LEGAL AND INSTITUTIONAL STRATEGIES TO SUPPORT THE INTERESTS OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN BUSH FOOD COMMERCIALISATION

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A thesis submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy

University of New England

15 August 2015
DECLARATION OF ORIGINALITY

I certify that the substance of this thesis has not already been submitted for any degree and is not currently being submitted for any other degree or qualification.

I certify that any help received in preparing this thesis and all sources used have been acknowledged in this thesis.

Kylie Lingard

15 August 2015
DEDICATION

To the Plant Business Advisory Group

(Rayleen Brown, Max Emery, Pat Torres, Juleigh Robins, Andrew Fielke, Jenni Lightowlers and Slade Lee)
ACKNOWLEDGEMENTS

The single name on the cover of this thesis does not do justice to the people who have so warmly and expertly contributed to its production.

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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACIPA</td>
<td>Australian Centre for Intellectual Property in Agriculture</td>
</tr>
<tr>
<td>AIATSIS</td>
<td>Australia Institute of Aboriginal and Torres Strait Islander Studies</td>
</tr>
<tr>
<td>ACIP</td>
<td>Advisory Council on Intellectual Property</td>
</tr>
<tr>
<td>ALRC</td>
<td>Australian Law Reform Commission</td>
</tr>
<tr>
<td>ANBG</td>
<td>Australian National Botanic Gardens</td>
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<td>ANFIL</td>
<td>Australian Native Food Industry Limited</td>
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<td>ANH</td>
<td>Australian National Herbarium</td>
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<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<td>CLC</td>
<td>Central land Council</td>
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<tr>
<td>CRC-REP</td>
<td>Cooperative Research Centre for Remote Economic Participation</td>
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<td>CSIRO</td>
<td>Commonwealth Science and Industrial Research Organisation</td>
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<td>DKCRC</td>
<td>Desert Knowledge Cooperative Research Centre</td>
</tr>
<tr>
<td>FAO</td>
<td>Food and Agriculture Organisation</td>
</tr>
<tr>
<td>HAL</td>
<td>Horticulture Australia Limited</td>
</tr>
<tr>
<td>HIA</td>
<td>Horticulture Innovation Australia</td>
</tr>
<tr>
<td>IAC</td>
<td>Indigenous Advisory Council</td>
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<td>IBA</td>
<td>Indigenous Business Australia</td>
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<tr>
<td>NGIA</td>
<td>Nursery and Garden Industry Australia</td>
</tr>
<tr>
<td>NLC</td>
<td>Northern Land Council</td>
</tr>
<tr>
<td>NNTT</td>
<td>National Native Title Tribunal</td>
</tr>
<tr>
<td>PBR</td>
<td>Plant Breeder’s Right</td>
</tr>
<tr>
<td>RAP</td>
<td>Reconciliation Action Plan</td>
</tr>
<tr>
<td>RIRDC</td>
<td>Rural Industries Research and Development Corporation</td>
</tr>
<tr>
<td>TRIPS</td>
<td>Agreement on Trade Related Aspects of Intellectual Property</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environment Programme</td>
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<tr>
<td>WIPO</td>
<td>World Intellectual Property Organisation</td>
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ABSTRACT

Australia’s Aboriginal and Torres Strait Islander peoples are an eclectic society with diverse needs and aspirations in relation to the commercialisation of their traditional plant foods (bush foods). Their interests reflect different worldviews, social structures, personal circumstances and development goals. There is very little legal support for the interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation. This thesis uses a combination of methods to develop an integrated framework of legal and institutional strategies to better support the diverse interests of Aboriginal and Torres Strait Islander peoples in this commercial context.

The research draws upon legal and systems-based analysis to identify pivotal transactions that occur along bush food commercialisation pathways and interventions that might better enable Aboriginal and Torres Strait Islander peoples to realise their goals. While a central focus of the research is legal arrangements, of necessity the proposals suggested in this thesis go beyond the conventional bounds of legal research. This is because useful applications or reforms of the law depend upon there being potential strategies that the law might enable. A large part of this research has been to identify potential strategies and then place possible legal arrangements within this context.

The integrated framework of possibilities outlined in this thesis combines innovative uses of existing arrangements with new interventions to support as many interests as possible. This differs to current academic approaches that tend to propose single-instrument solutions for specific problems, especially those related to the use of Aboriginal and Torres Strait Islander knowledge. Such narrowly focused solutions cannot comprehensively support the diverse set of interests identified in discussions with Aboriginal and Torres Strait Islander peoples throughout this research project.

