Implications of Indigenous Land Tenure Changes for Accessing Indigenous Genetic Resources from Northern Australia

Fran Humphries, Daniel F Robinson and Heron Loban*

Genetic resources contain DNA and other genetic material necessary to sustain biodiversity and ecosystem services. Australia’s biodiversity legislation regulates access to, and sharing the benefits of using, genetic resources. The Commonwealth government is considering its options for complying with obligations under the UN’s Nagoya Protocol, including to allow for indigenous communities’ prior informed consent for third parties accessing genetic resources over which they have “an established right to grant access”. Meanwhile, it is pursuing its policy to “reform” indigenous land tenure to attract more intense development in northern Australia – the home to the majority of Australia’s biodiversity. Using a Kakadu Plum example, and highlighting recent proposals for reform, this article analyses the connection between access and benefit sharing (ABS) and land tenure laws. It concludes that policymakers must consider the effects of land tenure “reform” on ABS frameworks to avoid undermining indigenous communities’ current and future rights of consent for accessing and using biological and genetic resources from their land and waters.

I. INTRODUCTION

The current and future rights of consent for accessing and using biological resources from land and waters of Australia’s indigenous communities are at risk of dilution as a result of competing policies at the Commonwealth, State and Territory levels of government. On the one hand, domestic and international companies are exploiting loopholes in the patchwork of Australia’s access and benefit sharing (ABS) laws. “ABS” is a legal concept and framework for regulating the process for taking, collecting, utilising and developing genetic resources. It also regulates how the benefits arising from their use (monetary and non-monetary) are shared fairly between the users and the providers of the genetic resource. The history of the Kakadu plum outlined in this article is one of many increasing examples where Australia’s native biological resources are taken and developed overseas with little or no benefit to the indigenous communities and environments where they came from. On the other hand, the Commonwealth is pushing the development of northern Australia under its White Paper plan, which includes changes to indigenous land tenure to reduce complexity and increase certainty for domestic and overseas investors.1 This article analyses the integral link between ABS and land tenure legislation in Australia.2 The Kakadu plum example is used to highlight the complexity of this relationship, and recent proposals for land tenure reform provide examples of potentially unfair outcomes for indigenous communities if policymakers do not take into account the effects of land tenure reform on ABS consent rights.

* Dr Fran Humphries: Research Fellow of the Law Futures Centre and member of the Australian Centre for Intellectual Property in Agriculture (ACIPA), Griffith University Australia. Associate Professor Daniel F Robinson: Environmental Humanities, Arts and Social Sciences, The University of New South Wales (UNSW) Australia; Research Fellow at the International Centre for Trade and Sustainable Development (ICTSD), Geneva; and member of the Australian Centre for Intellectual Property in Agriculture (ACIPA). Ms Heron Loban: Senior Lecturer, Griffith Law School, Griffith University, Australia.


2 A detailed exploration of issues relating to sea tenure is beyond the scope of this article but is an important area for further analysis in relation to ABS.
The focus of this article is northern Australia, which is the State, Territory and Commonwealth areas in Western Australia and Queensland above the tropic of Capricorn, and all of the Northern Territory. Northern Australia has particular significance for ABS policy because it has the majority of Australia’s unique biological resources3 and has the only jurisdictions that have standalone ABS legislation. Significantly, they are the only jurisdictions affected by the Commonwealth government’s White Paper plan to develop northern Australia.

Australia’s ABS laws are based on its obligations under the Convention on Biological Diversity (CBD).4 Under this regime, genetic resources are biological resources that are used for their actual or potential genetic material value5 (eg traits for breeding or chemical compounds for pharmaceuticals) rather than for other values such as the use of the biological product for consumption (eg a crop). Australian jurisdictions have a patchwork of geographical areas that either fall within or are excluded from ABS obligations. The one common element is that benefit sharing is triggered by access to the biological resource, which this article argues is inextricably linked to land tenure. The Nagoya Protocol,6 which Australia signed in 2012, has shifted the trigger for benefit sharing from the “access” stage to the “utilisation” stage. This article argues that this shift, together with specific provisions for consent concerning indigenous peoples and local community genetic resources, will have an impact on the connection between access and land tenure. Each jurisdiction is now reviewing their arrangements and considering how to implement the new obligations.

The connection between ABS and land tenure is significant in northern Australia because it has the majority of the determinations and claimant applications of native title in Australia.7 This part of the continent also has the majority of areas covered by other forms of indigenous peoples’ tenure.8 This article uses the term “land tenure” to broadly include, statutory land rights schemes in Northern Territory and Queensland, the modified reserve system in Western Australia and rights and interests under native title. These frameworks are outlined in the following section of this article. There is no clear picture of the full range of tenure reforms being progressed and the extent to which rights of indigenous land and interest holders may be affected, so this article highlights a few examples. Despite the broad scope of the Nagoya Protocol, which includes traditional knowledge, this article does not examine traditional knowledge associated with genetic resources, which has been analysed extensively elsewhere.9 The analysis is confined to the physical genetic resources over which an indigenous community has a right to grant access.

To understand how land tenure relates to ABS legislation, this article first outlines the main forms of land tenure in the north, the landholding bodies responsible for decision-making and some examples of current “reforms”. The section introduces the Kakadu plum example to illustrate the range of land tenure holders who have a stake in the use and exchange of the plum as a biological resource that spans northern jurisdictions. Part B analyses the relationship between Australia’s access consent provisions and land tenure, using the Kakadu plum to illustrate the practical effects of inconsistencies between jurisdictions and the implications of land tenure reform on the operation of ABS. It highlights how many indigenous communities are excluded from participation in an ABS model even though they may have a native title

5 Convention, n 4, Art 2.
7 94% of north Western Australia, 54% of Queensland and 30% of the Northern Territory is subject to a native title claim or determination; White Paper, n 1, 20.
8 See Figure 1.
9 See, eg Daniel Robinson, Biodiversity, Access and Benefit-sharing: Global Case Studies (Routledge/Earthscan, 2015).
determination or are in claims process. Part C briefly outlines the Nagoya Protocol’s obligations that will impact the relationship between land tenure and informed consent, depending on how those obligations are implemented in Australia. The article concludes that Australia now has the opportunity to take a more consistent approach across its jurisdictions for determining who is entitled to informed consent for ABS. This approach will be improved by careful consideration of the impacts on ABS legislation of proposed changes of reform to Aboriginal peoples and Torres Strait Islander forms of land tenure and resource rights.

II. INDIGENOUS LAND TENURE IN NORTHERN AUSTRALIA

Each northern jurisdiction has separate legislation and arrangements that govern land tenure. Consequently there are often overlapping and multiple tenure types over the one geographical area. The White Paper argued that it is the complexity of land arrangements that has slowed development in the north and committed to “simplify and modernise land arrangements” to create certainty for investors. Government assumptions about the nature of reform have been explored elsewhere and are beyond the scope of this article. This section gives an overview (including proposed reform) of statutory land rights schemes in Northern Territory and Queensland and the modified reserve system in Western Australia as well as their interaction with native title (summarised in Table 1). It then introduces the Kakadu plum case study to demonstrate its geographical distribution over the different forms of land tenure (Figure 1).

The Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (NT Land Rights Act) provides for the grant of inalienable freehold title to Aboriginal Land Trusts in the Northern Territory (about 50% of the Northern Territory land mass and 70% of its coastline). It is “one of the strongest forms of indigenous land title in the world [and delivers] a high level of control over access and resource use by others”. It establishes Land Councils, which have a statutory role to assist traditional owners acquire and manage their land and waters between the high and low water mark. Under the Act, affected communities have an opportunity to express their views about proposed land dealings, but ultimately the traditional owners are the title holders and decision makers. The NT Land Rights Act also provides for township leases which is a lease over a whole community for between 40 and 99 years to an approved government or community entity. Current leases are held by an independent Commonwealth statutory office holder on behalf of the Commonwealth although township leasing remains the subject of land tenure reform. Unless pastoral leases are bought by traditional owners, areas under pastoral leases cannot be claimed as Aboriginal land under NT Land Rights Act. Instead, excisions from pastoral leases can be granted as community-living areas to Aboriginal landholding entities under the Associations Act 2003 (NT).

---

10 White Paper, n 1, 15.
13 COAG, n 12, 22.
14 COAG, n 12, 74.
18 COAG, n 12, 74.
20 COAG, n 12, 74.
Implications of Indigenous Land Tenure Changes for Accessing Indigenous Genetic Resources

and under a variety of other legislation. This is a form of conditional freehold held by more than 100 Aboriginal communities and has been the subject of many proposals for reform to improve the alleged benefits to indigenous communities. Another form of tenure are leases for Aboriginal communal living (town camps) held under the Crown Lands Act 1992 (NT) and Special Purposes Leases Act 1953 (NT), which are also under review.

In Queensland, the Aboriginal Land Act 1991 (Qld) and the Torres Strait Islander Land Act 1991 (Qld) “allow for the grant of inalienable freehold title to Land Trusts and Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) bodies for the benefit of a broader Indigenous group”. Lands that may be transferred to inalienable freehold include Deed of Grant in Trust (DOGIT) lands, Aboriginal and Torres Strait Islander reserve land, State land (but not State waters) declared by regulation to be transferable land and national parks in the Cape York Peninsula Region. There is now a “freehold land option” where specific town land can be made available for regular freehold land, which would fall within the exclusion of the Biodiscovery Act 2004 (Qld). The government is running a pilot program to make freehold available to seven communities, including Napranum and Mapoon in Cape York. At the time of writing, none of the communities have made freehold available. DOGIT lands are generally former indigenous reserves granted under the Land Act 1962 (Qld) as inalienable freehold to indigenous local governments who hold the land on trust for the benefit of indigenous inhabitants.

In Western Australia, 8% of land is freehold while the remaining 92% is administered by the State government. Within this domain, 14.7% is set aside for the benefit of Aboriginal people as reserves, general leases or pastoral leases. Reserve land under the Aboriginal Affairs Planning Authority Act 1972 (WA) is held under the “care, control and management” of the Aboriginal lands trust (ALT) or Aboriginal corporations. Leases for the use and benefit of Aboriginal inhabitants have been issued to Aboriginal Communities, and pastoral leases for Aboriginal corporations have been issued under the Land Administration Act 1997 (WA). The Western Australian government is proposing land tenure reform, including to divest ALT estates to Aboriginal land holders.

The content, nature and incidents of native title are determined by the traditional laws and customs of the Aboriginal and Torres Strait Islander people. In other words, native title is by its nature based


22 Australian Government 2013, n 21, 2. See also Stronger Futures in the Northern Territory Act 2012 (NT) and the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012 (NT).

23 COAG, n 12, 74.


25 COAG, n 12, 75.

26 Aboriginal Land Act 1991 (Qld) s 31.

27 Aboriginal Land Act 1991 (Qld) s 10; Torres Strait Islander Land Act 1991 (Qld) s 9.

28 Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014 (Qld).


30 COAG, n 12, 75.


32 Department of Regional Development and Lands, n 31.

33 COAG, n 12, 77.


35 Mabo v Queensland (No 2) (1992) 175 CLR 1; 66 ALJR 408 (Mason CJ and McHugh J), 15 (Brennan J), 58–63 (Deane and Gaudron JJ), 109–110 (Toohey J), 187 (CLR); Native Title Act 1993 (Cth) s 223.
on traditional ownership. It is possible to have both native title and statutory land rights over the same parcel of land because the grant of statutory land rights does not necessarily extinguish native title. As there may be more than one group of indigenous people with an interest in the same land – the traditional owners under native title and the residential group under the statutory scheme – land tenure reform will alter the existing balance of interests between these groups. There are a variety of reform proposals in relation to native title which are currently under review; however, this article focuses on reform to the statutory schemes.

Under the Native Title Act 1993 (Cth), native title claimants may apply to the Federal Court to have their native title recognised by Australian law. Recent decisions have recognised that a native title right to access and take resources could be exercised for any purpose, either commercial or non-commercial. Native title rights can be either exclusive or non-exclusive possession, although in tidal and sea areas, only non-exclusive native title can be recognised.

Exclusive possession native title is the right to assert sole possession, occupation, use and enjoyment in relation to the land or waters. It includes a right to make decisions about the land or waters and a right to control access. Non-exclusive possession native title rights co-exist with other interests in the land. An example is the right to access and use an area of land or water for ceremony.

A determination of native title is a determination that native title does or does not exist. Native title holders nominate a Prescribed Body Corporate to hold and manage native title on behalf of native title holders. Even before a determination is made, registered claimants will be entitled to various procedural rights, including the right to negotiate. Indigenous Land Use Agreements (ILUAs) are agreements between a native title group and others about the use of land and waters for which there has been a determination (body corporate agreements) or a claim (area agreements). Regarding the latter, in 2017, the Full Court ruled that all “named applicants” to an ILUA have to sign for it to be valid even if they have passed away. However Parliament overturned the effects of the decision in June so that such agreements (including those relating to biological resources in Pt B) remain valid.

Litigation involving indigenous parties and the government highlights where land tenure reform causes the different statutes to converge and conflict. The complexity of the interaction between indigenous forms of land tenure was made plain in the recent case of Dorante v Minister for Natural Resources and Mines; Sabatino v Minister for Natural Resources and Mines heard by Judge Kingham in the Land Court of Queensland. Dorante and Sabatino sought to have leasehold interests granted pursuant to those Queensland laws designed to increase home ownership among indigenous people. At the heart of the case was the

---

36 Leon Terrill, “Converting Aboriginal and Torres Strait Islander Land in Queensland into Ordinary Freehold” (2015) 37 Sydney Law Review 519, 523.
37 Terrill, n 36, 521.
41 COAG, n 12, 22.
42 Native Title Act 1993 (Cth) s 225.
43 Native Title Act 1993 (Cth) Pt 2, Div 3, Subdiv P.
44 Native Title Act 1993 (Cth) Pt 2, Div 3.
46 Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth).
47 Dorante v Minister for Natural Resources and Mines; Sabatino v Minister for Natural Resources and Mines [2017] QLC 15.
48 Namely, the Aborigines and Torres Strait Islanders (Land Holding) Act 1985 (Qld) replaced by the Aboriginal and Torres Strait Islander Land Holding Act 2013 (Qld).
Implications of Indigenous Land Tenure Changes for Accessing Indigenous Genetic Resources

matter that if the proprietary interest had been granted to Dorante and Sabatino, the nature of these leasehold interests meant that they extinguished native title. This matter had to be settled in part because a native title claim is on foot and the State of Queensland is negotiating with the native title claimants (who were interlocutory applicants in these matters). The Court found that the lease interests had been granted and that if the anticipated consequence was the extinguishment of native title, then the State of Queensland which granted the leasehold interests would likely ultimately have to pay monetary compensation to the recognised native title holders. The following section highlights how the conversion to freehold would not only undermine any rights of native title holders to consent for accessing biological resources under ABS legislation but also exclude the owners of freehold title under the statutory scheme to such rights.

