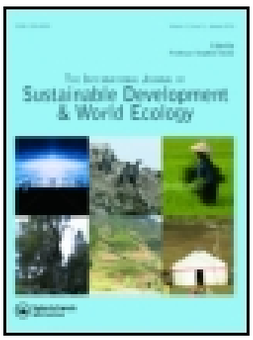

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The potential of current legal structures to support Aboriginal and Torres Strait Islander interests in the Australian bush food industry

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There are complex connections between Australia's native plants and first peoples, the Aboriginal and Torres Strait Islander peoples. The maintenance of these connections is central to Aboriginal and Torres Strait Islander culture and well-being and the tangible realisation of Australian policy commitments. Diverse cultural connections combine with other motivations to underpin an array of Aboriginal and Torres Strait Islander interests in the commercial development of traditional plant foods ('bush foods'). Despite nation-wide policy support for these interests, there is no national legal framework to support them. This fortifies the popular call for a new (*sui generis*) law that transforms the interests of Aboriginal and Torres Strait Islander peoples into enforceable legal rights. It is unclear the extent to which a single *sui generis* law might help Aboriginal and Torres Strait Islander peoples realise their diverse interests in the development of gourmet bush food products and new bush food varieties. It is also unlikely that Australia will implement such a law in the near future. This paper offers a preliminary study of the capacity of current legal structures to support some key Aboriginal and Torres Strait Islander interests that might arise in these two development contexts. The study can inform the future development of practical legal strategies to support the diverse interests of Aboriginal and Torres Strait Islander peoples in the bush food industry.

Keywords: native plants; cultural heritage; food and agricultural sector; Indigenous knowledge; intellectual property rights; genetic resources

Introduction

Australia comprises mostly arid and semi-arid regions, fringed by some temperate and tropical regions along the coast (Wolfe 2009; Wells 2013). 'Apart from Antarctica, Australia is the driest continent in the world', with nearly 35 per cent classified as desert (Geoscience Australia 1994). Australia is also one of the most biologically diverse countries, with 'a staggering 24,000 species of native plants … identified compared to England's 1700 native plants' (Wells 2013a). Threats to one species pose a risk to the whole system, including human life (CBD 2000). Key threatening processes include land clearance, hard-hoofed animal grazing, altered land management techniques and introduced species and diseases (DEH 2004). Overharvesting is also a concern for some high-demand species (OEH 2013; see also DEHP 2015). This concern partially explains an increased government interest in the horticultural production of native plants (see e.g. ANBG 2013).

The wild harvesting of Australian native plants occurs in a variety of industries, such as the cut flower, essential oil, cosmetic, pharmaceutical, and bush food industry. Each industry uses native plants in different ways, with different uses attracting different legal rules. This paper explores two development pathways in the Australian bush food industry. Specifically, it explores the relationship between current Australian legal structures and Aboriginal and Torres Strait Islander interests in the development of gourmet food products and new bush food varieties. The aim is to explore the potential of existing legal arrangements to better support the diverse interests of Aboriginal and Torres Strait Islander peoples in these two development contexts. The paper is an initial step in a broader research project that aims to develop practical legal strategies to support the diverse interests of Aboriginal and Torres Strait Islander peoples in the Australian bush food industry.

It begins with an overview of the two development pathways and relevant Aboriginal and Torres Strait Islander interests. It then outlines the status of current research on laws to improve support for these interests in these contexts. The substantive discussion explores the compatibility of key interests with current Australian legal regimes and some innovative uses of these structures that advance overall support for Aboriginal and Torres Strait Islander interests.

Overview of development pathways and Aboriginal and Torres Strait Islander interests

The Australian bush food industry comprises many sole traders and small-to-medium enterprises that exploit native plants in different ways (Clark 2012). For instance, an Aboriginal and Torres Strait Islander family in remote Australia may collect and process wild fruits for on-sale to community stores and traders; traders may then on-sell

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to food manufacturers (Bryceson 2008; Cleary 2012). A non-Aboriginal and Torres Strait Islander entity may grow and process domesticated or new bush food varieties in a horticultural environment ('commercial growers') and sell processed ingredients to manufacturers (see Bush Food Sensations 2015). A publically funded or private entity may extract a preservative from a bush food to sell to gourmet food manufacturers (Robinson 2010; Brann 2015) or develop a new bush food variety to license or sell to production nurseries or commercial growers (see e.g. IP Australia 2004). The array of entities forms the network of users operating in the Australian bush food industry.

The development pathway of each user is likely to be unique, shaped by the personal preferences of the developer and the specific legal arrangements those choices attract. However, it is possible to identify some commonalities between pathways that produce the same product. For instance, common stages that gourmet food manufacturers may undertake include the following:

- Sourcing samples and supply
- Research and development
- Securing finance and business licenses
- Product manufacturing
- Product marketing; and
- Product distribution and/or sales

Common stages that plant breeders may undertake include the following:

- Project planning and financing
- Research and development
- Acquisition of rights to exclusively exploit new varieties
- Product marketing
- Licensing of exploitation rights and rights to use marketing materials; and
- Production and sale of new variety

This paper focuses on those two development pathways. The aim is to explore the interests that Aboriginal and Torres Strait Islander peoples may have along these paths and scope the potential of Australian legal regimes to support them. The paper does not offer a detailed examination of specific laws or propose law reform recommendations. The paper instead builds upon current research to lay the foundations for those studies.