The thesis fills a gap in knowledge on ways to improve the laws regulating bush food commercialisation to better support the interests of Aboriginal and Torres Strait Islander peoples. It makes several original contributions, including the further development of a systems-based legal research method and identification of strategies that may provide real-world benefits for Aboriginal and Torres Strait Islander peoples. Most exciting is the identification of new ways through which governments and Aboriginal and Torres Strait Islander peoples can work together to advance social
justice goals and wellbeing outcomes. It is not part of the scope of this research to evaluate the acceptability or feasibility of these proposals in practice. This is a further task being advanced by the Cooperative Research Centre for Remote Economic Participation and its managing entity Ninti One, the funding agency for this work. A series of briefing papers included in the thesis are the starting point for this dialogue and further investigation.
CHAPTER 1: INTRODUCTION

1.1 Problem statement

Australia’s Aboriginal and Torres Strait Islander peoples are a heterogeneous society, with similarly diverse needs and aspirations in relation to the commercialisation of their traditional plant foods (bush foods). Interests may reflect the worldviews, social structures or development aspirations of an Aboriginal and Torres Strait Islander group, or the cultural and economic aims of an Aboriginal and Torres Strait Islander individual. These interests position Aboriginal and Torres Strait Islander peoples as key stakeholders in bush food commercialisation.

There are few laws to support the diverse interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation. Current legal research tends to focus on single-instrument solutions for specific problems, such as ways to control the use of secret bush food knowledge or promote cultural products. This thesis proposes a combination of methods to create a more comprehensive framework, using multiple legal and institutional interventions in different ways to allow for very diverse interests in bush food commercialisation. As such, its approach is strategic rather than doctrinal.

1.2 The meaning of ‘bush food commercialisation’

Australia is home to at least 24 000 native plants species and 145 Aboriginal and Torres Strait Islander language groups. Aboriginal and Torres Strait Islander peoples have used some native plants as foods for millennia. Some species have a special spiritual status within a group, and are the subject of traditional songs, stories and

2 Michael Davis, Bridging the gap or crossing a bridge? Indigenous knowledge and the language of law and policy, in Reid W, Berkes F, Wilbanks T and Capistrano D (eds), Bridging scales and knowledge systems (Washington, Island Press, 2006) 145, 153; see also Veronica Dodson, Arnpermirrentye: relationships between bush foods, people, country and all things (Video, Arrernte People of Central Australia and DKCRC, 2009); Merne Altyerre-ipenhe, above n 1.
4 Merne Altyerre-ipenhe, above n 1, 12.
ceremonies. Some Aboriginal and Torres Strait Islander group members have special rights and responsibilities in relation to a species, such as the right to make decisions about species use and the duty to conserve species knowledge in accordance with customary law.

The wild harvest of bush foods for commercial purposes provides Aboriginal and Torres Strait Islander peoples with an opportunity to fulfil cultural responsibilities, socialise, exercise, earn money, connect with land and carry out environmental management activities. The harvest also provides a space for peoples to share and develop the knowledge necessary to sustain their traditional food systems; it is about far more than collecting and consuming food.

‘Bush food commercialisation’ is the transformation of bush foods into marketable products. This thesis uses the phrase ‘bush food commercialisation’ interchangeably with ‘commercial development’ and ‘development’. Popular commercial species include macadamia, lemon myrtle, wattle seed, bush tomato, Kakadu plum, muntries and quandong. Recent estimates place the sale of raw bush food materials at over A$18 million annually (excluding macadamias), with the sale of products derived from these materials potentially increasing this figure ‘by up to 500%’. Macadamia sales add a further A$200 million to this figure.

 Marketable, tangible bush food products include nursery seeds and seedlings, and food products like restaurant meals and gourmet sauces, jams and pies.

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5 Ibid 16.
8 Dodson, above n 2; Merne Altyerre-Ipenhe, above n 1, 13.
9 See generally Department of Industry and Resources, 'The Path to Commercialisation: A Guide for Planning an Early Stage Innovation Project' (Government of Western Australia, 2004); Standing Committee on Science and Innovation, 'Inquiry into Pathways to Technological Innovation' (Australian Government, 19 June 2006).
11 Ibid vii.
12 Ibid.
Intangible products include copyrights in cookbooks and rights to exclusively exploit artificially created plants for up to 25 years.  