One of the biggest problems with an ABS regime predicated upon land tenure in Australia’s native title system is that many determinations do not grant exclusive possession native title (akin to a form of land tenure or occupancy) and even if they do then the determination is likely to be a mixture of exclusive possession and non-exclusive possession native title. Non-exclusive possession (depending upon the rights determined on a case-by-case basis) are generally forms of subsistence-based access to land, waters and resources including biological resources. The analysis of ABS laws in the next section shows that for those laws that afford “consent” rights for accessing biological resources to native title holders with exclusive possession (such as Northern Territory), many native title holders with non-exclusive possession (or a mix) are excluded from protections under these laws. For those jurisdictions that exclude lands subject to rights granting exclusive possession such as Queensland, these holders are excluded from protection while holders of non-exclusive possession may be afforded a certain level of protection. The analysis shows how the different forms of land tenure (summarised in Table 1) and native title produce a complex matrix of consent rights for indigenous peoples and communities depending on the location where a given resource is collected.49

The Kakadu plum (Terminalia ferdinandiana) (also known colloquially as billygoat plum, as gubinge in the Kimberleys, mi marrari near Wadeye, and several other Aboriginal names across the top end) has been used as a food for hundreds and possibly thousands of years by indigenous Australians in the northern regions of Australia. It has been well documented by Gorman et al, Woods and Brand et al50 that the Kakadu plum has a history of traditional use as both a food and medicine by indigenous Australians. The plum is endemic to northern Australia, found in a tropical zone mainly in the Northern Territory, the far north of Western Australia, and to a limited extent in far north Queensland.

The plum has been recognised as one of the world’s highest sources of vitamin C, and therefore it has received considerable commercial interest from different sectors. Given that it is found across three States and Territories, on Commonwealth land and a range of other land tenure types (see Figure 1), it provides a useful case study for considering the relevance of land tenure for access to genetic resources and benefit sharing. Throughout the article, we return to the Kakadu plum case to explain some of the issues and challenges stakeholders and Australian governments face as land tenure reform progresses and as governments prepare to ratify the Nagoya Protocol.

III. RELATIONSHIP BETWEEN INDIGENOUS LAND TENURE AND ABS CONSENT PROVISIONS

The Commonwealth, Northern Territory and Queensland have different requirements for the taking of biological resources within specific land and waters in their jurisdictions. The Commonwealth’s Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) and Environment

49 There have also been questions about whether consent represents a veto right in different contexts such as mining; see L Godden and L O’Neill, “Benefit Agreements with Indigenous Communities: The Native Title Act in Australia” in L Barrera-Hernández, B Barton, L Godden, A Lucas and A. Rønne (eds), Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities (Oxford University Press, 2016) 135–152.

Protection and Biodiversity Conservation Regulations 2000 (Cth) (EPBC Regulation) applies to Commonwealth areas, which includes Commonwealth lands, Australia’s coastal sea and waters out to 200 nautical miles and non-indigenous and indigenous land leased by the Commonwealth.\textsuperscript{51} The latter includes Kakadu National Park, Uluru-Kata Tjuta National Park and Booderee National Park.\textsuperscript{52} It includes Commonwealth areas over which native title exists.\textsuperscript{53} The Northern Territory’s Biological

<table>
<thead>
<tr>
<th>Geographical area</th>
<th>Legislation</th>
<th>Forms of tenure</th>
<th>Land holding bodies</th>
<th>Examples of reform proposals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Native Title Act 1992 (Cth)</td>
<td>Exclusive and non-exclusive possession</td>
<td>Prescribed Body Corporate</td>
<td>2015 Australian Law Reform Commission report</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</td>
<td>Inalienable freehold (in trust)</td>
<td>Aboriginal Land Trust on behalf of traditional owners</td>
<td>Continuing reform of town leases</td>
</tr>
<tr>
<td></td>
<td>Associations Act (NT) Miscellaneous Acts Amendment (Aboriginal Community Living Area) Act (NT) Lands Acquisition Act (NT) Pastoral Land Act (NT) Planning Act (NT)</td>
<td>Community Living Areas (Enhanced NT freehold) or ‘conditional freehold’</td>
<td>Community Living Areas land holding bodies supported by representative associations (eg Land Councils)</td>
<td>Implementing Community Living Areas reform in the Stronger Futures legislation</td>
</tr>
<tr>
<td></td>
<td>Crown Lands Act 1992 (NT) Special Purposes Lease Act 1953 (NT)</td>
<td>Lease in perpetuity for communal living</td>
<td>Town camp land holding bodies supported by representative associations</td>
<td>2017 review into town camps including leasing arrangements</td>
</tr>
<tr>
<td>Queensland</td>
<td>Aboriginal Land Act 1991 (Qld)</td>
<td>Inalienable freehold (in trust)</td>
<td>Existing Land Trusts or Corporations registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</td>
<td>Pilot Project in seven communities to convert inalienable freehold land to regular freehold</td>
</tr>
<tr>
<td></td>
<td>Torres Strait Islander Land Act 1991 (Qld)</td>
<td>Inalienable freehold (in trust)</td>
<td>As above</td>
<td>As above</td>
</tr>
<tr>
<td></td>
<td>Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014 (Qld)</td>
<td>Freehold option</td>
<td>As above</td>
<td>As above</td>
</tr>
<tr>
<td></td>
<td>Land Act 1962 (Qld)</td>
<td>Inalienable freehold (in trust)</td>
<td>Elected Indigenous local government councils</td>
<td>Transferring DOGIT to land under ALA and TSLA</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Aboriginal Affairs Planning Authority Act 1972</td>
<td>Reserve (in trust)</td>
<td>Aboriginal Lands Trust (ALT)</td>
<td>Divesting ALT estate to Aboriginal land holders</td>
</tr>
<tr>
<td></td>
<td>Land Administration Act 1997 (WA)</td>
<td>Leases</td>
<td>Crown</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{51} Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 525; Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) s 8A.04(1).


\textsuperscript{53} Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 8A.04(1)(i).
Resources Act 2006 (NT) applies to all Territory land and sea areas, including crown land within 3 nm, freehold land, Aboriginal land, Aboriginal community-living areas, Park freehold title, land subject to exclusive passion native title and land subject to leases including pastoral leases.\(^54\) Queensland’s Biodiscovery Act 2004 (Qld) has the narrowest scope as it only applies to State land and waters, which specifically excludes freehold and land subject to a native title determination granting rights of exclusive possession.\(^55\) As Western Australia has only implemented the power to regulate ABS in respect of in situ genetic resources,\(^56\) there are no details on how the ABS system would work in practice and it is only mentioned briefly.

This section outlines how land tenure relates to requirements to obtain consent for collecting biological resources from northern jurisdictions. An important factor to keep in mind is that the trigger for ABS in Australia’s current legislation is physical access (taking, collecting, etc) to the biological

\(^{54}\) Biological Resources Act 2006 (NT) s 6.