The interests of Aboriginal and Torres Strait Islander peoples in these contexts

Aboriginal and Torres Strait Islander peoples share the commitment of all Australian governments to conserve our native plants (NRMMC 2010; DOH 2012). For Aboriginal and Torres Strait Islander peoples, conservation embodies their role as first stewards of Australian lands and resources and their belief that all species, lands and peoples are interconnected (Rose 1996; Merne 2011; Drahos 2011). However, biodiversity conservation is not the only interest Aboriginal and Torres Strait Islander peoples have expressed in relation to the transformation of their traditional plant foods ('bush foods') into gourmet food products or new plant varieties. The interests of Aboriginal and Torres Strait Islander peoples in these contexts are highly varied, reflecting distinct customary legal systems, roles in society, relationships with resources, political aspirations, economic motivations, personalities and capacities (see e.g. Cleary et al. 2009; Evans et al. 2009; Morse 2010; Merne 2011; Drahos 2011; Holcombe et al. 2011).

Beyond plant conservation, we have identified the following interests from the literature (e.g. Janke 1998; Cleary et al. 2009; Evans et al. 2009; Morse 2010; Merne 2011; Holcombe et al. 2011) and consultations with Aboriginal and Torres Strait Islander peoples:

- Control over access to and the use of bush foods
- Control over access to and use of bush food knowledge
- Fair share of benefits from bush food and knowledge use
- Development of bush food enterprises and partnerships
- Transfer and maintenance of bush food knowledge; and
- Participation in relevant law, policy and decision-making

The non-binding *United Nations Declaration of the Rights of Indigenous Peoples* 2007 considers these interests to be part of a putative set of rights, support for which is essential to 'the survival, dignity and well-being of the indigenous peoples' (article 43). This view reflects decades of research and discussions (RA 2013). In 2009, the Australian federal government endorsed the Declaration (Macklin 2009). Soon after, all Australian governments agreed upon a national policy to improve the well-being of Aboriginal and Torres Strait Islander peoples ('Closing the Gap')(Commonwealth 2009). While some programs have resulted in marginal improvements (see Australian Government 2014; SCRGSP 2014), the acute well-being gap between Aboriginal and Torres Strait Islander peoples and others remains (Australian Government 2015). The challenge for Australian governments lies in meeting commitments to conserve biological diversity and safeguard the interests of Aboriginal and Torres Strait Islander peoples in the development of their traditional resources.

The status of research on laws to support Aboriginal and Torres Strait Islander interests in the two development contexts

There is no research directly examining the extent to which the laws that regulate the development of gourmet food products or new bush food varieties support the

diverse interests of Aboriginal and Torres Strait Islander peoples. There is some research on measures to improve participation opportunities for Aboriginal and Torres Strait Islander peoples in the supply chains of gourmet food manufactures (see e.g Miers 2004; Gorman & Whitehead 2006; Cleary 2009, 2012; Cooney & Edwards 2009; Cunningham et al. 2009; Morse 2010; Holcombe et al. 2011). Suggestions include the following:

- Marketing, education and regulatory measures to support Aboriginal and Torres Strait Islander landowners to develop horticultural enterprises
- Enrichment planting and wild harvest research
- Business skills development
- Improved telecommunications and transport logistics
- Independent certification schemes; and
- Statutory protections against commercial competition

There is also some research on how Aboriginal and Torres Strait Islander peoples may control and exploit their wealth of bush food knowledge (Evans et al. 2009; Morse 2010). Proposals here include the use of knowledge databases, contracts, land access protocols and commercial partnerships.

The aforementioned bush food research informs discussions on ways to improve support for the economic participation and knowledge-related interests of Aboriginal and Torres Strait Islander peoples in the development of gourmet food products. Absent from the literature is research that considers measures to support the diverse interests of Aboriginal and Torres Strait Islander peoples along these development pathways and measures to advance the interests of Aboriginal and Torres Strait Islander peoples in the development of new bush food varieties. This paper furthers existing research by bringing together and exploring a range of possible measures to advance the diverse interests of Aboriginal and Torres Strait Islander interests in these contexts.

There is substantial research on the capacity of genetic resource and intellectual property regimes to support the interests of Aboriginal and Torres Strait Islander peoples in their native plants and associated knowledge. This research has progressed alongside international developments. For example, members of the *Convention on Biological Diversity* endorsed the *Nagoya Protocol* in 2010. The Protocol offers domestic legislatures a framework for ensuring genetic resources users have consent to use genetic resources and knowledge owned by Indigenous and local peoples under domestic law and to share the benefits of research with those peoples. The World Intellectual Property Organisation has drafted an instrument to guide domestic legislatures in the implementation of laws to help Indigenous and local peoples control the use of their knowledge according to their customary laws (IGC 2013).

The domestic implementation of these measures may help trigger access and benefit-sharing negotiations with Aboriginal and Torres Strait Islander peoples when others seek direct access to bush foods from their lands or their bush food knowledge. These negotiations are likely to be rare in the development of gourmet food products and new bush food varieties because of the availability of bush foods and knowledge from other sources (see Morse 2005; Cunningham et al. 2009; Merne 2011). This supports an exploration of additional measures to advance the interests of Aboriginal and Torres Strait Islander peoples in these development contexts.

