a ‘grace period’ that allows novelty to be preserved even if the invention has been publicly disclosed. However, not all countries recognise grace periods for public disclosures. This means that a patent application that relies on a grace period in one country may be invalid in other countries. Third parties who use an invention during the grace period and before a patent application is made will retain their rights to use the invention.

Even if the invention is novel, it will not be valid unless it is also ‘inventive’. This means that the invention must not be an obvious approach to solving a known problem. Inventiveness is judged according to what a non-inventive skilled person in that field would try if faced with the same problem.

Additionally, in some countries, the invention cannot be patented if it is not susceptible or capable of industrial application.

### **Patent holder’s rights**

The owner of a patent has the exclusive right to commercialise the invention in the country in which

patents are held for the life of the patent (usually 20 years from the filing date of the application). In return, the patent holder is required to fully disclose the invention to the public, so that others can learn from the invention, and use it when the patent expires.

### **Defences**

Patents can only be infringed where the patent is valid (see above), and where all of the elements of the invention are infringed. For example, if a patent claims 5 essential features, another product or process that utilises or incorporates 4 of those 5 features will not infringe the patent.

Patent laws in many countries include a ‘research exemption’ that allows researchers to conduct experiments on a patented invention without infringing the patent. In many countries, use of an invention by a government, a government authority, or a person authorised in writing by the government will not infringe a patent. However, in these situations, the law usually requires compensation be paid to the patent owner.

Many intellectual property professionals offer advice and assistance about patents. These include registered patent attorneys or agents, patent lawyers, and patent search firms. The services that these entities provide range from professional searches of intellectual property databases, to advice about how to protect and commercialise inventions, to legal representation to enforce patent rights.

### **Patents and plant breeder’s rights**

In some countries, it is possible to protect plant varieties under two legal frameworks, namely patents and plant breeders’ rights. However, there are important differences between the two regimes. For example, there are defences available under the plant breeder’s rights scheme (e.g., the ‘farmer’s privilege’ to save and re-use farm saved seed) that typically are not available under patent law (*see* Fact Sheet 2: Plant Breeder’s Rights).

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# What is a trade mark?

A trade mark is a 'sign' that identifies and distinguishes the goods or services of one trader from those of another. A trade mark acts as a shortcut to allow consumers to efficiently identify the nature, quality, and source of a product or service. In this way, trade marks are valuable assets that can act as a 'badge of origin', and that can help to build a business's profile, develop its reputation, and achieve its commercialisation objectives. Some of the most familiar trade marks worldwide are Apple, Microsoft and Google. In the context of agriculture, farming, and food, recognisable trade marks include Roundup Ready, Nestle, and FairTrade. In Australia, trade marks are registered under the *Trade Marks Act 1995* (Cth).

## What can be trade marked?

Most commonly, trade marks consist of names and/or logos that are applied to goods, or used in relation to services. However, a trade mark can also be a letter, number, phrase, sound, smell, shape, picture, movement, aspects of packaging, or a combination of these. For example, in Australia, the 'Happy Little Vegemites Tune' is a registered sound trade mark, and there is a registered trade mark for the movement of the red M&M. An example of an Australian scent trade mark is the *Eucalyptus radiata* scent applied to golf tees.

## Registered and unregistered trade marks

Many traders in Australia choose to register their trade marks under the *Trade Marks Act 1995*. However, unregistered trade marks may be able to receive legal protection if they have been used in the marketplace and enjoy consumer recognition. Protection for unregistered trade marks is available under the law of 'passing off' or consumer protection legislation such as the Australian Consumer Law. However, only registered trade marks receive protection under the *Trade Marks Act 1995*.

## The TM and ® symbols and passing off

Goods and services often have the symbols TM and ® on them. There are some important points to consider when using the TM and ® symbols:

- By using the TM or ® symbol, you signal to consumers and other traders that you are asserting trade mark rights;
- You can only attach the ® symbol to your goods or services if you have a registered trade mark. Unauthorised use of the ® symbol (that is, on marks that are not registered) is an offence;
- You do not need to have a registered trade mark to attach the TM symbol to your goods or services. The TM symbol is most often used in situations where a trader wants to assert rights in non-registrable aspects of his or her business, under the law of passing off.
- Passing off prevents one trader from misrepresenting goods or services as being the goods and services of another trader, and it also prevents one trader from holding out his or her goods or services as having some association or connection with another trader when this is not true. A trader may bring an action for passing off even if he or she does not have a registered trade mark. Often, a passing off action is brought in conjunction with a trade mark dispute (if there is a registered trade mark) or instead of trade mark dispute (if there is not a registered trade mark).

## The registration process

Application for registration is made to IP Australia (<http://www.ipaustralia.gov.au/>). Once you have submitted your trade mark application, it will undergo an initial examination to ensure that it can be registered. If the Registrar decides to reject the application, the



applicant will have the opportunity to make a case to have this decision reversed. If the trade mark application meets all of the requirements for registration, the Registrar will advertise the application for a two-month period in which third parties may oppose registration. If registration is not opposed, the trade mark will be registered and published in the *Australian Official Journal of Trade Marks*.

### **Legal requirements for registration**

In Australia, trade marks are registered under the *Trade Marks Act 1995*. Under the *Trade Marks Act* there is a presumption of registrability. This means that the Registrar must accept a trade mark for registration unless there is evidence that the trade mark application was not made in accordance with the Act and with the associated *Trade Marks Regulations 1995*, or that there are grounds for rejecting it.

Perhaps the most important of these grounds is that the mark lacks distinctiveness, that is, the average consumer would not understand the mark as indicating the trade origin of the goods, because the mark simply describes the owner's goods or services. Proposed marks that indicate the size, type of goods or services, quality, characteristics, quantity, intended purpose, or geographical names will be difficult to register as trade marks.

Other grounds for refusing or rejecting a trade mark application include:

- The mark applied for is likely to mislead, deceive or confuse consumers; and
- The mark applied for is substantially identical with or deceptively similar to an earlier registered trade mark or trade mark application for identical or similar goods or services. However, the application for the later mark might not be rejected if the applicant establishes that the two marks have been used honestly and concurrently.

### **Classes of goods and services**

Trade marks do not apply to all goods and services. When you apply to register your mark, you need to nominate the class, or classes, of goods and services in which you will use your trade mark.

### **Duration and loss of registration**

Registered trade marks generally are protected for an initial period of ten years, which can be renewed indefinitely. However, trade mark rights may be lost under certain circumstances. Most importantly, a registered mark must be actively used in the course of trade. If it is shown that the trade mark has not been used in the past three years, it may be removed from the register.

### **Ownership and licensing of trade marks**

Priority in recognising ownership over trade marks is based on use of the mark and not how it was created. To be recognised as the owner of a trade mark, an applicant must be:

- The first to use the mark in relation to the goods or services in question; or
- In the case of an application for a registered trade mark prior to the commencement of trade, the person must intend to start using the mark in relation to the goods or services in question.

Trade marks can be licensed and assigned. However, where a trade mark is unregistered a more limited rule applies. This is because unlike registered trade marks, the law does not recognise a property right in unregistered trade marks. Therefore, it is not possible to transfer rights in an unregistered mark separate from the sale of the underlying business to which the 'goodwill' associated with the unregistered mark is attached.

### **Collective, certification, and well-known marks**

In addition to standard trade marks there are several other categories of marks. These include:

- Collective trade marks may be granted to an association or collective group, and used by members of that group to distinguish their goods or services based on their association with that group;
- Certification trade marks show that a trader's goods or services are certified as meeting particular standards. Certification marks may be granted to anyone who can verify that his or her goods or services meet established

standards related to quality, origin, or some other characteristic; and

- Well-known trade marks are marks that have a high degree of consumer recognition. Significantly, well-known marks do not need to be registered in a particular class of goods or services to receive protection in that class.

### **Infringement and defences**

For registered trade marks, infringement occurs when a person uses, without permission, a mark that is substantially identical with or deceptively similar to an existing trade mark.

The three most common defences to trade mark infringement are: (1) that the individual claiming infringement has not title to the mark because it has not yet been registered; (2) that the registration of the trade mark is invalid; and (3) that some provision of the *Trade Marks Act 1995* indicates that no infringement has occurred. With respect to the latter defence, the Act recognises that there may be no infringement if you use a trade mark in good faith, or if you refer to the mark to compare goods and services.

### **Is there an international trade mark?**

As a general rule, you need to apply for a trade mark in each country where you want protection. However, the Madrid System for the International Registration of Marks allows you to avoid the need to register the mark separately with each national or regional office. The World Intellectual Property Organization (WIPO) administers the Madrid System, which allows applicants to submit one application to WIPO. WIPO then forwards the application to the various national offices that you specify for consideration. There are also regional application processes in some parts of the world, such as those administered by the European Community Trademark and African Intellectual Property Organization.

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# Certification Trade Marks

A certification trade mark is a specialised form of trade mark that indicates that goods or services comply with certain standards, for example, quality, content, manufacturing method, or geographic origin. A certification trade mark can be owned by individuals, companies, and other incorporated entities. Unlike standard trade marks, certification trade marks must be registered under the *Trade Marks Act 1995* to receive protection in Australia.

## Examples

Commonly encountered examples of certification trade marks include:

- The ‘Australian Made®’ logo:



- The ‘Woolmark®’ logo:



- The ‘Low GI Certified®’ mark:



Certification trade marks may be claimed for names of geographical regions, indicating that the goods produced under that mark have certain qualities attributable to their geographical origin. For example, the place name ‘STILTON’ is a certification trade mark in Australia for cheese produced according to a specific production method in Derbyshire, Nottinghamshire, and Leicestershire counties of the UK.

## Who can own a certification trade mark?

Certification marks are normally registered and owned by an independent body or organisation that does not itself trade in the goods or services that bear the mark. Rather, the owner of the certification mark will grant permission to approved traders to use the mark to market the goods and/or services for which it is registered.

## Procedure for obtaining a certification mark

The procedure for obtaining a certification trade mark is more onerous than for a standard mark. In addition to complying with most of the substantive requirements that apply to standard trade marks, applications for certification trade marks must also be accompanied by a set of rules that prescribe when and how the mark may be used by authorised users. The rules should also indicate how disputes governing use of the mark will be settled. After reviewing the application, IP Australia will

send the proposed rules to the Australian Competition and Consumer Commission (ACCC), which must approve the application and the rules. The ACCC will review these materials to assess their consistency with the parts of the *Trade Practices Act 1974* that deal with anti-competitive conduct, unconscionable conduct, and consumer protection.

### **The ongoing role of the ACCC**

Once registered, the rules governing the use of a certification trade mark can only be changed with the consent of the ACCC. In addition, permission from the ACCC is required before a registered certification trade mark can be assigned to a third party.

### **Collective trade marks**

A collective mark is a mark that members of an association use to distinguish their goods or services from those of others who are not members of the association. For example, the name ‘MYSTIQUE MANDARIN’ is a registered collective trade mark that is owned by the Western Australian Citrus Improvement Group and can be used only by that association or its members to distinguish the Group’s mandarins from those of other traders.

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# What is Copyright?

## Copyright basics

Copyright is a set of rights granted by the government to protect the particular form, way, or manner in which information or concepts are expressed. Copyright does not protect ideas, concepts, styles, techniques, or information, but rather the form in which these things are expressed. Other subject matter that is not able to be protected with copyright includes names, titles, slogans, people, and people's images.

Copyright is administered and enforced on a country-by-country basis. In Australia, the relevant law is the Copyright Act 1968. Although many aspects of copyright law have been harmonised internationally, it is important to follow the laws of the country (or countries) in which you wish to protect your copyright.

Copyright protection generally divides into two categories: 'works' and 'other subject matter'.

Examples of works include:

*Literary works:* In this category, copyright protects the written word, irrespective of any literary quality of the work. Examples include books, journal articles, poems, song lyrics, compilations, instruction manuals, reports, computer programs, directories, and databases.

*Artistic works:* This category includes paintings, drawings, cartoons, sculptures, craft work, diagrams, architectural plans, buildings, photographs and maps. As with literary works, considerations of artistic quality do not affect the ability of the work to be protected.

*Dramatic works:* This category includes choreography (dance), screenplays, plays, and mime pieces.

*Musical works:* This category includes music itself, separate from any lyrics or sound recordings.

The 'other subject matter' category covers sound recordings, films, and TV and radio broadcasts.

Owners of copyright have several exclusive rights to control the use of their material, and different rights apply to different types of material. In general, anyone who wants to use copyrighted material needs to obtain permission from the copyright owner.

## Criteria for protection

Copyright protection is free and automatic. You do not need to apply for copyright in Australia as there is no system of registration in the country. For the purpose of copyright protection, a work must be 'original': original does not mean that the information that a work presents is novel or that it never has been expressed before. Instead, original simply means that the work has not been copied from another source.

## Exclusive rights

The owner of copyright for a work has the exclusive right to:

- reproduce the work (including copying, filming, recording, and scanning);
- make the work public for the first time; and
- communicate the work to the public (including via online media).

Copyright owners of literary, dramatic and musical works have two additional exclusive rights to:

- perform the work in public (this includes performing a work live, or playing a recording or sharing a film containing the work); and
- make an adaptation of the work (for example a translation or dramatised version of a literary work, a translation or 'non-dramatic' version of a dramatic work, or an arrangement or transcription of a musical work).

## Duration of copyright protection

In general, the term of copyright protection in Australia lasts for the life of the creator plus 70 years. This is the case even when the creator never actually owned the copyright. Notably, however, the duration of copyright varies from country to country.

## Who owns copyright?

The general rule is that the first owner of copyright is the creator of the work, or the person responsible for making the sound recording, film, broadcast, or published edition.

There are some important exceptions to this general rule. Both the general rule and the exceptions can be altered by agreement.

*Employees:* where a work is made by an employee (rather than a contractor or freelancer) as part of that employee's job, the employer usually owns the copyright.

*Contractors and Freelancers:* Contractors and freelancers usually own the copyright in their creations. Someone who pays for work to be created generally will not own the copyright but will be able to use the work for the purposes for which it was commissioned. However, where a person commissions a freelance photographer, engraver, or portrait maker to create material for a private or domestic purpose (e.g., wedding photographs, family portraits), that person will own the copyright in the commissioned material, not the creator.

*Film and Sound Recordings:* The first owner of copyright in a film is the producer or the person who paid for it to be made or controls the master. However, in some cases, performers recorded on sound recordings own a share of the copyright in those sound recordings.

*State, Territory, or Federal Government:* A government usually owns the copyright for material created, or first published by it or under its direction or control.

## Infringement of copyright

Copyright is infringed when a person uses (or authorises another to use) copyrighted material in any of the ways exclusively reserved to the copyright owner without permission, unless a special exception or defence to infringement applies. The most common type of infringement for literary and artistic works is the unauthorised reproduction of a substantial part of the work. The determination of 'substantial part' is qualitative rather than quantitative. That is, the question is not about how much of the work was copied, but the nature of what was copied. Furthermore, the issue is not whether the copyrighted material has been changed or expanded, but whether the part used is an important, essential, or distinctive part of the original material. Copyright can also be infringed by selling, distributing or importing infringing copies of copyrighted material in Australia. For a court to find infringement, there must be actual copying.

## Defences to infringement

Several defences or exceptions to infringement allow certain people to use copyrighted material without the owner's permission. In Australia, these include 'fair dealing'. This exception allows reviewers and students to use copyrighted material without permission for the purposes including criticism, review, research, study, or news reporting. To claim fair dealing, only a reasonable portion of the material may be used, and the use of that portion must be 'fair'.

There are also special provisions that allow Australian libraries, educational institutions, and governments to use copyrighted material without permission. In some cases, certain procedures must be followed, and fees must be paid to the copyright owner. Notably, the *Copyright Act 1968* does not grant non-profit organisations a general exemption to use copyrighted material without authorisation.

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# Moral Rights for Researchers

Moral rights are the rights individual creators have in copyright works that they have created, including works that result from research projects. Moral rights last for the same duration as copyright itself, which in Australia is the life of the author plus 70 years. However, moral rights are separate from the economic rights of copyright.

A creator (or author) has the following moral rights:

- To be attributed (or credited) for their work (right of attribution)
- Not to have their work falsely attributed (right of false attribution)
- Not to have their work treated in any derogatory way (right of integrity)

Moral rights arise automatically upon creation of the work, as with copyright itself. Unlike copyright, moral rights cannot be assigned, transferred or sold. Furthermore, moral rights are owned by the creator or author. This may occur, for example, where research notes or a research paper is written by an employee researcher in the course of his or her duties of employment.

Infringement of moral rights does not occur if:

- the creator has given consent for his or her work to be used in specific ways (including ways that would, but for the creator's consent, constitute an infringement of a moral right); or
- the alleged infringer's actions are reasonable in the circumstances.

## 1. Right of attribution

Creators have the right to be attributed (i.e., credited or identified) whenever their work is reproduced, published, performed, or adapted (for literary, dramatic, or musical works); reproduced, published, exhibited, or communicated (for artistic works); or copied, exhibited, or transmitted (for films). The right of attribution applies to all reproductions, unless it is not reasonable to attribute authorship, having regard to all of the circumstances.

In Australia, moral rights were introduced in 2001, which means that creators can take an action for any failure to attribute works that are reproduced after 21 December 2000 (regardless of when the works were originally created). Unless the creator has specified how attribution is to be made, the author must be identified in a clear and reasonable manner, so that anyone receiving, seeing, or hearing the work would be aware of the author's name.

## When is it reasonable not to attribute an author?

A creator does not need to be attributed if the creator has consented in writing not to be identified or if it is reasonable in all the circumstances not to identify the author. Circumstances that may make it reasonable to not attribute an author include where:

- 1) the work is a collaborative effort of a significant number of people;
- 2) the work is very short;
- 3) the work is technical instruction, rather than research; and
- 4) the work is used only for internal purposes, and was written by an employee.

## 2. Right not to have authorship falsely attributed

The right not to have authorship falsely attributed means that in any reproduction of a work, there is a duty to the creator of the work

not to insert another person's name in or on the work in such a way as to suggest falsely that the other person is the author. It is difficult to conceive of a situation in which false attribution would be reasonable.

### **3. Right of integrity**

The right of integrity is a right to prevent 'derogatory treatment' of a work, unless it is reasonable to do so. Derogatory treatment means doing anything in relation to the work that prejudices the author's honour or reputation, including:

- distorting, mutilating, or materially altering the work in a way that prejudices the creator's honour or reputation.
- in the case of artistic works, destroying the work or exhibiting it in public in a way that prejudices the creator's honour or reputation.

Regardless of when the works were created, under Australian law creators of literary, artistic, dramatic, and musical works can take action for

any derogatory treatment that occurs after 21 December 2000.

### **When is the right of integrity not breached?**

The right of integrity would not be violated when an employer edits or rewords a draft document; when a translation of the work is made; when a minor part of a photograph is not reproduced due to space constraints; or when the work is subjected to criticism or review.

### **4. Consent**

In the case of employment contracts, general consent agreements may be signed to permit a work to be used in specific ways. These include ways that, but for the creator's consent, would constitute an infringement of a moral right. For example, a creator may consent to have their name omitted from the final version of a research proposal or report.

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# What is Confidential Information?

Confidential information is information that is not publicly available and that the law protects from misuse or improper disclosure by a person who is under an obligation to keep it confidential (or secret). Confidential information is not property, but you can control access to it, and license its use or transfer it to another person. In some circumstances, confidential information may constitute 'know how' or a trade secret.

## How is confidential information protected?

The law offers protection for confidential information under the doctrine of breach of confidence. This means that confidential information is only protected if it is, in fact, confidential and not publicly available, or if it would be difficult for the public to acquire the information except by unlawful means. If the confidential information is disclosed to a third party, it must be made clear that the recipient of the information has the obligation to maintain confidentiality. If this does not occur, the information will not be protected.

It is not necessary to have a written agreement in place covering use or disclosure to receive protection for confidential information. However, it is prudent to require third parties to sign a written confidentiality agreement (also known as a 'non-disclosure agreement') if you plan to disclose the confidential information to them. Use of a confidentiality agreement allows you to set out clear terms that will govern how the recipient of the information may use it, and what his or her confidentiality obligations will be. Furthermore, by requiring third parties to sign a written confidentiality agreement, you can demonstrate that you disclosed the information under confidential circumstances, which will strengthen your case in the event of a future legal dispute.

To determine the appropriate procedures to protect your confidential information, you should assess the risk that someone might obtain the information through industrial espionage. You should also consider how easy it is to obtain the information through reverse engineering or by analysing publicly available information.

Finally, you should consider the likelihood and probable consequences if another person were to develop the same invention. In all of these circumstances, once your confidential information is publicly available, you will lose all rights to control its use or disclosure.

If the risk is high that your confidential information will become public, obtaining a patent may offer a better form of protection for the information, assuming that it would meet the criteria for patentability. Some kinds of confidential information may be patentable (e.g., a new, inventive, and useful device, substance, method, or process), while other classes of confidential information are not patentable (e.g., business information, such as recipes, formulas, business processes, price lists, and customer lists).

If your confidential information is patentable and you elect to pursue patent protection, you must fully disclose the information to the national patent office. In exchange for this disclosure, you will receive a temporary monopoly of 20 years to control the use of the information. However, if it is feasible to keep the information secret and reverse engineering would be difficult, you may prefer to rely on the law of breach of confidentiality. The benefit of this latter strategy is that you can control the information (and receive commercial benefits from this control) for an indefinite period, rather than the limited, 20-year period of patent protection.

## Obligations of confidence

The law recognises both express and implied obligations of confidence. An express obligation often arises because of the relationship between the parties. This frequently occurs where a contract governs the relationship, such as in an

employment situation or where a confidentiality agreement was signed. Likewise, an implied obligation of confidence may arise where under the circumstances, the other party should have known that the information is confidential.

