



Australia's Biodiversity Conservation Strategy 2010-2020

Submission to the National Biodiversity Strategy Review Taskforce

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We welcome this opportunity to offer input into Australia's Biodiversity Conservation Strategy 2010-2020. This submission focuses on "Priority for Change 3: Knowledge for all" and "Priority for Change 5: Involving Indigenous Australians". Our particular interest lies with ensuring that Indigenous knowledge holders are engaged with in a manner that recognises their prior rights over their own knowledge and intellectual property. As the Preamble of the recently endorsed *United Nations Declaration on the Rights of Indigenous Peoples* states, we need to; "Recognis[e] that respect for Indigenous Knowledge, cultures and traditional practises contributes to sustainable and equitable development and proper management of the environment".

We further draw the Secretariat's attention to the following relevant clauses from the *United Nations Declaration on the Rights of Indigenous Peoples*:

Article 29 (1). Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for Indigenous peoples for such conservation and protection, without discrimination.

Article 32 (1). Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of flora and fauna, oral traditions, literatures, designs ... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and cultural expressions.

Article 32 (2). In conjunction with Indigenous peoples, States shall take effective measure to recognise and protect the exercise of these rights.

Article 32 (1). Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

It is crucial that the sentiment within these Articles begins to be translated into action in the Australian context. This Review is an opportune moment to ensure that this occurs. This submission offers suggestions and recommendations as to how the Commonwealth can take such "effective measure[s]" in the recognition and protection of these rights. To this effect, it is laudable that there is an increasing recognition of Indigenous people's particular interests in conservation and biodiversity, and indeed that Indigenous people's access to, and presence on,

country and their use of the biodiversity resources of country are regarded as essential elements of management of country (p. 75 – Appendix 8).

However, there is systemic failure in *enabling* this recognition; that is, there is no framework through which Indigenous knowledge can be both protected and managed. The significant section “Indigenous peoples and Australia’s biodiversity” almost appears an afterthought in the form of Appendix 8. We strongly recommend that **Indigenous Knowledge Management Guidelines** are developed as a matter of priority to service the diverse range of actions (under objectives 5.2 and 5.3- pp. 39 and 40) for use of this knowledge. It is clear that the statement “Indigenous knowledge is owned by the Indigenous peoples who hold the knowledge, and is protected by Traditional intellectual and cultural property rights and protocols” (p. 75 – Appendix 8) cannot be put into practise without a regulatory framework. This framework would need to provide for benefit sharing regimes, free prior and informed consent processes, the management of the intellectual property that develops from NRM research and the storage and repatriation of research materials, for instance. It would need to be embedded across the Priority Actions. There is no linkage provided between Traditional knowledge systems and their treatment and protection under Common Law.

The “equal sharing of knowledge and perspectives” (p. 38) cannot take place equitably without ensuring that Indigenous knowledge holders in NRM have access to supportive and regulatory resources that guide best-practise. We draw the Secretariats’ attention to attachment 1 – the International Society of Ethnobiology (ISE) Code of Ethics.¹ This code recognises that “culture and language are intrinsically linked to land and territory, and cultural and linguistic diversity are inextricably linked to biological diversity” (2008:4).

This submission is closely informed by recent work that Holcombe and Janke have undertaken in the Northern Territory for the Natural Resource Management Board of the NT. Over the course of a year we were tasked with developing a suite of resources to ensure systematic management of Indigenous Cultural and Intellectual Property. See attachments 2 and 3. We draw the Secretariats attention to the following 3 resources². Resources 1) and a section of 3) are attached:

- 1) Guidelines for Indigenous Ecological Knowledge Management (including archiving and repatriation) – for all researchers
- 2) Handbook for Working with Indigenous Ecological Knowledge and Intellectual Property (Maintain and Strengthen your Culture) – for Aboriginal people
- 3) Report on the Current Status of Indigenous Intellectual Property – for policy and lawmakers

Although the principles, ethical engagement practices and the IP management advice these resources espouse are transferrable, their limitation is that they are

¹ http://ise.arts.ubc.ca/common/docs/ISE%20COE_Eng_rev_24Nov08.pdf

² All 3 of these resources will be available on the NRMB NT website in the near future and also on the National Centre for Indigenous Studies – ANU website.