Another proposal in the broader literature concerns the implementation of a new (*sui generis*) law that transforms the diverse interests of Indigenous peoples in their traditional resources and knowledge into enforceable legal rights (see e.g. Swiderska 2006). A challenge facing the development of such a law is the need to reconcile existing legal rights, such as the rights of landowners to control access to plants on their land and the rights of the public to access and use non-secret knowledge with the interests of Aboriginal and Torres Strait Islander peoples. It may take a long time to resolve this conflict and other issues inherent in the transformation of Aboriginal and Torres Strait Islander interests into enforceable legal rights. These matters further the case for an exploration of innovative uses of current legal structures. This paper contributes to that journey by exploring the compatibility of Aboriginal and Torres Strait Islander interests with current legal structures relevant to the development of gourmet food products and new bush food varieties.

Exploration of Aboriginal and Torres Strait Islander interests and their compatibility with current legal structures

This section explores some key interests Aboriginal and Torres Strait Islander peoples have expressed regarding the development of gourmet food products and new plant varieties. Specifically, it explores the following:

- The compatibility between certain interests and current legal regimes relevant to the two development pathways; and
- Some innovative uses of existing legal structures that may advance the interests of Aboriginal and Torres Strait Islander peoples along these paths.

It is a scoping study of current legal regimes, not a detailed examination of specific laws. The intent is to identify some possibilities within existing legal structures that merit closer inspection. The discussion can then inform the development of practical legal strategies to support for the diverse interests of Aboriginal and Torres Strait Islander peoples in the bush food industry. The findings reflect consultations, workshops and field trips over the past five years and a desktop study of international and domestic law, policy and literature.

Control bush food plants

Food manufacturers may seek access to bush foods to investigate a new recipe or make a new product. They may source supply from private gardens, lands under Aboriginal and Torres Strait Islander control, other lands, commercial growers and processors. Plant breeders may seek access to bush food materials to research superior plant qualities. Sources of plant material include the wild and public and private genetic resource collections ('*ex situ* collections').

For Aboriginal and Torres Strait Islander peoples, bush foods are more than scientific objects or 'commodities that can be traded on a weight basis with a dollar value in a profit-driven market place' (Merne 2011, p. 8). They are the basis of ancient stories, songs, artworks, ceremonies and practices through which people strengthen their relationships with lands and resources (Morse 2005; Cunningham et al. 2009; Merne 2011; Holcombe et al. 2011). Bush foods may also be family totems that direct social structures and relationships within and between different peoples (Dodson 2009; Merne 2011; Drahos 2011).

The unique customary laws of each Aboriginal and Torres Strait Islander group may vest certain members with rights and responsibilities in relation to their totem (Merne 2011). These 'bush food custodians' describe the interdependent connection between their holistic health and 'the well-being of their totemic species' (Rose 1996, p. 28). For Aboriginal and Torres Strait Islander peoples, species well-being may involve plant conservation and the maintenance of customary rules regarding species use (Merne 2011). For example, some species 'are so culturally powerful they can only be picked by certain people' and never sold (Merne 2011, p. 20). Infringement of these rules may threaten the well-being of species and clans.

Article 26 of the *United Nations Declaration of the Rights of Indigenous Peoples 2007* ('the Declaration') supports the right of Indigenous peoples to control access to and use of their traditional resources. Article 43 positions this right as one of several essential to Indigenous well-being. Australian government support for the Declaration demonstrates political acceptance of the intrinsic relationship between Aboriginal and Torres Strait Islander peoples, their resources and their well-being. Several national policies confirm this acceptance (e.g. Commonwealth 2009, p. 19; NRMMC 2010, p. 40).

However, international instruments and domestic policy commitments only become law in Australia if enacted in legislation. The Australian federal government has not enacted the Declaration, but it has enacted the *Convention on Biological Diversity 1992* that affirms the sovereign right of nations to determine who owns what resources within their territory (*Environmental Protection and Biodiversity Conservation Act* 1999 (Cth)). The *Nagoya Protocol 2010* affirms this principle by calling on signatory states to ensure researchers have consent to access genetic resources owned by Indigenous peoples *under domestic law* (article 6).

The Australian federation comprises nine jurisdictions (including a federal jurisdiction). Each has the power to make laws with respect to biological resources in their territory, and each follows the property law principle that landowners own the biological resources on their land subject to any law or agreement to the contrary (Voumard 2000). This rule means that only Aboriginal and Torres Strait Islander peoples who own or control access to land can control access to and the use of their traditional resources.

Aboriginal and Torres Strait Islander peoples own or control access to around 25–30% of Australian land under various types of tenure. These include statutory land rights, 'exclusive possession' native title rights that allow holders to exclude others from land, freehold title and contracts with landowners. Legally recognised landowners can use land access agreements to control the terms of access and use of bush foods collected from their lands. They can also incorporate other interests into these agreements, such as control over the use of knowledge collected from people on the land (Swiderska 2006). Landowners might also negotiate future rights to control access to and use of plants collected from their lands and deposited in *ex-situ* collections.