The law recognises that obligations of confidence exist in the following relationships:

**Fiduciary relationships:** A fiduciary is someone on whom the law imposes a duty to act in the best interest of another person. Examples of fiduciary responsibilities include the duty that director of a company has to the company, the duty that a lawyer owes to his or her client, and the duty of an agent to a principal. Fiduciaries are obligated to maintain confidentiality for confidential information that they received during the course of the fiduciary relationship, even after the relationship ends.

**Employment:** An employee owes a fiduciary duty to the employer. An employment contract may expand on this duty by specifying what information is confidential, and by imposing restrictions on the use of confidential information. Employment agreements may stipulate that employees must maintain confidentiality even after the employment ends.

**Company officers and employees:** A person who obtains confidential information because they are, or have been, company officers and employees must not improperly use the information to gain an advantage for themselves or for someone else, or to cause detriment to the company.

An obligation of confidence does not override other legal obligations. This means that even if you have an obligation of confidence, a court can order you to disclose the confidential information.

## **Benefits of a confidentiality agreement**

There are many advantages to using a clear, concise, written confidentiality agreement. As noted above, the agreement removes any doubt that the information was disclosed under circumstances of confidence. Other advantages include:

- Ability to clearly define the information and the limited purpose for which it can be used;
- Ability to clearly define the rights and obligations of each party;
- Ability to agree upon a notification process to follow if one party receives a subpoena or other legal order that may compel disclosure;
- Ability to specify that threatened disclosure without proof of damage will entitle the disclosing party to seek an injunction to restrain any prospective breach (if this is not included, you would need to prove damage, which can be difficult).

Agreements can also restrict the use or disclosure of information that is not confidential. Such agreements will only be valid or enforceable if the restraint that is imposed and its duration are 'reasonable'.

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# Trade Secrets

Trade secrets – also known as confidential information – protect information or knowledge that is not publicly available and that the law protects from misuse or improper disclosure. In Australia, the law does not provide a formal registration system for trade secrets. Instead, trade secrets are protected under common law through actions such as breach of confidence and ‘passing off’ unregistered trade marks. Trade secrets are not property, but you can control access to them through confidentiality protocols. You can also use contracts to license the use of trade secrets or to transfer the protected information to other parties.

## Patent or trade secret?

For some types of subject matter – for example, technical information – it may be possible to obtain protection either via patents or trade secrets. There are benefits and drawbacks associated with both of these options. The main benefit of trade secrets is that they exist for as long as the information remains secret, whereas the protection granted under patent law is limited to 20 years. Therefore, even if the subject matter of a trade secret is patentable, simply keeping a trade secret confidential may be a better strategy.

Trade secrets are most effective in cases where the product is difficult to ‘reverse engineer’, that is, where it is difficult to determine exactly how the product is manufactured. In such situations, it is easier to keep the relevant information and knowledge secret. Other factors to be considered when deciding whether to use a patent or a trade secret to protect a given product are the expected lifespan of the product in the marketplace, and whether you have an effective monopoly in the field.

Another way that patents and trade secrets intersect is that if an invention is publicly disclosed before a patent application is filed, it can be difficult to obtain patent protection. This is because one of the requirements for patent protection is novelty. Australian law provides a limited ‘grace period’, during which the public disclosure of an invention will not affect the validity of a subsequent patent application. The grace period will only apply if the patent application is filed within 12 months of the public disclosure. Nevertheless, the grace period should not be used as a general strategy for publishing an

invention before a patent application, because other legal systems do not recognise similar grace periods (e.g., the European Patent Convention). Therefore, it is advisable to keep information about a patentable invention secret at least until the patent application is submitted.

## How are trade secrets protected?

Trade secrets are only protected if they:

- have the necessary quality of confidence;
- have been disclosed in circumstances that indicate that the discloser expects the information to be treated as confidential; and
- have been used without the consent of the discloser.

## Is there an obligation of confidence?

An obligation of confidence can arise in several situations. These include where there is an express obligation arising out of the relationship between two or more parties, for example, where the nature of the relationship is contractual. An obligation of confidence also may be implied, based on relevant laws or because given the circumstances, one party should have known that the information was confidential.

The law recognises that obligations of confidence exist in the following relationships:

**Fiduciary relationships:** A fiduciary is someone who the law imposes a duty on to act in the best interest of another person. Examples of fiduciary responsibilities include the duty that director of a company has to the company, the duty that a lawyer owes to his or her client, and the duty of an



agent to a principal. Fiduciaries are obligated to maintain confidentiality for confidential information that they received during the course of the fiduciary relationship, even after the relationship ends.

**Employment:** An employee owes a fiduciary duty to the employer. An employment contract may expand on this duty by specifying what information is confidential, and by imposing restrictions on the use of confidential information. Employment agreements may stipulate that employees must maintain confidentiality even after the employment ends.

**Company officers and employees:** A person who obtains confidential information because they are, or have been, company officers and employees must not improperly use the information to gain an advantage for themselves or for someone else, or to cause detriment to the company.

An obligation of confidence does not override other legal obligations. This means that even if you have an obligation of confidence, a court can order you to disclose the confidential information.

### **Disclosure to collaborators, partners and financial backers**

In the context of research, it is important that all personnel involved in the project are aware of the need for confidentiality, and that procedures are established to ensure that information is not leaked. Trade secrets are protected regardless of whether you have a written agreement covering their use or disclosure. However, it is prudent to require all partners to sign a written confidentiality agreement (also known as a ‘non-disclosure agreement’) if you plan to disclose the confidential information to them. Doing so secures greater legal protection and clearly sets out the terms that govern the research project. A signed agreement means that you will be able to demonstrate that the information was disclosed under confidential circumstances.

Most importantly, where staff are involved in discussions with outside parties – such as potential collaborators in a commercialisation deal – a non-disclosure or confidentiality agreement should be used. This is particularly important if an unpatented invention will be discussed with outside parties, because public disclosure can jeopardise future patent protection. The confidentiality agreement should establish the purpose of the disclosure (e.g., negotiations towards a licensing deal) and state that the information should not be used for any other purpose.

### **Benefits of a confidentiality agreement**

There are many advantages to using a clear, concise, written confidentiality agreement. As noted above, the agreement removes any doubt that the information was disclosed under circumstances of confidence. Other advantages include:

- Ability to clearly define the information and the limited purpose for which it can be used;
- Ability to clearly define the rights and obligations of each party;
- Ability to agree upon a notification process to follow if one party receives a subpoena or other legal order that may compel disclosure; and
- Ability to specify that threatened disclosure without proof of damage will entitle the disclosing party to seek an injunction to restrain any prospective breach (if this is not included, you would need to prove damage, which can be difficult).

Agreements can also restrict the use or disclosure of information that is not confidential. Such agreements will only be valid or enforceable if the restraint that is imposed and its duration are ‘reasonable’.

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# Indigenous Intellectual Property

Intellectual property laws provide legal protection for different manifestations of creativity, including books, films, art, technological products and processes, and designs. Intellectual property laws allow a person to own the products of his/her creativity and innovation, to control the uses of these products by others, and to be rewarded for third party use.

Indigenous intellectual and cultural property may cover many types of works, including:

- Art works;
- Written works;
- Stories (oral and written);
- Music;
- Performances such as dances and ceremonies;
- Languages;
- Sacred sites and burial grounds;
- Traditional and biological knowledge; and
- Documented forms of Indigenous heritage such as photographs, films, reports, sound recordings and databases.

## How is Indigenous intellectual property protected?

In Australia, Indigenous intellectual property is protected under the same laws as non-Indigenous intellectual property. This means that protection is available if individuals meet the criteria for protection under copyright, patent, trade mark, and design statutes, in addition to other relevant intellectual property laws. It has been widely recognised that the usefulness of these conventional systems of intellectual property to protect the interests of Indigenous creators and communities is limited.

## Problems with protection

The most problematic issue with applying the concept of intellectual property to Indigenous works is that legal systems that rely on notions of private ownership may be incompatible with Indigenous peoples' understandings related to the access and circulation of knowledge, connection to Country, communal responsibility, guardianship, and custodianship.

In addition, the appropriation or 'taking' of Indigenous styles, themes, images, knowledge, and biological materials has been a widespread and serious problem for Indigenous communities. This issue has arisen in relation to all conventional forms of intellectual property, implicating arts and cultural expressions, Indigenous languages, unauthorised uses of secret or sacred materials, Indigenous medicinal and nutritional knowledge, cultural objects, ancestral remains, human genetic material, and documentation of Culture on film, tape, or in databases.

## Laws that apply to Indigenous intellectual property

### Copyright

Copyright law is a bundle of rights that covers the *expression* of ideas but not the ideas themselves. The law protects the rights of creators for their art works, music, writing, some types of performances, and film and sound recordings. Copyright protection also covers the moral rights of an individual creator. Moral rights ensure that proper attribution, acknowledgement, and integrity is afforded to

third party uses of a protected work. Indigenous creators have been able to use copyright laws to prevent the copying of their art works to create souvenirs and other items without the creators' consent.

*Limitations:* To obtain copyright protection, a work must be original, reduced to some permanent form, and have an identifiable author. These requirements are often incompatible with Indigenous understanding of cultural productions. This is because works often follow a pre-existing theme such as a community design, and therefore it may be difficult to establish originality. However, in many instances the artistic interpretation of designs will be sufficiently original to obtain copyright.

Another limitation is that body painting, rock art, oral stories, etc. cannot be protected with copyright, because they are not fixed in the required form (in contrast to a painting on canvas or a story in a book). Furthermore, to obtain copyright there must be an identifiable author of a given work, so older creations with unknown authors are not protected. Finally, Australian law does not recognise customary laws relating to a community's interests in cultural material. Therefore, once copyright for a protected work expires (after the duration of the creator's life plus 70 years), anyone may freely use the material.

Specific examples of problems with copyright as a form of protection for Indigenous intellectual property in Australia have arisen in relation to photographs, reports, sound recordings, and films containing Indigenous cultural material. This is because in some instances the law has granted protection for these works to the non-Indigenous creators of the material and not to the Indigenous individuals or communities who feature in the materials.

### **Patents**

A patent is a set of exclusive rights granted for an invention, which may be a device, substance, method, or process that is new and useful. Patents provide owners with the right to exclude others from making, using, or selling the invention for 20 years.

*Limitations:* The economic value of Indigenous biological knowledge and resources is substantial, and commercial firms and research organisations alike have benefited from the use

of such knowledge and resources at the expense of Indigenous communities. This is because in all Australian jurisdictions except for the Northern Territory, the law that regulates bioprospecting activities does not grant any protections to Indigenous communities to control access to or utilisation of the genetic resources or associated knowledge that may be obtained from their land. This means that Indigenous people may not benefit from downstream scientific or commercial utilisation of their knowledge or resources.

A related issue is that it is often difficult for Indigenous people to meet the requirements of patentability for the products of their knowledge. This contrasts with the many instances in which Non-Indigenous parties have obtained patents for inventions that incorporate Indigenous knowledge, which have been converted into commercially successful products.

### **Trade marks**

Trade marks are signs used to distinguish one trader's goods or services from those of another business. The sign may include a logo, word, slogan, or symbol. Trade mark protection can last forever if it is maintained, meaning that trade mark registrations must be renewed every 10 years. It is possible to register a trade mark in the name of a group who jointly use the mark. Therefore, an Indigenous community organisation could collectively register a trade mark, such as a clan symbol or design.

*Limitations:* Trade mark registration can be expensive. Another issue with trade marks is that Non-Indigenous individuals and companies have registered Indigenous symbols and names as trade marks. There is no direct legal protection to prevent this practice.

### **Designs**

In intellectual property law, a design refers to the features of a shape, configuration, pattern, or ornamentation that give a product a unique appearance. Designs apply to commercial products, and they must be new and distinctive to receive protection.

*Limitations:* Australian intellectual property law does not provide special protection for Indigenous designs or cultural material. A cultural motif can be a design, but it may only be registered if it is used on a finished product.

Therefore, if not applied to a commercial product, motifs such as community insignia cannot be protected as designs. The period of protection lasts for 10 years, and after that time, the design becomes free for anyone to use. For

this reason and because there is no recognition of community ownership, designs law probably does not constitute an appropriate form of protection for Indigenous intellectual property.

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# Key International Treaties for Plant Genetic Resources

This Fact Sheet provides an overview of the key international treaties that are relevant for the governance of plant genetic resources in Australia.

## The Convention of the International Union for the Protection of New Varieties of Plants (UPOV)

UPOV is a binding international agreement that was first adopted in 1961 by a group of European nations. The Convention came into force in 1968 establishing international rules to protect the rights of the developers of new plant varieties. The original UPOV Convention has been modified a number of times and its most recent revision in 1991 requires member countries to provide an intellectual property right specifically for plant varieties. This form of intellectual property protection is often referred to as plant breeder's rights.

The main objectives of UPOV are:

1. to encourage plant breeding and innovation through the grant of a limited commercial monopoly to breeders of new varieties; and
2. to give legal protection to breeders, without which anyone could commercialise their new varieties without payment.

While farmers' rights are not specifically recognised by UPOV, the Convention recognises 'farmers' privilege'. This allows member countries of UPOV to decide whether farmers can save and re-use farm saved seeds and propagating material while still safeguarding the legitimate interest of the breeders of new plant varieties.

To be eligible for protection under UPOV, plant varieties need to be: new, distinct from existing, commonly-known varieties, sufficiently uniform, and stable. Under the UPOV Convention, the plant breeder's rights are granted for a limited period of time – 20 years from application date

(25 years for trees and vines) – and then the variety passes into the public domain.

Australia became a member of UPOV on 1 March 1989 and introduced a *Plant Breeder's Rights Act* in 1994 to comply with UPOV.

## The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO)

TRIPS came into force on 1 January 1995 to set out the minimum standards of intellectual property protection that WTO member countries are required to provide. The TRIPS Agreement requires WTO member countries to protect plant varieties by patents, an 'effective *sui generis* system' (of its own kind), or combination of both. A *sui generis* system enables WTO member countries to design their own system of protection for plant varieties if they have elected not to use their patent system for plant protection.

In Australia, plants can be protected by patents provided that they meet the necessary requirements that exist for patentability.

## The Convention on Biological Diversity (CBD)

The CBD entered into force in December 1993 to establish a framework for the governance of genetic resources from plants, animals, or microorganisms. It provides that 'States have the sovereign right to exploit their own resources pursuant to their own environment policies', and that 'the authority to determine access to genetic resources rests with the national governments and is subject to national legislation'.

The key goals of the CBD are:

1. the conservation of biological diversity;
2. the sustainable use of the components of biological diversity; and
3. the fair and equitable sharing of the benefits from the use of genetic resources.

The CBD recognises that access to and use of valuable genetic resources should be based on mutually agreed terms and the prior informed consent of the resource-providing parties. The protection of traditional knowledge of Indigenous and local communities is a key concept of the CBD. The Convention requires States to encourage the equitable sharing of the benefits accrued from the use of traditional knowledge, innovations, and practices.

Australia was one of the first countries to accept the Convention (1992). In response to the CBD, Australia has adopted the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Some States and Territories of Australia also have adopted CBD-compatible laws. These include Queensland and the Northern Territory.

### **Nagoya Protocol on Access to Genetic Resources and Benefit Sharing (the Nagoya Protocol)**

The Nagoya Protocol is an international agreement establishing binding legal obligations relating to the access and use of genetic resources. The Protocol is supplementary to the CBD and only applies to those States that have ratified it. The Protocol, which has been ratified by 120 countries, came into force on 12 October 2014. Contracting Parties to the CBD that have not ratified the Protocol are still bound by obligations on access and benefit sharing set out in the CBD.

The Nagoya Protocol is designed to implement the third objective of the CBD: ‘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,

considering all rights over those resources and to technologies, and by appropriate funding’.

Australia signed the Nagoya Protocol in January 2012 and is now consulting with national stakeholders to implement and ratify it.

### **International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty)**

The Plant Treaty, which came into effect on 29 June 2004, aims to promote:

1. the conservation and sustainable use of plant genetic resources for food and agriculture; and
2. the fair and equitable sharing of benefits derived from their use.

The Plant Treaty encourages the use of plant genetic resources through the sharing of national and international collections of plant materials that are important for research, breeding, and training for food and agriculture.

A key feature of the Plant Treaty is its ‘Multilateral System’, a global mechanism to ensure access to plant materials and benefit sharing. The Multilateral System covers plant materials of 64 food and forage crop species that have been identified in *Annex 1* of the Plant Treaty. These include plant materials that are under the management and control of the government and in the public domain, that are held by CGIAR and other gene banks as *ex situ* collections, and that individuals and institutions include as contributions to the Multilateral System. The Plant Treaty also recognises farmers’ rights to plant genetic resources and traditional knowledge, including the right to save, use, exchange, and sell seeds. The Treaty encourages States to protect these rights under their national laws.

Australia signed the Treaty on 10 June 2002 and ratified it on 12 December 2005.

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# International Treaty on Plant Genetic Resources for Food and Agriculture

The International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty) came into effect on 29 June 2004. The Treaty provides for the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits that accrue from the use of these resources.

A key feature of the Plant Treaty is its 'Multilateral System': a global mechanism to ensure access to plant materials and benefit sharing. The Multilateral System covers plant materials of 64 food and forage crop species that are listed in *Annex 1* of the Plant Treaty. These include plant materials that are under the management and control of governments and in the public domain, that are held by the Consultative Group for International Agricultural Research (CGIAR) and other gene banks as *ex situ* collections, and that individuals and institutions include as contributions to the Multilateral System.

Transfers of the Annex 1 materials are governed according to a standard material transfer agreement (SMTA) between the provider of the plant materials and the recipient of the plant materials. The SMTA sets out the terms and conditions of access, use and benefit sharing, and addresses a number of intellectual property matters.

## Scope of the Plant Treaty

The SMTA of the Plant Treaty deals with three forms of the plant material:

1. plant materials 'in the form received' from the Multilateral System with available passport data and non-confidential descriptive information;
2. plant materials 'under development' derived from the originally provided material that is being changed up to the stage of a commercialised 'product'; and
3. plant materials as a 'product' that incorporates the plant material received, or any of its genetic parts or components ready for commercialisation (excluding commodities and other products used for food, feed and processing).

The SMTA only covers access to materials for use or conservation for the purpose of research, breeding and training for food and agriculture. Any other uses, including chemical, pharmaceutical and other industrial uses are outside the bounds of the SMTA and require a separate agreement.

All issues of access to genetic resources, other than human genetic resources and those resources covered by *Annex 1* of the Plant Treaty and subject to the SMTA, are governed by the Convention on Biological Diversity (CBD) and the Nagoya Protocol (*see* Fact Sheet 14: Access to Genetic Resources under the CBD; and Fact Sheet 15: Nagoya Protocol).

## Obligations of the plant material provider

- Provide relevant plant material passport data (accession numbers etc).
- Provide non-confidential descriptive information about the plant materials.
- Ensure that any intellectual property covering the plant materials is consistent with international and national laws.

## Obligations of the plant material recipient

- Refrain from claiming intellectual property over the plant materials (and their genetic parts or components) 'in the form received' from the Multilateral System.
- Share benefits arising from commercialisation of received plant materials, or their parts or components.



- Impose the same rights and obligations in a separate agreement, on any transfers of received plant materials and its progeny developments.

### Benefit sharing obligations

Benefit sharing obligations depend on whether the recipient restricts further research and breeding uses of the commercialised product:

- *With restrictions:* The recipient is required to pay a fixed percentage of the sales value for the particular Product and of the sales value of other products belonging to the same crop.
- *Without restrictions:* Recipients are encouraged to make voluntary payments to the financial mechanism established by the Governing Body.

### Resolving disputes

Dispute settlement can be initiated by the provider, the recipient or an entity acting on behalf of the Treaty's Governing Body. The dispute should be addressed at first instance through 'good faith' negotiation, failing this mediation, and then failing this arbitration.

### Claiming intellectual property over Plant Treaty materials

The SMTA restricts recipients from claiming intellectual property where the claim would restrict access to the plant materials (and their genetic parts or components) in the form received for use or conservation for research, breeding and training for food and agriculture.

This leaves open the possibility of claiming intellectual property over:

- Any materials received so long as access to the materials for research, breeding and training for food and agriculture is allowed (possibly through a non-exclusive license).
- Any developments to the plant materials received.

- Any developments over genetic parts or components of the plant materials received.

Importantly, recipients of any plant materials that are already protected by intellectual property must continue to respect those restrictions.

### Transfer and exhaustion of the terms and conditions of the SMTA

The terms and conditions of the SMTA generally follow the genetic resources:

- For recipients transferring – Recipients must impose the same rights and obligations on any transfers of received plant materials and their progeny and developments where the transfer is for use or conservation for the purposes of research, breeding and training for food and agriculture.
- For recipients commercialising – When sold as a product on an open market the benefit sharing obligations take effect and the vendor is not obliged to pass on the same rights and obligations to the purchaser unless the purchaser is going to use or conserve the plant materials for research, breeding and training for food and agriculture.
- For purchasers of commercialised products – The purchaser of a product sold on an open market that was derived from plant materials covered by an SMTA is not automatically bound by the SMTA.
- Other uses – Where the use changes from research, breeding and training for food and agriculture to something that does not involve commercialisation of the received materials, the recipient is obliged to negotiate terms and conditions including benefit sharing with the provider.

### Farmers' rights

The Plant Treaty is the first binding international instrument to formally recognise farmers' rights to plant genetic resources and associated traditional knowledge (*see* Fact Sheet 13: Farmers' Rights).

