Background

One aim of the Plant Business project is to identify how laws and institutions (public and private) can support the interests of Aboriginal and Torres Strait Islander peoples in the commercialisation of their traditional plant foods ('bush foods').

This brief provides an overview of research findings in relation to the capacity of laws and institutions to provide for the meaningful involvement of Aboriginal and Torres Strait Islander peoples in the governance processes that shape bush food development.

The aim of the brief is to further discussion and investigation of options to strengthen the position of Aboriginal and Torres Strait Islander peoples in the development of their traditional foods.

Context of bush food resource governance

Aboriginal and Torres Strait Islander knowledge has contributed to the commercial development of over 15 bush food species, including macadamias, desert raisins and Kakadu plums. Bush food products include nursery seedlings, new plant varieties and gourmet sauces and jams. These commercial pathways form part of a ‘bush food commercialisation system’.

There is little legal support for Aboriginal and Torres Strait Islander interests in this multi-million dollar system. The meaningful involvement of Aboriginal and Torres Strait Islander peoples in the legislative and administrative processes that shape the system can provide an avenue for Aboriginal and Torres Strait Islander peoples to assert their diverse bush food interests.

While more inclusive governance pathways are likely to intrude upon commercial freedoms, they may also be necessary to ensure bush food development is fair for all stakeholders.

This brief proposes some possible ways for governments to better support the meaningful involvement of Aboriginal and Torres Strait Islander peoples in the governance processes of key bush food resource authorities.
Biosecurity and export authorities

Biosecurity authorities determine interstate trade rules for plants and plant products. Export authorities make decisions regarding the overseas transport of plants and plant products, including what plants and products to regulate, and the conditions of trade for regulated material.

Issues with current legal avenues for involvement

- Interstate trade and export rules do not specifically require the authorities to consult Aboriginal and Torres Strait Islander peoples on trade decisions.
- International law supports the issuing of international plant trade certificates to people that have agreements with Indigenous peoples who own or control access to plants under domestic law, or provide knowledge for use in plant genetic research, but Australian law does not make export dependent on these agreements.

Possible ways for government to improve involvement

- Amend interstate trade and export rules to encompass Aboriginal and Torres Strait Islander peoples and their interests in decisions regarding the trade of bush food plants and products.
- Restrict the interstate trade and export of bush food products to those harvested, grown or made in compliance with a legally valid species management plan, developed in partnership with Aboriginal and Torres Strait Islander peoples, with an appropriate certificate issued to this effect.

Environmental authorities

Among other things, environmental authorities administer laws related to the scientific and commercial use of wild native plants (‘native plant laws’). Specific governance processes supported by these laws include deciding whether to list a species as threatened, and specifying the rules for taking, growing and selling native plants. Environmental authorities also issue permits to take, grow and sell bush foods in accordance with those rules.

Issues with current legal avenues for involvement

- Native plant laws allow any person to make a written submission on a draft species management plan, and impose no obligation on the authority to specifically consider the views or interests of Aboriginal and Torres Strait Islander peoples.
- Native plant laws do not require environmental authorities to consult Aboriginal and Torres Strait Islander peoples on decisions to permit the taking of native plants from the wild.
- Threatened species laws prioritise formal scientific information, and impose no obligation on the authority to specifically consider the knowledge, views or interests of Aboriginal and Torres Strait Islander peoples.
Possible ways for government to improve involvement

- Amend native plant laws to ensure Aboriginal and Torres Strait Islander peoples and their knowledge are formally part of the system for flora management and development.
- Amend native plant laws to ensure environmental authorities consider the knowledge and interests of Aboriginal and Torres Strait Islander peoples when making relevant plans and decisions.
- Amend native plant laws to ensure Aboriginal and Torres Strait Islander representation on relevant advisory boards, to strengthen their voice in planning and decision-making.
- Support environmental authorities to exercise their existing legal power to make species management plans in collaboration with:
  - Aboriginal and Torres Strait Islander peoples with cultural links to specific species
  - species commercialisers
  - food authorities responsible for issuing relevant licenses.
- Species management plans should include strategies that:
  - build respect for Aboriginal and Torres Strait Islander culture
  - engage Aboriginal and Torres Strait Islander peoples in decision-making
  - help Aboriginal and Torres Strait Islander peoples realise their aspirations.
- Amend native plant laws to require any person seeking a permit to take or grow bush foods, or make or sell a bush food product, to comply with the plans, and issue a certificate of compliance to facilitate trade.
- Resource the involvement of Aboriginal and Torres Strait Islander peoples in these governance processes, to support processes that address power imbalances e.g. resource the use of trained facilitators and translators, and the equitable payment of all participants.