Legally recognised landowners have no legal capacity to control access to and the use of *ex situ* collection samples collected from lands prior to the recognition of their property law rights. However, it would be possible to link specimens stored in public *ex situ* collections to the legally recognised traditional owners of land. For instance, government funders can require a public *ex situ* collection to link the geographical collection coordinates of each specimen with the legally recognised traditional owners of that land and make access to the specimen dependent on negotiation with those owners. This rule could apply regardless of the purpose for which the sample is sought, and regardless of the industry in which the research occurs. This option is limited in that it connects individual specimens to landowners. It does not connect individual specimens to every Aboriginal and Torres Strait Islander group who may have a cultural connection in the species as a whole. On the other hand, granting negotiation rights to multiple groups could result in negotiations that include dozens of people with various needs and aspirations (Lingard 2012). In effect, this may result in no Aboriginal and Torres Strait Islander group having any real control.

Aboriginal and Torres Strait Islander peoples who do not hold legal rights to exclude others from their traditional lands can only control access to and the use of traditional plants from their lands if the landowners agrees. Genetic resource laws enacted in four Australian jurisdictions do not displace these property law principles. They at best affirm the right of Aboriginal and Torres Strait Islander peoples to control access to genetic resources on land they own under domestic property law (see e.g. *Environment Protection and Biodiversity Conservation*

Regulations 2000 (Cth) reg 8A.04; *Biological Resources Act 2006* (NT) s 6).

It seems unlikely that Australian legislatures will radically alter the property law regime by enacting laws that vest Aboriginal and Torres Strait Islander peoples with rights to control access to plants situated on lands they do not legally own. However, it may be possible to use existing legal structures to extend rights to negotiate access to and use of bush food plants to more Aboriginal and Torres Strait Islander peoples. For instance, NSW cultural heritage laws require land developers to consult Aboriginal and Torres Strait Islander peoples who have registered a native title claim to the land before they harm cultural objects or places on that land (*National Parks and Wildlife Act 1974* (NSW) Part 6 Div 2). Native title laws also require some land users to negotiate future uses with registered native title claimants (*Native Title Act 1993* (Cth) Part 2 Div 3). Although the registration of a native title claim does not confer property law rights on the claimants, it would be possible to extend rights to negotiate the harvesting of bush foods on public lands to registered native title claimants. There is of course a risk that negotiation rights will vests in groups later determined by a court to have no traditional connection to the land.

An additional consideration in the creation of any legal duty to negotiate with Aboriginal and Torres Strait Islander peoples is the potential for power imbalances to frustrate negotiation processes and outcomes (ATSISJC 2009; Stoianoff 2009; Hunt 2013). Complementary strategies to assist in the effective implementation of a duty to negotiate might include support for Aboriginal and Torres Strait Islander groups to develop access protocols specifically for their bio-cultural resources (Bavikatte & Jonas 2009; ATSISJC 2009) and requirements for outside parties to comply with these instruments (ATSISJC 2009). These protocols can reflect 'the core ecological, cultural and spiritual values and customary laws relating to their [knowledge] and resources' and 'provide clear terms and conditions to regulate access' (Bavikatte & Jonas 2009, p. 9).

Control knowledge

Aboriginal and Torres Strait Islander bush food knowledge is localised, transmitted between generations through cultural practices and oral expressions and refined over time in response to changing environments (Merne 2011). Practical bush food knowledge that gourmet food manufacturers and plant breeders may seek includes the following:

- Land management techniques to promote plant growth and conservation
- Processing and cooking methods to eliminate toxins and maximise health benefits
- Selection, harvesting and storage processes to maximise raw material quality
- Varietal characteristics and differences; and
- Growing habits, seasonal availability and flavour combinations (ATSISJC 2008; Merne 2011).

Knowledge may also relate to spiritual matters, including plant naming protocols and customary laws surrounding the sharing of bush food stories, songs, ceremonies and art (Merne 2011). Bush food developers may also be interested in using cultural stories to market products or promote ethical business practices.

'The rights to Indigenous traditional knowledge are generally owned collectively' by a group (ATSISJC 2008, p. 213), with certain individuals entrusted with specific rights and duties (ATSISJC 2008; Merne 2011). Rights may include making decisions in relation to the use of that knowledge (ATSISJC 2008); responsibilities may include ensuring knowledge use accords with customary law (Merne 2011). For example, customary law restricts the availability of some knowledge, 'even to members of the particular group' (ATSISJC 2008, p. 213). Customary rights and responsibilities underpin the call for outsiders to negotiate knowledge use 'with appropriate knowledge holders' (Merne 2011, p. 19).

There is international support for the rights of Indigenous peoples to control the use of their knowledge. Article 8(j) of the *Convention on Biological Diversity 1992* calls on states to promote the wider use of Indigenous biodiversity knowledge 'with the approval and involvement of the holders of such knowledge'. The *Nagoya Protocol* requires contracting parties to take into consideration customary laws 'with respect to traditional knowledge associated with genetic resources' (article 12) and to take measures to ensure that any knowledge used in plant genetic research 'is accessed with the prior and informed consent or approval and involvement of. . .communities' (article 7). The *United Nations Declaration on the Rights of Indigenous Peoples* affirms the right of Indigenous peoples to control access to and the use of their knowledge, innovations and creations in accordance with their customary laws and decision-making institutions (articles 31 and 18). Although Australian governments have endorsed each of these international instruments (Commonwealth 1992, 1992a; NRMMC 2002; Macklin 2009), they have not translated this policy support into a national regulatory framework. Aboriginal and Torres Strait Islander peoples must rely on ad hoc measures to control access to and the use of their bush food knowledge.