The methods used in this thesis focus attention on commercialisation pathways. The methods identify pivotal transactions, and where changes to these transactions might help Aboriginal and Torres Strait Islander peoples obtain legal leverage to advance their interests. The path taken to make each type of product differs. For example, the path taken to transform raw bush food ingredients into gourmet food products differs to that taken to develop and exploit new bush food varieties. Each of these commercial paths involves a different set of transactions and, thus, different possible mechanisms to advance Aboriginal and Torres Strait Islander interests. The key contribution of this thesis is the exploration of these paths and proposals for legal and institutional changes to make them more conducive to Aboriginal and Torres Strait Islander interests.

1.3 How this thesis came about

In 2010, the Australian Government began funding the Cooperative Research Centre for Remote Economic Participation (CRC-REP) to develop practical responses to the economic challenges affecting remote Australia. The CRC-REP supports a range of projects to further this goal. One of these is Plant Business.

The aim of Plant Business is to develop new bush tomato varieties from which Aboriginal and Torres Strait Islander peoples may obtain benefits. This is essentially a scientific process. A broader aim is to design a bush food commercialisation model acceptable to Aboriginal and Torres Strait Islander peoples. The vision is of a model that encompasses scientific, cultural, commercial and legal aspects of commercialisation. To this end, Plant Business provided funding

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20 CRC-REP, above n 18; CRC-REP, ‘Conversations’, above n 19, 6. 
for a PhD on strategies to support the interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation.\textsuperscript{21}

Research for this PhD commenced in April 2012, with confirmation of candidature in November 2012. Between 2010 and April 2012, a series of conversations occurred between:

- Aboriginal and Torres Strait Islander elders and bush food developers;
- Non-Indigenous bush food developers;
- Associate Professor Slade Lee (Plant Business project leader and plant scientist based at Southern Cross University);
- Professor Paul Martin (Principle Supervisor of this thesis and Director of the Australian Centre for Agriculture and Law, University of New England).\textsuperscript{22}

In 2011, a group of central Australian women with cultural responsibilities for bush food published ethical guidelines to generate commercial support for their needs and aspirations in bush food development.\textsuperscript{23} Between April 2012 and November 2012, conversations also occurred between the aforementioned people and the PhD researcher, along with the conduct of preliminary literature reviews.

These discussions, publications and reviews affirmed the diversity of needs and aspirations Aboriginal and Torres Strait Islander peoples have in relation to the commercialisation of their traditional plant foods. Interests may reflect different customary legal systems, relationships with local lands and resources, political and economic motivations, and personalities and capacities.\textsuperscript{24} Possible interests include:

- control over the use of plants and knowledge;
- respect for Aboriginal and Torres Strait Islander knowledge, skills and practices;

\textsuperscript{21} CRC-REP, ‘Conversations’, above n 19, 9.
\textsuperscript{22} See generally ibid.
\textsuperscript{23} Merne Altyerre-ipenhe, above n 1, 4.
• acknowledgement of Aboriginal and Torres Strait Islander contributions to bush food development;
• fair compensation for these contributions;
• fair remuneration for the authorised uses of plants and knowledge;
• maintenance of cultural practices such as wild harvest;
• transmission of knowledge to Aboriginal and Torres Strait Islander youth;
• sharing of plant cultural stories with consumers;
• development of bush food enterprises and commercial partnerships; and
• meaningful involvement in bush food governance processes.\(^{25}\)

It is arguably patronising for any researcher to determine that any of these interests (such as traditional cultural interests) is more important or ‘valid’ than any other (such as the economic interests of a modern Aboriginal and Torres Strait Islander entrepreneur). The aim of this PhD thesis reflects the need to advance a diversity of interests rather than attempting to prioritise which interests of which people are most important.

1.4 **Research aim**

The aim of this thesis is as follows:

**Identify possible legal and institutional strategies to support the diverse interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation.**

In this thesis, legal arrangements refer to laws and regulations. Institutional arrangements refer to the policies, systems, and processes that public and private organisations use to plan and manage their activities.