\(^{55}\) Biodiscovery Act 2004 (Qld) “state land” definition in schedule.

\(^{56}\) Biodiversity Conservation Act 2016 (WA).
resources. Part C outlines some of the international developments that may promote a change in the trigger to one of access and/or utilisation of the biological resource in accordance with the Nagoya Protocol if ratified by Australia. It explains that this would have significant implications for the link between land tenure holders and a right of consent before a resource is taken from their lands and used for their genetic material potential.

A. Commonwealth

Persons (other than resource access providers) seeking to take genetic resources in Commonwealth areas must obtain permission from the Commonwealth by way of a permit issued by the relevant Commonwealth agency (currently Department of Environment and Energy). The exemption of resource access providers from this requirement is interesting, given that there may be more than one resource access provider for biological resources in a particular area. This exemption therefore would mean that they do not need to seek permission from the other providers. Whether the permission or consent of other land holders is required depends on the purpose for taking the resources as the following discussion highlights.

If the taking is for commercial or potential commercial purposes, the applicant must have “entered into a benefit sharing agreement for the biological resources with each access provider”. Access providers are:

• The Commonwealth – for genetic resources on land owned and leased (other than indigenous people’s land and only if the Commonwealth holds a usage right to control access to the biological resources) by the Commonwealth, external territories and Commonwealth marine areas and reserves;

• The owner of the land – for indigenous people’s land under lease by the Commonwealth;

• Native title holders – for areas over which native title exists.

The owner of indigenous people’s land and/or a native title holder must give “informed consent to a benefit-sharing agreement concerning access to the biological resources”. "Land is indigenous people’s land if: (a) a body corporate holds an estate that allows the body to lease the land to the Commonwealth or the Director; and (b) the body corporate was established by or under an Act for the purpose of holding for the benefit of indigenous persons title to land vested in it by or under that Act". In this case, the access provider is the “owner” of the indigenous people’s land who will be afforded a right to consent to access. However, in the case of owners of leased land other than “indigenous people’s land”, each access provider needs only “consult with” the owner of the land before entering into a benefit-sharing agreement. This does not amount to needing consent to take the resources from their land, because in this case, the Commonwealth is deemed to be the “access provider”. When deciding whether to issue

---

57 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 8A.06.
58 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 8A.04(1).
59 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 17.03A(6)(1) (emphasis added).
60 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 8A.02.
62 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 8A.04(1)(c).
63 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 8A.04(1)(i).
64 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 8A.10(1).
65 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 363.
66 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 8A.04(1)(c).
67 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 8A.09.
68 See Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 8A.04(1)(d).
an access permit, the Minister need only take into account the “views” of owners of leased land that were consulted.\textsuperscript{66}

Native title holders are regarded as access providers “if native title exists in relation the area”.\textsuperscript{70} While the language is ambiguous, it is likely that the use of the term “holder” instead of “claimant” means that a determination of native title is required before they can have the rights of access providers. This would exclude many northern communities from consent rights. There is no clarity about whether exclusive or non-exclusive possession is required under the Commonwealth’s framework, which potentially captures more native title holders than the Northern Territory framework that only affords rights to holders with exclusive possession (see below).

The EPBC Regulation provides that a native title holder must give “informed consent” to a benefit-sharing agreement concerning access to biological resources.\textsuperscript{71} While the Minister must be satisfied that an “owner has given informed consent to the benefit-sharing agreement”\textsuperscript{72} when considering whether to issue a permit, there is no similar requirement for the Minister to be satisfied that a native title holder has given “informed consent” if native title exists in the relevant area before issuing a permit. It is unclear whether this is a legislative oversight or if it is intended to be a different level of consent required from native title holders.

The Regulation sets out what the Minister \textit{must} consider when determining if informed consent by land owners has been given. This includes:

(a) whether the access provider had adequate knowledge of these Regulations and was able to engage in reasonable negotiations with the applicant for the permit about the benefit-sharing agreement;
(b) whether the access provider was given adequate time to consult with relevant people, traditional owners and to negotiate the agreement; and
(c) whether the views of (a) and (b) above from land councils or representative bodies within the meaning of the \textit{Native Title Act 1993 (Cth)} where relevant.\textsuperscript{73}

The Minister \textit{may} be satisfied that native title holders have given informed consent if the benefit-sharing agreement “is a registered indigenous land use agreement” and sets out the native title holder’s consent to the issue of the permit.\textsuperscript{74} The differences in what the Minister “must” and “may” be satisfied highlights again the different level of consent required by land owners of indigenous land and native title holders.

Consent provisions are different again in situations where access to biological resources is for non-commercial purposes. In this case, an applicant must obtain the “written permission” of each access provider for the resources to enter the area, take and remove samples from the area.\textsuperscript{75} Where native title interests are affected, an indigenous land use agreement may constitute the “written permission”.\textsuperscript{76} The applicant needs to demonstrate to the Minister that permission was received from each access provider (including land owners and native title holders where relevant) and provide a copy of a statutory declaration undertaking, among other things, not to pass on samples without each access provider’s permission or carry out commercial research without a benefit-sharing agreement with each access provider.\textsuperscript{77}

\textsuperscript{66} \textit{Environment Protection and Biodiversity Conservation Act 1999 (Cth)} s 17.03A(4)(ii).
\textsuperscript{70} \textit{Environment Protection and Biodiversity Conservation Act 1999 (Cth)} s 8A.04 (1)(i).
\textsuperscript{71} \textit{Environment Protection and Biodiversity Conservation Act 1999 (Cth)} s 8A.10(1).
\textsuperscript{72} \textit{Environment Protection and Biodiversity Conservation Act 1999 (Cth)} s 17.03A(6)(a)(iii).
\textsuperscript{73} \textit{Environment Protection and Biodiversity Conservation Act 1999 (Cth)} s 8A.10(2).
\textsuperscript{74} \textit{Environment Protection and Biodiversity Conservation Act 1999 (Cth)} s 8A.10(3).
\textsuperscript{75} \textit{Environment Protection and Biodiversity Conservation Act 1999 (Cth)} s 8A.12(1).
\textsuperscript{76} \textit{Environment Protection and Biodiversity Conservation Act 1999 (Cth)} s 8A.12(3).
\textsuperscript{77} \textit{Environment Protection and Biodiversity Conservation Act 1999 (Cth)} s 8A.13.
The EPBC’s provisions do not apply to biological resources within the Great Barrier Reef Marine Park. This means that a significant area of northern Australia – 344,400 km² including approximately 70 Commonwealth islands and all waters seaward of the low water mark (excluding Queensland internal waters) – is not covered by the Commonwealth’s consent provisions in relation to taking biological resources from indigenous areas. Instead, Great Barrier Reef Marine Park Authority’s permit provisions apply to bioprospecting in the marine park where access and benefit-sharing arrangements are discretionary permitting rather than legislative requirements.