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# What are Farmers' Rights

Farmers' rights were developed primarily to secure recognition of the farmers' role in the conservation and continuing development of plant varieties and to protect their rights to these varieties, including the right to save, use, exchange, and sell seeds from their harvest (farmers' privilege). They are legally recognised in a number of international legal instruments and are the subject of specific legislation in a growing number of countries, especially those with large farming communities such as India, Malaysia, and Thailand.

Originally conceived in the 1980s as a means to counterbalance the impact of plant breeder's rights on farmers' ability to save, use, exchange and sell seeds and other propagating material, farmers' rights are enshrined in a variety of national legal instruments that regulate access to and use of genetic resources and traditional knowledge, and that protect plant varieties as intellectual property. The term 'farmers' rights' has been primarily linked with international regulation of plant genetic resources for food and agriculture.

Recognition of the rights of farmers not only to their local seed varieties but also to their lands, resources, traditional knowledge and self-determination is found in international human rights and environmental treaties, national constitutions and laws as well as in the customary laws and practices of Indigenous peoples and local communities.

## Legal recognition of farmers' rights

The first legal recognition of farmers' rights was in the 1983 International Undertaking of Plant Genetic Resources of the Food and Agriculture Organization (FAO). FAO Conference Resolution 5/89 to the International Undertaking defined Farmers' Rights as "rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centres of origin/diversity". The 2001 preamble to the International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty) describes the right "to save, use, exchange and sell farm-saved seed, and other propagating material" as fundamental for the realisation of Farmers' Rights (*see* Fact Sheet 12: International Treaty on Plant Genetic Resources for Food and Agriculture).

## Scope of farmers' rights

The Plant Treaty recognises the contribution that the local and Indigenous communities and farmers of all regions of the world, particularly those in centres of origin and of crop diversity, have made and will continue to make for the conservation and development of plant genetic

resources which constitute the basis of food and agricultural production throughout the world.

Under the Plant Treaty, the responsibility for realising farmers' rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. Article 9 of the Treaty, sets out the obligations of Contracting Parties to take measures to protect and promote these rights, including measures to secure:

- the protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
- farmers' right to equitably participate in sharing benefits from the utilisation of plant genetic resources for food and agriculture; and
- farmers' rights to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

The Plant Treaty states that the content of farmers' rights is not to be interpreted as limiting any rights that farmers have to save, use, exchange, and sell farm-saved seed and propagating material. The exercise of rights relating to farm-saved seeds depends, however,

on national legislation and the Plant Treaty gives States complete freedom to decide whether or not to recognise such rights or farmers' privilege.

Legislation specifically addressing farmers' rights has been adopted at the regional level by the African Union. Countries such as Costa Rica, Ethiopia, India, Malaysia, Nepal, Pakistan, the Philippines, Thailand, and Sri Lanka as well have either adopted or are in the process of adopting national legislation that protect various rights of farmers, such as the rights to save, use, exchange, and sell seeds and to participate in sharing of the benefits derived from the use of their plant varieties.

Farmers' rights include both rights to share in economic benefits and rights to State support for farmers' traditional knowledge and farming practices necessary for the conservation and sustainable use of their plant genetic resources. Under the Plant Treaty, Contracting Parties are required to:

- promote the collection of plant genetic resources for food and agriculture and relevant associated information on those plant genetic resources that are under threat or are of potential use;
- promote or support, as appropriate, farmers' and local communities' efforts to manage and conserve their plant genetic resources for food and agriculture; and
- promote *in situ* conservation of wild crop relatives and wild plants for food production, including in protected areas.

The rights of farmers over their traditional knowledge and traditional farming practices, as well as over their traditional lands and resources, are found in a variety of national, regional and international laws and policies. These include: the United Nations Declaration on the Rights of Indigenous Peoples; the Convention on Biological Diversity (CBD); and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.

The CBD and the Nagoya Protocol exclude from their remit a small range of plant varieties, which fall within Annex 1 of the Plant Treaty, to the extent that these are utilised for research, breeding and training for food and agriculture (*see* Fact Sheet 14: Access to Genetic Resources

under the Convention on Biological Diversity; Fact Sheet 15: Nagoya Protocol; and Fact Sheet 12: International Treaty on Plant Genetic Resources for Food and Agriculture).

### **Responsibility of the users of the seeds of farmers' varieties**

Responsibility for ensuring prior informed consent for access to and use of farmers' varieties lies with the user. All those involved in the collection, documentation, storage, and transfer of the seeds and other propagating material of farmers' varieties and associated traditional knowledge are obliged to ensure that they have been obtained in accordance with the Plant Treaty (for varieties falling within Annex 1 of the Treaty and for uses falling exclusively within the coverage of the Treaty). In all other cases, users will need to secure prior informed consent and enter into mutually agreed terms for collection and use of farmers' varieties and traditional knowledge as required by international law, including the CBD, the Nagoya Protocol, and relevant national or regional laws.

### **Farmers' rights and national seed laws**

National seed laws have impeded the continuing development and use of farmers' local varieties in favour of protecting and promoting the sale of certified seed, usually from commercial companies. This practice is now widely seen as inimical to the protection of agrobiodiversity. As a result, new legislation increasingly provides certification of local varieties and recognition of their role in promotion of local livelihoods, biological diversity, and Farmers' Rights.

### **Farmers' rights and plant breeder's rights**

Plant breeder's rights are protected internationally by the Convention of the International Union for the Protection of New Varieties of Plants (UPOV) 1961. UPOV 1978 recognised a 'farmer's privilege' allowing farmers to reuse propagating material from the previous year's harvest. Under UPOV 1991, the farmers' privilege is no longer automatic and all unlicensed multiplication of protected seed and propagating material is an infringement. UPOV 1991 provides a limited right to States to permit farmers to use farm-saved seed for sowing on their own lands, but not for sale or exchange

with others (*see* Fact Sheet 2: Plant Breeder's Rights).

### **Participatory plant breeding programs**

Farmers' Rights may be enhanced by participatory plant breeding and variety selection programmes. These programmes establish

partnerships between a range of stakeholders, including local farmers and agricultural scientists. Such partnerships lead to the selection or breeding of plant varieties that adapt to local growing conditions and that address the needs of local farmers.

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# Access to Genetic Resources under the Convention on Biological Diversity

The Convention on Biological Diversity (CBD) is an international legal instrument that governs access to and use of genetic resources from plants, animals, or microorganisms. The Convention was adopted on 22 May 1992 to provide a legal framework for member countries to address global concerns about the conservation, access, and use of biological diversity, and the sharing of benefits arising from the use of genetic resources. The CBD entered into force on 29 December 1993. So far, 196 countries, including the European Union have joined the Convention as its Contracting Parties. In October 2010, the Conference of the Parties to the CBD adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. As a supplementary agreement to the CBD, the Protocol came into force on 12 October 2014 and is ratified by 120 countries, including the European Union (*see* Fact Sheet 15: Nagoya Protocol).

The Contracting Parties of the CBD have the obligation to regulate access to and use of genetic resources through legislative, administrative, and policy measures. It is the responsibility of each Contracting Party to ensure that their domestic measures do not restrict access to genetic resources for environmentally sound uses. Contracting Party must also ensure that access to genetic resources is based on prior informed consent from resource providers and mutually agreed terms between providers and users of genetic resources.

## Objectives and scope of the CBD

The CBD aims to promote:

- (1) the conservation of biological diversity;
- (2) the sustainable use of the components of biological diversity; and
- (3) the fair and equitable sharing of the benefits arising out of the use of genetic resources, including access to genetic resources and transfer of technologies.

The CBD applies to genetic resources from plants, animals, or microorganisms but not to human genetic resources. The resources covered by the CBD are those provided by States that are countries of origin of such resources or those that States have acquired in accordance with the Convention. A country of origin is defined as the country in which the resources are found *in situ*, and with regard to domesticated or cultivated species the country where they have developed their distinctive properties.

The CBD does not apply to genetic resources covered under *Annex 1* of the International Treaty on Plant Genetic Resources for Food and Agriculture, in so far as they are used for research, breeding, and training for food and agriculture (*see* Fact Sheet 12: International Treaty on Plant Genetic Resources for Food and Agriculture).

## State sovereignty, prior informed consent, and mutually agreed terms

The CBD requires Contracting Parties to create conditions to facilitate access to genetic resources for uses deemed environmentally sound. Access to genetic resources is to be granted based on the prior informed consent of the Party providing genetic resources, and the establishment of mutually agreed terms of access and benefit sharing between providers and users of genetic resources.

## Benefit sharing

Under the CBD, States are required to ensure that when genetic resources are accessed, there is

a fair and equitable sharing of benefits. Importantly, the benefits can be monetary or non-monetary.

Monetary benefits include:

- access fees/fee per sample collected or acquired;
- up-front payments;
- special fees to be paid to a trust/benefit sharing fund;
- salaries;
- research funding;
- joint ventures; and
- joint ownership of relevant intellectual property rights.

Non-monetary benefits include:

- sharing of research and development results;
- collaboration, cooperation and contribution in scientific research and development programmes, and in education and training;
- participation in product development;
- transfer of technology;
- access to scientific information, including biological inventories and taxonomic studies;
- research directed towards health, food and livelihood security; and
- social recognition.

## **Traditional knowledge**

The CBD also regulates access to traditional knowledge relevant to the conservation and sustainable use of biological diversity. The Convention requires States to promote wider usage of traditional knowledge with the involvement and consent of Indigenous and local community custodians; and encourage the equitable sharing of the benefits arising from the utilisation of traditional knowledge. Prior informed consent and mutually agreed terms are also required for access to and use of the genetic resources and traditional knowledge of Indigenous and local communities.

## **Intellectual property rights**

States are obliged to cooperate to ensure that intellectual property rights are supportive of and do not run counter to the objectives of the CBD.

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# Nagoya Protocol on Access to Genetic Resources and Benefit Sharing

The Nagoya Protocol on Access to Genetic Resources is an international agreement establishing binding legal obligations relating to the access and use of genetic resources. The Protocol is supplementary to the Convention on Biological Diversity (CBD) and only applies to those States that have ratified it. The Protocol, which has been ratified by 120 countries, came into force on 12 October 2014. Contracting Parties to the CBD that have not ratified the Protocol are still bound to fulfil their access and benefit sharing obligations under the Convention (*see* Fact Sheet 14: Access to Genetic Resources under the Convention on Biological Diversity).

The Nagoya Protocol is designed to implement the third objective of the Convention: ‘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.’ The Protocol views benefit sharing, access, technology transfer, and funding as means of securing the conservation of biological diversity and the sustainable use of its components.

## Scope of the Nagoya Protocol

The Nagoya Protocol applies to genetic resources derived from plants, animals, or microorganisms; traditional knowledge associated with these genetic resources; and benefits that arise from their utilisation. The Protocol also applies to the use of derivatives, defined as naturally occurring biochemical compounds resulting from the genetic expression or metabolism of biological or genetic resources, even if they do not contain functional units of heredity. The Nagoya Protocol does not apply to human genetic resources or genetic resources outside areas of national jurisdiction.

The Protocol does not also apply to the genetic resources covered by specialised international access and benefit sharing instruments, including pandemic influenza covered by the International Health Regulations (2005); and plant genetic resources that are covered under *Annex 1* of the International Treaty on Plant Genetic Resources for Food and Agriculture. The only exception here is that the use of these resources must be for the purpose of utilisation and conservation for research, breeding, and training for food and agriculture. If the use of these resources is for the purpose of chemical, pharmaceutical and/or

other non-food/feed industrial uses, the Nagoya Protocol may apply (*see* Fact Sheet 12: International Treaty on Plant Genetic Resources for Food and Agriculture).

## Benefit sharing

Parties to the Nagoya Protocol are required to adopt domestic measures to ensure the fair and equitable benefit sharing for the utilisation of genetic resources and traditional knowledge. Benefit sharing must be based on mutually agreed terms and may be both monetary and/or non-monetary (e.g., royalties, milestone payments, access to resultant technologies, sharing of research results, and access to scientific information, including biological inventories and taxonomic studies).

The obligation for benefit sharing is triggered by the utilisation of:

- genetic resources, i.e. conducting research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology;
- derivatives;
- genetic resources over which Indigenous and local communities have established

- rights under national law; and/or
- traditional knowledge associated with genetic resources held by Indigenous and local communities.

Benefit sharing obligations extend to subsequent applications and commercialisation of genetic resources, derivatives, and traditional knowledge.

Any new utilisation of genetic resources, derivatives or traditional knowledge that have been accessed following the entry into force of the CBD but prior to the Nagoya Protocol entering into force may also be subject to benefit-sharing obligations. This is not clearly defined by the Protocol and users will need to pay close attention to relevant national legislation and institutional policies. Botanical gardens, part of the International Plant Exchange Network (IPEN), for example, do not differentiate between pre- and post-CBD collections. Meanwhile, European Union legislation limits benefit-sharing obligations to resources accessed after the Nagoya Protocol entered into force.

### **Access obligations**

Parties under the Protocol are required to adopt domestic measures with a view to ensuring that access to genetic resources and knowledge is subject to prior informed consent from and mutually agreed terms with relevant providers, including:

- countries of origin or Parties who have obtained those resources in accordance with the CBD;
- Indigenous and local communities for resources and knowledge over which they have established rights.

The obligations to seek prior informed consent and to negotiate mutually agreed terms for access to and utilisation of genetic resources are set by national access legislation and other national legislative and administrative measures. They may also include relevant customary laws and protocols of Indigenous and local communities and directly applicable international legal instruments.

### **Compliance**

The Nagoya Protocol requires Parties to adopt measures to provide that genetic resources

and/or traditional knowledge used in their jurisdiction have been accessed in accordance with the domestic access legislation or regulatory requirements of the other Party. To this end, the European Union and Switzerland have both adopted legislation requiring users of genetic resources and/or traditional knowledge to demonstrate due diligence in ensuring compliance with relevant domestic access legislation in provider countries.

The Protocol also requires Parties to:

- establish a national focal point and one or more competent national authorities to provide access permits and to ensure compliance with the Protocol;
- create a system for monitoring compliance through the designation of checkpoints at one or more stages of resource use, including: research, development, innovation, pre-commercialisation or commercialisation;
- cooperate in cases of alleged violation of relevant national law and policy;
- encourage alternative dispute resolution in access contracts; and
- provide access to justice in cases of failure to comply with obligations on access and benefit sharing.

### **Internationally recognised certificate of compliance**

To ensure compliance with the Protocol, Parties are required to make available all access permits or their equivalent to the Access and Benefit-sharing Clearing-House. Under the Protocol, an access permit issued by a national authority and made available to the Clearing-House shall constitute an internationally recognised certificate of compliance. Such certificates are important because they serve as evidence that genetic resources were accessed based on prior informed consent and that mutually agreed terms were established in accordance with domestic access and benefit sharing laws or other relevant regulatory requirements.

When it is not confidential, the internationally recognised certificate of compliance must contain the following minimum information:

- Issuing authority;
- Date of issuance;

- The provider;
- Unique identifier of the certificate;
- The person or entity to whom prior informed consent was granted;
- Subject-matter or genetic resources covered by the certificate;
- Confirmation that mutually agreed terms were established;
- Confirmation that prior informed consent was obtained; and
- Commercial and/or non-commercial use.

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# The Legal Regulation of Biodiscovery in Australia

Biodiscovery refers to the process of collecting biological resources (e.g., plants, animals, microorganisms) in the search of active compounds or ingredients that can be developed into useful products. Examples of commercial products derived from biological materials include Indian snakeroot (*Rauwolfia serpentine*) which is used in the drug Reserpine to treat hypertension, and the Cinchona bark (*Cinchona*) which yields the quinine used in the treatment of malaria.

Until 1992, there was no legally-binding international agreement to govern how countries should facilitate the access and use of biological resources, and the sharing of benefits derived from the use of such resources. As a result, biodiscoveries based on the access and use of biological resources did not require the return of benefits to the country or community from where the source material was extracted. The entry into force of the 1992 Convention on Biological Diversity (CBD) and the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from the Utilization of Genetic Resources (Nagoya Protocol) changed the regulatory dynamics of biodiscovery activities, including the access and use of biological resources (*see* Fact Sheet 14: Access to Genetic Resources under the Convention on Biological Diversity; Fact Sheet 15: Nagoya Protocol; and Fact Sheet 12: International Treaty on Plant Genetic Resources for Food and Agriculture).

## Why is biodiscovery important?

Australia has approximately 10 percent of the world's biodiversity. In addition, advances in science and technology mean that it is possible to systematically scan biological materials for chemicals and products that may have commercial values.

The Australian Government has stated that it aims to ensure that the social and economic benefits of the use of biological resources are returned to Australia. To do this, the Government has attempted to facilitate access to Australian resources, and encourage investment in biodiscovery. The rules for biodiscovery come from two main sources: international treaties and Australian domestic law

## 1. International treaties

The CBD aims to:

1. conserve biological diversity,
2. promote the sustainable use of the components of biological diversity, and
3. ensure the fair and equitable sharing of benefits arising from the use of genetic resources.

The CBD entered into force in 1993 and lays down the framework for access to genetic resources and the sharing of benefits for all Contracting Parties, including Australia.

Australia is also a signatory to the Nagoya Protocol to the CBD but is yet to ratify it. The ratification of the Protocol may require Australia to make amendments to the national laws that the country has developed to comply with the CBD.

## 2. National laws

### Commonwealth areas

Commonwealth areas include all the land and water under Commonwealth control in Australia and does not include private lands and State and Territory lands.

For Commonwealth areas, the *Environmental Protection and Biodiversity Conservation Act 1999* and the *Environment Protection and Biodiversity Conservation Regulations 2000* implement a CBD-compatible regime of access to biological resources.

The Act and Regulations for Commonwealth areas aim to ensure that Australia's genetic resources are used for research and development by fulfilling the requirements of prior informed consent and mutually agreed terms of access and benefit sharing that providers and users of genetic resources are required to conclude.

### Queensland

In 2004, the Queensland Government passed the Biodiscovery Act to implement the obligation under the CBD. The Biodiscovery Act extends only to native biological resources collected from State land and Queensland waters. State land is defined as all land in Queensland except freehold land, freehold leases or lands subject to native title determination granting rights of exclusive possession. Queensland waters are all waters within the limits of the State or coastal waters.

### Northern Territory

In order to comply with the CBD, the Northern Territory Government passed the *Biological Resources Act 2006*. The Act applies to the collection of native biological material throughout the Territory, including the air above, the water and the seabed or riverbed below the water. However, the Act does not apply to the collection of native biological material from Commonwealth areas in the Territory, which are governed by the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

## Key aspects of Australian domestic laws

### Obtaining a permit

In locations where biodiscovery laws apply, applicants need to apply for a permit to collect native biological material for biodiscovery. Generally, the permit for biodiscovery is granted if the collection is:

- ecologically sustainable, and
- a Benefit Sharing Agreement has been reached with the resource provider, which includes prior informed consent and mutually agreed terms.

### Concluding a benefit sharing agreement

In certain Australian States and Territories, it is a condition of access to native biological material that a Benefit Sharing Agreement be entered into. The benefits may be monetary (e.g., up-front payments or royalties on future products) or non-monetary (e.g., training and jobs).

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# Disclosure of Origin

One of the techniques adopted to regulate the use of genetic resources is to require parties making use of those resources to specify, in certain situations, the origin of the resources. Disclosure requirements serve as a tool for ensuring compliance with relevant national and international laws on access and use of genetic resources and traditional knowledge. Disclosure requirements serve a number of different ends, including:

- identifying scientific or commercial use, rights holders or prior art;
- facilitating the monitoring and enforcement of rights;
- preventing illegal and/or unauthorised use;
- preventing the grant of 'bad' patents or plant breeder's rights; and
- promoting equitable sharing of the benefits that arise from the access and use of genetic resources or traditional knowledge.

## National and regional disclosure measures

Disclosure of origin requirements have been adopted by the Andean Community of Nations; the Organization of African Unity; The African Regional Intellectual Property Organization; the European Community; and the South Pacific Forum. At least 32 countries have also adopted disclosure requirements in national law. These are Belgium, Brazil, Burundi, China, Costa Rica, Cuba, Denmark, Djibouti, Ecuador, Egypt, Ethiopia, France, Germany, India, Indonesia, Italy, Kyrgyzstan, Namibia, Norway, Panama, Peru, the Philippines, Romania, Samoa, South Africa, Spain, Sweden, Switzerland, Uganda, Vanuatu, Vietnam, Zambia.

In many of these countries, legislation applies to both genetic resources and traditional knowledge, and requires that evidence of prior informed consent and mutually agreed terms of benefit sharing is provided to commercialise these resources or relevant traditional knowledge. Failure to comply with the obligation of disclosure requirements under these national legislation may result in refusal to process intellectual property and access to genetic resources applications, revocation of patents, placing of intellectual property rights in joint ownership, or criminal sanctions.

## Nature of disclosure requirements

Countries that are members of the World Trade Organization (WTO) and/or the International Union for the Protection of New Varieties of Plants (UPOV) are limited in their ability to make disclosure of origin requirements a substantive requirement for patent or plant breeder's rights laws. They have more freedom in establishing procedural disclosure requirements. Failure to comply with procedural requirements may have severe consequences, including the cancellation of intellectual property rights, and criminal sanctions.