Aboriginal and Torres Strait Islander landowners can require people who access their land to obtain consent to use confidential knowledge collected while on the land. Federal law requires researchers who access genetic resources from land owned or leased by the federal government to prove they have consent to use confidential knowledge provided directly by an Aboriginal and Torres Strait Islander person (*Environment Protection And Biodiversity Conservation Regulations 2000* (Cth) reg 8A.08(j)). Both of these measures are limited to

Aboriginal and Torres Strait Islander landowners. Agreement-making potential is further limited by the availability of bush foods and genetic material from other sources and the extent of publically available knowledge on developed species (see e.g. Isaacs 1987; Cherikoff & Isaacs 1991; Stewart & Percival 1997). The ready availability of a lot of bush food knowledge also limits the scope of laws designed to allow any person to control the use of their confidential knowledge and trade secrets. An Aboriginal and Torres Strait Islander person can sue others for breach of an express or implied agreement regarding the use of this knowledge (Martin & Jeffrey 2007), but these proceedings are expensive and difficult to prove.

Australian law only allows people to control the use of publically available knowledge if it is subject to an intellectual property right that grants such control (e.g. *Patents Act 1990* (Cth) s 13). Intellectual property regimes aim to balance the need to access knowledge to innovative with the need to inspire people to innovate by offering something in return. As such, an intellectual property right grants the individual or corporate holder a time-limited right to exclusively exploit an invention (*Patents Act 1990* (Cth) s 13), new plant variety (*Plant Breeder's Right Act 1994* (Cth) s 11), literary or artistic work (*Copyright Act* (Cth) s 31) or trade mark (*Trade Marks Act 1995* (Cth) s 20). In return, the rights holder agrees to release the subject matter into the public domain at the end of the protection period where it is free for anyone to use (*Patents Act 1990* (Cth) s 67; *Plant Breeder's Right Act 1994* (Cth) s 22; *Copyright Act* (Cth) s 33; *Trade Marks Act 1995* (Cth) s 72).

The intellectual property regime does not reflect the perpetual obligations of Aboriginal and Torres Strait Islander knowledge holders to control the use of their knowledge according to customary law. Some rights even permit the use of knowledge during the protection period. For instance, copyright does not prohibit a food manufacturer from using a copyright recipe to make a new gourmet food product (IP Iustitia 2014). The regime does not recognise collective ownership rights, unless the collective is also a corporation.

These disparities, and the costs and resources required to secure and enforce many intellectual property rights, make the intellectual property regime ill-suited to helping Aboriginal and Torres Strait Islander peoples control the use of their knowledge. This allows others to exploit a lot of Aboriginal and Torres Strait Islander knowledge without consequence. In recognition of this inequity, Australian intellectual property authorities have instituted ongoing consultations on how to safeguard the rights of Aboriginal and Torres Strait Islander peoples to control the use of their knowledge (IP Australia 2012). One possibility is knowledge registers and databases that allow knowledge holders to register their interest in publically available knowledge (Alexander et al. 2004; Waitangi 2011; WIPO 2012). While registration may not create rights to control the knowledge (Waitangi 2011, pp. 92–93), it may help ensure intellectual property examiners reject applications for inventions or creations that derive from it (Alexander et al. 2004). Amendments to existing Plant Breeder's Rights and patent laws to require applicants to disclose the source of any native plant materials and Aboriginal and Torres Strait Islander knowledge used in the development process might further this objective (Rimmer 2003).

Legal researchers have considered the merit of creating a new intellectual property right that vests Indigenous peoples with perpetual rights to control the use of their knowledge (see e.g. Sand 2003; Verma 2004; Kuruk 2007; OseiTutu 2011; Forsyth 2012). The general proposition is that the new law would recognise collective rights in knowledge, impose a duty on users to obtain collective consent to use knowledge and require users to share the benefits of use with the collective (see e.g. Janke 1998, 2009; Smallacombe et al. 2007). The proposals mirror treaty provisions drafted by a dedicated intergovernmental committee at the World Intellectual Property Organisation in 2013 (IGC 2013).

Although *prime facie* appealing, problems may arise with identifying members of the collective (Forsyth 2012) and the external imposition of ownership rights on undefined groups. A new intellectual property law is also only likely to extend protection to confidential knowledge and only up until the time it becomes public (see e.g. IGC 2013). Finally, as Stoianoff argues:

> [W]hat is often being sought is a license to use such knowledge, and this is just another contract. As with any contractual arrangement the question of 'equal bargaining power' resounds. Is more regulation required to deal with this? (Stoianoff 2009, p.311).

An alternative to regulating contractual negotiations is increased support for Aboriginal and Torres Strait Islander peoples to develop bio-cultural access protocols that articulate their needs and expectations concerning their knowledge (Swiderska 2006; Bavikatte & Jonas 2009).

Fair share of benefits resulting from plant and knowledge use

'Over generations, Aboriginal people have selected hundreds of species that are edible from among thousands of native plant species' (Merne 2011, p. 19). Colonial researchers have published a lot of this knowledge, mostly prior to discussions on the ethics of securing Aboriginal and Torres Strait Islander consent (e.g. Maiden 1889). This knowledge has contributed to scientific understandings and bush food development (Miers 2004; Morse 2005; Cunningham et al. 2009; Merne 2011, p. 14; Holcombe et al. 2011; Lee 2012).