Food authorities

Food authorities determine permissible ingredients for food products, product label requirements and food business licensing conditions. They also issue licenses to food businesses. The Australian government classifies bush foods as "novel food" ingredients, and regulates their development under Standard 1.5.1: Novel Foods in the Food Standards Code.

Issues with current legal avenues for involvement

- Standard 1.5.1: Novel Foods makes no special provision for the knowledge or interests of Aboriginal and Torres Strait Islander peoples in the development of bush food products.
- The terms of reference for the Novel Food Advisory Board require a social scientist to advise on traditional food uses, with no special

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- The terms of reference for the Novel Food Advisory Board require a social scientist to advise on traditional food uses, with no special
provision for the knowledge or voices of Aboriginal and Torres Strait Islander peoples.

Possible ways for government to improve involvement

- Amend Standard 1.5.1: Novel Foods to require food authorities to obtain advice on novel food regulations and traditional food uses from Aboriginal and Torres Strait Islander peoples, and ensure Aboriginal and Torres Strait Islander cultural experts enjoy the same conditions as other experts.
- Revise the terms of reference for the Novel Food Advisory Board to provide for Aboriginal and Torres Strait Islander representation, and resource meetings processes that minimise power imbalances e.g. resource the use of trained facilitators and translators, and the equitable payment of all participants.

Intellectual property authorities

Australia’s intellectual property authority (IP Australia) administers applications for patents, Plant Breeder’s Rights, trademarks and industrial designs. This involves publishing intellectual property applications, considering objections to applications and maintaining intellectual property registers.

Issues with current legal avenues for involvement

- Although the law requires one person to represent Aboriginal and Torres Strait Islander peoples on the Plant Breeder’s Rights Advisory Committee:
  - the position has been vacant since 2012
  - there are moves to abolish to Committee.
- Although IP Australia must advertise intellectual property applications in intellectual property journals, and maintain intellectual property registers:
  - IP Australia has no process to inform Aboriginal and Torres Strait Islander peoples of applications regarding native plants
  - IP Australia is not required to consider cultural views in determining objections to intellectual property applications.

Possible ways for government to improve involvement

- Revise intellectual property application requirements to ensure all applications related to native plants are clearly designated, and subject to arrangements to ensure that Aboriginal and Torres Strait Islander interests are identified and considered e.g. through the registration and notification of traditional custodians with geographical links to the species.
- Assist Aboriginal and Torres Strait Islander peoples to object to intellectual property application, possibly through the establishment of an Aboriginal and Torres Strait Islander expert panel.
Ensure all panel participants are fairly remunerated and treated as technical experts.

Research and collection management authorities

Research and collection authorities include the Rural Industries Research and Development Corporation, other rural research organisations, and public herbariums and seed banks. These authorities set relevant research agendas, fund and conduct research, maintain specimen collections and information databases, and determine access conditions for collections and databases.

Issues with current legal avenues for involvement

- There is no legal requirement to include Aboriginal and Torres Strait Islander peoples in the deliberations of these authorities.
- Aboriginal and Torres Strait Islander peoples can attach conditions to specimens collected from their land, but specimens can and have been collected before the introduction of Aboriginal and Torres Strait Islander land rights.

Possible ways for government to improve involvement

- Amend the legal instruments (e.g. laws and funding agreements) underpinning these authorities to require:
  - at least one Aboriginal and Torres Strait Islander person to be included in the deliberations of these authorities when they consider issues which have the potential to involve Aboriginal and Torres Strait Islander interests
  - specimen access decisions to reflect specific consultation with the traditional custodians of the land from where the specimen was collected
  - consultation with Aboriginal and Torres Strait Islander peoples in the development of research plans and collection management policies that potentially relate to native plants.
- Resource the involvement of Aboriginal and Torres Strait Islander peoples in these governance processes, to support processes that address power imbalances e.g. resource the use of trained facilitators and translators, and the equitable payment of all participants.