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1.5 Research problem and knowledge gap

The thesis aim acknowledges the diversity of Aboriginal and Torres Strait Islander interests. It differs to current approaches in the bush food research that focus on institutional solutions for specific problems.\textsuperscript{26} For example, Cleary proposes regional cooperatives to help connect remote wild harvesters with urban buyers.\textsuperscript{27} Miers considers the capacity of Aboriginal and Torres Strait Islander landowners to carry out horticulture.\textsuperscript{28} Morse suggests a series of measures to support remote bush food enterprises.\textsuperscript{29} While all such research contributes, this thesis aims for a more comprehensive approach that encompasses as many Aboriginal and Torres Strait Islander interests as possible.

As well as being atomistic in focus, there is very little research on how the laws relevant to bush food commercialisation may improve support in practice for Aboriginal and Torres Strait Islander interests. There is also no integration of law reform proposals with mechanisms for altering commercial outcomes. As the outcomes of legal arrangements depend on the context of their application, a piecemeal approach to solution finding is unlikely to accelerate effective improvement.

A primary concern from examining the broader literature is the lack of legal support for Aboriginal and Torres Strait Islander peoples to control and benefit from the use of their knowledge.\textsuperscript{30} Authors recommend a range of single-instrument solutions to address this problem. The most popular of these is a new law that would grant Aboriginal and Torres Strait Islander peoples the right to consent to the use of

\textsuperscript{28} Geoff Miers, 'Cultivation and Sustainable Wild Harvest of Bushfoods by Aboriginal Communities in Central Australia' (RIRDC, 2004).
\textsuperscript{29} Morse, above n 14.
their secret knowledge and share in the benefits of that use.31 Such a new approach is often termed a *sui generis*—literally: “of its own kind”32. In practice, these *sui generis* approaches are likely to have limited use in bush food commercialisation because a lot of Aboriginal and Torres Strait Islander knowledge is freely available.33 This may partially explain why:

In Australia, there are currently few examples of ethical and equitable intellectual property negotiations in relation to IEK [Indigenous Ecological Knowledge] of plants used in the food, biopharmaceutical or biomedical industries. There are even fewer, if any, examples of substantive payments or other benefit-sharing returns to Aboriginal and Torres Strait Islander groups.34

It is also likely that an all-encompassing *sui generis* response to the challenges outlined in this thesis would take a very long time to create and negotiate, and that the political processes for its adoption would be challenging and perhaps lead to a compromised approach. That is not to say *sui generis* approaches have no role to play, just that it may be unduly optimistic to rely on this strategy alone to support diverse Aboriginal and Torres Strait Islander interests in this context within any reasonable timeframe. Similar difficulties affect other solutions proposed in the literature, leading to the expectation that they may fail to effectively address the overall set of needs and aspirations Aboriginal and Torres Strait Islander peoples may have in bush food commercialisation. This thesis aims to address that problem by proposing a ‘cocktail’ of interventions which provide alternative routes to a single goal: meeting the aspirations of Aboriginal and Torres Strait Islander peoples in the commercialisation of ‘their’ foods.

### 1.6 Research questions

The main question this thesis seeks to answer is as follows:

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32 Smallacombe, Davis and Quiggin, above n 25, 29; Merne Altyerre-ipenhe, above n 1, 5-6, 14.
34 Merne Altyerre-ipenhe, above n 1, 23.
What legal and institutional strategies may improve support for the diverse interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation?

Related sub-questions address these issues in an implicit hierarchy:

1. To what extent can current legal and institutional arrangements (not limited to government) support the diverse interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation?
2. What innovative uses of current legal and institutional arrangements may improve support for Aboriginal and Torres Strait Islander interests in bush food commercialisation?
3. What more radical measures, including new laws, might further improve support for Aboriginal and Torres Strait Islander interests in bush food commercialisation by addressing issues beyond the scope of existing rules and institutional arrangements?

1.7 Social value of the research

The non-binding United Nations Declaration on the Rights of Indigenous Peoples reflects more than 20 years of academic research and Indigenous advocacy. Article 43 contends that the wellbeing of Indigenous peoples depends upon their capacity to control, maintain, and develop their traditional resources, knowledge, skills and practices, and their meaningful involvement in legislative and administrative measures likely to affect their interests. Australia’s endorsement of the Declaration demonstrates acceptance of this proposition.