If we consider the Kakadu plum, which is found within Kakadu National Park and surrounding regions, the Commonwealth’s EPBC Act has some jurisdiction here. The Kakadu National Park was declared as a national park under the *National Parks and Wildlife Conservation Act 1975* (Cth) (replaced by the EPBC Act) and is managed through a joint management arrangement between the Aboriginal Traditional Owners and the Director of National Parks. Approximately 50% of the land in the park is Aboriginal land under the NT Land Rights Act, and most of the remaining area of land is subject to claims to traditional ownership under the same Act.80 Outside the NT Land Rights Act areas,81 there is a native title claim over a town lease area in the park.82 Title to Aboriginal land in the park is held by Aboriginal land trusts on behalf of the Traditional Owners.83 The land trusts have leased their land to the Director of Parks Australia for the purpose of a national park for the enjoyment and benefit of all Australians.84

Any person who wants to access biological resources (including the plum) must obtain a permit from the Minister for the Environment. The “access provider” must consent to the taking of biological resources. The access provider for Aboriginal land in Kakadu is the relevant land trust,85 and for non-Aboriginal land, it is the Director of Parks Australia. Section 8A.06(2) of the EPBC Regulation appears to exempt a land trust from requiring a permit for the taking of biological resources from their defined “indigenous people’s land”. Access for commercial research and development (R&D) would mean seeking consent from and establishing benefit sharing with the relevant Aboriginal Land Trust after consulting Traditional Owners of the land where it is Aboriginal land and the views of the Northern Land Council.86 However, if the plum was intended to be collected from the half of the park that is not leased from the Land Trusts (the areas claimed under the NT Land Rights Act by other traditional owners), it appears that the Minister does not need to be satisfied that an applicant sought consent from or consulted with traditional owners in the area. Further, it is unlikely that the native title claimant would be afforded the status of “access provider” with the associated rights of consent if the plum was taken from the claimant area. Even if the claimants had these rights, the legislation is ambiguous about whether the Minister must be satisfied that the native title group gave consent before issuing a permit. This complexity

---

81 Section 210 of the *Native Title Act 1993* (Cth) provides that native title does not affect the operation of beneficial land rights laws, including the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); see COAG, n 12, 74.
82 Director of National Parks, n 80, 120.
83 Director of National Parks, n 80.
84 Director of National Parks, n 80.
85 These are body corporates created under s 4(3) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and so fall within the definition of owner of “indigenous people’s land” under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 363.
86 Director of National Parks, n 80, 183 specifies that “where access is sought to Aboriginal land in the park, the relevant land trust must give ‘informed consent’ to the benefit-sharing agreement, after the traditional owners of the land have been consulted and the views of the NLC obtained”.

570 (2017) 34 EPLJ 560
of land tenure arrangements in one relatively small area of plum distribution demonstrates that taking a biological resource from a Commonwealth Area requires a deep understanding of ownership, rights and interests under statutory land title schemes as well as native title.

B. Northern Territory

Under the Northern Territory’s framework, an applicant must apply for a permit from the relevant agency responsibility for administering the biological resource sought for collection. Before the resource can be accessed, the applicant must have a benefit-sharing agreement with relevant access providers.

“A benefit-sharing agreement is not valid unless the resource access provider has given prior informed consent to the terms of the agreement”. This means, as with the Commonwealth legislation, that the “resource access provider” is central to determining who is responsible for granting access to the genetic resources and who is authorised to enter into benefit-sharing arrangements. The categories of resource providers are broader than the Commonwealth categories. This reflects the broader application of the Biological Resources Act 2006 (NT) to not only Territory land and waters but also private land and other forms of tenure. Resource access providers include the owner of the fee simple in freehold land, Aboriginal land, Aboriginal community-living area, land held under Park freehold title as well as the registered body corporate for land subject to native title (exclusive possession). The Territory government is the access provider for crown land, Territory waters and land subject to a lease under the Special Purposes Leases Act 1953 (NT) and Pastoral Land Act 1992 (NT). This means that Aboriginal land trusts (bodies corporate), community-living areas landholding bodies and registered native title bodies corporate are access providers with rights of consent, but town camp landholding bodies do not have a similar right of consent as they would not fall into the category of access providers (see Table 1).

While the Northern Territory legislation appears to follow the Commonwealth’s approach to consent provisions, it has several important differences. Persons wishing to engage in bioprospecting in the Northern Territory must obtain permission from the relevant permitting agency. Unlike the Commonwealth legislation, the Biological Resources Act 2006 (NT) does not exempt a resource access provider from the requirement to obtain a permit, nor does the type of permission or consent of other land holders depend on whether the taking is for commercial or non-commercial purposes. A bioprospector (a person taking biological samples for research) must enter into a benefit-sharing agreement with each resource access provider of the resources. The permitting agency must decline an application if the Territory is the relevant access provider and a benefit-sharing agreement has not been entered into. The situation is less clear in cases where the resource access provider is not the Territory. In these cases, the CEO of the Department of Primary Industry and Resources need only advise the permitting agency that a benefit-sharing agreement in accordance with the Biological Resources Act 2006 (NT) is in place. There is no clear language that an application must be declined if one is not entered into. This undermines in practice any incentives for having prior informed consent from non-government access providers.

The prior informed consent provisions for benefit-sharing agreements are modelled on the Commonwealth’s EPBC Act provisions but differ in several respects. The Territory CEO must be satisfied.

---

87 For example, the Fisheries Act 1988 (NT) for aquatic life and Territory Parks and Wildlife Conservation Act 2009 (NT) for indigenous flora and fauna.

88 Biological Resources Act 2006 (NT) s 27(3).

89 Biological Resources Act 2006 (NT) s 6.

90 Biological Resources Act 2006 (NT) s 11.

91 Biological Resources Act 2006 (NT) ss 4–5.

92 Biological Resources Act 2006 (NT) s 27(1).

93 Biological Resources Act 2006 (NT) s 18(1)(b).

94 Biological Resources Act 2006 (NT) s 20.
that “the” resource access provider has given prior informed consent to the terms of the benefit-sharing agreement.\textsuperscript{95} This differs from the EPBC Regulation requirement for consent from “each” access provider and supports the argument above that there is less certainty for achieving prior informed consent from non-government access providers in practice. To determine whether there has been informed consent, the Territory CEO must consider whether the access provider had adequate knowledge of the Act and was given adequate time to consult relevant people and to receive independent legal advice.\textsuperscript{96}

The EPBC Regulation requires the Minister to consider views of any representative indigenous body within the meaning of the \textit{Native Title Act 1993} (Cth) when considering whether informed consent was given to a benefit-sharing agreement, whereas the \textit{Biological Resources Act 2006} (NT) does not.\textsuperscript{97} While the registered native title body corporate can be a resource access provider, this omission excludes the views of native title holders with non-exclusive possession and native title claimants and may undermine “informed” consent in practice by an indigenous access provider. Under the provisions of the NT Land Rights Act, affected communities have an opportunity to express their views about proposed dealings in land, but it is ultimately traditional owners who are the decision-makers. There are a range of affected communities who are not afforded similar protection, for example, on community-living area land and town camps. As with the Commonwealth legislation, however, the authority holder must get permission for physical access to the resource from the person who controls the physical access.\textsuperscript{98}

In summary, the broader categories of indigenous tenure holders appear to give indigenous people more opportunity to be access providers from whom informed consent is required for ABS. Access to Kakadu plum within Northern Territory’s jurisdiction, for example, might occur with prior informed consent and benefit sharing of communities with inalienable freehold and community-living area land, but it could also be indigenous and non-indigenous owners of the fee simple in freehold land. Similarly, under s 29 of the \textit{Biological Resources Act 2006} (NT) “reasonable benefit-sharing arrangements, including protection for, recognition of and valuing of any indigenous people’s knowledge to be used” can be expected if researchers were directly utilising indigenous knowledge of Kakadu plum. But the Act adds a significant caveat, limiting realistic benefits for indigenous knowledge holders, “knowledge is not indigenous person’s knowledge if it was obtained from scientific or other public documents, or otherwise from the public domain”.\textsuperscript{99}