Industry authorities

Industry authorities include Australian Native Food Industry Limited, Nursery and Garden Industry Australia, Horticulture Innovation Australia and Australian Macadamia Society. These authorities have the power to influence bush food research priorities and set industry codes of conduct.
Issues with current legal avenues for involvement

- No relevant industry authority constitution requires Aboriginal and Torres Strait Islander representation in the deliberations of industry authorities.
- Only the Constitution of the Australian Native Food Industry Limited requires board members to consider Aboriginal and Torres Strait Islander interests.

Possible ways for government to improve involvement

- Encourage industry authorities to amend their Constitutions to require:
  - Aboriginal and Torres Strait Islander peoples to be represented on governing boards
  - Consultation with Aboriginal and Torres Strait Islander peoples in the setting of industry research priorities
  - The development of industry codes of conduct in partnership with Aboriginal and Torres Strait Islander peoples.
- Help industry authorities to resource the involvement of Aboriginal and Torres Strait Islander peoples in these governance processes, to support processes that address power imbalances.

Further information

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Research Partners of the CRC-REP Plant Business Project
Background

One aim of the Plant Business project is to identify how laws and institutions (public and private) can support the interests of Aboriginal and Torres Strait Islander peoples in the commercialisation of their traditional plant foods (‘bush foods’). Bush food products include processed raw ingredients, gourmet sauces, jams and pies and new varieties of bush food plants.

This brief provides an overview of research findings in relation to the capacity of laws and institutions to support Aboriginal and Torres Strait Islander interests in the development of gourmet sauces, jams and chutneys.

The aim of the brief is to further discussion and investigation of options to strengthen the position of Aboriginal and Torres Strait Islander peoples in the development of their traditional foods.

Context of gourmet product development

Aboriginal and Torres Strait Islander knowledge has contributed to the commercial development of over 15 bush food species, including Kakadu Plums, quandongs, wattle seed and desert raisins.

The market value of all bush food products is unknown. Recent estimates put the sale of raw bush food materials at over $A18 million a year (excluding macadamia), with the sale of products derived from these materials potentially increasing this figure by 500% (Clarke 2012). Macadamia sales account for a further $A200 million (AMS).

Aboriginal and Torres Strait Islander peoples have diverse interests in this commercial context, including:

- the control of plants and knowledge according to customary law
- a fair share of the benefits from plant and knowledge use
- respect and compensation for their contributions to product development
- the development of bush food enterprises and partnerships
- the transfer and maintenance of knowledge to younger people.

This brief proposes some possible ways for governments to improve support for Aboriginal and Torres Strait Islander interests at key development stages.
Samples and supply

This stage may involve seeking samples to experiment with, securing raw ingredients to make products with ('supply'), and transporting samples or supply interstate to the place of manufacture.

Current possibilities

- Aboriginal and Torres Strait Islander peoples who control access to land can negotiate support for their interests in agreements with people wanting to harvest on their land.
- Aboriginal and Torres Strait Islander peoples who control access to land can harvest or grow bush foods on that land, subject to any law or agreement to the contrary.
- Traditional land custodians who do not control access to land can negotiate agreements with landowners that allow them to harvest or grow bush foods on the land.
- Any Aboriginal and Torres Strait Islander person can apply for permission to commercially harvest bush foods on public land.

Issues

- Land access agreements between non-Aboriginal and Torres Strait Islander harvesters and Aboriginal and Torres Strait Islander landowners are rare because a lot of lands are in remote areas and difficult to get to, and most popular ingredients are readily available from commercial growers.
- There is no legal requirement for commercial growers to consider the interests of Aboriginal and Torres Strait Islander peoples.
- The government can prohibit the commercial harvest of a species on the grounds that the species is threatened, without full consideration of Aboriginal and Torres Strait Islander interests.
- Aboriginal and Torres Strait Islander peoples who want to harvest and sell wild produce need things that may be difficult to secure, for example, access to land, government permission, transport to harvest areas, access to buyers, and reliable supplies of seasonal produce.
- Aboriginal and Torres Strait Islander peoples who want to grow and sell horticultural produce need things that may be difficult to secure, for example, access to land, money and training to adapt to non-traditional production methods.

Possible ways for government to improve the situation

- Create a national register of traditional land custodians, including as a starting point Aboriginal and Torres Strait Islander groups with freehold title over land, native title holders, registered native title claimants and traditional custodians party to land use agreements.
Create specific laws to regulate the harvesting and growing of bush foods on public and private land and:

- require non-Aboriginal and Torres Strait Islander harvesters to obtain consent from the relevant traditional custodians to harvest from public lands (similar to existing legal requirements for harvesters to obtain consent to access private land)
- require commercial growers to pay the government a royalty on all produce sold, for distribution to traditional custodians with geographical links to species.