Although of benefit to science and industry, publication deprives Aboriginal and Torres Strait Islander peoples of the capacity to exploit the knowledge as confidential business information (WIPO 2015). Species custodians and knowledge holders would like compensation for

these losses and remuneration for the continued contribution of this knowledge to bush food research and development (Merne 2011, pp. 6–8, 23). They would also like to ensure a fair share of benefits from specific authorised uses of their plants and knowledge (Merne 2011, pp. 28–29).

Article 28 of the *United Nations Declaration on the Rights of Indigenous Peoples* affirms the right of Indigenous peoples to 'fair and equitable compensation' for the unauthorised use of their traditional resources. The *Convention on Biological Diversity* and *Nagoya Protocol* encourage countries to implement measures to ensure Indigenous peoples receive an equitable share of any benefits resulting from the use of their biodiversity knowledge or genetic resources (*Convention on Biological Diversity* article 8(j); *Nagoya Protocol* articles 5, 7). Australian governments have committed to implementing these instruments (Commonwealth 1992, 1992a; NRMMC 2002) and to improving the economic circumstances of Aboriginal and Torres Strait Islander peoples (Commonwealth 2009). Australian governments also acknowledge the need to include the private sector in measures to achieve this goal (Commonwealth 2009).

Despite these commitments and acknowledgements, few laws support the compensation and remuneration of Aboriginal and Torres Strait Islander peoples for the use of their plants and knowledge. Aboriginal and Torres Strait Islander peoples with rights to control access to land may negotiate benefit-sharing arrangements with people who want to take plants from that land (Voumard 2000). Three Australian jurisdictions make permits to access wild genetic resources dependent on commitments to share any future commercial benefits with Aboriginal and Torres Strait Islander peoples who contribute knowledge to the research process (*Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.08; *Nature Conservation Act 2014* (ACT) s 211; *Biological Resources Act 2006* (NT) s 29). The public availability of bush food knowledge, and the availability of raw materials from commercial growers and *ex situ* collections, may explain why there are few examples of 'substantive payments or other benefit-sharing returns to Aboriginal and Torres Strait Islander groups' from bush food development (Merne 2011, p. 23). Another reason may be the lack of legal obligation on commercial growers and *ex situ* collections to share their profits with Aboriginal and Torres Strait Islander peoples.

It is possible to draw on several existing legal and institutional frameworks to improve this situation. Benefit-sharing requirements for genetic resources and associated knowledge demonstrate the capacity of law to require plant and knowledge users to share commercial benefits with Aboriginal and Torres Strait Islander peoples. The capacity of law to regulate compensation schemes is demonstrated by the valuation and causation arrangements for claims by injured workers (e.g. *Workers' Compensation and Rehabilitation Act 2003* (QLD); *Workers' Compensation and Injury Management Act 1981* (WA)) and car accident victims (e.g. *Motor Accidents Compensation Act 1999* (NSW)). The Australian Government has made voluntary contributions to the *International Treaty on Plant Genetic Resources for Food and Agriculture* benefit-sharing fund to support food and agricultural development opportunities in developing countries (FAO 2012).

These frameworks demonstrate the capacity of Australian law to accommodate a national framework for the equitable sharing of profits from gourmet product and new plant variety development. For example, the law might make permits to grow or harvest native plants, or access *ex situ* specimens, dependent on the payment of royalties into a central fund, for distribution to traditional owner groups with geographical connections to the species. Such a scheme may help transform the current welfare-funding model into a model based on recognition of foregone opportunities and industry contributions. Even a small share of the $215 million dollar farm-gate value of bush foods may make a big difference to Aboriginal and Torres Strait Islander peoples.

Development of enterprises and partnerships

The economic development interests of Aboriginal and Torres Strait Islander peoples may include the following:

- Wild harvest enterprises
- Manufacturing enterprises
- Plant production operations
- Nursery operations; and
- Commercial partnerships

The *United Nations Declaration on the Rights of Indigenous Peoples* asserts the right of Indigenous peoples to develop their traditional resources in accordance with their own priorities and agendas (articles 3, 21, 23, 32). This reflects a global consensus on the minimum standards necessary for the dignity and well-being of Indigenous peoples (article 43). It also reflects the notion of 'self-determined development', where Indigenous peoples draft their own development models to capture their unique identity, systems and aspirations (Bamba 2010).

Australian governments recognise the critical relationship between culture and 'emotional, physical and spiritual well-being' (Commonwealth 2009, p. 19) and the need to support development models that 'recognise and build on the strength of Indigenous cultures and identities' (Commonwealth 2009, p. 19). In 2009, all Australian governments agreed to work together to improve Aboriginal and Torres Strait Islander economic independence (Commonwealth 2009, p. 30) and to 'engage with Indigenous Australians' in this process (Commonwealth 2009, p. 9). Australian governments have invested hundreds of millions of dollars in this goal (Gardiner-Garden 2013).

Despite the policy rhetoric and recent findings that wildlife enterprises have the potential to further

'multiple desired outcomes' (DAA 2005, p. 236), recent reports suggest Aboriginal and Torres Strait Islander culture is 'poorly addressed' in the design of development programs and services (Hunt 2013, p. 17). This is unsurprising in light of reports that in remote areas, 'one in five [Indigenous people] experience difficulty in understanding or being understood by service providers' (Commonwealth 2009, pp. 208). It is also unsurprising in light of the emphasis on increasing mainstream employment rates for Aboriginal and Torres Strait Islander peoples (see e.g. Australian Government 2015, p. 2). These matters suggest a preference for government-developed plans and programs (see ONTC 2012, p. 55). This top-down approach seems unnecessary in light of the demonstrated capacity of Aboriginal and Torres Strait Islander peoples to draft their own development models. For instance, the Indigenous Stock Exchange attracts many Aboriginal and Torres Strait Islander peoples wanting to connect with commercial partners willing to support their business plans and ideas (ISX 2014).