There are some limitations, however, to the Territory’s framework in practice. Aboriginals in “town camps” with a lease in perpetuity for communal living would not be entitled to consent provisions nor would native title holders with non-exclusive possession and native title claimants (as at 2015, there were 167 active claims applications\textsuperscript{100}). In other words, there is a significant geographical area of Northern Territory where Aboriginal peoples are not entitled to consent for accessing their resources. The ongoing reform of land tenure where NT Land Rights Act Aboriginal land is being converted into town leases means that the relevant ALT bodies will cease being the access provider (with the associated consent rights) as the land will fall within the category of “land subject to a Crown term lease or Crown perpetual lease” for which the Crown is the only access provider.\textsuperscript{101} This is an example of where changes to land tenure can have a significant impact on the level of consent for accessing biological resources and the operation of ABS legislation in practice.

\textsuperscript{95} \textit{Biological Resources Act 2006} (NT) s 28(1).
\textsuperscript{96} \textit{Biological Resources Act 2006} (NT) s 28 (2).
\textsuperscript{97} \textit{Environment Protection and Biodiversity Conservation Act 1999} (Cth) s 8A.10(2)(d).
\textsuperscript{98} \textit{Biological Resources Act 2006} (NT) s 6(2).
\textsuperscript{99} \textit{Biological Resources Act 2006} (NT) s 29(2)(b).
\textsuperscript{100} COAG, n 12, 74. These claims cannot be on areas already claimed under \textit{Aboriginal Land Rights (Northern Territory) Act 1976} (Cth); see n 81.
\textsuperscript{101} \textit{Biological Resources Act 2006} (NT) s 6(1)(f).
C. Queensland

To take native biological resources in Queensland land and waters, an applicant must have a draft biodiversity plan, which is required for considering whether a collection authority will be issued by the Department of Environment and Heritage Protection. The Biodiscovery Act 2004 (Qld) specifically excludes from its ABS arrangements “land subject to a native title determination granting rights of exclusive possession”. It also excludes freehold land and land (including land in a freeholding lease) contracted to be granted in fee simple by the State.

The only “access provider” for the purposes of taking and using the biological resources is the State, with the exception of land in a State plantation forest. Under the Aboriginal Land Act 1991 (Qld) and the Torres Strait Islander Land Act 1991 (Qld), the laws of the State apply to indigenous land, persons and things on indigenous land, and acts and things done on indigenous land “to the same extent, and in the same way, as if the land were not [Indigenous] land”. This means that the Biodiscovery Act 2004 (Qld) is likely to apply to biological resources in these areas and other areas held on trust for indigenous communities or subject to non-exclusive native title (see Table 1), but that the Queensland government, rather than the tenure holders, are the access providers (with the associated rights of consent) and beneficiaries of the resources’ use.

There are different requirements for giving consent for entry upon the land from which the resources will be taken and consent required to take and collect the genetic resources for biodiscovery purposes. A collection authority applicant “must negotiate access arrangements with the relevant land/water manager, prior to or as soon as practical after a collection authority is issued”. A land/water manager is “the occupier, resident, trustee, trustee lessees, lessees, local, district or regional level government entity that has responsibility and authority in law for activities on a piece of land, or over an area of water”. It is unclear whether this would include a manager on a reserve, DOGIT land or inalienable freehold land. The “holder … must comply with the requirements of all legislation and agreements regarding native title, indigenous rights and the protection of cultural heritage while collecting”.

The only factors that the Department of Environment and Heritage chief executive must consider when deciding whether to issue a collection authority is that the proposed taking and use of the native biological material “(i) is for biodiscovery only; and (ii) conforms with the compliance code and any applicable collection protocols’ and other matters prescribed by regulation”. The codes and protocols are statutory instruments under the Statutory Instruments Act 1992 (Qld) but are not subordinate legislation and therefore not enforceable unless they become a condition of an authority. The Compliance Code “sets out the minimum standards that must be complied with during any collection

---

102 Biodiscovery Act 2004 (Qld) Pt 5, Div 1.
103 Biodiscovery Act 2004 (Qld) Pt 5, Div 2.
104 Biodiscovery Act 2004 (Qld) Pt 3.
105 “State land” definition in Biodiscovery Act 2004 (Qld) s 5 definition schedule.
106 “State land” definition in Biodiscovery Act 2004 (Qld) s 5 definition schedule.
107 In this case, the chief executive must consult with any plantation licensee when considering the application for a collection authority; Biodiscovery Act 2004 (Qld) s 14(2A).
108 Aboriginal Land Act 1991 (Qld) s 32; Torres Strait Islander Land Act 1991 (Qld) s 28.
110 Compliance Code, n 109, Appendix 1, 26.
111 Compliance Code, n 109, code 2.2.3, 6.
112 Biodiscovery Act 2004 (Qld) s 14(2).
113 Biodiscovery Act 2004 (Qld) ss 44–45.
114 Biodiscovery Act 2004 (Qld) s 17.
carried out under a collection authority”, including a buffer zone for protecting indigenous cultural heritage where collection cannot take place.115 The interim Biotechnology Code of Ethics (currently under review) sets out the only requirements for consent provisions in relation to consent from land owners and indigenous peoples. These simply pledge to treat indigenous knowledge with respect and negotiate “reasonable benefit-sharing arrangements with indigenous people and communities”.116 These codes fall short of requiring consent from indigenous land holders for entering their land to take biological resources, and they are not enforceable unless they become a condition of the collection authority.

If we consider access to Kakadu plum under these limited rules, and given its limited distribution in Cape York, while permissions may be required for access to a landholder’s land, the access provider is the State. The applicant would require a benefit-sharing agreement with the Department of Science, Information Technology and Innovation, but there currently seems limited scope for benefit sharing with indigenous land owners and Native Title holders. The conditions of an authority might require negotiation of “reasonable benefit-sharing arrangements” with Aboriginal tenure holders, but this falls far short of prior informed consent. Even this lesser requirement, however, may be under threat for indigenous communities deciding whether to take up the option of converting community inalienable freehold to “freehold” title such as in Mapoon and Napranum in the Cape. If the land becomes freehold, the Biodiscovery Act 2004 (Qld) no longer applies and bioprospectors can take the Kakadu plum from these areas without an authority or benefit sharing. While this proposed change to land tenure is intended for the benefit of the self-governance of the communities, it could have unintended consequences for ABS in respect of biological resources. It is these sorts of dependencies between ABS and land tenure laws that should be taken into account when reviewing policies and laws.

D. Western Australia

In 2016, the Western Australian government enacted the Biodiversity Conservation Act 2016 (WA) which gives the power to make regulations in relation to:

Section 256 (a) A condition authorising bioprospecting activity that requires the licence holder to enter into an arrangement with the CEO or another person for the sharing of profits; and

(b) A condition authorising the taking of fauna or flora that restricts the quantity of fauna or flora that may be taken”.117

As no regulation has been made at the time of writing, an analysis of how the ABS framework may work is purely speculation at this stage.