## Regularising current practice

Studies indicate that a requirement for disclosure of origin in patent law would simply regularise current practice relating to the filing of patent applications. Disclosure of the origin of traditional knowledge, as opposed to disclosure of the relevant traditional knowledge itself, may not necessarily be required to carry out an invention. However, obligations in existing intellectual property regimes to identify the inventor may require disclosure of sources of traditional knowledge where that knowledge amounts to what a report of the World Intellectual Property Organization (WIPO) has identified as 'inventive contributions.' Where traditional knowledge (known to the applicant) is



so close to the claimed invention that it is in fact intrinsic to it under the legal doctrine that determines ‘inventive contribution’ in the jurisdiction concerned, then it may be necessary to declare the provider of the traditional knowledge as a joint inventor. Existing requirements to disclose prior art would, in many cases, require disclosure of relevant traditional knowledge in a patent application.

## **Certificates of compliance**

A global standardised certification of compliance system is a central element of the compliance system established by the Nagoya Protocol, which entered into force on 12 October 2014 (*see* Fact Sheet 15: Nagoya Protocol). This regime anticipates States will adopt a number of checkpoints where certificates of compliance would be reviewed as a means to monitor and ensure compliance with relevant national and international laws on access and benefit sharing.

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# End Point Royalties

Plant breeder's rights, sometimes known as plant variety rights, provide exclusivity for various uses of the propagating material of protected plant varieties. There are a number of different ways through which plant varieties might be used or commercialised.

Commonly, farmers that want to grow a protected variety agree to a contract or license that includes terms that govern the farmer's use of the variety. This commonly includes the purchase price of the propagating material, terms of use, reporting requirements, and the amount (and timing) of any royalties to be paid.

## What are royalties?

The cost of the propagating material of a protected plant variety often includes a royalty, which is a payment for use of the material that generates revenue for the breeder. For example, a variety that costs \$100 per tonne may include a \$4 royalty that goes back to the owner of the plant breeder's rights.

Royalties are often collected at the point of sale, as a one-off payment when propagating material such as seed is purchased. Alternatively, growers in Australia may be required to pay an end point royalty on newly released varieties. End point royalty payments are calculated on the volume, quantity, or weight of the crop that is harvested from the seed of a particular variety. End point royalties are also known as Crop Improvement Royalties.

Importantly, the use of end point royalties is not restricted to varieties that are protected by plant breeder's rights. Royalties are the exclusive province of the contract between the grower and the seller (who is often the plant breeder's rights owner or their licensee) of the propagating material.

## Why end point royalties?

End point royalties are often presented as a fairer alternative to point of sale royalties. This is because they may enable breeders to obtain a return on the investments they made in breeding the variety, while keeping the cost of propagating material relatively low.

End point royalties also spread the risk of crop failure, while allowing plant breeder's rights

owners to collect royalties from the sale of grain that was grown using farm-saved seed. In this way, end point royalties are understood as a user pays system that allows the grower to produce the variety and to pay royalties proportionately based on the success of the harvest.

## How do end point royalties affect the grower?

In most circumstances, the grower is required to sign a contract (often referred to as a 'Grower Agreement' or 'Seed Licence' when they purchase propagating material (*see* Fact Sheet 19: Closed Loop Contracts). This contract outlines the obligations of the grower, which may include:

- to pay an end point royalty that will be calculated based on each tonne of grain harvested, whether sold or retained on farm; and
- to retain records that specify the tonnage of grain either sold or retained.

Importantly, any propagating material that growers save, and subsequent harvests of crops grown with this material, may be subject to the terms and conditions of the contract.

## How do growers pay end point royalties?

When grain of a variety that is subject to end point royalty payments is delivered to certain buyers, the royalty may be automatically deducted from the payment that the buyer makes to the grower. Alternatively, if delivery is made to a buyer that does not automatically

deduct the royalty, then the grower may be invoiced subsequently for the end point royalty.

Grower declarations, grain delivery information, and contract auditing are all used to ensure that appropriate end point royalties are being collected.

### **How do I know if I have to pay end point royalties?**

Your contract will state what type of royalties are payable. You need to check your contract to determine whether the royalties are end point royalties.

### **Who receives the end point royalties?**

The recipient of the end point royalties is usually the breeder, distributor, or licensee.

### **What are the issues with end point royalties?**

**Transparency:** Occasionally, breeders will collect a point of sale royalty on the propagating material, in addition to an end point royalty. Some growers believe that this constitutes 'double-dipping' because they are paying two royalties twice: once for the propagating material, and once for the harvested product. However, this does not occur for most commercially grown plant varieties.

**Variation in end point royalties rates:** There can be a large variation in end point royalty rates, depending on the variety. This variation

generally results from a consideration of the costs of other varieties in the market place, the benefit(s) of the new variety, and market tolerance. Variation can be reduced by charging a percentage rate rather than a \$/tonne charge.

**Standardised contracts:** While end point royalties are widely used, their implementation has been approached variously by different breeding organisations and/or collection agents. This has resulted in several similar but separate systems operating within the same industry. As a result, there is a wide range of Grower Agreements, which can vary substantially. It is important that you read the terms of any contract you sign carefully.

**Third-line forcing (Competition and Consumer Law):** While it is lawful to recommend the product or service of a third party to a grower, it is unlawful to force growers to use those products or services. For example, it may be unlawful for a seed vendor to force growers to use a particular grain collection agent. However, the legality of this situation may depend on whether any public benefit (e.g., based on price or choice) would result from forcing growers to use a nominated agent. For example, in Australia, the former Australian Wheat Board successfully obtained 'authorisation' from the relevant national regulator to force growers to use only their nominated collection agent, based on a public benefit rationale.

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# Closed Loop Contracts

An integrated ‘closed loop’ arrangement occurs when one party (e.g., a wholesaler) controls one, or all, aspects of the supply chain from which another party (e.g., a farmer) accesses goods or services. In the agricultural industry, a closed loop contract places restrictions on what a grower can (and cannot) do. These restrictions may relate to how, where, and with whom a farmer does business.

## An example of a closed loop contract

Jane Grower purchases apple trees from Jay’s Fruits. Under the Grower Agreement, a closed loop contract, Jay’s Fruits will control every aspect of the supply chain related to the apple growing process. This includes:

- the packaging of apples by approved packers;
- the selling of apples by approved vendors; and
- the exporting of apples by approved exporters.

## Why use a closed loop contract?

In the horticultural sector, closed loop contracts may be used to:

- control the quality of the supply chain;
- maximise returns on produce;
- protect and capture end point royalties; and
- ensure product integrity.

## Possible legal implications

There are a number of possible legal implications of using closed loop contracts. This fact sheet will focus on three key areas: competition law, contract law, and plant breeder’s rights.

### 1. Competition law

Increasingly, growers independently negotiate the terms of commercial agreements with wholesalers and retail outlets. This direct dealing entails both opportunities and risks, which the Australian Competition & Consumer Commission (ACCC) has attempted to address in part through its Horticulture Code of Conduct, which came into effect in April 2018. The

Horticulture Code is mandatory for growers and sellers when they buy and sell horticulture produce which is defined as ‘unprocessed’ fruits, vegetables, nuts, herbs, and other edible plants. The Code does not apply to nursery products and to purchasers of horticultural produce who sell directly to consumers. However, the Code mandates that a farmer growing fruits or vegetables who sells this produce through an agent must have a written contract that contains certain terms, including how price is calculated and when payments are due.

The Horticulture Code sets out a series of obligations to which horticultural growers and traders must adhere. These include the requirement that traders cannot act as both agents and merchants, and that traders must accept horticulture produce delivered under a horticulture produce agreement, except where the agreement permits them to reject it.

The Horticulture Code stipulates that agents must act in the best interests of the grower when selling horticulture produce and not sell the produce other than on ‘an arm’s length basis’. If parties do not comply with the Horticulture Code, the ACCC could take court action to seek a financial penalty for breaches, or to issue an infringement notice.

One possible consequence of using a closed loop arrangement is that the contract may infringe the Trade Practices Act 1974 (Cth). The Trade Practices Act prohibits certain anti-competitive practices, which may include anti-competitive agreements (e.g., price fixing, market sharing); misuse of market power; or exclusive dealing.

Exclusive dealing occurs when one person trading with another person imposes some

restrictions on the other's freedom to choose with whom, in what, or where they deal. Exclusive dealing is against the law only when it substantially lessens competition. Exclusive dealing can be divided into two broad categories: third-line forcing and full-line forcing.

**Example 1: Third-line forcing**

A contract may provide a product to a grower on the condition that the grower buys another product from a third party. For example, Jay's Fruits will sell you propagating material on the condition that you buy fertiliser from Tom's Fertilisers. Under the *Trade Practices Act* this conduct is unlawful. This is because although it is lawful to recommend the product of a third party to a grower, it is unlawful to force third-party products on growers.

**Example 2: Full-line forcing**

Charlie's Fruit will only sell you propagating material for stone fruit if you agree not to buy goods from a competitor. This is an exclusive supply arrangement but is only unlawful if it substantially lessens competition in the relevant market. A substantial lessening of competition occurs when the ability of buyers to shop around for a deal is significantly diminished.

**2. Contract law**

One of the fundamental principles of contract law is that parties are free to contract on whatever terms and conditions they see fit. This is known as 'freedom of contract'. The law has always taken the view that it would not invalidate contracts whose terms appear overly restrictive for one or more parties. However, courts may be prepared to set aside contracts on the grounds of fraud, misrepresentation or unconscionability (i.e., if the agreements are unfair, unreasonable, or oppressive).

In addition, statutory law has altered the notion of freedom of contract under certain circumstances. These include granting protection to consumers, and in some cases, businesses where these parties lack bargaining power, and as such, the resulting contract may be unfair or unconscionable.

**3. Plant breeder's rights**

In Australia, the Plant Breeder's Rights Act 1994 mandates that a grantee of plant breeder's right must take all reasonable steps to ensure reasonable public access to the protected plant variety. This is important because in some circumstances, onerous closed loop contracts may prevent growers from easily obtaining propagating material.

Under the Plant Breeder's Rights Act, compulsory licenses may be granted to ensure reasonable public access to a plant variety covered by plant breeder's rights. This is triggered if the variety is not reasonably publicly available after two or more years have elapsed after the grant of plant breeder's rights. At this time, a person who believes that their access to a plant variety has been unduly restricted may seek a compulsory licence. The affected person would need to demonstrate that there is not reasonable public access, and that his or her interests are being affected. This requirement would be satisfied if a reasonable quality of propagating material were not available to the public at reasonable prices and in sufficient quantities.

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# Consequences of Breach of Contract

## When does a breach of contract occur?

A breach of contract most commonly occurs when a party to a contract refuses to perform a material obligation of the contract. Material obligations may be express or implied. If one party to a contract makes it impossible for the other party or parties to perform their obligations, the contract will be frustrated. However, it is also possible that acts outside the parties' control may prevent performance. Under such circumstances, the contract may be suspended or terminated, without there being a breach. Termination without breach could also occur for personal contracts (e.g., employment and certain service contracts) if one of the parties dies, where the identity of the person is important to the performance of the contract.

## What are the consequences of breach of contract?

If there is a breach of a material term of a contract, the party who is not in breach can choose whether or not to terminate the contract. In many contracts, this process and the corresponding timing is set out explicitly in the contract. For example, the contract may require notice of a breach to be given to the defaulting party, or that the defaulting party will have the opportunity to remedy the breach. If the breach is remedied then the contract cannot be terminated.

If the party chooses to maintain the contract after a breach occurs, in some circumstances, the non-breaching party can seek a court order to compel the breaching party to fulfil its obligations under the contract. This type of remedy is known as 'specific performance.'

If the non-breaching party decides to end the contract after the breach occurs, it must notify the breaching party immediately. The contract will terminate upon notification. Any obligations

that arose before the notification will continue and can be enforced.

If the breaching party has breached only some of the terms of the contract, it may be difficult to determine whether the non-breaching party has the right to terminate the contract. Generally, a right to terminate only arises if the breach is serious and the unfulfilled term is essential or material.

If a party attempts to terminate a contract when there is no legal right to do so, a wrongful repudiation of the contract will occur, which itself constitutes a breach. This will give the other party the right to terminate the contract and to recover damages. For this reason, it is imperative to seek advice before terminating or refusing to perform your side of a contract.

## Remedies for breach of contract

### Informal remedies

If the breach involves defective goods or services, you may choose to contact the supplier. In so doing, you should state why the goods or services are defective and what you want the supplier to do to remedy the situation. You should put your concerns in writing. This simple approach may be effective.

### Damages

Damages refers to the payment of money to compensate the non-breaching party for breach of contract. The basic principle behind an award of damages is to put the non-breaching party in the same position that it would have been in if the contract had been performed properly. An award of damages may include money to compensate you for any cost you have incurred as a result of the breach (e.g., the cost of repairs), or money for loss of profit.

When you go to court, damages are assessed on a 'once and for all basis'. This means that you will not be able to go back to court for a review if you suffer additional losses in the future.



However, the non-breaching party has a duty to mitigate or minimise damages. This means that if there is a reasonable action that you could take that would reduce the damage that you would otherwise suffer, you must take that action. If you fail to do so, the breaching party will not be required to pay you for the full amount of the loss that you actually incur.

### **Specific performance**

Sometimes a non-breaching party will want the breaching party to actually do what it promised to do rather than to pay damages. This is called 'specific performance'. Several factors are relevant to whether a court will decide to order specific performance. For example:

- Damages must be an inadequate means of compensation. This determination will depend on the circumstances of the case. However, where an innocent party has purchased something unique (for example, land), the court is more likely to consider damages to be inadequate.
- A court will not order specific performance where there are ongoing obligations to be performed, because doing so would involve the court in continuous supervision of the contract.
- Specific performance will not be ordered if there has been a delay in initiating court proceedings and it would be prejudicial to the other party to grant specific performance.

### **Dispute resolution**

In many contracts, the parties agree to a dispute resolution process that is outside of formal judicial proceedings. These 'alternative' dispute resolution processes may be particularly important for long-term contracts, where the parties foresee an ongoing relationship.

Alternative dispute resolution is also beneficial because it allows for continual performance of contractual obligations while the dispute is being resolved. These processes also provide for a way to resolve the dispute without incurring the high costs of litigation.

However, alternative dispute resolution clauses need to be very carefully drafted, to ensure that they are clear and enforceable. Consideration also needs to be given to the communication procedures that should be followed during contract performance, given that good communication is key to avoiding and resolving disputes.

Examples of alternative dispute resolution that contracts may recognise include informal negotiations, escalation through senior management, mediation, and arbitration.

The Australian Commercial Disputes Centre has drafted a number of model clauses that may serve as useful references. These clauses principally deal with mediation, expert appraisal, and expert determination. The Centre has also published guidelines that detail the procedures to be adopted when each form of dispute resolution is carried out. These model clauses and the other information provided by the Centre can provide guidance when drafting dispute resolution clauses.

In some jurisdictions, courts can require parties to a dispute to engage in some form of compulsory alternative dispute resolution, even if the contract did not contain alternative dispute resolution terms.

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# Intellectual Property Remedies

Intellectual property rights are private rights, which means that it is the responsibility of the holder of these rights to enforce them. In other words, there is no intellectual property ‘police’ that will initiate legal proceedings on your behalf. If infringement of your intellectual property rights occurs, you could pursue several strategies. These include alternative dispute resolution procedures such as mediation and arbitration and lawsuits filed in the court system. There are three different types of orders that courts may grant as remedies for intellectual property infringement. These are interim injunctions, interlocutory injunctions, and final orders. The types of orders that fall within each of these categories are summarised below.

## 1. Interim injunctions

An interim injunction is a temporary court order of limited duration, usually sought on an urgent basis, and without notice to the alleged infringer. Interim injunctions are sought when action is needed very quickly to preserve rights or assets. If granted, an interim injunction may be limited to a few days or hours, and the court will review and either extend or allow the order to lapse after the alleged infringer has the opportunity to present his or her argument. If the injunction is extended after hearing arguments from the alleged infringer, it will be replaced with an interlocutory order.

## 2. Interlocutory orders

Interlocutory orders are temporary court orders that are made after an infringement case has been filed but before it has been finalised. These types of orders generally are made on notice. They may be aimed at preserving the rights of a party, obtaining evidence, or preventing further damage to the intellectual property owner. To obtain an interlocutory injunction, it is necessary to establish the following conditions:

- There is a serious question to be tried.
- There is a matter of urgency.
- Damages will not adequately repair the harm.
- The balance of convenience favours granting the injunction. This means that the intellectual property owner would suffer greater damage if the conduct were to continue than the damage that the alleged infringer would suffer if he or she were ordered to stop the conduct.
- The intellectual property owner gives a promise to the court to pay any damages that the alleged infringer suffers because of the injunction if, at the end of the trial, infringement is not proven.

Interlocutory (and interim) orders include:

**Interlocutory injunction** is an order to prevent (or to require) specified conduct for the purpose of maintaining the status quo or preserving the subject matter of the litigation until the trial is over.

**Anton Piller order** is an order to enter a premise to search and seize allegedly infringing goods and related documents or evidence. The primary purpose of an Anton Piller order is to prevent the destruction of relevant evidence.

**John Doe order** is a representative order against an identifiable class of defendants rather than named persons that allows allegedly infringing goods to be seized. John Doe orders are useful when the exact identity of an alleged infringer is not known to the intellectual property owner.

**Mareva Injunction** is an order to prevent a defendant from disposing of their assets to defeat a judgment. Mareva injunctions are also known as freezing orders or asset protection orders.

## 3. Final orders

Final orders are granted after the case has been heard. These orders give effect to the court’s decision about the issues in dispute. Final orders may include the following:

**Damages:** Orders for damages require the infringer to pay money to the intellectual property owner to compensate for the infringement. Damages are often calculated based on the amount of money that the intellectual property owner has

lost because of the infringement. If an infringer's conduct has been 'flagrant', a court may, in some circumstances, award extraordinary damages.

**Account of profits:** Where the infringer has sold or benefited financially from the infringing goods, the court may order that they pay the intellectual property owner a sum equivalent to the profits they made from using the owner's intellectual property. Under certain intellectual property legislation, damages are not available where the infringing party was unaware that he or she was infringing. In such situations, the intellectual property owner is limited to obtaining an account of profits. Where damages and account of profits are both available as infringement remedies, the intellectual property owner must choose one or the other. If the infringer operates more efficiently or has a lower cost structure than the owner, it may make sense for the owner to choose account of profits as the best remedy.

**Delivery up:** In certain cases, a court may order the infringer to deliver any infringing articles or devices used to make the infringing articles. In delivery up, the owner is entitled to have the infringing goods rather than to have them destroyed. If the goods have been sold, a court may order the infringer to pay conversion damages, calculated based on the value of the goods that have been sold.

**Final injunction:** If infringement is proven, a permanent injunction will be put in place to prevent the infringer from undertaking any further infringing conduct. The infringer will not be able to continue his or her conduct without a licence to do so from the intellectual property owner.

**Interest:** If the remedies ordered include damages or account of profits, the court will also order interest to be paid, typically set at a rate much higher than current interest rates. Interest will accrue from the date of infringement to the date of judgment, and from the date of judgment to the date of payment.

**Costs:** Ordinarily, the successful party to an infringement lawsuit is entitled to have the legal

costs that they have incurred in relation to the proceedings to be reimbursed, in addition to any damages, profits, or interest that also may be awarded. However, the successful party will not receive 100% of the legal costs that he or she has paid. On average, 50-60% of actual costs are reimbursed. This is because some intellectual property laws make concessions for when an infringement has occurred but and the infringing party is 'innocent', that is, he or she had no reasonable grounds for suspecting that his or her conduct was infringing. If this defence is allowed, the intellectual property owner will be entitled to an injunction and costs, but may not be entitled to damages or profits.

**Penalties:** In Australia, several intellectual property statutes allow courts to impose penalties on infringers, the amount of which will vary depending on whether the infringer is a corporation or individual. For example, under the Copyright Act 1968, an individual who is found guilty of infringement may be fined up to 550-650 penalty units, imprisoned for up to 5 years, or both. A corporation may be fined up to 5 times the amount of the maximum fine for individuals.

### Remedies for moral rights infringement

A creator who brings a successful claim for infringement of moral rights is entitled to the following remedies.

- Financial compensation (damages).
- An order to prevent or stop a particular activity (an injunction).
- A declaration that a moral right of the creator has been infringed.
- An order that the defendant make a public apology for the infringement.
- An order that any false attribution or authorship, or derogatory treatment of the work be reversed or removed.

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# Copyright, Open Access and Translation for Scientific and Academic Research

To ensure that information is widely available to end-users, it is important that the results of scientific and academic research should be translated into local languages. In the agricultural sciences, translation is key to ensure that smallholder farming communities, local agricultural scientists, and extension agents have meaningful access to information.

To maximise uptake, it is important for translations of scientific and academic publications to be:

- readily accessible;
- available as soon as possible; and
- accurate.

If the publications are protected by copyright, it may be challenging for research institutions to meet the goals of open access. This is because where a work is protected by copyright, the copyright owner has the ability to control whether and under what conditions that work may be translated into another language. As a result, copyright has the potential to undermine the widespread dissemination of research results.

Where a work is protected by copyright, the work may be translated *without permission* of the copyright owner under either (i) the general exceptions to copyright, or (ii) the special provisions for developing countries in relation to translations. Alternatively, (iii) a work may be translated *with permission* under a licence.

## (i) General exceptions to copyright protection

While the rights given to the owners of copyrighted works are extensive, they are not absolute. Several exceptions limit the exclusive rights of copyright owners. One of the most well-known exceptions is the fair dealing/fair use defence, which allows the use of copyright protected works in circumstances that ordinarily would be construed as infringements, provided that the use is 'fair'. However, the general exceptions to copyright are unlikely to facilitate the translation of protected works if the copyright owner will not agree to a translation or is imposing unreasonable demands.

## (ii) Special provisions for developing countries in relation to translations

Under international treaties that set the terms for national copyright laws, developing countries can:

- introduce a compulsory licensing scheme for translations, or
- amend their laws so that translation rights lapse if the rights are not exercised within a ten-year period.