Amend threatened species laws to require Aboriginal and Torres Strait Islander representation on committees that decide whether to list a species as threatened.

Encourage regional Aboriginal and Torres Strait Islander land authorities (e.g. Land Councils) to coordinate wild harvest or horticultural supply by:

- researching ways to improve wild harvest yields
- providing horticultural production training
- developing certification schemes and other marketing strategies to attract buyers
- developing a register of culturally qualified harvesters
- contracting approved harvesters to collect produce
- providing harvesters with transport to and from growing locations
- accessing markets and distributing produce.

Research and development

This stage may involve collecting bush food knowledge and developing product prototypes and strategies to safeguard confidential commercial information.

Current possibilities

- The Aboriginal and Torres Strait Islander holders of non-public knowledge can negotiate agreements with people wanting to use the knowledge.
- The law allows a limited ability for people to sue for unfair use of commercial secrets and breach of agreement.

Issues

- A lot of bush food knowledge is publicly and freely available, for example, in cookbooks.
- Court proceedings to enforce agreements are expensive, risky and jurisdictionally limited, for example, a Queensland court can only prevent the publication of culturally sensitive knowledge in Queensland.
Aboriginal and Torres Strait Islander peoples cannot stop bush food developers using their traditional foods in gourmet products.

Aboriginal and Torres Strait Islander peoples are generally unable to exploit secret bush food ingredients without disclosing the nature of the ingredients.

Possible ways for government to improve the situation

- Amend all the laws regulating bush food development to prohibit the unauthorised use of culturally sensitive and non-public Aboriginal and Torres Strait Islander knowledge.
- Amend federal food standards to create a right for traditional custodians with geographical links to undeveloped species to exclusively exploit those species for a defined period or license that use during that period (namely, up to 10 years from first commercial use).
- Implement a central database support service to help Aboriginal and Torres Strait Islander groups develop knowledge databases that serve their interests. Support may include:
  - searching for and collating public knowledge
  - identifying what knowledge is available without disclosing the details of that knowledge
  - developing policies and model agreements to facilitate commercial partnership
  - negotiating database access arrangements with international intellectual property offices to prevent Plant Breeder’s Rights or patents being granted for products derived from database knowledge.

Finances and business licensing

This stage may involve obtaining manufacturing or retail business licenses and securing private or public funds.

Current support

- Public sector researchers (e.g. those working at universities) must comply with ethical guidelines that may require the researcher to negotiate the project and its benefits with Aboriginal and Torres Strait Islander peoples (e.g. Guidelines for Ethical Research in Australian Indigenous Studies 2012).

Issues

- Most bush food developers are private enterprises not subject to research ethics conditions.
- There is no legal requirement for private sector food manufactures or retailers to consider the interests of Aboriginal and Torres Strait Islander peoples.
Possible ways for government to improve the situation

Amend all the laws regulating bush food development to require people holding government permits or licenses to comply with ethical development guidelines developed in partnership with Aboriginal and Torres Strait Islander peoples.

Manufacturing

Manufacturing of foods may involve the acquisition of land and premises, production of products according to standards, packaging and labelling of products for distribution and sale, and the negotiation of production services.

Current support

- Indigenous Business Australia has the legal power to help Aboriginal and Torres Strait Islander peoples establish and grow businesses.

Issues

- Indigenous Business Australia focuses mainly on helping established businesses grow rather than helping businesses start.
- There are few services to address the unique challenges facing Aboriginal and Torres Strait Islander peoples who wish to start a bush food business.

Possible ways for government to improve the situation

- Establish a bush food business support unit to help interested Aboriginal and Torres Strait Islander peoples develop viable food businesses.
- If feasible, the unit should be staffed with Aboriginal and Torres Strait Islander peoples experienced in the challenges of bush food business.
- Use skilled case managers to help Aboriginal and Torres Strait Islander entrepreneurs access land, ingredients, training, business expertise, permits, finance, technology, transport and markets.

Distribution and sales

This stage may involve negotiating distribution agreements, making domestic and international retail sales and securing permission to transport products interstate or overseas.

Current support

- Aboriginal and Torres Strait Islander developers may join Supply Nation to connect with people interested in buying Aboriginal and Torres Strait Islander products.
Issues

- There is no legal requirement for people distributing gourmet food products to interstate or overseas retailers to consider the interests of Aboriginal and Torres Strait Islander peoples.