Northern Territory specific. Indeed, we note that the recent Submission by the Indigenous Advisory Committee to Dr Allan Hawke in response to the *Independent Review of the EPBC Act (1999)* also notes that:

“The current arrangement where state/territory jurisdictions are responsible for consultation with Indigenous peoples is failing to provide for effective processes and outcomes. It is our view that establishing a process that is applied consistently across all jurisdictions is of paramount importance” (clause 33. p.7)³

It is clear that the Commonwealth needs to take the lead in setting these standards and developing practical guidelines. However, while we strongly advocate the development of cross-jurisdictional benchmarking resources that set minimum standards for Indigenous knowledge management, we are also conscious of the need to respect the range of local protocols and management tools that already exist within some Indigenous organisations (such as representative bodies). Any new resources should be complementary to these and would provide an architecture for compliance for all researchers (within government, universities and NGOs). They would also aim to offer higher level advice and direction as necessary.

Indigenous knowledge management Guidelines:

We suggest that the development of any national guidelines would have to be underpinned by the Principle of “Active Protection”. This principle promotes the support of: 1) engaging with the knowledge holders and relevant community 2) ensuring that any data generated from Indigenous knowledge holders is returned in an accessible form; and 3) fostering opportunities for inter-generational knowledge transmission. Such active protection ensures engagement with, and respect for, local protocols as these manage customary knowledge. Crucially, it has to be recognised that Indigenous knowledge of biodiversity is as much about practise, as it is about content. That is; it is about the *activity* of cultural transmission, as much as it is about the knowledge that is taught. Thus, the sharing of this knowledge has to be managed in such a way that respects Indigenous customary knowledge protocols. Knowledge is *not* for all in the Indigenous knowledge ‘economy’.

Intellectual Property laws and Indigenous Knowledge

It is unfortunate that Australian courts and the Federal Parliament have failed, thus far, to provide comprehensive protection in respect of Indigenous traditional knowledge.

It is true that von Doussa J of the Federal Court of Australia has shown judicial innovation in a number of cases – most notably, the “Carpets” case, and the “Bulun Bulun” decision. However, there have been limits to the extent of judicial innovation in Australia – as illustrated by the refusal of the High Court of Australia to recognise the linkage between native title rights and traditional knowledge in the case of *Ward v Western Australia*. The case law has demonstrated that there is a need for a more

³ <http://www.environment.gov.au/epbc/review/submissions/pubs/210-iac.pdf>

fundamental legislative reform of laws with respect to traditional knowledge in Australia.

Unfortunately, the Australian Parliament has thus far failed to heed the recommendations of Terri Janke's landmark report, *Our Culture, Our Future*. The previous Howard Government showed little interest in the protection of traditional knowledge. A Federal bill on the recognition of communal moral rights in respect of copyright works created by Indigenous communities has not been implemented. Thus far, there have only been piecemeal reforms. The authenticity trade marks scheme, which was set up in 2000, has collapsed.

The new Rudd Federal Government has yet to establish its priorities in respect of the protection of traditional knowledge. It has expressed an interest in establishing a right of resale – which would have the potential to benefit Indigenous artists and communities. However, this legislative bill has been contentious and will have to be amended, partly because it was based upon questionable constitutional assumptions.

Ideally, there is a need to **develop sui generis protection** in respect of Indigenous intellectual property in Australia. Public servants have been prone to scoff at such a suggestion. We think that it is an entirely reasonable and sensible approach. We note that the Australian Parliament has seen fit to provide sui generis protection in relation to such specific areas as geographical indications, circuit layouts, plant breeder's rights, lending rights, and performers' rights. We think that it is discriminatory to provide such industrial areas with special intellectual property rights protection, but to deny similar privileges to Indigenous traditional knowledge holders.

We are of the belief that the United Nations *Declaration on the Rights of Indigenous Peoples* provides an important blueprint for law reform in Australia. See especially Article 31 (1) and Article 31 (2), outlined earlier. If sui generis legislation is not enacted, at the very least, there needs to be a comprehensive reform revision of existing intellectual property laws. The *Intellectual Property Laws Amendment Bill 2008*⁴ (South Africa) provides a possible model for such an approach.

Access to Genetic Resources

We are of the strong view that Australia's Biodiversity Conservation Strategy 2010-2020 is poorly served by the existing environmental laws with respect to access to genetic resources.