### Compulsory licenses for translations:

International law allows countries to replace the right of translation with a system of non-exclusive and non-transferable ('compulsory') licenses. Countries including Colombia, India, Indonesia, Malaysia, Mexico, and the Philippines have introduced compulsorily licensing schemes for translations.

A person who wishes to obtain a licence to translate a copyrighted work must make an application to the relevant government agency, which will review the application and decide whether to grant the licence. Where a translation has not been published in a language in general use in a given country, the applicant can apply for a license for translation three years after the date of the first publication of the original work.

However, they must wait an additional six months before the licence comes into effect. Meanwhile, if the applicant wishes to translate the work into a language that is not in general use in any developed country, the applicant can apply for a compulsory licence to translate one year after the date of the first publication of the original work. After complying with the relevant national protocols, the applicant must wait an additional nine months before the licence to translate will come into effect.

In both cases, the applicant must show that the copyright owner has refused their request to translate the protected work. Where the owner cannot be found, the applicant must show that he or she exercised due diligence to find the owner. The applicant is also required to send by registered airmail copies of the application for the license to the publisher of the work and to any designated national or international information centre.

The compulsory licencing system is limited to works published in printed or analogous forms of media. A licence to translate should only be granted 'for the purpose of teaching, scholarship or research'. While it is normally not possible to export a translated work to another country, in some cases public bodies can export translations. The copyright owner must receive 'just compensation' for translations made under compulsory licenses, consistent with royalties that normally would be paid for access to the work. The translations should also be 'correct'.

**Lapse of translation rights:** International law also allows countries to amend their national copyright laws so that translation rights lapse if they are not exercised within a 10-year period after publication. This option is open to all developing countries, so long as they have not created a system of compulsory licencing.

#### **Problems with the existing scheme**

Although it may appear that international law provides an effective system to facilitate the translation of copyright protected works, the current regime has been criticised for failing to meet the needs of developing countries.

One problem may arise where institutions conduct research across multiple countries, in which different languages are spoken and which have different copyright laws. While global standardisation in copyright law has occurred to

a certain extent, differences still exist between different national systems. Given that the extent to which a copyright owner is able to control the translation of his or her works depends on the laws of individual countries, this means that it is often necessary to navigate the intricacies and idiosyncrasies of local laws.

**Delays:** The fact that the translation rights lapse 10 years after publication means that this option will be of limited use for most scientific publications. This is because the long gap between the initial publication and the permissible translation would render the translation of little value. Although countries that recognise compulsory licenses may permit translations one or three years after the initial publication, as noted above, several issues limit the usefulness of compulsory licences.

**Online Matter:** Because compulsory licences are limited to works published in printed or analogous forms of media, they do not apply to works published online.

**Administrative burdens:** The usefulness of compulsory licenses may be undermined by the administrative burdens, such as the need to file applications with government agencies, to demonstrate that due diligence was exercised, to pay administrative fees, and to maintain communications with several parties.

**Cost for access:** Countries with compulsory licencing frameworks for translations must ensure that the author is paid 'just compensation'. This gives rise to the question of who will pay the royalty costs. If the end-user were to pay, it would undermine the open access principle that materials should be freely available.

#### **(iii) Licences**

Given the issues associated with both the general defences in national copyright laws and the special options available under international law for translations in developing countries, it is likely that research institutions will need to consider licensing protected works to make them openly accessible. This may be challenging if there is uncertainty about who owns copyright in a given research publication. Problems may arise especially where multiple authors from different institutions were involved in the research.

The question of whether a published work can be translated depends on the terms of the initial research agreement and/or the conditions under which the authors of the work were engaged (if any). Where a contract is unclear or does not

deal with translation, the only option will be to renegotiate with the relevant copyright owner to license the right to translate.

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# Freedom to Operate

While it is widely known that intellectual property may be used to claim rights in ‘inventions’ or new technologies that are the products of science, intellectual property also covers many of the tools or enabling technologies on which the research relies. Therefore, scientists need to know enough about intellectual property to be aware of the issues that may arise during the research process, and when to seek advice from research management experts.

In fields such as the biological and health sciences, patents are commonly used to claim exclusive rights in the utilisation of enabling technologies. Patents allow their owners to exclude others from making, using, selling, offering for sale, or importing the patented invention. In some countries, such as the United States, patent law does not recognise an explicit exemption for research use. In Australia, this changed in 2012, when an amendment to the Patents Act 1990 introduced a statutory exemption to patent infringement for use of the patented invention for experimental purposes, including improving or modifying the invention. Nevertheless, it is still important for researchers (and research managers) to ensure that products, processes, and services do not infringe the intellectual property rights of other parties.

Where researchers are unable to conduct research using enabling technologies without infringing the intellectual property rights of a third party, they do not have ‘freedom to operate’. A well-known example of a major research project that implicated the freedom to operate concept is ‘Golden Rice’, a genetically engineered rice that was developed to prevent vitamin-A deficiency. When research towards the development of Golden Rice began, experts soon realised that the intellectual property rights for 70 enabling technologies belonging to 32 different companies and universities had been infringed. Therefore, licences needed to be obtained for all of these technologies to secure freedom to operate to allow them to continue the research process.

## What is freedom to operate?

Freedom to operate refers to the ability of a researcher to conduct research or to commercialise a research output without infringing the intellectual property owned by a third party. A major risk in the development of new products is that third parties may block exploitation because they hold patents for enabling technologies that a party needs to market their invention. This is common in fields where inventions are protected by patents and plant breeder’s rights, but issues also may arise in relation to other forms of intellectual property (e.g., trade marks).

It is important that researchers have a clear understanding of potential freedom to operate issues that may affect the production, marketing, and use of new products, processes, or services as early as possible in the research process. This will help to ensure that their work does not infringe the intellectual property of others. While

an initial determination of freedom to operate at the start of a research project is important, researchers and research managers should continue to assess freedom to operate throughout the duration of the project.

## Determining freedom to operate

The best way to understand how third party intellectual property might affect research is to conduct a freedom to operate analysis. This is something that you might do yourself, or that a research manager or intellectual property specialist may conduct for you. A freedom to operate analysis identifies who owns the enabling technologies used in your research and who has the right to grant licenses or assignments for these technologies.

This information is essential to design a strategy for obtaining freedom to operate and to

determine the risks associated with going forward. Some research funding agencies require the person seeking grant money to disclose freedom to operate as part of the application process. In this situation, the onus is placed on the investigator to obtain freedom to operate.

If a patent search reveals that one or more patents (or other forms of intellectual property) do in fact limit your freedom to operate, you must decide how to proceed. There are various options for gaining access to proprietary technologies. Ultimately, selecting the best strategy will involve a cost/benefit analysis of the relevant merits of each option, including the possibility of abandoning the project for lack of freedom to operate. Alternatively, you may need to pursue several of the strategies described above to obtain freedom to operate for a given project. The various options include:

#### **(1) Licences**

Researchers may seek a licence from the owners of the intellectual property that covers each proprietary enabling technologies that the freedom to operate analysis reveals. A licence is an agreement involving the transfer of rights from one party ('the licensor') to another party ('the licensee'). Licences can be used to obtain usage rights for technologies protected by different forms of intellectual property, including patents, plant breeder's rights, and trade secrets.

Licences may be exclusive or non-exclusive, and they may contain different kinds of restrictions, which may limit the field of use or the territory (i.e., jurisdiction) in which the license applies. Another strategy involves 'cross-licensing', which may be an option if you have your own intellectual property portfolio. For example, X may enter a cross-licensing agreement with Y under which X receives access to Y's products.

At the same time, Y gains access to X's technology.

#### **(2) Collaborations**

In academic research, collaborations may enable a researcher from one institution to access technologies owned by another institution. Sometimes, these arrangements take the form of 'patent pools' or other agreements to make intellectual property protected technologies openly available to all members of a network of researchers. In the commercial sector, mergers, acquisitions, and joint ventures are common strategies that are used to reduce transaction costs associated with obtaining third party intellectual property.

#### **(3) Purchase the patent**

If the patent is of great value to your project (or to projects that others may conduct in the future), you may seek to purchase the patent outright. Doing so will result in the 'assignment' of the patent from the previous owner to you. Obtaining an assignment of a patent allows you to exploit all of the exclusive rights that patent ownership entails, including restricting others from accessing the protected invention. However, one downside to patent assignment is that there may be a substantial cost involved with the purchase.

#### **(4) Invent around**

Researchers may attempt to find alternative ways to develop a desired product or process, effectively 'inventing around' the third party intellectual property that would otherwise limit their freedom to operate. Inventing around a proprietary enabling technology would mean that you do not need to acquire usage rights to the technology through assignment or licensing.

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## Collecting Australian native plant materials from Intermediaries: Guidelines on key legal issues

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# 1. Introduction

Australian native plants offer numerous cultural, social, economic, environmental, and scientific benefits. As a result, over the years, people have collected, circulated and used these plants for many different reasons that range from use in kitchen gardens, botanical classification and scientific research, through to food production, breeding and product development. Increasingly, and because of their cultural, social, economic, environmental, and scientific significance, the collection, circulation, and use of native plant materials have become the subject of national and international regulation.

Native plant materials can be obtained either directly from the wild (*in situ*), or indirectly from intermediaries who have collected the plant material from the wild (*ex situ*). These *Guidelines* highlight the legal issues that potentially arise when Australian native plant materials are obtained from intermediaries, who may include personnel at research institutions (e.g. scientists; plant breeders; administrators), staff at botanic gardens, herbaria, and seed banks (e.g. curators; botanists; taxonomists), businesses (e.g. nurseries; food and seed trading companies), private organisations (e.g. seed cooperatives; seed savers' networks), or individuals (e.g. relatives; friends; colleagues). The legal issues that potentially arise when native plant materials are collected from the wild are dealt with in *Collecting Australian native plant materials from the Wild: Guidelines on key legal issues*.

For the purpose of these *Guidelines*:

- ‘*native plant material*’ is taken to mean plant material that is indigenous to Australia.
- a native plant is understood to have been collected from the wild (*in situ*) when it is obtained directly from the ecosystem or natural habitat where it grows (such as National Parks, State Forests, Crown land, roadsides, private land, and Indigenous land).
- native plant material is understood to have been collected from an intermediary (*ex situ*) when the plant is obtained from outside of its ecosystem or natural habitat, for example, from individuals or institutions such as gene and seed banks, herbaria, botanic gardens, museums, plant nurseries, food and seed trading companies, or from neighbours, colleagues, friends, or relatives.

In Australia, the collection of native plant materials from intermediaries triggers a number of different legal obligations. These *Guidelines* focus on the legal obligations that are associated with different types of contracts (such as a benefit sharing agreement and material transfer agreement) and intellectual property (such as patent and plant breeder's rights). The *Guidelines* do not cover other legal obligations, such as those that arise from laws governing biosecurity, biosafety, or food regulatory standards.

The target audience of these *Guidelines* are the users and providers of Australian native plant materials including:



- individuals, enterprises, networks, and cooperatives that utilise Australian native foods and botanicals;
- public institutions such as government authorities, gene banks, herbaria, botanic gardens, plant nurseries, and museums;
- universities;
- industries that utilise plant materials for research and development; and
- Indigenous peoples and organisations.



**Image 1:** A range of Australian native plant foods

## 2. Potential legal issues

There are a number of legal issues that potentially arise when native plant materials are obtained from intermediaries in Australia. The legal issues will depend on whether:

- use of the plant material is subject to any contractual obligations;
- the plant material is protected by intellectual property; and
- the plant material or a derived product will be exported to another country.

### 2.1 Where use of plant material is subject to contractual obligations

In some situations, an intermediary may be under a legal obligation to ensure that parties that they transfer plant materials to adhere to the same terms that were agreed to when the plant was initially collected. This will be the case where the plant material was initially obtained under a benefit sharing agreement (or similar contract), or via the Standard Material Transfer Agreement (SMTA) of the *International Treaty on Plant Genetic Resources for Food and Agriculture* ('Plant Treaty'). In these cases, the intermediary will be under a legal obligation that dictates how they use the plant material, including when they transfer the material to other parties.

In other cases, the intermediary may not be under any specific legal obligations when they transfer the plant material to other parties. Where this is the case, the intermediary is free to do whatever they want with the material. For instance, they could simply transfer the material with no obligations or impose their own requirements for use.

#### (i) Agreement based on mutually agreed terms of benefit sharing

In some situations, intermediaries may be under an obligation to ensure that parties who they transfer plant material to adhere to the same terms that were agreed on to when the plant was first collected. In these cases, the intermediary is required to ensure that parties who they transfer the plant material to share benefits with the original provider of that material and that they maintain the same condition for any other subsequent user of the material. This will be the case when the initial collection is governed by the laws that regulate biodiscovery or bioprospecting in Australia.<sup>1</sup>

Depending on the parties, the mutually agreed terms of benefit sharing might be monetary, non-monetary, or both. Examples of monetary benefit sharing include:

- access fees/fee per sample collected or acquired;
- up-front payments;
- special fees to be paid to a trust/benefit sharing fund;

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<sup>1</sup> A detailed analysis of biodiscovery laws in Australia is provided in *Collecting Australian native plant materials from the Wild: Guidelines on key legal issues*.

- salaries;
- research funding;
- joint ventures; and
- joint ownership of relevant intellectual property rights.

Examples of non-monetary benefits include:

- sharing of research and development results;
- collaboration, cooperation, and contribution in scientific research and development programmes, and in education and training;
- participation in product development;
- transfer of technology;
- access to scientific information, including biological inventories and taxonomic studies;
- research directed towards health, food, and livelihood security; and
- social recognition.

## **(ii) Standard Material Transfer Agreement**

In some situations, native plant material obtained from an intermediary may be governed by the SMTA of the Plant Treaty. The SMTA is a standardised, non-negotiable agreement whose terms and conditions cannot be changed. The SMTA was developed and adopted to facilitate the collection and use of the plant materials that fall within the scope of the Plant Treaty.

There are two potential ways that a plant falls within the scope of the Plant Treaty. These are when the plant:

- is one of the 64 species of plants listed in Annex I of the Plant Treaty (*see* Appendix 1 of these *Guidelines*), or
- is included in the Multilateral System of the Plant Treaty (either because the plant is listed in Annex 1 of the Plant Treaty, or because it has been placed into the Multilateral System by the relevant government authorities of members of the Treaty, or by gene banks, individuals, private institutions, or other actors).

There are a number of key terms of the SMTA that are worth noting, including that:

- access to plant materials is only allowed for research, breeding, and training for food and agriculture and not for chemical, pharmaceutical, and/or other non-food uses;
- no one is allowed to obtain intellectual property rights over the materials in the form in which the user receives them; and

- users of the plant materials will share any benefits that they obtain through use of the materials by contributing to the International Benefit-Sharing Fund that the Plant Treaty Secretariat administers, or by including any new material that is derived from the initial plant material in the Multilateral System.

### **(iii) Independent contracts/material transfer agreements**

While the collection of plant material in Australia is often governed by biodiscovery laws that require use of a bilaterally negotiated benefit sharing agreement or by the SMTA of the Plant Treaty, there are many situations where collection may occur outside of these frameworks. For example, if a macadamia specimen was collected from a farmer in New South Wales, that collection would not be subject to a biodiscovery-based benefit sharing agreement or to the SMTA of the Plant Treaty for two main reasons. The first is that New South Wales does not have biodiscovery laws that require an access and benefit sharing agreement between the provider and the collector of the plant material. Second, the SMTA of the Plant Treaty would not apply to this collection because macadamia does not fall within the scope of the Treaty.

In these situations, native plant material obtained from an intermediary will be governed by the contractual terms that were agreed to when the plant material was first collected from the original provider. The nature and scope of these terms will vary, given that one of the fundamental principles of contract law is that parties are free to contract on whatever terms and conditions they see fit.

Depending on the interests of the parties, an independent contract or material transfer agreement (other than the SMTA) governing the collection and use of native plant materials could be negotiated for various purposes. For example, an independent contract or a material transfer agreement that sets the terms for the collection and use of the plant material could be negotiated for commercial, potential commercial, and/or non-commercial purposes. Likewise, an independent contract or a material transfer agreement governing the collection and use of the plant material may include terms for monetary, non-monetary, or both kinds of benefit sharing.

Additionally, an independent contract or a material transfer agreement may be negotiated to include other contractual obligations such as:

- who could claim ‘new’ intellectual property that is created out of the use of the collected plant material;
- how the collected plant material may be distributed or circulated, including through the publication of the results of research involving the plant material; and
- the obligations of the parties to comply with relevant laws, including in the event that the agreement is breached.



Image 2: A macadamia specimen (*Macadamia tetraphylla* L.A.S.Johnson) held in an *ex situ* collection at the Queensland Herbarium.  
© The State of Queensland – Queensland Herbarium

## 2.2 Where the plant material is covered by intellectual property

Obtaining Australian native plant materials from an intermediary may trigger legal issues if the plant material is protected by Australian intellectual property laws. This is typically the case where the plant material is protected by a patent or plant breeders' rights in Australia.

Anyone who obtains plant material that is protected by intellectual property from intermediaries must be careful that they do not violate the rights of the intellectual property owner. In this situation, to use the protected plant material, it may be necessary to obtain a licence from the intellectual property owner.

In other situations, it may not be necessary to obtain a licence to use the protected plant material. For example, interested parties may be able to use intellectual property protected plant materials for experimentation and breeding, or to save propagating material on-farm for re-planting, but not for commercial purposes. Notably, anyone is able to use intellectual property protected plant materials for any purpose after the period of intellectual property protection (typically 20 years) expires, at which time the materials enter into the public domain.

### (i) Patents

In Australia, plants and related subject matter can be protected under the *Patent Act 1990*. The Act covers a range of plant-related subject matter that may be patentable, including new plant varieties; plant components such as genes and chromosomes; reproductive material (e.g. seeds and cuttings); products from plants including fruit, flowers, oils, chemicals or pharmaceuticals; genetic engineering techniques; and breeding and cultivation methods. While patent protection is not available under the *Patent Act 1990* for naturally occurring genes, protection is available for many types of genetic innovations (including synthetic genetic materials).

The rights granted by a patent are not automatic. To obtain a patent for an invention, an application must be lodged with IP Australia. This application must demonstrate that the invention is new, involves an 'inventive step' (meaning that it is not an obvious, incremental improvement on an existing invention), and that it is useful for industrial purposes.

A patent is only infringed if it is valid and the infringement involves all of the essential features of the invention as claimed. For example, if a patent claims 5 essential features (which gives it its novelty and inventiveness), another product or process that includes 4 of those 5 features will not infringe the patent. In Australia, experiments on patented inventions do not constitute patent infringement. This exemption applies when the predominant purpose motivating the use of the patented invention is to gain new knowledge, or to test a principle or supposition about the invention. However, where the main purpose is to commercialise a patented invention or to manufacture it for sale or use for commercial purposes, the exemption does not apply. An additional exemption under Australian patent law is that the use of an invention by a government, a



government authority or a person authorised in writing by the government will not constitute infringement.

The exclusive ownership rights associated with a patent are temporary, with a maximum duration of 20 years. After the patent has expired, any person can use the invention and can benefit from the disclosures that were made in the patent application.

## **(ii) Plant breeder's rights**

In Australia, it is possible to protect plant varieties under both patent law and plant breeder's rights law. The Australian *Plant Breeder's Rights Act 1994* grants a set of exclusive commercial rights to the breeders of the plant varieties that are new, distinct, uniform, and stable.

Australian law specifies that plant breeder's rights can be granted for a maximum of 25 years for trees and vines and 20 years for any other plant variety. After a plant variety is protected, the plant breeder's rights scheme enables the relevant right holders to prevent others from acts including producing, reproducing, offering for sale, selling, importing, and exporting the seed and other propagating material of the protected variety.

The Australian *Plant Breeder's Rights Act 1994* recognises exemptions to the exclusive commercial rights of the breeder, including for acts done for experimental purposes or for the purpose of breeding other plant varieties. One of these exemptions allows farmers to save and re-plant the propagating material (e.g. seeds) of protected plant varieties, provided that they do not sell these seeds or exchange them with other people.

As is the case with patents, the exclusive rights associated with plant breeder's rights are temporary. After the plant breeder's rights have expired, any person can exploit the plant variety, for example, by producing, reproducing, and selling the seed and other propagating material of the plant variety.

## **2.3 Where the plant material (or a derivative product) will be exported to a Nagoya-compliant country**

The Nagoya Protocol came into force in 2014 as a supplementary international agreement to implement the access and benefit sharing provisions of the *Convention on Biological Diversity* (CBD). As of 2020, 124 countries, including the European Union, had ratified the Nagoya Protocol.

Although Australia signed the Nagoya Protocol in January 2012, it had not yet ratified the Protocol. Nevertheless, the Protocol is still important for people who collect and utilise Australian native plant materials. If Australian native plant materials, derivatives thereof, or products that contain either of these are exported to a country that has adopted the Nagoya Protocol, the exporters may be required to demonstrate that they acquired the items in accordance with the Protocol. This is because countries that have ratified the Protocol are obligated to ensure that all relevant imported plant materials (including those obtained from countries that are not members of the Nagoya Protocol) were collected, used, and/or developed in compliance with the Protocol. Specifically, Nagoya Protocol

member countries are required to ensure that imported plant materials are accompanied by relevant documentary evidence including:

- access permits from the relevant authorities;
- prior informed consent from the authorities and providers of the materials; and
- benefit sharing agreements between users and providers of the materials.

This evidence, which is needed in order to obtain an ‘internationally recognised certificate of compliance’, must be provided to relevant authorities and the ‘Access and Benefit Sharing Clearing-House of the Nagoya Protocol’.