There is debate about whether Australian law should entrench Aboriginal and Torres Strait Islander rights to self-determined development (HRCC 2009). Pending the outcome of such major issues, the removal of smaller legal barriers may yield results. For example, removing commercial use restrictions imposed on some Aboriginal and Torres Strait Islander land might increase commercial harvesting opportunities for landowners (DAA 2005, p. 233–235; DOH 2012). There seems no reason why the law cannot limit these restrictions to threatened species only.

There is a risk that the removal of commercial use restrictions may create 'freedom without opportunity', what Noam Chomsky calls 'the devil's gift' (Bamba 2010, p. 2). For example, most land held by Aboriginal and Torres Strait Islander peoples is in very remote areas (DAA 2005, p. 231; NNTT 2015, 2015a):

> Indigenous people in remote Australia face many challenges in developing viable resource-based industries, in particular the tyranny of distance, limited infrastructure, lack of capital and few opportunities to raise capital on land held under inalienable title. Education, training and technical support are also constrained (Whitehead et al. 2006, p. iii)

Service providers might focus on measures to mitigate these impacts on remote peoples in conjunction with the requisite implementation of government-directed plans and programs. It may also be possible to implement a streamlined land and resource access procedure for Aboriginal and Torres Strait Islander peoples who do not own or control land (Cooney & Edwards 2009, pp. 57–58). Existing processes can take over a year and result in landowners and governments demanding royalties for each plant picked (Cooney & Edwards 2009, pp. 8–9, 41, 46). Streamlined procedures might involve devolving some decision-making power to the local level, such as decisions on the small-scale harvesting of non-threatened species (Cooney & Edwards 2009, p. 57).

Transmit and maintain knowledge

Aboriginal and Torres Strait Islander peoples have expressed an interest in transmitting and maintaining their knowledge in accordance with their traditions (Janke 1998, 2009; Smallacombe et al. 2007; Merne 2011; HRC 2012). Relevant traditions include the following:

- The sharing and refining of knowledge in cultural practices such as wild harvest
- The storing and passing of knowledge through oral expressions such as story; and
- The maintenance of the language in which knowledge is stored.

Threats to these traditions limit the capacity of knowledge holders to transmit and maintain their bush food knowledge (ATSISJC 2008; HRC 2012).

The *United Nations Declaration on the Rights of Indigenous Peoples* affirms the right of Indigenous peoples to maintain their knowledge, practices and expressions (articles 11, 31, 34). The *Convention on Biological Diversity* calls on States to preserve and maintain Indigenous 'knowledge, innovations and practices' relevant to biodiversity conservation (article 8(j)). Australian governments support these instruments and recognise the value of Aboriginal and Torres Strait Islander knowledge to biodiversity conservation (NRMMC 2010; Commonwealth 1992; e.g. *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(g)).

Aboriginal and Torres Strait Islander people who own or control access to around 30% of land can carry out cultural practices on that land and in doing so maintain and transmit their bush food knowledge. Most Australian jurisdictions also allow members of traditional owner groups who do not hold property rights to carry out non-commercial cultural activities on public land. This right does not extend to privately owned land. This may explain reports that 'the preservation of...traditional knowledge is under threat' (ATSISJC 2008, p. 214). Key threatening processes include limited access to traditional lands and a loss of language through successive English education policies (ATSISJC 2008; Rose 1996). Threats to the demand for wild harvest produce may also result in young people not wanting to participate in arduous harvesting tasks (Cleary 2012).

The Australian government aims to halt the loss of Aboriginal and Torres Strait Islander knowledge through the funding of around 700 Aboriginal and Torres Strait Islander rangers (DOE 2015). The rangers manage national reserve land in accordance with government conservation objectives (DOE 2015; DOE 2010). The jobs allow rangers to transmit and maintain knowledge in cultural practices that correspond with government

objectives (DOE 2012, p. i-iv). The survival of the ranger program depends on ongoing government funding (DOE 2012; p. 2). Government funding agreements generally prevent the unauthorised use of secret and sacred knowledge. However, they typically grant the federal government a worldwide, royalty-free license to use other resources developed by rangers, such as booklets and plant calendars. This limits the capacity of rangers to control and exploit knowledge integrated into project materials.

Outside the ranger program, Aboriginal and Torres Strait Islander peoples who want to share knowledge through oral expressions risk losing control over the story, song or knowledge if it becomes publically available. This risk may stop Aboriginal and Torres Strait Islander peoples sharing important bush food knowledge. It may be possible for the law to allow identifiable Aboriginal and Torres Strait Islander authors to control the use of knowledge contained within written or oral works. This might provide knowledge holders with the confidence to share important biodiversity knowledge without having to forgo the right to control its use (Drahos 2000).