In 2009, the United Nations reported that Australians had the third highest standard of living in the world, but the standard of living of Aboriginal and Torres Strait Islander peoples ranked 103rd. The inequity is startling. Since 2009, all Australian governments have committed to improving Aboriginal and Torres Strait

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36 Jenny Macklin, ‘Statement on the United Nations Declaration on the Rights of Indigenous Peoples’ (Minister for Families, Housing, Community Services and Indigenous Affairs, 2009); see also Pat Dudgeon et al, ‘Effective Strategies to Strengthen the Mental Health and Wellbeing of Aboriginal and Torres Strait Islander People’ (Closing the Gap Clearinghouse, 2014) 3.
Islander wellbeing. Although some recent programs have produced marginal improvements, an acute wellbeing gap remains. For instance:

Aboriginal and Torres Strait Islander males born between 2010 and 2012 can expect to live 69.1 years, 10.6 years less than non-Indigenous males. Aboriginal and Torres Strait Islander females can expect to live 73.7 years, 9.5 years less than non-Indigenous females.

Similar gaps exist in education, employment, health and the criminal justice system.

This thesis follows the logic that people who can realise their own needs and aspirations generally have greater wellbeing. Supporting Aboriginal and Torres Strait Islander peoples to realise their diverse interests in bush food commercialisation is one part of this picture. Supportive strategies may also help transform current policy approaches that are argued to promote government dependency to ones that empower Aboriginal and Torres Strait Islander peoples.

1.8 Research challenges and assumptions

The identification of possible strategies to support diverse Aboriginal and Torres Strait Islander interests must confront some grand challenges. A particular challenge posed by the diversity of interests is that ‘each interest involves different issues, and recognition of some may come at a cost to others’. It is also impossible to predict all the interests Aboriginal and Torres Strait Islander peoples may have.

Another challenge is the need to start somewhere in developing a set of comprehensive strategies to support Aboriginal and Torres Strait Islander interests in bush food commercialisation. While this thesis makes every effort to evaluate

38 Council of Australian Governments (COAG), 'National Indigenous Reform Agreement (Closing the gap)' (Commonwealth of Australia, 2009).
41 Steering Committee for the Review of Government Service Provision, above n 39, 4.5-4.7
42 See generally ibid ch 4.
43 See Robert Nemeskeri et al, 'System Dynamics to Diagnose and Devise Patterns for Sustainable Consumption and Production' (SYSCONS, 2008) 43-44.
45 Ibid.
possibilities ‘in terms of the success of their practical application’, actual effectiveness will depend upon ‘the quality of implementation’. This thesis starts the journey to implementation by developing policy concepts for Aboriginal and Torres Strait Islander peoples to consider further.

Existing power structures pose the ultimate challenge. For example:

‘Respect’ and ‘recognition’ at the deeper levels of culture involve challenges to the institutionalised power structures of the dominant culture. Coming to grips with this political contest requires far more than legal and institutional mechanisms that protect and allow Indigenous peoples to exploit cultural symbols such as art and ritual, or even arrangements which give legal force to traditional control over access to places and information.

In recognition of these challenges, this thesis proceeds upon three key assumptions. First, the work is conceptual. It aims to identify possibilities that Aboriginal and Torres Strait Islander peoples might choose to pursue. It does not judge the legitimacy of different interests, or the conflicts that might arise between them. The second assumption and underlying logic of the thesis is that the best way of advancing Aboriginal and Torres Strait Islander interests in native biodiversity is by enabling them to pursue their own interests more effectively. This positions the plurality of interests as a reality we need to understand, not a problem we need to solve. The final point is that the analysis does not deal with past or potential future actors or roles. It proceeds on the assumption that current political, legal, commercial and cultural structures will largely exist in the future and, while change is inevitable, forecasting what change will occur is beyond the scope of this work.

1.9 Thesis structure

This is a ‘thesis-by-publication’ through the University of New England, Australia. Under the rules of the University, a thesis-by-publication is one where the substantive body comprises self-contained journal papers. These need not have

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47 Martin et al, above n 44.
48 Ibid.
49 Ibid.
been published, or submitted to any journal at the time of thesis examination.\(^{51}\) In this thesis, the papers are at varying stages of publication.

This thesis-by-publication does not contain a section designated as the ‘literature review’, as the relevant literature is reviewed within each journal paper and so a separate chapter would be redundant. There is also unavoidable repetition between papers because they stand alone, so some background is required for each paper. An introduction precedes each substantive chapter to help guide the reader through the thesis as efficiently as possible.