An Australian individual or entity that wants to export native plant materials or products to one of the Nagoya-compliant countries would need to be able to demonstrate that:

- prior informed consent was obtained from the relevant authorities or the providers of the materials when they were collected;
- benefit sharing agreements were concluded between providers and users of the materials; and
- all measures were undertaken to involve and to address the interests of Indigenous peoples in cases of the access and use of Indigenous knowledge and/or native plant materials obtained from Indigenous land.

When the relevant information is not confidential, an internationally recognised certificate of compliance must contain the following minimum details:

- Issuing authority;
- Date of issuance;
- Name of the provider;
- Unique identifier of the certificate;
- Name(s) of the person or entity to whom prior informed consent was granted;
- Subject-matter or specific plant materials covered by the certificate;
- Confirmation that mutually agreed terms were established;
- Confirmation that prior informed consent was obtained; and
- Specification of whether the use will be commercial and/or non-commercial.

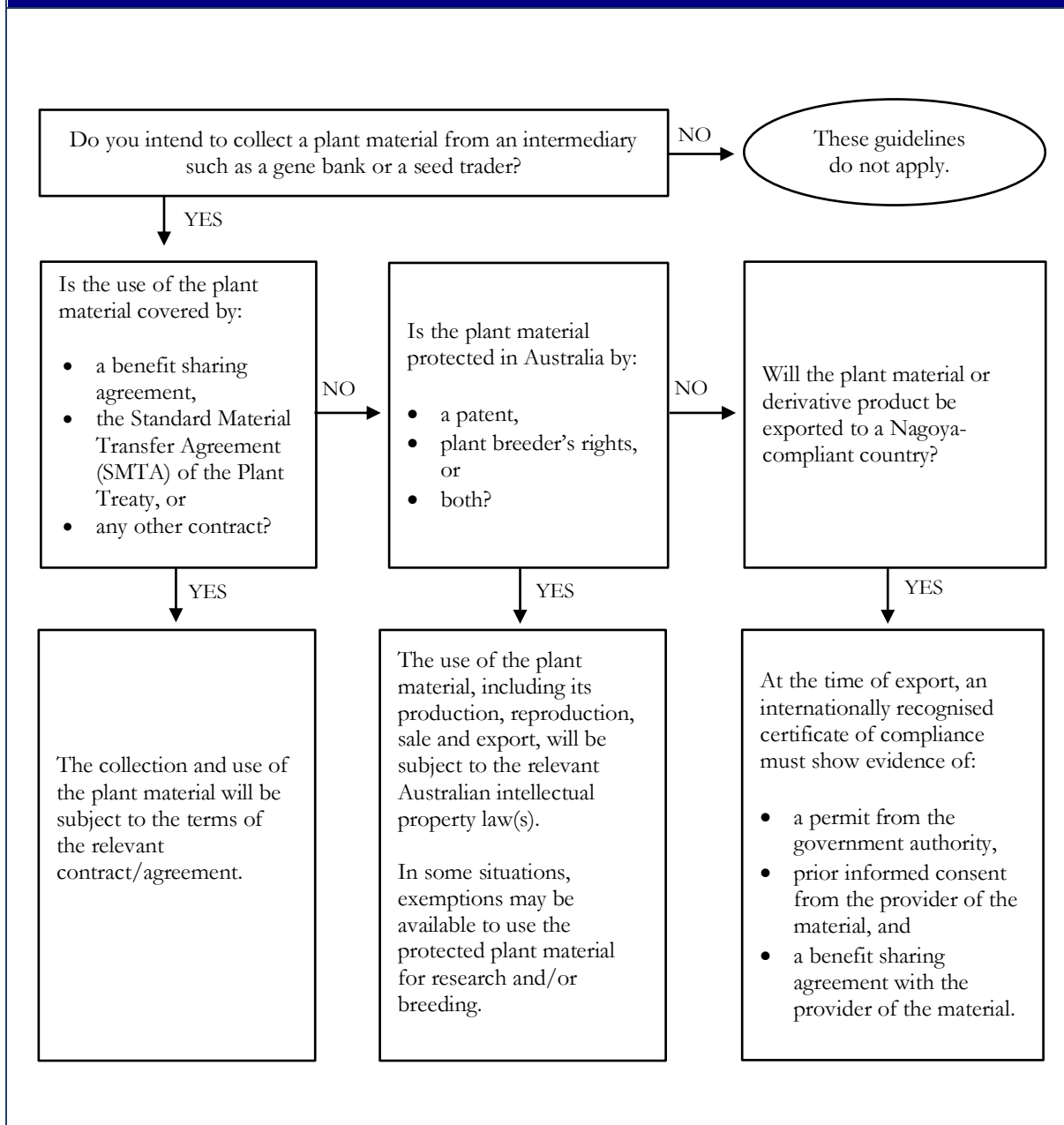
Despite the requirement to be Nagoya-compliant, in some cases certain obstacles could limit the ability of parties to obtain an internationally recognised certificate of compliance or to demonstrate that prior informed consent was obtained and that a benefit sharing agreement was concluded with the original provider of the plant material. This could occur when intermediaries provide access to historical plant materials, that is, materials

that were collected before the Nagoya Protocol came into force in 2014. The reason for this is that the provenance or source of the plant material may not be known.



**Image 3:** Indigenous owned Gulkula Nursery in Nhulunbuy, East Arnhem Land, Northern Territory

## Decision Tree: Collecting plant materials from intermediaries



## Appendix 1: Materials under Annex I of the Plant Treaty

Crop	Genus	Observations
Breadfruit	Artocarpus	Breadfruit only.
Asparagus	Asparagus	
Oat	Avena	
Beet	Beta	
Brassica complex	Brassica et al.	Genera included are: Brassica, Armoracia, Barbarea, Camelina, Crambe, Diplotaxis, Eruca, Isatis, Lepidium, Raphanobrassica, Raphanus, Rorippa, and Sinapis. This comprises oilseed and vegetable crops such as cabbage, rapeseed, mustard, cress, rocket, radish, and turnip. The species <i>Lepidium meyenii</i> (maca) is excluded.
Pigeon Pea	Cajanus	
Chickpea	Cicer	
Citrus	Citrus	Genera Poncirus and Fortunella are included as root stock.
Coconut	Cocos	
Major aroids	Colocasia, Xanthosoma	Major aroids include taro, cocoyam, dasheen and tannia.
Carrot	Daucus	
Yams	Dioscorea	
Finger Millet	Eleusine	
Strawberry	Fragaria	
Sunflower	Helianthus	
Barley	Hordeum	
Sweet Potato	Ipomoea	
Grass pea	Lathyrus	
Lentil	Lens	
Apple	Malus	
Cassava	Manihot	Manihot esculenta only.
Banana / Plantain	Musa	Except <i>Musa textilis</i> .
Rice	Oryza	
Pearl Millet	Pennisetum	
Beans	Phaseolus	Except <i>Phaseolus polyanthus</i> .
Pea	Pisum	
Rye	Secale	
Potato	Solanum	Section tuberosa included, except <i>Solanum phureja</i> .
Eggplant	Solanum	Section melongena included.
Sorghum	Sorghum	
Triticale	Triticosecale	
Wheat	Triticum et al.	Including <i>Agropyron</i> , <i>Elymus</i> , and <i>Secale</i> .
Faba Bean/Vetch	Vicia	
Cowpea et al.	Vigna	
Maize	Zea	Excluding <i>Zea perennis</i> , <i>Zea diploperennis</i> , and <i>Zea luxurians</i> .

## Forages

Genera	Species
<b>LEGUME FORAGES</b>	
Astragalus	chinensis, cicer, arenarius
Canavalia	ensiformis
Coronilla	varia
Hedysarum	coronarium
Lathyrus	cicera, ciliolatus, hirsutus, ochrus, odoratus, sativus
Lespedeza	cuneata, striata, stipulacea
Lotus	corniculatus, subbiflorus, uliginosus
Lupinus	albus, angustifolius, luteus
Medicago	arborea, falcata, sativa, scutellata, rigidula, truncatula
Melilotus	albus, officinalis
Onobrychis	viciifolia
Ornithopus	sativus
Prosopis	affinis, alba, chilensis, nigra, pallida
Pueraria	phaseoloides
Trifolium	alexandrinum, alpestre, ambiguum, angustifolium, arvense, agrocicerum, hybridum, incarnatum, pratense, repens, resupinatum, rueppellianum, semipilosum, subterraneum, vesiculosum
<b>GRASS FORAGES</b>	
Andropogon	gayanus
Agropyron	cristatum, desertorum
Agrostis	stolonifera, tenuis
Alopecurus	pratensis
Arrhenatherum	elatius
Dactylis	Glomerate
Festuca	arundinacea, gigantea, heterophylla, ovina, pratensis, rubra
Lolium	hybridum, multiflorum, perenne, rigidum, temulentum
Phalaris	aquatica, arundinacea
Phleum	pratense
Poa	alpina, annua, pratensis
Tripsacum	laxum
<b>OTHER FORAGES</b>	
Atriplex	halimus, nummularia
Salsola	vermiculata



## Appendix 2: Definitions of Key Terms

*Access* or *collection* means the taking of native plant materials for research and development purposes, including taxonomic research, breeding, and development of novel crops and foods, etc.

*Benefit Sharing* means the sharing of benefits derived from the access and use of the collected native plant materials. ‘Access’ and ‘benefit sharing’ are two important objectives of the *Convention on Biological Diversity* (CBD), the Nagoya Protocol, and the *International Treaty on Plant Genetic Resources for Food and Agriculture* (the Plant Treaty).

*Biodiscovery* or *bioprospecting* is the process whereby any genetic resources or biochemical compounds that comprise or are contained in the collected native plant materials are used for the purpose of subsequent research and development.

*Collected from the wild* means the collection of native plant material from the ecosystem or natural habitat where it grows (such as National Parks, State Forests, Crown land, roadsides, private land, and Indigenous land).

*Collected from intermediaries* means the collection of native plant material from locations other than the ecosystem or natural habitat in which the plant lives, for example, from individuals or institutions such as gene and seed banks, herbaria, botanic gardens, museums, plant nurseries, plant and seed trading enterprises, retail outlets that sell garden supplies, public and private research institutions, non-governmental organisations, neighbours, colleagues, friends, and relatives.

*International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty)* is an international agreement that entered into force on 29 June 2004. The Treaty provides for the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits that accrue from the use of these resources. A key feature of the Plant Treaty is its ‘Multilateral System’, which is a global mechanism to ensure access to plant materials and benefit sharing. The Multilateral System covers plant materials of 64 food and forage crop species that are listed in Annex 1 of the Plant Treaty. Plant materials that are included in the Multilateral System must be accessed by using the non-negotiable Standard Material Transfer Agreement (SMTA).

*Nagoya Protocol* is an international agreement that entered into force on 12 October 2014. The Protocol establishes binding legal obligations relating to the access and use of genetic resources. The Protocol is supplementary to the United Nations’ *Convention on Biological Diversity* (CBD). The Protocol requires the user of genetic resources and traditional knowledge to obtain prior informed consent from the provider of these resources and to establish mutually agreed terms of access and benefit sharing with the provider.

*Native plant material* means any plant material that is indigenous to Australia.

*Patents* are a form of intellectual property rights. A patent is granted for any device, substance, method, process or system that is new, inventive and useful. Patents are also known as limited monopoly rights, which subsist up to the maximum period of protection granted under law, which in most countries is 20 years.

*Plant Breeder's Rights* are a set of exclusive intellectual property rights to produce or reproduce, offer for sale, sell, and to import and export propagating material of the registered plant variety. To obtain plant breeder's rights protection, the plant variety must be distinct, uniform and stable. In addition, the variety must not have been previously commercially exploited (i.e. it has to be 'new') for a certain period of time, typically between one and four years. Plant breeder's rights last for a minimum of 25 years in the case of trees and vines, and 20 years in the case of all other varieties.

*Standard Material Transfer Agreement (SMTA)* is a standardised template agreement for access and benefit sharing in relation to plant genetic resources that are included in the Multilateral System of the *International Treaty on Plant Genetic Resources for Food and Agriculture*.



## Collecting Australian native plant materials from the Wild: Guidelines on key legal issues

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This document is only for information purposes, and to assist you in understanding your legal rights and obligations in a general sense. It is not tailored to any particular fact, situation or specific requirements, and must not be relied on as legal advice.



### Front Cover Image:

Bunya Nuts, Bunya Dreaming Festival (Landsborough QLD) – January 2020  
(Jaqueline Moura Nadolny, HDR Student, ARC Training Centre for Uniquely Australian Foods)

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# 1. Introduction

Australian native plants are an important cultural, economic, and scientific resource. As a result, over the years, people have collected these plants for many different reasons that range from use in kitchen gardens, botanical classification and scientific research, through to food production, breeding and product development. Increasingly, and because of their social and economic significance, the collection and circulation of native plant materials have become the subject of national and international regulation.

Native plant materials can be obtained either directly from the wild (*in situ*), or indirectly from someone who has already collected the plant material (*ex situ*). These *Guidelines* highlight the legal issues that potentially arise when native plant materials are collected from the wild in Australia. The legal issues that arise when native plant materials are obtained from an intermediary (such as a seed bank or a trader) are dealt with in *Collecting Australian native plant materials from intermediaries: Guidelines on key legal issues*.

For the purpose of these *Guidelines*:

- ‘*native plant material*’ is taken to mean any plant material that is indigenous to Australia.
- a native plant will be understood to have been collected from the wild (*in situ*) when it is obtained directly from the ecosystem or natural habitat where it grows (such as National Parks, State Forests, Crown land, roadsides, private land, and Indigenous land).

In Australia, the collection of native plant materials from the wild is regulated by a number of different laws. These *Guidelines* focus on the laws that regulate biodiscovery of native plant materials. Biodiscovery (or bioprospecting) involves research and development on any genetic resources or biochemical compounds that are comprised or contained in the collected native plant materials. The *Guidelines* do not cover other legal issues, such as those relating to intellectual property, biosecurity, biosafety, or food regulatory standards.

The target audience of these *Guidelines* are the users and providers of Australian native plant materials including:

- individuals, enterprises, networks, and cooperatives that utilise Australian native foods and botanicals;
- public institutions such as government authorities, gene banks, herbaria, botanic gardens, and museums;
- universities;
- industries that collect plant materials for research and development; and
- Indigenous peoples and organisations.



There are a number of legal issues that arise when native plant materials are collected from the wild in Australia. The legal issues that arise will depend on:

- where the native plant material was obtained from; and
- whether the plant material or a derived product will be exported to another country.



Image 1: Green Kakadu Plum

## 2. Where was the native plant material obtained from?

One of the consequences of the Australian Federal system is that the legal issues that arise when native plant material is collected from the wild differ depending on whether the material was obtained from Commonwealth, State, or Territory land or waters. Because there is no unified approach across Australia, it is necessary to look at the laws that apply in each of the different jurisdictions separately.

### 2.1. Commonwealth

#### Collecting from Commonwealth land and waters

To collect native plant materials from Commonwealth land and waters, it is necessary to obtain a permit from the Commonwealth Department of Agriculture, Water and the Environment. The type of permit that is needed will depend on whether the plant is to be used for commercial (or potentially commercial) purposes, or for non-commercial purposes.

#### (i) Permit for commercial and potentially commercial uses

To obtain a permit to collect native plant materials for commercial and potentially commercial uses, the user and the party who provides access to the materials (the ‘access provider’) must enter into a benefit sharing agreement, as required by the *Environment Protection and Biodiversity Conservation Act (1999)* and the *Environment Protection and Biodiversity Conservation Regulations (2000)*. The benefit sharing agreement must include:

- full details of the parties to the agreement;
- details regarding the time and frequency of entry to the area where the plant material is located;
- name and other details of the resources to be collected, including the quantity to be collected;
- the purpose of the collection, as disclosed to the access provider;
- a statement setting out the proposed means of labelling samples;
- the agreed disposition of ownership in the samples, including details about any proposed transmission of samples to third parties;
- a statement regarding any use of Indigenous knowledge, including details about the source of the knowledge, such as, for example, whether the knowledge was obtained from scientific or other public documents, from the access provider, or from another group of Indigenous persons;
- a statement regarding the benefits to be shared with the access provider, or any agreed commitments given in return for the use of the Indigenous knowledge;
- if any Indigenous knowledge held by the access provider, or by another group of Indigenous persons, is to be used, a copy of the agreement regarding use of the

knowledge (if there is a written document), or the terms of any oral agreement, regarding the use of the knowledge;

- if applicable, the details of how the resource user will benefit biodiversity conservation in the area from which the plant materials are collected if access is granted;
- details of the benefits that the access provider will receive for having been granted access;
- where relevant, evidence that informed consent was obtained from the owners of Indigenous land and other landholders, and that mutually agreed terms of access and benefit sharing were negotiated based on the principles of fairness and equity;
- evidence that an environmental assessment (if required) was undertaken and completed; and
- a statement regarding how the proposed access is ecologically sustainable and consistent with Australia's biodiversity conservation strategy.

#### **(ii) Permit for non-commercial uses**

In order to obtain a permit to collect native plant materials for non-commercial uses, the user is required to provide:

- evidence of written permission from the access provider, and where relevant, an Indigenous land use agreement to enter the Commonwealth area, take samples from the plants of the area, and remove samples from the area;
- a copy of a statutory declaration given to each access provider. The statutory declaration, among others, must declare that the user “undertakes not to carry out, or allow others to carry out, research or development for commercial purposes on any genetic resources or biochemical compounds comprising or contained in the biological resources unless a benefit-sharing agreement has been entered into with each access provider”;
- evidence that an environmental assessment (if required) was undertaken and completed; and
- a statement regarding how the proposed access is ecologically sustainable and consistent with Australia's biodiversity conservation strategy.

#### **Exceptions**

There are a number of situations where the access and benefit sharing provisions of the Commonwealth legal framework do not apply to the collection and use of native plant materials.

##### **(i) Where the materials are covered by the Plant Treaty**

The access and benefit sharing provisions of the Commonwealth legal framework do not apply when the relevant Minister declares that the native plant material is within the scope of the *International Treaty on Plant Genetic Resources for Food and Agriculture* (the ‘Plant Treaty’).

There are two potential ways that a plant may be within the scope of the Plant Treaty. These are when the plant:

- is one of the 64 species of plants listed in Annex I of the Plant Treaty (*see* Appendix 1 of these Guidelines), or
- is included in the Multilateral System of the Plant Treaty (either because the plant is listed in Annex I of the Plant Treaty, or because it has been placed into the Multilateral System by the relevant government authorities of members of the Treaty, or by gene banks, individuals, private institutions, or other actors).

To be covered by the Plant Treaty (and thus to fall outside the remit of the Commonwealth access and benefit sharing system), the provider and the user of the plant material must use the Standard Material Transfer Agreement (SMTA) of the Plant Treaty. The SMTA is a standardised, non-negotiable contract which provides that:

- access to plant materials is only for research, breeding, and training for food and agriculture and not for chemical, pharmaceutical, and/or other non-food uses;
- no one will obtain any intellectual property rights over the materials in the form in which the user receives them; and
- users of the plant materials will share any benefits that they realise through the utilisation of the materials by contributing to an International Benefit-sharing Fund that the Treaty Secretariat administers, or by including any new material that is derived from the initial plant material in the Multilateral System.

**(ii) Where the materials are protected by intellectual property**

The access and benefit sharing provisions of the Commonwealth legal framework do not apply to the collection of a plant which is protected by plant breeder's rights.

**(iii) Where the materials are from a genetically modified organism**

The access and benefit sharing provisions of the Commonwealth legal framework do not apply to the collection of 'genetically modified' plant material that is included within the scope of Article 10 of the *Gene Technology Act 2000*. This provision defines 'genetically modified organism' as (1) an organism that has been modified by gene technology, (2) an organism that has inherited particular traits from an organism (the 'initial organism'), being traits that occurred in the initial organism because of gene technology; or (3) anything declared by the Regulations to the *Gene Technology Act 2000* to be a genetically modified organism, or that belongs to a class of things declared by the Regulations to be genetically modified organisms.

**(iv) Where access to the materials are controlled by another law**

The access and benefit sharing provisions of the Commonwealth legal framework do not apply to the access of the plant materials that are controlled by another Commonwealth, self-governing Territory, or State law.