Possible ways for government to improve the situation

- Amend interstate trade and exports laws to require people distributing gourmet bush food products to domestic or overseas retailers to disclose benefit-sharing arrangements with Aboriginal and Torres Strait Islander peoples.
- Encourage peak bush food industry bodies and their members to implement Reconciliation Action Plans that target partnerships with Aboriginal and Torres Strait Islander peoples.

Further information

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Research Partners of the CRC-REP Plant Business Project
Background

One aim of the Plant Business project is to identify how laws and institutions (public and private) can support the interests of Aboriginal and Torres Strait Islander peoples in the development of their traditional plant foods (‘bush foods’). Bush food products include gourmet sauces, jams and pies and new varieties of bush food plants.

This brief provides an overview of research findings in relation to the capacity of laws and institutions to support Aboriginal and Torres Strait Islander interests in the development of new bush food varieties.

The aim of the brief is to further discussion and investigation of options to strengthen the position of Aboriginal and Torres Strait Islander peoples in the development of their traditional foods.

Aboriginal and Torres Strait Islander interests in new plant variety development

The development of new native plant varieties for horticultural production can help conserve wild populations by lessening the demand on wild plants. Australian and international breeders have developed new varieties of native wildflowers, bush foods and landscape plants.

Aboriginal and Torres Strait Islander peoples have diverse interests in their local species from which new varieties derive. These may include, but are not limited to:

- control of species and species knowledge
- fair share of benefits from species and knowledge use
- development of native plant enterprises and partnerships
- transfer and maintenance of species knowledge in cultural practices.

This brief proposes some possible ways for governments to improve support for Aboriginal and Torres Strait Islander interests at key stages in the development of new plant varieties.
Project planning and financing

This stage involves planning research and development and securing investment and commercial partners.

Current support

- Aboriginal and Torres Strait Islander people can enter into plant breeding partnerships.
- Public sector researchers (e.g. those working at universities) who research Aboriginal and Torres Strait Islander peoples must generally comply with ethical guidelines, which may require negotiating with Aboriginal and Torres Strait Islander peoples (e.g. Guidelines for Ethical Research in Australian Indigenous Studies 2012).

Issues

- Most public sector breeder’s research native plants, not Aboriginal and Torres Strait Islander peoples, and so are not generally expected to follow ethical guidelines which may require negotiations with Aboriginal and Torres Strait Islander peoples.
- Most plant breeders are private enterprises not subject to ethics approval conditions.
- An Aboriginal and Torres Strait Islander person may not have the capacity or desire to be involved in further developing wild native plant varieties.

Possible ways for government to improve the situation

- Extend the application of the Guidelines for ethical research in Australian Indigenous studies 2012 to publicly funded researchers investigating native plants.
- Implement a collaborative native plant breeding program to benefit and in partnership with Aboriginal and Torres Strait Islander peoples, providing support to:
  - create confidentiality agreements to protect knowledge
  - develop cultural branding strategies
  - make Plant Breeder’s Rights applications
  - license Plant Breeder’s Rights and trademarks
  - manage licensing agreements and royalties.

Research and development

This may involve collecting plant specimens and knowledge, selecting varieties with desirable traits, crossbreeding selected varieties and propagating new varieties.
Current support

- Aboriginal and Torres Strait Islander peoples who control access to land can negotiate agreements with people wanting to access wild specimens from their land.
- The holders of Aboriginal and Torres Strait Islander knowledge can negotiate support for their interests with people wanting to use their knowledge.
- The law allows a limited ability for people to sue others for unfair use of their commercial secrets and breach of agreement.
- Aboriginal and Torres Strait Islander people might develop, legally protect and exploit plant varieties.

Issues

- Access to many plant specimens does not require negotiations with traditional land custodians, for example, specimens accessed from herbariums, nurseries and private collections.
- Many collection agencies (e.g. herbariums, arboreta or germplasm collections) freely provide native plant specimens to researchers in other countries, limiting Aboriginal and Torres Strait Islander people’s control of traditional resources.
- It is difficult for breeders to know what knowledge Aboriginal and Torres Strait Islander peoples have, and much native plant knowledge is publicly available from non-Aboriginal and Torres Strait Islander sources.
- Court proceedings to enforce agreements to not disclose Aboriginal and Torres Strait Islander knowledge are expensive, risky and limited jurisdictionally, for example, a Queensland court can only prevent use in Queensland.
- Aboriginal and Torres Strait Islander peoples cannot control the use of their knowledge once it is published.
- Aboriginal and Torres Strait Islander peoples may not have the funds to transform wild varieties into stable varieties for commercialisation.