We are concerned that Australian Governments have implemented the obligations with respect to access to genetic resources under the *Rio Convention on Biological Diversity* 1992 in a partial and fragmentary way.

⁴ <http://www.thedti.gov.za/ccrd/ipbills.htm> The site for the South African notice, policy and bill.

We are of the view that the access to genetic resources scheme established by *Environmental Protection and Biodiversity Conservation Amendment Regulations (No 2) 2005* has a number of significant limitations and deficiencies, in terms of its form and practice.

The regime fails to fulfill the objective stated in Division 8A.01 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) of “recognising the special knowledge held by indigenous persons about biological resources.”

Critically, the provisions in Division 8A.2 and 8A.3 of the *Environment Protection and Biodiversity Conservation Regulations 2000* draw a distinction between access to genetic resources for commercial and non-commercial purposes.

We note the **absence of permits on the register in respect of commercial benefit-sharing** in Australia:

<http://www.environment.gov.au/biodiversity/science/access/permits/apply.html>

In practice, this means that the regime is not generating commercial benefits to be shared with Indigenous communities and groups. As a result, the regime has not achieved any capacity for meaningful benefit-sharing.

The lack of commercial permits also indicates a significant level of non-compliance with the regime by the large number of public and private bio-prospecting entities in Australia.

There are problems with the process established in Division 8A.4 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth). The relevant Minister should undertake greater scrutiny of both commercial and non-commercial applications affecting Indigenous communities and groups.

Notwithstanding Australian and international controversies over biopiracy of Indigenous genetic resources, 8A.06 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) provides for paltry remedies in the event of non-compliance with this regime. We note, too, that there has been no enforcement action taken under the regime thus far. We think that the Commonwealth regime should follow the lead of the Queensland regime for access to genetic resources, which provides for meaningful remedies. Consequently, the access to genetic resources scheme will need to be established in a legislative form, and not left to the regulations.

There is a **lack of national harmonisation with respect to access to genetic resources regime**. The *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) establish a regime, which is quite different in substance from both the *Biodiscovery Act 2004* (Qld) and *Biological Resources Act 2006* (NT). Moreover, the failure of other states and territories to implement specialist regimes in respect of access to genetic resources has resulted in very patchy coverage across Australia. Consequently, Indigenous groups and communities enjoy varying degrees of rights and interests in respect of access to genetic resources.

There is also a pressing need for **regional harmonisation in respect of access to genetic resources**. The Sorcerer II Expedition demonstrated that major multi-national bioprospecting projects can involve a range of nation states in Australasia and the Pacific. Many neighboring countries to Australia have not established regimes to provide for protection in respect of access to genetic resources. Indeed, New Zealand has not yet implemented a regime – it has been waiting for the ruling in the WAI 262 Treaty of Waitangi claim.

Indigenous Engagement on the WIPO IGC⁵

We strongly suggest that the government representatives who attend the WIPO Inter-Governmental Committee (IGC) on intellectual property, genetic resources, traditional knowledge and folklore consult with Indigenous people, regarding IGC work. This includes inviting Australian Indigenous expertise to comment on the draft provisions for the protection of traditional knowledge. This includes resourcing for this Indigenous expertise. We also suggest that the government representatives provide information to Indigenous people or their representatives on the work of WIPO in this area.

Native Title Law

The Federal Government should amend the *Native Title Act* 1993 (Cth) to expressly provide that native title rights include traditional knowledge and Indigenous intellectual property.

Recommendations:

- 1) Develop national Guidelines to manage Indigenous knowledge in NRM
- 2) These Guidelines would ensure a systematic approach to working with Indigenous knowledge in NRM across Australia
- 3) They would need to be developed collaboratively with Indigenous people and actively engage with the principles in the *United Nations Declaration on the Rights of Indigenous Peoples*; to “maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge...” (Article 32.1).
- 4) Develop sui generis legislation to protect Indigenous intellectual property
- 5) Provide for a comprehensive, nationally consistent scheme for access to genetic resources, which offers meaningful protection of traditional knowledge and substantive benefit-sharing with Indigenous communities;
- 6) Amend the *Native Title Act* 1993 (Cth) to provide for traditional knowledge and Indigenous IP within native title rights
- 7) Support Indigenous engagement with the WIPO IGC

⁵ <http://www.wipo.int/tk/en/igc/> and http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html