Chapters 3-6 contain the substantive body of this thesis. Each chapter has a journal paper under peer review at a reputed journal, and a policy brief summarising key points from the journal paper. The policy briefs have been prepared for the Cooperative Research Centre for Remote Economic Participation, for circulation to stakeholders and government bodies as part of the process of consultation about the implementation of new arrangements, based on this research. That consultation process has commenced and is ongoing.

1.9.1 Aim and purpose of each chapter
Chapter 2 outlines the combination of methods used to identify possible strategies to support the diverse interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation. It provides a reference point for people to critique or advance the possibilities outlined in this thesis.

The identification of strategies to support interests in a specific context must begin with an understanding of relevant interests, challenges and resources.\(^{52}\) The journal paper in Chapter 3 explores key Aboriginal and Torres Strait Islander interests in detail. The paper also highlights issues that may arise in developing strategies to support each interest, and existing laws that are relevant to possible strategies. The paper is supported by the co-authored book chapter in Appendix 1 that explores the challenges facing Aboriginal and Torres Strait Islander peoples in asserting their cultural interests.

\(^{51}\) Ibid.

In addition to understanding the interests at stake, it is necessary to understand the context in which these interests arise. The journal paper in Chapter 4 begins by exploring current research on Aboriginal and Torres Strait Islander interests in bush food commercialisation, and the relevance of international developments to these interests. It then outlines a method for understanding bush food commercialisation transactions.

The journal papers in Chapters 4, 5 and 6 assess the extent of legal support for Aboriginal and Torres Strait Islander interests in the development of gourmet food products and new bush food varieties, and the governance processes that shape bush food commercialisation. Each paper identifies the legal and institutional possibilities within these contexts. The findings together form an integrated framework of multiple interventions that together or separately may improve support for Aboriginal and Torres Strait Islander interests in bush food commercialisation.

Chapter 7 concludes the thesis by synthesising key research findings, the significance of the research, and areas of further research.

Table 1.1 provides an overview of the chapters.
Table 1.1: Outline of the content of each chapter

| Chapter 1 | Explains the background to the thesis  
|           | Outlines the research aim, problem and questions  
|           | Outlines thesis structure  |
| Chapter 2 | Outlines research methods and ethics  |
| Chapter 3 | *Journal Paper one (and Policy Brief one):* ‘Key issues and opportunities in developing laws to support the diverse interests of Aboriginal and Torres Strait Islander peoples in the commercialisation of traditional plant foods’ (submitted to *International Journal of Sustainable Development and World Ecology*)  
|           | - Explores some Aboriginal and Torres Strait Islander interests in bush food commercialisation  
|           | - Detects issues in developing strategies to support these interests  
|           | - Considers the potential of law to support these interests  |
| Chapter 4 | *Journal Paper two (and Policy Brief two):* ‘Strategies to Support the Interests of Aboriginal and Torres Strait Islander Peoples in the Development of Gourmet Bush Food Products’ (submitted to *International Journal of Cultural Property*)  
|           | - Reviews the relevance of current literature and international developments  
|           | - Outlines a method for developing strategies  
|           | - Assesses support for Aboriginal and Torres Strait Islander interests in the development of gourmet food products  
|           | - Identifies possible strategies to improve support for these interests in this context  |
| Chapter 5 | *Journal Paper three (and Policy Brief three):* ‘Strategies to support the Interests of Aboriginal and Torres Strait Islander Peoples in the Development of New Native Plant Varieties’ (submitted to *Australian Intellectual Property Journal*)  
|           | - Assesses support for Aboriginal and Torres Strait Islander interests in the development of new bush food varieties  
|           | - Identifies possible strategies to improve support for these interests in this context  |
|           | - Assesses support for Aboriginal and Torres Strait Islander involvement in bush food commercialisation governance processes  
|           | - Identifies possible strategies to improve support for Aboriginal and Torres Strait Islander involvement in these processes  |
| Chapter 7 | Synthesises research findings  
|           | Outlines areas of future research and a way forward from this research  |
CHAPTER 2: RESEARCH METHODS AND ETHICAL FRAMEWORK

This Chapter outlines the methods used to identify possible strategies to support diverse Aboriginal and Torres Strait Islander interests in bush food commercialisation, and the ethical framework in which the research occurred. The discussion provides a reference point for people to critique the possibilities outlined in this thesis.

2.1 Research methods

The methodology chosen for this research responds to the following project rationale:

To work with and for Aboriginal and Torres Strait Islander peoples in conceptualising feasible legal and institutional strategies to support their diverse interests in bush food commercialisation.