**(v) Where the materials are held as *ex situ* specimens**

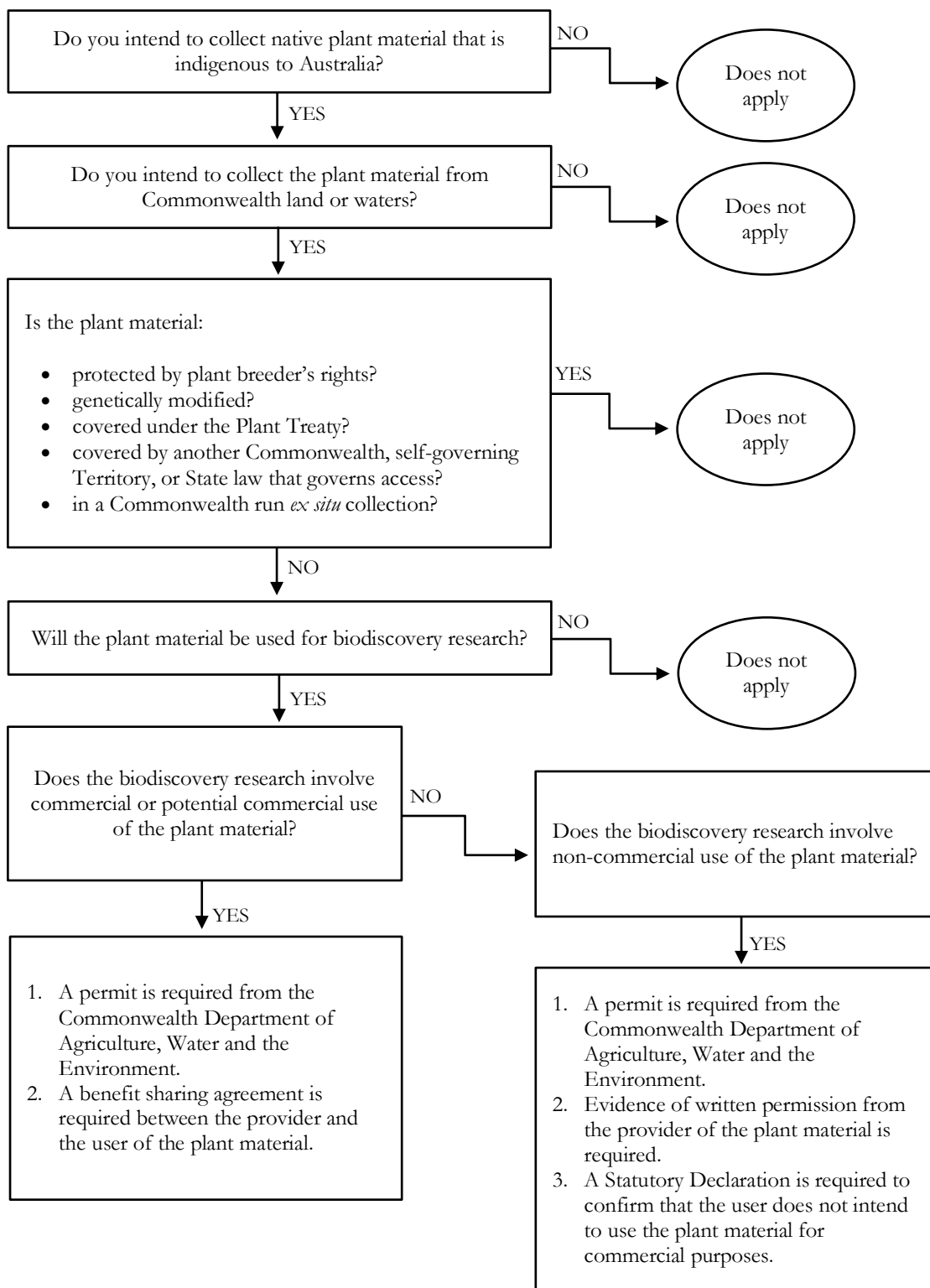
The access and benefit sharing provisions of the Commonwealth legal framework do not apply where the plant materials are held as specimens separated from their natural environment (whether in a collection or otherwise) by a Commonwealth Department or Commonwealth agency and where there are reasonable grounds to believe that access to the plant materials would be administered by the Department or agency in a manner that is consistent with the purpose of the access and benefit sharing framework.

**(vi) Other exceptions**

The access and benefit sharing provisions of the Commonwealth legal framework do not apply when biological resources (including plant materials) are accessed for the following activities:

1. the collection of biological resources (including plant materials) by Indigenous peoples:
  - a. for a purpose other than research and development on any genetic resources, or biochemical compounds, comprising or contained in the collected resources; or
  - b. in the exercise of their native title rights and interests;
2. access to human genetic resources;
3. the taking of resources that have been cultivated or tended for a purpose other than research and development on any genetic resources, or biochemical compounds, comprising or contained in the collected resources;
4. fishing for commerce or recreation, game or charter fishing or collecting broodstock for aquaculture;
5. harvesting wildflowers;
6. taking wild animals or plants for food;
7. collecting peat or firewood;
8. taking essential oils from wild plants;
9. collecting plant reproductive material for propagation; and
10. commercial forestry.

## Decision Tree 1: The applicability of the Commonwealth biodiscovery law





## Collecting threatened native plants

In addition to the possible need to obtain a permit to collect plant materials for commercial or non-commercial purposes, other permits may also be required. For example, a permit is required to take, trade, keep, or move the material of any native plant from Commonwealth land when the plant is classified as a threatened species or part of a threatened ecological community (*Environment Protection and Biodiversity Conservation Act 1999*). The Environment Minister of the Commonwealth Department of Agriculture, Water and the Environment evaluates permit applications for the collection of threatened species and communities. A permit will only be granted if the applicant can demonstrate that certain conditions are present. These include that the proposed activity would contribute significantly to the conservation of the listed threatened species or community, and that the proposed activity is of particular significance to Indigenous tradition. In all cases, the applicant must show that the impact of the activity will not adversely affect the survival or recovery of the threatened species or ecological community.

## 2.2 Queensland

### Collecting from State land in Queensland

Where native plant materials are collected from State land and waters in Queensland for the purpose of 'biodiscovery', the collection must comply with the requirements in the Queensland *Biodiscovery Act 2004*. Biodiscovery is the process whereby the biological or genetic material of native plant species is collected for the purpose of subsequent research and development.

The Queensland *Biodiscovery Act 2004* does not apply where materials are collected on either private land or Indigenous land.

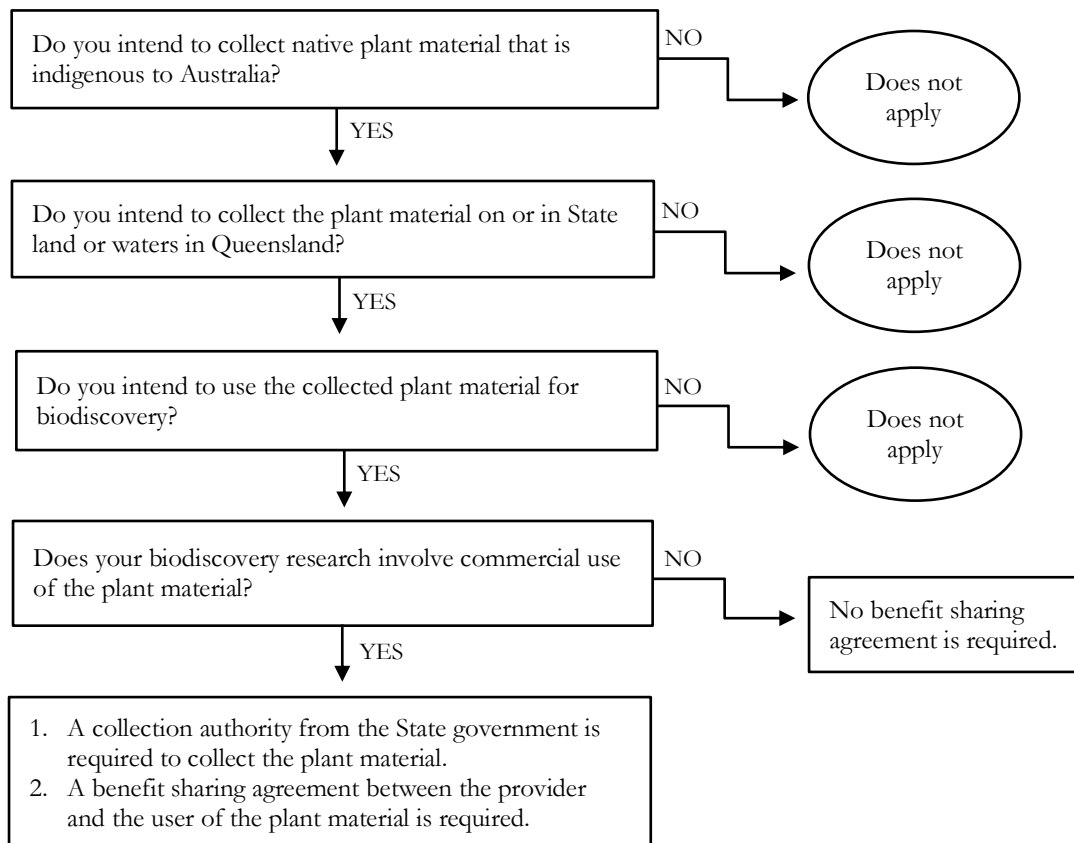
To collect native plant materials for biodiscovery research from State land or waters in Queensland, a 'Collection Authority' must be obtained from the Queensland Department of Environment and Science. The *Biodiscovery Act 2004* imposes conditions on an applicant for a Collection Authority. Applicants must:

- comply with any conditions imposed on the collection of materials;
- execute a 'benefit sharing agreement' with the State government; and
- ensure that when native plant materials are transferred to a third party, the third party is subject to the same conditions that were imposed on the original collector of the materials. This requirement is designed to ensure that people who collect native plant materials do not avoid their legal obligations by transferring the materials to third parties.

Queensland law currently does not allow for materials that fall within the scope of the Plant Treaty to be exempted from the requirements of the Queensland biodiscovery legislation. However, a recent review report of the Queensland *Biodiscovery Act 2004* has recommended that the State government should amend the law to allow 'the Minister to declare that the Act or part thereof not apply to specified Native Biological Material or a

specified collection of Native Biological Material where use of the resources is required to be controlled under any international agreement to which Australia is a party<sup>7</sup>. If this change is adopted, it will bring Queensland into line with the legal systems of the Commonwealth and the Northern Territory.

## Decision Tree 2: The applicability of the Queensland biodiscovery law



### **Collecting from private land in Queensland**

The Queensland *Biodiscovery Act 2004* does not apply to the collection of Australian native plant materials from private land or waters in Queensland. However, a harvesting license must be obtained from the Department of Environment and Science to collect plants classified as protected under the *Nature Conservation Act 1992* from private land or waters located in Queensland. Furthermore, whether or not the plant in question is classified as protected, it is always necessary to obtain permission from the landowner prior to collection.

A person or an institution collecting and removing native plant material from private land without permission from the landowner exposes themselves to the risk of criminal charges (trespass and theft) and civil action. The conditions under which the material is collected, as well as what is able to happen to the material after it has been collected (including any benefits that may flow back to the landowner) will be determined by the contract between the landowner and the collector.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

### **Collecting from Indigenous land in Queensland**

The Queensland *Biodiscovery Act 2004* does not apply to the collection of Australian native plant materials from Indigenous land or waters in Queensland. However, a harvesting license must be obtained from the Department of Environment and Science to collect plants classified as protected under the *Nature Conservation Act 1992* from Indigenous land or waters located in Queensland. Furthermore, whether or not the plant in question is classified as protected, it is necessary to obtain permission from the Traditional Owner(s) or local Land Council to enter the land or waters, as well as to collect native plant materials located there.

A person or an institution collecting and removing native plant material from Indigenous land without permission from the Traditional Owner(s) or local Land Council exposes themselves to the risk of criminal charges (trespass and theft) and civil action. The conditions under which the material is collected, as well as what is able to happen to the material after it has been collected (including any benefits that may flow back to the Traditional Owner(s) or local Land Council) will be determined by the contract between the Traditional Owner(s) or local Land Council and the collector. One issue of potential importance for the collection and utilisation of Australian native plants relates to the question of whether, and if so, how native title impacts on and interacts with laws that regulate intellectual property and biodiscovery research. This is a matter that needs further consideration.

### **Collecting protected native plants in Queensland**

In addition to the possible need to obtain a permit to collect native plant materials for biodiscovery, other types of permits may also be required. For example, the Queensland

Department of Environment and Science has a special licensing system that is derived from the *Nature Conservation Act 1992*, which governs certain uses of protected native plants located within State jurisdiction. This system regulates the harvesting and growing of protected plants, regardless of whether these activities occur on State land or waters, Indigenous land, or private land. Under the *Nature Conservation Act 1992*, a ‘protected plant’ means a plant that is prescribed under the Act as threatened, or near threatened. This definition does not include certain kinds of processed products that are made or derived from a protected plant.

The Queensland licensing system for protected plants consists of several types of licenses. For instance, a protected plant harvesting licence is required to harvest protected plants. A separate licence is required if the licensed harvester also intends to grow protected plants from harvested plant parts. This second licence is classified as a protected plant growing licence. Harvesting will only be permitted if the applicant can demonstrate that the proposed harvest activity is sustainable. A sustainable harvest plan may be required as part of an application for a protected plant growing licence. Harvesting and growing licences allow the licensee to conduct the permitted activity for both commercial and non-commercial purposes.

In certain circumstances, protected plant parts, other than parts from endangered plants, can be collected in Queensland without a licence where the parts taken do not exceed the quantities listed in the *Code of practice for the harvest and use of protected plants*. However, even if this exception applies, as discussed before, plants harvested from private or Indigenous land or waters still require the approval of the landowner (including Aboriginal Land Councils).

## 2.3 Northern Territory

### Collecting from Northern Territory land and waters

Where native plant materials are collected in the Northern Territory, the collection must comply with the *Biological Resources Act 2006* (NT). The Act applies to all of the Northern Territory (including the air above, the water, and the seabed or riverbed below the water). The Act does not apply to Commonwealth areas located within the Territory, which are governed by the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

Parties who want to collect native plant materials in the Northern Territory must apply for a permit from the relevant ‘permit issuing authority’:

- For collection on land, the permit should be obtained from the Parks and Wildlife Commission within the Department of Tourism, Sport and Culture.
- For collection in marine areas, the permit should be obtained from the Fisheries division within the Department of Primary Industries and Resources.

When the permit application is assessed, the relevant authority must determine whether the activity involves ‘bioprospecting’, which is defined as ‘the taking of samples of biological resources, existing *in situ* or maintained in an *ex situ* collection of such

resources, for research in relation to any genetic resources, or biochemical compounds, comprising or contained in the biological resources.’ If the activity involves bioprospecting, the Department of Primary Industry and Resources must determine whether a benefit sharing agreement is required. If the Department of Primary Industry and Resources decides that a benefit sharing agreement is required, such agreements must be made either with:

- the Territory Government (if the native plant materials are obtained from Crown land); or
- other relevant resource providers (if the native plant materials are obtained from private land or Aboriginal land).

### **Exceptions**

Similar to the Commonwealth system for access to biological resources, the Northern Territory *Biological Resources Act 2006* also contains certain exceptions where it is not necessary to enter into an access and benefit sharing agreement when collecting native plant materials.

#### **(i) Where the materials are covered by the Plant Treaty**

A permit for access to certain plant materials is not required when the relevant Minister has declared that the use of the native plant materials is controlled by the *International Treaty on Plant Genetic Resources for Food and Agriculture* (the ‘Plant Treaty’).

#### **(ii) Where the materials are protected by plant breeder’s rights**

The Northern Territory *Biological Resources Act 2006* does not apply to the collection of a plant that is protected by plant breeder’s rights.

#### **(iii) Where the materials are from a genetically modified organism**

The Northern Territory *Biological Resources Act 2006* does not apply to the collection of ‘genetically modified’ plant material included within the scope of Article 10 of the *Gene Technology Act 2000*. This provision defines ‘genetically modified organism’ as (1) an organism that has been modified by gene technology, (2) an organism that has inherited particular traits from an organism (the ‘initial organism’), being traits that occurred in the initial organism because of gene technology; or (3) anything declared by the Regulations to the *Gene Technology Act 2000* to be a genetically modified organism, or that belongs to a class of things declared by the regulations to be genetically modified organisms.

#### **(iv) Where the materials are held as *ex situ* specimens**

The Northern Territory *Biological Resources Act 2006* does not apply where the plant materials are ‘held away from their natural environment (whether in a collection or otherwise) by an Agency or other body and there are reasonable grounds to believe that bioprospecting of the plant materials is administered by the Agency or body in a manner that is consistent with this Act’.

#### **(v) Other exceptions**

The Northern Territory *Biological Resources Act 2006* does not apply when biological resources (including plant materials) are accessed in relation to the following activities:

1. where Indigenous Peoples who have traditionally used an area of land or water in accordance with Aboriginal tradition take biological resources from the area of land or water for hunting, food gathering (other than for sale) and for ceremonial and religious purposes;
2. access to human genetic resources;
3. the taking of resources that have been cultivated or tended for a purpose other than biodiscovery and where the samples are not to be used for biodiscovery;
4. taking aquatic life, within the meaning of the *Fisheries Act 1988*, that;
  - a. has been caught, taken, or harvested under a licence or permit granted under that Act (other than a permit granted under section 17 of the *Fisheries Act 1988* for bioprospecting); or
  - b. comprises a managed fishery or part of a managed fishery within the meaning of that Act.
5. fishing for commerce or recreation, game or charter fishing or collecting broodstock for aquaculture;
6. harvesting wildflowers;
7. taking wild animals or plants for food;
8. collecting peat or firewood;
9. taking essential oils from wild plants;
10. collecting plant reproductive material for propagation; and
11. commercial forestry.

#### **Collecting from private land in the Northern Territory**

The Northern Territory *Biological Resources Act 2006* applies to *all* land in the Northern Territory, including private land, that is not owned by the Commonwealth. Collectors of native plant materials from private land in the Northern Territory must:

- adhere to the access and benefit sharing protocols described above;
- obtain permission from the landowner prior to collection; and
- apply for a permit to take or interfere with wildlife from the Northern Territory Department of Environment and Natural Resources, as described above.

A person or an institution collecting and removing native plant material from private land without permission from the landowner exposes themselves to the risk of criminal charges (trespass and theft) and civil action. The conditions under which the material is collected, as well as what is able to happen to the material after it has been collected



(including any benefits that may flow back to the landowner) will be determined by the contract between the landowner and the collector.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

### **Collecting from Indigenous land in the Northern Territory**

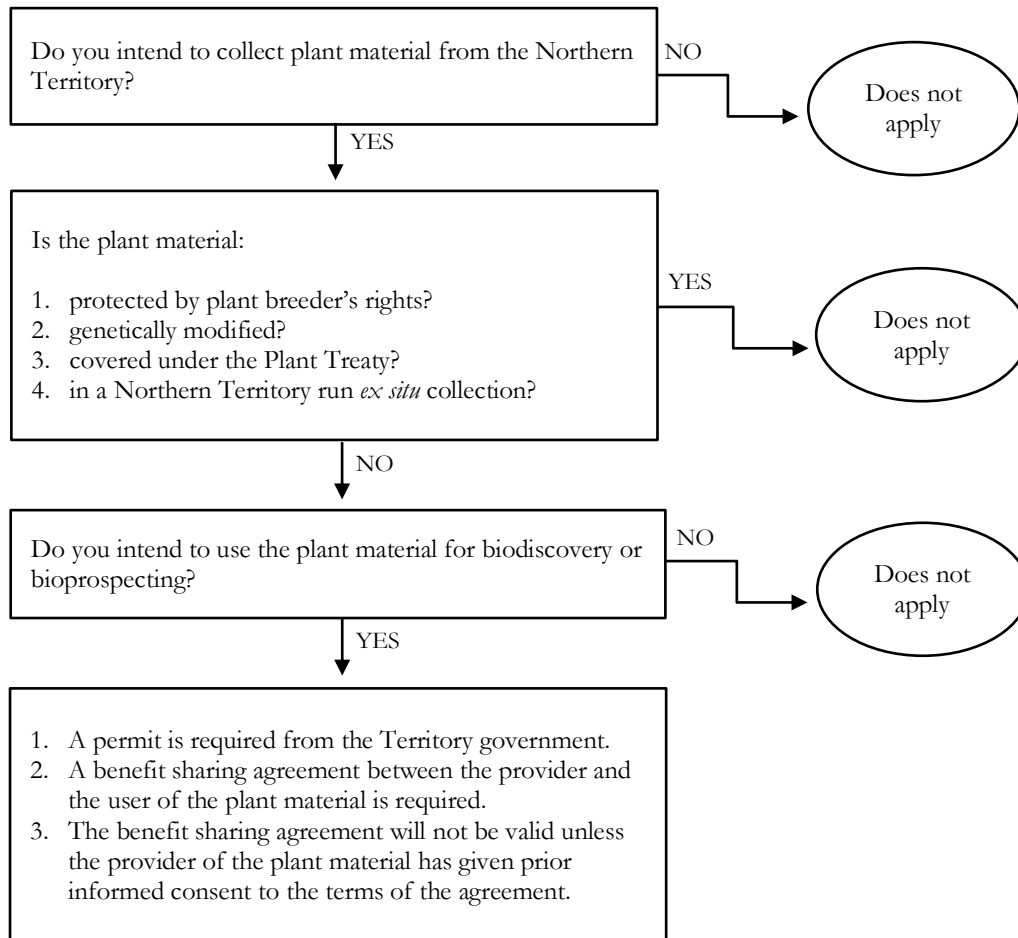
The Northern Territory *Biological Resources Act 2006* applies to all land in the Northern Territory that is not owned by the Commonwealth, including Indigenous land. Therefore, collectors of native plant materials from Indigenous land in the Northern Territory must:

- adhere to the access and benefit sharing protocols described above under the subheading 'Collecting from Northern Territory land and waters';
- obtain permission from the Traditional Owner(s) or local Land Council to enter the land or waters, as well as to collect native plant materials located there; and
- apply for a permit to take or interfere with wildlife from the Northern Territory Department of Environment and Natural Resources, as described above.

A person or institution collecting and removing native plant material from Indigenous land without permission from the Traditional Owner(s) or local Land Council exposes themselves to the risk of criminal charges (trespass and theft) and civil action. The conditions under which the material is collected, as well as what is able to happen to the material after it has been collected (including any benefits that may flow back to the Traditional Owner(s) or local Land Council) will be determined by the contract between the Traditional Owner(s) or local Land Council and the collector.

One issue of potential importance for the collection and utilisation of Australian native plants relates to the question of whether, and if so, how native title or other relevant laws impact on and interact with laws that regulate intellectual property and biodiscovery research. For example, under Section 19 of the *Land Rights Act 1976*, third parties, including Traditional Owners of Indigenous land located in the Northern Territory, must also conclude a 'Section 19 Agreement' to undertake micro-enterprise, private business, and community development activities on Indigenous land or waters. To what extent a 'Section 19 Agreement' could be considered to have addressed the obligation of benefit sharing under the Northern Territory *Biological Resources Act 2006* is a matter that needs further consideration.