Possible ways for government to improve the situation

- Create a national register of the contact details for legally recognised traditional custodians of bush foods, using as a starting point Aboriginal and Torres Strait Islander groups with freehold title over land, native title holders, registered native title claimants and Aboriginal and Torres Strait Islander peoples party to land use agreements.
- Amend the laws regulating the taking of native plants from public lands to require non-Aboriginal and Torres Strait Islander researchers and developers to obtain consent from relevant traditional custodians to take native plants from these lands (similar to existing legal requirements to obtain landowner consent to access private land).
● Amend funding agreements with public botanical collections (e.g. herbariums, arboreta or germplasm collections) to require the collection to ensure people negotiate specimen access with the traditional custodians of land from where the specimen was collected.

● Amend export laws to require the exporters of native plant specimens to have a benefit-sharing agreement with the traditional custodians of the land from where the specimen was originally collected (where known).

● Support traditional custodians to develop engagement protocols, and require parties to comply with the engagement protocols of traditional custodians.

● Implement a central database support service to help Aboriginal and Torres Strait Islander groups develop knowledge databases that serve their interests. Support might include:
  o searching and collating publicly available knowledge
  o identifying what knowledge is available without disclosing the details of that knowledge
  o developing policies and model agreements to facilitate commercial partnership
  o negotiating database access arrangements with international intellectual property offices to prevent Plant Breeder's Rights or patents being granted for products derived from database knowledge.

● Implement a collaborative native plant breeding program to benefit and in partnership with Aboriginal and Torres Strait Islander peoples (see above).

### Acquisition of rights and marketing

This may involve naming a new variety and securing a Plant Breeder’s Right or patent over the variety. Plant Breeder’s Rights and patents grant the rights-holder the exclusive right to grow and sell the variety for up to 25 years. An alternative commercialisation strategy is to market the new variety using a distinctive trademark.

#### Current support

- Aboriginal and Torres Strait Islander peoples may petition IP Australia to reject a trademark application associated with a new plant variety, where the mark contains cultural words (e.g. words from an Aboriginal or Torres Strait Islander language).

- Aboriginal and Torres Strait Islander peoples may lodge a complaint with consumer authorities regarding commercial practices that misrepresent Aboriginal and Torres Strait Islander support for, or involvement in, product development.

- Any person whose commercial interests would be affected by the grant of Plant Breeder’s Rights can object to its registration on the basis the variety is commonly known.
Any person can oppose the grant of a patent on the basis that the variety is not original.

Aboriginal and Torres Strait Islander breeders can obtain Plant Breeder’s Rights or patents over otherwise secret varieties, and/or distinguish those varieties in the marketplace using distinctive trademarks (e.g. geographical or cultural indicators of provenance).

**Issues**

- In order to exercise many of their potential rights, Aboriginal and Torres Strait Islander peoples need to be aware of unauthorised uses of cultural words and symbols.
- Objecting to Plant Breeder’s Rights and patent applications requires awareness of the application and technical skills to prove the variety is a known variety.
- Plant Breeder’s Rights and patents only allow the rights holder to exploit the variety in the jurisdictions in which the rights are granted.
- Aboriginal and Torres Strait Islander peoples cannot obtain Plant Breeder’s Rights or patents over already known varieties, and collection agencies (e.g. herbariums, etc.) have identified and continue to identify many native varieties.
- Aboriginal and Torres Strait Islander peoples may not have resources to develop wild varieties into commercially viable plants that others can regrow, or to secure and enforce a Plant Breeder’s Right or patent.

**Possible ways for government to improve the situation**

- Implement a collaborative native plant breeding program to benefit and in partnership with Aboriginal and Torres Strait Islander peoples (see above).
- Waive fees for Aboriginal and Torres Strait Islander peoples to apply for Plant Breeder’s Rights over their genetically stable varieties.
- Implement an alternative dispute resolution service to mediate disagreements over the commercial use of native plant varieties.
- Amend Plant Breeder’s Rights, patent, trademark and copyright laws to require that any attempted registration of a native plant variety or any attempted use of Aboriginal or Torres Strait Islander art or expressions shall be notified to an agreed list of Aboriginal and Torres Strait Islander organisations, to facilitate protection of cultural interests.