These profit-sharing agreements would be entered into under the CEO of the Conservation and Land Management Act 1984 (WA)118 or another person although there is no detail about who would be considered to be the resource access provider. The Western Australian government is currently reviewing its ABS arrangements for in situ as well as ex situ genetic resources.119

The Kakadu plum is located in the far north of Western Australia where the Native Title Act 1993 (Cth) (relating to native title tenure) and the Aboriginal Affairs Planning Authority Act 1972 (WA) (relating to reserve in trust) apply (see Table 1 and Figure 1). When policymakers implement ABS legislation and their reforms to land/sea tenure (such as divesting ALT estates to Aboriginal land holders), they should

115 Compliance Code, n 109, code 2.8.1. See also Aboriginal Cultural Heritage Act 2003 (Qld) and the Torres Strait Islander Cultural Heritage Act 2003 (Qld).
117 Biodiversity Conservation Act 2016 (WA) s 256.
118 Biodiversity Conservation Act 2016 (WA) s 5(1).
119 There is a proposed WA Biodiscovery Bill with objectives to provide for an accreditation or certification regime that will be compliant with the Nagoya Protocol. On this basis, it is expected that access seekers will be required to provide evidence of legal access to biological resources through prior informed consent under mutually agreed terms and if involving traditional knowledge in respect of the resources that must have evidence of being acknowledged and have prior informed consent and benefit sharing. A proposed model WA benefit-sharing agreement is also anticipated in order to articulate benefits to a range of the key stakeholders.
consider the challenges that the Queensland and Northern Territory legislation face in ensuring that all relevant land holders are afforded rights of consent to the taking of their biological resources. Western Australia has the opportunity to implement provisions that are compliant with the Nagoya Protocol’s obligations and to seek to create fairer outcomes for everyone (see Pt C).

E. Linking Access and Consent Provisions to Land Tenure – The Kakadu Plum Experience

Depending upon how and where it is accessed, there is some opportunity for benefit-sharing relating to Kakadu plum. There are already several research activities and patents relating to Kakadu plum and as commercial interest grows about a range of its benefits (for cosmetics, nutraceuticals, foods and beverages) these are likely to continue.

The analysis above highlights inconsistencies across northern jurisdictions when it comes to informed consent provisions. The ALTs on behalf of the traditional owners in the Kakadu National Park would be afforded the right of informed consent if the plum is accessed for commercial purposes from the half of the park granted under the NT Land Rights Act and leased back to the Commonwealth. If the plum was taken from the town of Jabiru, the native title claimant would not be entitled to consent, and if the plum was taken from the half of the park not leased from the ALTs, only the Commonwealth government is entitled to consent (but may “consult with” the owner of the land before entering into a benefit-sharing agreement). If the plum is taken from an area adjacent to Kakadu National Park in the Northern Territory that is subject to Aboriginal inalienable freehold, freehold or conditional freehold (community-living areas), the Aboriginal tenure holders would be entitled to informed consent, unless their area becomes subject to a town lease when they would lose their right of consent unless agreed otherwise. Landholding bodies with leases in perpetuity for communal living are also unlikely to be entitled to consent protections. If the plum was taken over the Queensland border in Cape York, none of the Aboriginal landholding bodies would be entitled to informed consent unless it becomes a condition on a collection authority. If the communities in Cape York take up the freehold option in the land tenure pilot project, this entitlement would be lost. If the plum is taken from Western Australian areas, currently only the crown has the entitlement of consent although this is likely to change in the near-future as the ABS framework is developed and land reform progresses.

A specific controversy involving Kakadu plum arose in relation to Australian patent application number 2007205838 filed in 2007 by Mary Kay Inc. on “Compositions comprising kakadu plum extract or açai berry extract”. It was initially unclear where the biological resource had been obtained for the purported research underpinning the patent application. In an interview with SBS World News Radio in 2011, Crayton Webb of Mary Kay Inc. claimed that they “ethically” obtained Kakadu plum from a supplier in the Northern Territory near the Kakadu National Park under a licence issued by the Australian Government. A licence for this access does not appear in the Australian government Department of Environment’s website, nor were representatives of the Northern Territory Government able to identify a valid biodiscovery permit suggesting that this representative of the company was incorrectly conflating access for general commodity trade with access for R&D (triggering ABS obligations in the Northern Territory).

As analysed in Robinson and Raven, Mary Kay Inc. have filed and received another patent in the US and seem to be sourcing their genetic materials through a commercial supplier in another Australian state that does not have ABS laws. The patent states that “Terminalia ferdinandiana (kakadu plum) fruit extract…can be purchased from Southern Cross Botanicals Pty Ltd (NSW, Australia) which was used in


the Examples”.123 This appears to contradict what was said by a company spokesman in 2011. Sourcing the Kakadu plum from NSW, as the patent claimed, unfortunately may serve to circumvent obligations under Australian ABS legislation because NSW has failed to establish ABS regulations or policies.124 This highlights the importance of applying consistent ABS laws across Australia in all States and Territories. Practically speaking, researchers can purchase biological materials commercially without obtaining permits from the relevant Australian authorities and could then take them away overseas or interstate for further research.125 If they are taken offshore, it is likely to be very difficult to enforce the breach of ABS provisions or to establish retrospective benefit-sharing arrangements, unless these foreign countries have “user compliance measures”.

IV. INTERNATIONAL DEVELOPMENTS IMPACTING AUSTRALIA’S ABS

Australia is considering how to implement its obligations under the Nagoya Protocol, which is a legally binding instrument that clarifies ABS obligations and provides mechanisms for information exchange, monitoring and compliance. In 2014, the Commonwealth government released a discussion paper, “A Model for Implementing the Nagoya Protocol in Australia”126 No formal amendments have been proposed for public comment, but given that Australia is a highly biodiverse country and already has legislation in place, it is widely expected by the international community to ratify soon. The Queensland and Western Australian governments are both considering changes to their ABS arrangements. Of particular relevance to this article are the Nagoya Protocol’s obligations for consent of Indigenous Peoples and Local Communities (IPLCs), user measures and the focus on “utilisation” rather than “access” as the trigger for benefit sharing.

Under Art 6(2), the Nagoya Protocol requires parties, in accordance with domestic law, to “take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources”. There is a broad range of scholarship on the meaning of the terms “prior and informed consent” or “approval and involvement”, particularly in relation to accessing and using traditional knowledge127 and principles established under the United Nations Declaration on the Rights of Indigenous Peoples.128 The Australian Human Rights Commission clarified what each element of free, prior and informed consent means in the Australian context.129 Elements missing from Australia’s ABS legislation include the “free” element (no pressure), being informed when there is new information and demonstrating understanding that the indigenous peoples understood the information (eg through the use of an interpreter). In December 2016, the Conference of the Parties to the CBD invited parties and IPLCs to submit their views concerning best practices to

---

128 Such as the “free, prior and informed consent” principle under Art 32, Declaration on the Rights of Indigenous Peoples, UN Doc A/RES/61/295 (13 September 2007) (UNDRIP); The Nagoya Protocol formally recognises the UNDRIP in its preamble.
implement these concepts and proposed Mo’otz Kuxtal Voluntary Guidelines.\textsuperscript{130} Elements from these guidelines that are missing from Australia’s legislation include an application written in a manner and language comprehensible to the relevant indigenous community and culturally appropriate timing and deadlines.\textsuperscript{131}