### Decision Tree 3: The applicability of the Northern Territory biodiscovery law



## **Taking or interfering with wildlife in the Northern Territory**

In addition to the possible need to obtain a permit to collect native plant materials for biodiscovery, other types of permits may also be required. For example, a permit is required under the *Territory Parks and Wildlife Conservation Act 2006* to take or interfere with wildlife, including plants, for scientific and commercial purposes. This requirement applies to the collection of native plant materials from anywhere within Northern Territory jurisdiction, regardless of land tenure. Prior to applying for a permit to take or interfere with wildlife, the applicant must secure written permission from the landholder or lands authority (for public or private land), or permission from the local Land Council for collection on Indigenous land.

## **2.4 Western Australia**

### **Collecting from Western Australia land and waters**

Although Western Australia does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the State. Where native plant materials are collected in Western Australia, the collection must comply with the requirements in the *Biodiversity Conservation Act 2016* and the *Biodiversity Conservation Regulations 2018*. These legal frameworks apply to collection occurring on all Crown land and waters in Western Australia, and they regulate the activities of taking, disturbing, supplying, possessing, processing, dealing, importing, and exporting of native flora (and fauna) through a system of licences. Thus, the taking of native plants from Crown land and waters in Western Australia for identification, research, education, hobby, or other non-commercial purposes requires a Scientific or Other Prescribed Purposes Licence from the Department of Parks and Wildlife.

Collection from Crown land and waters in Western Australia for commercial purposes requires a Commercial Purposes Licence, which must be held by each individual taking native plant materials. If granted, this licence will be valid for one year, with the possibility of renewal. Before a Commercial Purposes Licence can be issued, the applicant must demonstrate that they have an area on which they are authorised to collect native plant materials. This includes the written permission of the government agency or authorised agent that is managing the land or water. The commercial collection of native plant materials from conservation estates in Western Australia is generally not permitted.

The licensing system of Western Australia also regulates the sale of protected flora that is collected from private property. Protected flora may only be collected from private property by the owner or occupier of the land or by a person who has the owner or occupier's permission (including the Aboriginal corporate body, where applicable), and the sale of protected flora taken from private property may only be sold under a Commercial Producer's Licence. If granted, this licence will be valid for one year, with the possibility of renewal.

### **Collecting from private land in Western Australia**

Where Australian native plant materials are collected from private land for non-commercial purposes in Western Australia, collection requires the permission of the property owner, but no licence from the Department of Parks and Wildlife. As described above, where protected flora is collected from private land for commercial purposes, permission from the property owner is required, and the materials may only be sold under a Commercial Producer's Licence issued by the Department of Parks and Wildlife.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

### **Collecting from Indigenous land in Western Australia**

Where Australian native plant materials are collected from Indigenous land for non-commercial purposes in Western Australia, collection requires the permission of the property owner (including the Aboriginal corporate body, where applicable), but no licence from the Department of Parks and Wildlife. As described above, where protected flora is collected from Indigenous land for commercial purposes, permission from the property owner is required (including the Aboriginal corporate body, where applicable), and the materials may only be sold under a Commercial Producer's Licence issued by the Department of Parks and Wildlife.

## **2.5 New South Wales**

### **Collecting from New South Wales public land and waters**

Although New South Wales does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the State. A licence is required to collect plants classified as 'protected native plants' from public land and waters in New South Wales for commercial purposes. Specifically, the New South Wales *Biodiversity Conservation Act 2016* makes it an offence to pick, possess, buy, or sell native plants listed in the Act for commercial purposes without a licence. There are different types of licences available under the Act, namely cut-flower licences and whole-plant licences for commercial uses of protected native plants, and scientific licenses for the use of protected native plants for research or conservation purposes.

The licensing system in New South Wales is narrow, such that a licence is not required to pick, possess, buy, or sell native plant species that are not listed as protected or threatened in the *Biodiversity Conservation Act 2016*. Furthermore, a licence is not required to pick, possess, buy, or sell protected plants cultivated as a hobby; or if you are an Aboriginal person using the plants for domestic purposes or on Aboriginal land with the permission of the owners. A licence is also not required to pick, possess, buy, or sell protected and threatened plants and cut flowers obtained from a licensed harvester or grower, to possess protected and threatened plant species naturally occurring on your property, or to pick protected plants cultivated on private land if you are the landholder

or have the consent of the landholder. Finally, a licence is not required to import or export protected plants interstate that are tagged as required under the *Biodiversity Conservation Act 2016* or corresponding interstate laws, nor is a licence required to buy, sell, or possess manufactured articles made from lawfully picked protected plants.

### **Collecting from private land in New South Wales**

Where Australian native plant materials are collected from private land in New South Wales, collection requires the permission of the property owner, but no licence from the Department of Planning, Industry and Environment.

A person or an institution collecting and removing native plant material from private land without permission from the landowner exposes themselves to the risk of criminal charges (trespass and theft) and civil action.

The conditions under which the material is collected, as well as what is able to happen to the material after it has been collected (including any benefits that may flow back to the landowner) will be determined by the contract between the landowner and the collector. Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

### **Collecting from Indigenous land in New South Wales**

Where Australian native plant materials are collected from Indigenous land in New South Wales, collection requires the permission of the property owner (including the Aboriginal corporate body, where applicable), but no licence from the Department of Planning, Industry and Environment.

## **2.6 Victoria**

### **Collecting from Victorian public land and waters**

Although Victoria does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the State. A permit is required to take, trade in, keep, move, or process plants classified as 'protected flora' from public land and waters in Victoria. Under the *Victoria Flora and Fauna Guarantee Act 1988*, protected flora includes plants that have been declared to be protected (section 46); plants that are listed as threatened (section 10); and plants that belong to communities that are listed as threatened (section 10). The *Flora and Fauna Guarantee Act 1988* defines 'take' to mean kill, injure, disturb, or collect. For protected flora that will be collected from public land for non-commercial purposes, a permit application must be lodged with the appropriate Department of Environment, Land, Water & Planning Regional Office. Meanwhile, to collect protected flora from two or more Department of Environment, Land, Water & Planning regions simultaneously, or from any public land for commercial purposes, an application must be lodged with the Environmental Research Co-ordinator.

A permit is not required in Victoria for flora taken from private land (other than land which is part of the critical habitat for the flora) by a person who is the owner of the land; is leasing the land; or has been given permission by the land owner or the lessee and has not taken the flora for commercial purposes. A permit is also not required to take, trade in, keep, move, or process flora that is propagated from flora that has been lawfully obtained and kept. Finally, the *Flora and Fauna Guarantee Act 1988* does not apply to a person who is a member of a Traditional Owner group entity and is acting under and in accordance with an authorisation order under the *Traditional Owner Settlements Act 2010*.

### **Collecting from private land in Victoria**

Where Australian native plant materials are collected from private land (other than land which is part of the critical habitat for the flora) in Victoria, collection requires the permission of the property owner, but no permit from the Department of Environment, Land, Water & Planning. A permit is required, however, to collect from private land that is part of the critical habitat of protected flora.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

### **Collecting from Indigenous land in Victoria**

Where Australian native plant materials are collected from Indigenous land (other than land which is part of the critical habitat for the flora) in Victoria, collection requires the permission of the property owner (including the Aboriginal corporate body, where applicable), but no permit from the Department of Environment, Land, Water & Planning. A permit is required, however, to collect from Indigenous land that is part of the critical habitat of protected flora.

## **2.7 Tasmania**

### **Collecting from Tasmania public land and waters**

Although Tasmania does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the State. A permit is required to take plants classified as 'native plant species' in the *Threatened Species Protection Act 1995* from public land and waters in Tasmania. Under the *Threatened Species Protection Act 1995*, the definition of 'take' includes to kill, catch, damage, and collect native plant species. The Act also mandates that a permit be obtained to take native plant species listed as endangered, vulnerable, or rare regardless of land tenure. Likewise, a permit is required to take any native plant species listed in the regulations of the *Nature Conservation Act 2002* regardless of land tenure. A permit is also required to take any native plant species from public lands managed by the State government, or from Private Sanctuaries and Private Nature Reserves named in the *Nature Conservation Act 2002*, where the collector is not the owner of the land.

Under the permitting framework of Tasmania, a permit is not required to take a native plant species from private land if the species in question is not protected by the *Threatened Species Protection Act 1995*, the regulations of the *Nature Conservation Act 2002*, or the *Environmental Protection and Biodiversity Conservation Act 1999*. A permit is also not required to take native plant species from private land that is not a Private Sanctuary, Private Nature Reserve, or protected by a Conservation Covenant.

### **Collecting from private land in Tasmania**

Where Australian native plant materials are collected from private land in Tasmania, collection requires the permission of the property owner, but no permit from the Department of Primary Industries, Parks, Water and Environment, unless the species to be collected is protected by the *Threatened Species Protection Act 1995*, the regulations of the *Nature Conservation Act 2002*, or the *Environmental Protection and Biodiversity Conservation Act 1999*.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

### **Collecting from Indigenous land in Tasmania**

Where Australian native plant materials are collected from Indigenous land in Tasmania, collection requires the permission of the property owner (including the Aboriginal corporate body, where applicable), but no permit from the Department of Primary Industries, Parks, Water and Environment, unless the species to be collected is protected by the *Threatened Species Protection Act 1995*, the regulations of the *Nature Conservation Act 2002*, or the *Environmental Protection and Biodiversity Conservation Act 1999*.

## **2.8 South Australia**

### **Collecting from South Australia land and waters**

Although South Australia does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the State. A permit is required to collect native plant material from public land and waters in South Australia. Under the *Native Vegetation Act 1991*, collecting native plant materials means removing the material without causing substantial damage or death to the plant. Any other activity, such as severing branches, limbs, stems, or trunks of vegetation is defined as clearance and is regulated by a separate permitting system and subject to approval from the Native Vegetation Council. The South Australia framework for collection mandates different types of permits depending on the intended use of the native plant material. If the intended use of the material is for scientific research, a Scientific Research Permit is required for all plant species if collection will occur on public land. A Scientific Research Permit is also required to collect from private land, pastoral leases, and Indigenous land if the species is classified as 'protected'. This type of permit is valid for a maximum of twelve months from the date of issue.



Where collection is for non-scientific purposes, South Australia law delineates different classes of permits. According to this scheme, a Commercial (Class A) permit is required for large-scale commercial collection and large-scale revegetation projects. A Bush Food Collection (Class B) permit is required for the use of native plant material as cuisine. A Small-scale (Class C) collection permit is required for activities such as individual or community-based revegetation projects, propagation and sale, botanic garden collections, artistic display, and individual projects and other purposes. Finally, a Threatened Species (Class D) collection permit is required to collect material from plants or ecological communities that are listed as threatened under State or Commonwealth legislation. All of these permits are valid for a maximum of twelve months from the date of issue. For non-scientific plant collection, a permit is not required to collect on private land unless the species is prescribed, however, written permission from the landowner is required. Permission must also be obtained from local councils or the agency responsible for care and control of the land prior to collecting on public land.

### **Collecting from private land in South Australia**

Where Australian native plant materials are collected for non-scientific purposes from private land in South Australia, collection requires the written permission of the property owner, but no permit from the Department for Environment and Water. If the collection of Australian native plant materials for scientific purposes involves protected species, a Scientific Research Permit from the Department for Environment and Water is required if collection will occur on private land (including pastoral leases).

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

### **Collecting from Indigenous land in South Australia**

Where Australian native plant materials are collected for non-scientific purposes from Indigenous land in South Australia, collection requires the written permission of the property owner (including the Aboriginal corporate body, where applicable), but no permit from the Department for Environment and Water. If the collection of Australian native plant materials for scientific purposes involves protected species, a Scientific Research Permit from the Department for Environment and Water is required if collection will occur on Indigenous land.

## **2.9 Australian Capital Territory**

### **Collecting from Australian Capital Territory land and waters**

Although the Australian Capital Territory does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the Territory. Under *The Nature Conservation Act 2014*, many activities related to Australian native plants require a licence from the Environment, Planning and Sustainable Development

Directorate – Environment of the ACT Government. These activities include taking, and taking and selling native plants from unleased (public) land. A licence is also required to take plants that are classified as ‘protected native species’ or as having ‘special protection status’ regardless of land tenure, and regardless of the purpose of collection.

### **Collecting from private land in the Australian Capital Territory**

Where Australian native plant materials are collected from private land in the Australian Capital Territory, collection requires the permission of the property owner, but no permit from Environment, Planning and Sustainable Development Directorate – Environment of the ACT Government. A permit is required, however, to collect plants that are classified as ‘protected native species’ or as having ‘special protection status’ from private land.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty’s SMTA and all of its terms and conditions.

### **Collecting from Indigenous land in the Australian Capital Territory**

Where Australian native plant materials are collected from Indigenous land in the Australian Capital Territory, collection requires the permission of the property owner (including the Aboriginal corporate body, where applicable), but no permit from the Environment, Planning and Sustainable Development Directorate – Environment of the ACT Government. A permit is required, however, to collect plants that are classified as ‘protected native species’ or as having ‘special protection status’ from Indigenous land.



Image 2: Wild Rice

### **3. Where the plant material or a derivative product will be exported to another country**

If Australian native plant materials, derivatives thereof, or products that contain either of these are exported to a country that has adopted the Nagoya Protocol, the exporters may be required to demonstrate that they acquired the items in accordance with the Protocol. The Nagoya Protocol came into force in 2014 as a supplementary international agreement to implement the access and benefit sharing provisions of the *Convention on Biological Diversity* (CBD). As of 2020, 124 countries, including the European Union, had joined the Nagoya Protocol.

Although Australia signed the Nagoya Protocol in January 2012, it has not yet ratified the Protocol. Nevertheless, the Nagoya Protocol is still important where native plant materials are collected and utilised in Australia. This is because countries that have ratified the Protocol are required to ensure that all relevant imported plant materials (including those obtained from countries that are not members of the Nagoya Protocol) were collected, used, and/or developed in compliance with the Protocol. Specifically, Nagoya Protocol member countries are required to ensure that imported plant materials are accompanied by relevant documentary evidence including:

- access permits from the relevant authorities;
- prior informed consent from the authorities and providers of the materials; and
- benefit sharing agreements between users and providers of the materials.

This evidence, which is needed in order to obtain an ‘internationally recognised certificate of compliance’, must be provided to relevant authorities and the ‘Access and Benefit Sharing Clearing-House of the Nagoya Protocol’.

An Australian individual or entity that wants to export native plant materials or products to one of the Nagoya-compliant countries would need to be able to demonstrate that:

- prior informed consent was obtained from the relevant authorities or the providers of the materials when they were collected;
- benefit sharing agreements were concluded between providers and users of the materials; and
- all measures were undertaken to involve and to address the interests of Indigenous peoples in cases of the access and use of Indigenous knowledge and/or native plant materials obtained from Indigenous land.

When the relevant information is not confidential, an internationally recognised certificate of compliance must contain the following minimum details:

- Issuing authority;
- Date of issuance;

- The provider;
- Unique identifier of the certificate;
- The person or entity to whom prior informed consent was granted;
- Subject-matter or specific plant materials covered by the certificate;
- Confirmation that mutually agreed terms were established;
- Confirmation that prior informed consent was obtained; and
- Specification of whether the use will be commercial and/or non-commercial.

## Appendix 1: Materials under Annex I of the Plant Treaty

Crop	Genus	Observations
Breadfruit	Artocarpus	Breadfruit only.
Asparagus	Asparagus	
Oat	Avena	
Beet	Beta	
Brassica complex	Brassica et al.	Genera included are: Brassica, Armoracia, Barbarea, Camelina, Crambe, Diplotaxis, Eruca, Isatis, Lepidium, Raphanobrassica, Raphanus, Rorippa, and Sinapis. This comprises oilseed and vegetable crops such as cabbage, rapeseed, mustard, cress, rocket, radish, and turnip. The species <i>Lepidium meyenii</i> (maca) is excluded.
Pigeon Pea	Cajanus	
Chickpea	Cicer	
Citrus	Citrus	Genera Poncirus and Fortunella are included as root stock.
Coconut	Cocos	
Major aroids	Colocasia, Xanthosoma	Major aroids include taro, cocoyam, dasheen and tannia.
Carrot	Daucus	
Yams	Dioscorea	
Finger Millet	Eleusine	
Strawberry	Fragaria	
Sunflower	Helianthus	
Barley	Hordeum	
Sweet Potato	Ipomoea	
Grass pea	Lathyrus	
Lentil	Lens	
Apple	Malus	
Cassava	Manihot	Manihot esculenta only.
Banana / Plantain	Musa	Except <i>Musa textilis</i> .
Rice	Oryza	
Pearl Millet	Pennisetum	
Beans	Phaseolus	Except <i>Phaseolus polyanthus</i> .
Pea	Pisum	
Rye	Secale	
Potato	Solanum	Section tuberosa included, except <i>Solanum phureja</i> .
Eggplant	Solanum	Section melongena included.
Sorghum	Sorghum	
Triticale	Triticosecale	
Wheat	Triticum et al.	Including <i>Agropyron</i> , <i>Elymus</i> , and <i>Secale</i> .
Faba Bean/Vetch	Vicia	
Cowpea et al.	Vigna	
Maize	Zea	Excluding <i>Zea perennis</i> , <i>Zea diploperennis</i> , and <i>Zea luxurians</i> .

## Forages

Genera	Species
<b>LEGUME FORAGES</b>	
Astragalus	chinensis, cicer, arenarius
Canavalia	ensifolmis
Coronilla	varia
Hedysarum	coronarium
Lathyrus	cicera, ciliolatus, hirsutus, ochrus, odoratus, sativus
Lespedeza	cuneata, striata, stipulacea
Lotus	corniculatus, subbiflorus, uliginosus
Lupinus	albus, angustifolius, luteus
Medicago	arborea, falcata, sativa, scutellata, rigidula, truncatula
Melilotus	albus, officinalis
Onobrychis	viciifolia
Ornithopus	sativus
Prosopis	affinis, alba, chilensis, nigra, pallida
Pueraria	phaseoloides
Trifolium	alexandrinum, alpestre, ambiguum, angustifolium, arvense, agrocicerum, hybridum, incarnatum, pratense, repens, resupinatum, rueppellianum, semipilosum, subterraneum, vesiculosum
<b>GRASS FORAGES</b>	
Andropogon	gayanus
Agropyron	cristatum, desertorum
Agrostis	stolonifera, tenuis
Alopecurus	pratensis
Arrhenatherum	elatius
Dactylis	Glomerate
Festuca	arundinacea, gigantea, heterophylla, ovina, pratensis, rubra
Lolium	hybridum, multiflorum, perenne, rigidum, temulentum
Phalaris	aquatica, arundinacea
Phleum	pratense
Poa	alpina, annua, pratensis
Tripsacum	laxum
<b>OTHER FORAGES</b>	
Atriplex	halimus, nummularia
Salsola	vermiculata

## Appendix 2: Definitions of Key Terms

*Access* or *collection* means the taking of native plant materials for research and development purposes, including taxonomic research, breeding and development of novel crops and foods, etc.

*Benefit Sharing* means the sharing of benefits derived from the access and use of the collected native plant materials. ‘Access’ and ‘benefit sharing’ are two important objectives of the *Convention on Biological Diversity* (CBD), the *Nagoya Protocol*, and the *International Treaty on Plant Genetic Resources for Food and Agriculture* (the Plant Treaty).

*Biodiscovery* or *bioprospecting* is the process whereby any genetic resources or biochemical compounds that comprise or are contained in the collected native plant materials are used for the purpose of subsequent research and development.

*Collected from the wild* means the collection of native plant materials from the ecosystem or natural habitat where they grow (such as National Parks, State Forests, Crown land, roadsides, private land, and Indigenous land).

*International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty)* is an international agreement that came into effect on 29 June 2004. The Plant Treaty provides for the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits that accrue from the use of these resources. A key feature of the Plant Treaty is its ‘Multilateral System’, which is a global mechanism to ensure access to plant materials and benefit sharing. The Multilateral System covers plant materials of 64 food and forage crop species that are listed in Annex 1 of the Plant Treaty. Plant materials that are included in the Multilateral System must be accessed by using the non-negotiable Standard Material Transfer Agreement (SMTA).

*Nagoya Protocol* is an international agreement that came into force on 12 October 2014. The Nagoya Protocol establishes binding legal obligations relating to the access and use of genetic resources. The Nagoya Protocol is a supplementary agreement to the United Nations *Convention on Biological Diversity* (CBD). The Nagoya Protocol requires the user of genetic resources and traditional knowledge to obtain prior informed consent from the provider of these resources and to establish with him/her mutually agreed terms of access and benefit sharing.

*Native plant material* means any plant material that is indigenous to Australia.

*Plant Breeder’s Rights* are a set of exclusive intellectual property rights to produce or reproduce, offer for sale, sell, and to import and export propagating material of the registered plant variety. To be registered for plant breeder’s rights protection, the plant variety must be distinct, uniform, and stable. In addition, the variety must not have been previously commercially exploited (i.e. it has to be ‘new’). Plant breeder’s rights last for a minimum of 25 years in the case of trees and vines, and 20 years in the case of all other varieties.

*Standard Material Transfer Agreement (SMTA)* is a standardised, non-negotiable agreement for access and benefit sharing in relation to plant genetic resources that are included in the Multilateral System of the *International Treaty on Plant Genetic Resources for Food and Agriculture* (the ‘Plant Treaty’).