**Licensing, production and sale**

This stage may involve licensing rights to reproduce, grow and sell varietal material (e.g. seeds, seedlings, clones and tissue culture), licensing rights to sell new varieties under distinctive marks, growing plants to sell, selling plants through nurseries and online stores, securing interstate trade or export permits and paying government levies on potted plant containers.
Current support

- Aboriginal and Torres Strait Islander peoples who hold a Plant Breeder’s Right or patent can negotiate licensing agreements.
- Aboriginal and Torres Strait Islander peoples with access to land can develop and sell genetically stable varieties.
- Aboriginal and Torres Strait Islander breeders can join Supply Nation to connect with people interested in buying Aboriginal and Torres Strait Islander products.

Issues

- Aboriginal and Torres Strait Islander peoples may not have the funds to transform wild varieties into stable varieties for commercialisation or to secure Plant Breeder’s Rights or patents.
- Aboriginal and Torres Strait Islander peoples may not have access to land on which to grow genetically stable varieties.
- There is no legal requirement for exporters to consider the interests of Aboriginal and Torres Strait Islander peoples when exporting native plant materials.

Possible ways for government to improve the situation

- Implement a collaborative native plant breeding program to benefit and in partnership with Aboriginal and Torres Strait Islander peoples (see above).
- Support traditional land custodians to negotiate land use agreements that allow them to grow new varieties on that land.
- Exercise existing legal authority to require people transporting plant materials to overseas producers to disclose benefit-sharing arrangements with Aboriginal and Torres Strait Islander peoples.
- Encourage peak plant-breeding bodies (e.g. Nursery and Garden Industry Australia) and their members to implement Reconciliation Action Plans that target commercial partnerships with Aboriginal and Torres Strait Islander peoples.

Further information


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Research Partners of the CRC-REP Plant Business Project
Background

One aim of the Plant Business project is to identify how laws and institutions can support the interests of Aboriginal and Torres Strait Islander peoples in the commercialisation of their traditional plant foods ('bush foods').

This brief provides an overview of findings from three years of research in relation to the capacity of law to support the diverse interests of Aboriginal and Torres Strait Islander peoples in this commercial context.

The aim of the brief is to further discussion and investigation of options to strengthen the position of Aboriginal and Torres Strait Islander peoples in the development of their traditional foods.

Context of new plant variety development

Aboriginal and Torres Strait Islander knowledge has contributed to the commercial development of over 15 bush foods. Bush food products include processed raw ingredients, gourmet sauces, pies and jams and new varieties of bush food plants.

The market value of all bush food products is unknown. Recent estimates put the sale of raw bush food materials at over $A18 million a year (excluding macadamia), with the sale of products derived from these materials potentially increasing this figure by 500% (Clarke 2012). Macadamia sales account for a further $A200 million (AMS).

Aboriginal and Torres Strait Islander peoples have many different interests in this commercial context. This brief proposes some legal and institutional options to explore with regards to the following interests:

- control of plants and knowledge according to customary law
- fair share of benefits from plant and knowledge use
- development of bush food enterprises and partnerships
- transfer and maintenance of knowledge to younger people
- participation in bush food law, policy and decision-making.
Although Aboriginal and Torres Strait Islander peoples are key stakeholders in bush food commercialisation, there are few laws that support their interests. This brief highlights important legal issues that affect each interest, and some possible actions Aboriginal and Torres Strait Islander peoples might lobby government to take.

**Control of plants**

**Issues**

- Aboriginal and Torres Strait Islander peoples cannot control the use of their traditional plants unless they control access to the lands on which the plants grow, or negotiate an agreement to control the use of plants with the landowner.

**Possible ways for government to improve the situation**

- Create a national register of traditional land custodians, including as a starting point Aboriginal and Torres Strait Islander peoples with freehold land titles, statutory land titles, native titles and registered native title claims.
- Amend the laws regulating the harvesting of bush foods on public lands to require non-Aboriginal and Torres Strait Islander harvesters to obtain consent from relevant traditional custodians (similar to existing legal requirements for harvesters to obtain consent to access private land).
- Amend funding agreements with public botanical collections (e.g. herbariums, arboreta or germplasm collections) to require the collection to ensure people negotiate specimen access with the traditional custodians of land from where the specimen was collected.
- Support traditional custodians to develop engagement protocols and then require parties to comply with these engagement protocols.