Participation in law, policy and decision-making processes

The *United Nations Declaration on the Rights of Indigenous Peoples* affirms the rights of Indigenous peoples to be involved in legislative or administrative processes that affect their interests (articles 3, 18). The Declaration deems the minimum standard of involvement to be good faith consultations, with a view to obtaining the free, prior and informed consent of affected peoples (article 19). Tara Ward contends:

> Although a customary international legal principle that addresses indigenous peoples' full right to FPIC [free, prior and informed consent] does not yet exist, there is a clear consensus within international human rights jurisprudence that at a minimum States must engage in good faith consultations with indigenous peoples prior to the exploration or exploitation of resources within their lands or actions that would impact their traditionally used resources (Ward 2011, pp. 54–55).

All Australian governments have pledged to involve Aboriginal and Torres Strait Islander peoples in planning and decision-making processes that affect their interests (Commonwealth 2009). This reflects the value of inclusion to Aboriginal and Torres Strait Islander well-being (Commonwealth 2009; Hunt 2013). Australian governments have also agreed to provide effective mechanisms for Aboriginal and Torres Strait Islander peoples to participate in natural resource planning and decision-making processes (Commonwealth 1992). Such processes include the making of flora laws, species management plans and conservation declarations and the granting of permits to pick or grow native plants.

There is no national framework to facilitate these commitments and few legal avenues to support the active participation of Aboriginal and Torres Strait Islander peoples in resource law, policy or decision-making. Some laws support the sharing of land management responsibilities with traditional landowners (e.g. *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ss 384-390A; *National Parks and Wildlife Act 1974* (NSW) Part 4A). More common is the requirement for government agencies to invite public submissions on draft resource plans (e.g. *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 303FR; *Flora and Fauna Guarantee Act 1988* (Vic) s 14). Participation in decision-making is limited to landowners and managers with rights to exclude others from land. In some cases, the right may extend to people with a cultural interest in the decision (*Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27). These provisions fall short of good faith consultations that strive for consent (ONTC 2012).

A particular challenge in supporting the meaningful involvement of Aboriginal and Torres Strait Islander peoples in the making of relevant laws, policies and decisions is the legal priority accorded to scientific information (e.g. *Nature Conservation Act 2014* (ACT) Part 2.4; *Threatened Species Conservation Act 1995* (NSW) s 129; *National Parks and Wildlife Act 1972* (SA) s 15; *Threatened Species Protection Act 1995* (Tas) s 8; *Flora and Fauna Guarantee Act 1988* (Vic) s 8). This priority conflicts with the equal value accorded to Aboriginal and Torres Strait Islander knowledge in more recent biodiversity laws (e.g. *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(g)). There seems no reason why other relevant laws cannot reflect this modern acknowledgement.

The Maori peoples in New Zealand also have limited capacity to participate in government processes related to their totemic species and knowledge (Waitangi 2011a). The New Zealand government funds the Waitangi Tribunal to investigate these issues. Although criticised for its lack of power and political influence (Tauri & Webb 2011), the Tribunal offers a caution of value to Australian governments:

> What we saw and heard in sittings over many years left us in no doubt that unless it is accepted that New Zealand has two founding cultures, not one; unless Māori culture and identity are valued in everything government says and does; and unless they are welcomed into the very centre of the way we do things in this country, nothing will change. Māori will continue to be perceived, and know they are perceived, as an alien and resented minority, a problem to be managed with a seemingly endless stream of taxpayer-funded programmes, but never solved (Waitangi 2011, p. xxiv).

Existing laws that vest traditional landowners with rights to co-manage public land demonstrate the capacity of law to provide for the meaningful involvement of Aboriginal and Torres Strait Islander peoples in resource law, policy

and decision-making. Although these laws only cover a few public parks, there is no reason why other laws cannot adopt a similar model. For instance, biodiversity laws might require relevant government agencies to consult traditional owners before making species management plans. The agency might identify traditional owner groups through data on species growing locations. The law might facilitate effective consultations by requiring the agency to comply with each group's resource access protocol or engagement policy.

Where to from here?

This review suggests that domestic incorporation of the principles contained in the *United Nations Declaration on the Rights of Indigenous Peoples* is unlikely to be simple. It will require the development of many strategies through detailed negotiations with affected peoples and the countering of tendencies to prioritise Western values, such as property ownership, scientific evidence and mainstream employment. Notwithstanding, the paper highlights the possibility of removing some legal barriers to improve support for Aboriginal and Torres Strait Islander interests in the development of gourmet bush food products and new bush food varieties. The existence of other laws that recognise Aboriginal and Torres Strait Islander values, such as native title and cultural heritage laws, reinforce this potential. Also promising is the government recognition of the need to support cultural relationships and improve Aboriginal and Torres Strait Islander well-being.

It is unlikely a single reform can address the diverse interests of Aboriginal and Torres Strait Islander peoples in the development of gourmet food products and new bush food varieties. This paper suggests value in exploring a package of complementary legal and institutional strategies to advance the interests of Aboriginal and Torres Strait Islander peoples in these two contexts. Such a package may include popular law reform proposals and innovative uses of existing legal arrangements. Of additional value to the development of practical strategies to support Aboriginal and Torres Strait Islander interest in these contexts would be a series of case studies that identify some practical realities that occur along these pathways. A detailed examination of the extent to which specific laws regulating these pathways support the interests of Aboriginal and Torres Strait Islander peoples would assist in identifying gaps in legal support and feasible intervention to help close those gaps. The closing of these gaps may have a positive impact on the well-being gap between Aboriginal and Torres Strait Islander peoples and others.

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