The dominant legal research method is legal analysis. Its application typically leads to recommendations for law reform. However, Martin and Craig contend that legal analysis alone cannot capture the complexities, values and practicalities inherent in a complex socio-economic system ‘that places emphasis upon wealth’. They support the use of multiple methods to produce environmental law scholarship of real-world value. This is consistent with an applied policy methodological approach.

This thesis uses a combination of six methods to further this end. The methods are not used sequentially. They are iterative and revisited at different stages throughout the project to advance the research aim. They are as illustrated in Figure 2.1:

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54 Martin and Craig, above n 52.
55 Ibid.
56 Ibid; see also Jennifer Mason, 'Mixing methods in a qualitatively driven way' (2006) 6(1) Qualitative Research 9, 19.
The combination reflects aspects of strategic decision-making and mixed methods approaches to problem-solving. Mixed methods approaches provide ‘multiple viewpoints, perspectives, positions, and standpoints’ on a problem:

By combining multiple observers, theories, methods, and empirical materials, researchers can hope to overcome the weakness or intrinsic biases and the problems that come from single-method, single-observer, single-theory studies.

The rest of this chapter explains the role of each method in the research project.

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57 Martin and Craig, above n 52.
2.1.1 Engaged scholarship

This thesis aims to identify possible legal and institutional strategies that align with the interests of Aboriginal and Torres Strait Islander peoples. This involves understanding what Aboriginal and Torres Strait Islander peoples want. The research uses an ‘engaged scholarship’ approach to inform this understanding.

Traditional academic research is the pursuit of knowledge ‘for its own sake’. Engaged scholarship is ‘user inspired research, where the community defines the problem and in partnership with the researcher looks for a solution’. It is a two-part process involving the discovery of knowledge and its ‘integration’ into real life, with each part informed by the people affected by the problem. At the heart of the approach lies a philosophical commitment to work ‘with’ or ‘for’ rather than ‘on’ the Aboriginal and Torres Strait Islander researcher partners.

Engaged scholarship processes used in this thesis include observation, dialogue and field trips. The thesis topic, aim and problem reflect the results of pre-project talks with Aboriginal and Torres Strait Islander peoples and the Plant Business Advisory Group, convened in 2011 to provide overarching guidance to the Plant Business project. Plant Business Advisory Group members include:

- Pat Torres: Aboriginal and Torres Strait Islander wild harvester and owner of Mayi Harvests, a bush food produce business;
- Rayleen Brown: Aboriginal and Torres Strait Islander owner and co-founder of Kungkas Can Cook, a bush food catering business;
- Max Emery: manager of Desert Garden Produce, an Aboriginal and Torres Strait Islander owned and operated bush food produce business;
- Juleigh Robins: author and director of Outback Sprit, a gourmet bush food manufacturing business;

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60 Sharon Paynter, 'Tackling Wicked Problems Through Engaged Scholarship' (2014) 7(1) Journal of Community Engagement and Scholarship 48, 48; see also Martin and Craig, above n 52.
61 Paynter, above n 60, 49.
62 Ibid.
63 See generally CRC-REP, Conversations, Cups of Tea …, above n 19, 6.
Andrew Fielke: chef and proprietor of Tuckeroo, a bush food manufacturing and distribution business;⁶⁸

Jenni Lightowler: lawyer with expertise in intellectual property and Cooperative Research Centres;⁶⁹ and

Slade Lee: plant scientist and Plant Business project leader.⁷⁰

Important engagement opportunities throughout the research process included four Advisory Group meetings, continuous dialogue with Advisory Group members, a field trip to Rainbow Valley in the Northern Territory, and cultural immersion experiences in Ntaria (NT) and Iga Warta (SA). Each of these provided an opportunity for discussion, observation and information exchange. The researcher also brings an awareness of Aboriginal and Torres Strait Islander interests gained from detailed discussions with Aboriginal and Torres Strait Islander peoples on prior cultural heritage research. Together, the interactions have helped ensure the research remains sensitive to the needs of Aboriginal and Torres Strait Islander peoples and the problems and practicalities peculiar to bush food commercialisation.

2.1.2 Desktop study
A desktop study is ‘a preliminary investigation and report into something collating currently available relevant information’.⁷¹ It involves the gathering and evaluation of published information from a wide variety of sources.⁷² Desktop studies help identify earlier discoveries relevant to the topic, and gaps in current knowledge.⁷³ Desktop study processes involve searching, collating, reading and synthesising published information.