**Control of knowledge**

**Issues**

- Existing legal arrangements provide very limited support for Aboriginal and Torres Strait Islander peoples to benefit from their plant knowledge:
  - benefit-sharing laws and confidentiality agreements at best help Aboriginal and Torres Strait Islander peoples control the use of secret knowledge
  - copyright law does not allow Aboriginal and Torres Strait Islander peoples to control the use of knowledge that is published in written works
  - patent rights provide limited help for Aboriginal and Torres Strait Islander peoples to control the use of their inventions
because the invention will be published, exclusive use is limited to 25 years, and the rights are costly to obtain and enforce.

Possible ways for government to improve the situation

- Amend all the laws regulating bush food development to prohibit the unauthorised use of culturally sensitive and non-public Aboriginal and Torres Strait Islander knowledge.

Fair share of benefits from plant and knowledge use

Issues

- Although some plant genetic researchers may be required to share development benefits with Aboriginal and Torres Strait Islander peoples who provide knowledge for the research, genetic research is rare in bush food commercialisation and much bush food knowledge is available from other sources.
- There is no general obligation to reward Aboriginal and Torres Strait Islander peoples for their contributions to bush food development.
- There is no duty to compensate Aboriginal and Torres Strait Islander people for lost rights to exploit their knowledge when others have published this without their consent.

Possible ways for government to improve the situation

- Create specific laws to regulate the harvesting and growing of bush foods, and require non-Aboriginal and Torres Strait Islander peoples who harvest or grow bush foods to pay a royalty on raw material sales, for distribution to traditional custodian groups with geographical links to the species.
- Alternatively, make licences to operate native food businesses dependent on the payment of royalties, for distribution to traditional custodian groups.

Development of enterprises and partnerships

Issues

- Some lands under Aboriginal and Torres Strait Islander control have commercial use restrictions, limiting the capacity of Aboriginal and Torres Strait Islander peoples to harvest or grow bush foods for commercial purposes.
- Aboriginal and Torres Strait Islander peoples have limited access to the resources needed to start a bush food business, including
money, lands, premises, business advice, technology, markets and transport.

Possible ways for government to improve the situation

- Ensure the laws and agreements affecting land under Aboriginal and Torres Strait Islander control permit the commercial use of non-threatened native species on those lands.
- Help Aboriginal and Torres Strait Islander peoples who do not control land to negotiate agreements that allow them to access land to harvest and/or grow bush foods.
- Support Aboriginal and Torres Strait Islander peoples to develop species management plans that identify sustainable harvest yields and strategies to improve yields.
- Provide a specialist service to help Aboriginal and Torres Strait Islander peoples access the resources they need to start and sustain bush food businesses.

Transfer and maintenance of knowledge

Issues

- The ability of Aboriginal and Torres Strait Islander peoples to maintain their bush food knowledge is under threat because:
  - a loss of Aboriginal and Torres Strait Islander languages means that some knowledge is lost
  - many Aboriginal and Torres Strait Islander peoples have limited access to lands to carry out wild harvest practices through which knowledge is transferred to younger people
  - younger people may not participate in wild harvest if there are no financial rewards.
- Aboriginal and Torres Strait Islander peoples who choose to maintain knowledge by recording it in publications cannot control the later use of the knowledge.

Possible ways for government to improve the situation

- Implement an Aboriginal and Torres Strait Islander development program that supports Aboriginal and Torres Strait Islander peoples to economically develop their local resources using local knowledge, practices and language.
Participation in law, policy and decision-making

Issues

➢ There is limited opportunity for Aboriginal and Torres Strait Islander peoples to participate in the legislative and administrative processes shaping bush food development, including the setting of research agendas and making of government decisions.

➢ This is partly because legislative and administrative processes privilege formal scientific information over Aboriginal and Torres Strait Islander knowledge.

Possible ways for government to improve the situation

➢ Ensure all the laws regulating bush food development:
  o recognise the value of Aboriginal and Torres Strait Islander peoples and their knowledge to bush food development
  o require bush food governance authorities to provide for the meaningful and active involvement of Aboriginal and Torres Strait Islander peoples in bush food resource governance
  o require bush food governance authorities to support participatory processes to address power imbalances that limit this involvement (e.g. the use of properly trained facilitators).

What next?

The other three papers in the series discuss more specific options for:

➢ gourmet bush food product development
➢ new bush food variety development
➢ bush food governance.

Further information

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