The \textit{Nagoya Protocol} does not define the meaning of the terms an “established right to grant access”. It is important to mention first that it is a mandatory obligation for each party to take measures with the aim of ensuring that the prior informed consent or approval and involvement of IPLCs is obtained where they have the established right to grant access to genetic resources. This is indicated by the use of the term “shall”.\textsuperscript{132} However, the obligation is to be fulfilled “in accordance with domestic law”, which is language used several times in the \textit{Nagoya Protocol} in the context of IPLCs.\textsuperscript{133} This could imply that each party is free to determine on its own which measures it shall take. It could also mean that each party is at liberty to take measures according to what its domestic law permits or requires. However, some authors are of the opinion that Art 6(2) limits the State’s role to a facilitative one in implementing rights of IPLCs over genetic resources rather than one of determining these rights, which is a view more favourable to community rights.\textsuperscript{134} Australia needs to consider its approach to “established rights to grant access” as prescribed by existing domestic laws like native title or whether there is an opportunity here to take a more facilitative approach (eg to create a mechanism for recognising community protocols). Policymakers need to ensure that amending legislation to require an “established right” does not narrow the current categories of indigenous land holders who are eligible as access providers (and entitled to prior informed consent). Similarly, it may be an opportunity to review the categories of land tenure holders who currently do not have a right to consent.

There is an emerging debate surrounding the “trigger” for benefit-sharing obligations – with the text of the \textit{Nagoya Protocol} pointing towards “utilisation” as the trigger. Article 3 of the \textit{Nagoya Protocol} on its scope states that, “[T]his Protocol shall apply to genetic resources within the scope of Article 15 of the Convention and to the benefits arising from the utilization of such resources”. Article 2 defines utilisation of genetic resources as “to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention”. Furthermore, Art 5(1) of the \textit{Nagoya Protocol} specifies, “[I]n accordance with Article 15, paragraphs 3 and 7 of the Convention, benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention. Such sharing shall be upon mutually agreed terms”. The joint reading of Arts 2, 3 and 5(1) leads to the interpretation that the trigger for benefit sharing is utilisation rather than access.\textsuperscript{135} This has significance for the Australian system which focuses primarily on access as triggering permit and benefit-sharing requirements.

In other jurisdictions that have ratified the \textit{Nagoya Protocol}, we are seeing different approaches to whether utilisation or access (or both) are the trigger for benefit sharing and this could be problematic

\textsuperscript{130} Conference of the Parties to the Convention on Biological Diversity, \textit{Decision adopted by the Conference of the Parties to the Convention on Biological Diversity}, 13\textsuperscript{th} mtg, Agenda Item 14, CBD/COP/DEC/XIII/18 (17 December 2016) annex.

\textsuperscript{131} Conference of the Parties to the Convention on Biological Diversity, n 130; Mo’otz Kuxtal Voluntary Guidelines, guideline 17 (note that the guidelines do not apply to traditional knowledge associated with genetic resources under the Nagoya Protocol).

\textsuperscript{132} Greiber et al, n 127, 100.

\textsuperscript{133} See also Nagoya Protocol, n 6, Arts 5(2), 7 and 12(1).


for international consistency. In the EU Regulations, Art 2.1. reads, “[T]his Regulation applies to genetic resources over which States exercise sovereign rights and to traditional knowledge associated with genetic resources that are accessed after the entry into force of the Nagoya Protocol for the Union’ and access is defined as ‘the acquisition of genetic resources or of traditional knowledge associated with genetic resources in a Party to the Nagoya Protocol’’. This has left some non-governmental organisations and developing countries with concerns that “new utilisations” of genetic resources transferred in the past and held in genebanks, herbariums, university and company collections will not be covered by the EU Regulations. Other countries such as Namibia have explicitly indicated that access and utilisation trigger benefit-sharing obligations. The Namibian Bill indicates, “10. (1) A fair and equitable share of benefits from access and utilisation of biological and genetic resources and associated traditional knowledge must accrue to the concerned right holders”.

In order for Australia to ensure it captures “new utilisations” and not just new attempts to access genetic resources for R&D, it could consider adopting language in its legislation like Namibia, requiring that access and utilisation trigger benefit sharing. If the laws focus solely on access, then new research might be conducted on those accessed genetic resources without additional benefit sharing to the indigenous land holders, unless the permit or benefit-sharing provisions prohibit new utilisations. On the other hand, if the law focuses entirely on “utilisation”, then it may be difficult to trace the indigenous land holder with established rights over the resource in their land or sea area if the resource has passed through a number of hands. A consistent approach to the triggers of access and utilisation across Australia’s jurisdictions is necessary to avoid the kind of ABS forum shopping that occurred in the Kakadu plum example above. If utilisation becomes a trigger, policymakers need to think carefully about the types of labelling and reporting requirements as well as compliance mechanisms for ensuring that the original providers can be traced for users to obtain informed consent.

V. Conclusion

Laws and policy relating to ABS and indigenous land tenure are in a state of flux to the detriment of the fair use and sharing of Australia’s biological resources. Although guided by principles of national consistency, each Australian jurisdiction has implemented or is proposing to implement ABS obligations to suit their own policy agendas. This has resulted in slight but significant differences in indigenous peoples and communities entitled to provide informed consent before a biological resource is accessed from their land or waters for biodiscovery purposes. This article demonstrated the connection between access provider provisions and land tenure legislation and the complex array of rules surrounding who might be entitled to informed consent for the taking of the Kakadu plum on their land – and who misses out purely on the basis of geography.

Added to this complexity is the progress of reforms to indigenous land tenure in each jurisdiction, which may potentially change the nature of the tenure held by an indigenous land holder. These reforms

---


137 Lassen et al, n 135, 8.


140 Another important gap in Australia’s legislation is that it does not yet have user compliance measures (eg ensuring that any use of genetic resources within their jurisdiction respects the providers’ legislation requiring prior informed consent); see Evanson Chege Kamau and Gerd Winter, “An Introduction to the International ABS Regime and a Comment on Its Transposition by the EU” (2013) 9 Law, Environment and Development Journal 106; See also, Robinson and Von Braun, n 138.
Implications of Indigenous Land Tenure Changes for Accessing Indigenous Genetic Resources

such as town leases in the Northern Territory and “freehold option” land in Queensland are progressing largely with the intent to benefit the indigenous land tenure holders for self-determination and economic development reasons. However, this article demonstrated that they could have unintended adverse consequences for indigenous land holder’s rights of consent to the taking of biological resources in these areas.

The reviews across northern jurisdictions about how ABS laws could become more compliant with International obligations under the Nagoya Protocol have either the potential to exacerbate the intricate connection between access provider provisions and land tenure legislation or the potential to resolve some practical difficulties for Australia’s geographically based system of ABS. Moving towards utilisation as well as access as a trigger for ABS could ensure that the communities originally providing the biological resources are afforded informed consent for subsequent uses of their resources. More effective recording and compliance mechanisms could ensure that the communities entitled to informed consent can be easily traced if utilisation becomes a trigger. More consistent application of the categories of indigenous land holders across Australia who have a right to grant access could avoid unfair outcomes where the resources are located across geo-political borders. Ultimately, developing an ABS system that is more inclusive for land holders and not so vulnerable to political agendas of land tenure reform would be a positive step towards the fair and equitable sharing of the benefits of Australia’s biological resources.