An early part of this thesis was a desktop study of information published by:

- Aboriginal and Torres Strait Islander peoples;

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⁷³ Belspo, above n 72; Education and Training Unit for Democracy and Development, above n 72.
• academics;
• international agencies;
• domestic government agencies;
• Rural Industries Research and Development Corporation;
• Commonwealth Science and Industrial Research Organisation;
• botanical and herbarium collections; and
• bush food developers.

The results of this study underpin the Issues Paper presented at the PhD Confirmation of Candidature in November 2012 (see Appendix 2).

Desktop studies have also occurred at each research stage. The findings have shaped the choice of methods outlined in this chapter, the exploration of interests, issues and opportunities in Chapter 3, the literature review and transaction mapping method in Chapter 4, and the reviews of current and potential possibilities in Chapters 4, 5 and 6.

2.1.3 Transaction mapping

‘Systems change … represents a new phase in the evolution of environmental policy approaches’. It comes about from systems thinking. Systems thinking ‘recognises that the … impact of a single product, process or practice can only be understood through an appreciation of the wider system of which it is part’. For example, a law that works in one context may not work in another. A holistic understanding of context can lead to the identification of workable solutions that respond to context-specific needs, goals, interactions and transactions.

‘In the area of natural resource management, research has incorporated notions of systems thinking since at least the early 1940s’. Systems mapping involves

75 Geels et al, above n 74, i.
76 Martin and Craig, above n 52.
77 Ibid.
78 Sedlackoa et al, above n 74, 34.
‘visually mapping the system of interest’ and identifying parts to change. Environmental law scholars have used systems mapping to understand complex policy problems and identify workable interventions in the area of sustainable consumption, sustainable development, and biofuel production.

This thesis uses systems mapping to understand the transactions peculiar to the development of gourmet bush food products (Chapter 4) and new plant varieties (Chapter 5), and the governance processes that shape bush food commercialisation (Chapter 6). The logic is that by understanding these transactions, it is possible to objectively consider how to adjust the legal and institutional arrangements supporting them to better reflect the interests of Aboriginal and Torres Strait Islander peoples. Application of the approach does not avoid implementation challenges arising from political will, social attitudes, commercial behaviour and community opposition, but it does help advance possibilities for further deliberation.

2.1.4 Doctrinal research and analysis

The use of multiple methods in legal research does not avoid the need to identify, analyse and synthesise the law. This process is referred to in law academia as doctrinal research and analysis, the traditional legal research method.

Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials.

Doctrinal processes include:

- identification of primary material (including legislation and case law);

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80 Sedlackoa et al, above n 74.
81 Chris Mcgrath, Does Environmental Law Work? How to Evaluate the Effectiveness of an Environmental Legal System (Lambert Academic Publishing, 2010); Paul Martin and Miriam Verbeek, Sustainability Strategy (Federation Press, 2006).
83 See Martin and Verbeek, above n 81; Martin and Gal, above n 82, 5-6.
84 Martin and Gal, above n 82.
85 Hutchinson and Duncan, above n 53, 85.
86 Ibid 105.
• analysis of primary material content, effects and interrelationships; and
• synthesis of issues and making of tentative conclusions.\footnote{87}

The processes are informed by studies of background material such as legal dictionaries, textbooks, policy papers and journal articles.\footnote{88}

This thesis uses doctrinal analysis to evaluate current and future legal avenues of support for Aboriginal and Torres Strait Islander interests in gourmet food production, new plant variety development and bush food governance. In the spirit of engaged scholarship, and respecting recent calls to move beyond the use of single methods in legal research,\footnote{89} the doctrinal findings are informed by dialogue with Aboriginal and Torres Strait Islander peoples, observations, desktop studies of non-legal information and studies of bush food commercialisation transactions.

\subsection{2.1.5 Peer review}

Peer review was used to develop the written communication skills of the researcher and improve the quality of research results. Journal peer review involves independent experts evaluating the publication potential of a paper:\footnote{90}

> It is based on the concept that a larger and more diverse group of people will usually find more weaknesses and errors in a work … and will be able to make a more impartial evaluation of it than will just the person or group responsible for creating the work.\footnote{91}

For journals, peer review is a filtering process used to protect journal integrity. For authors, the value of peer review is ‘tied to providing feedback so that a manuscript can be improved through revision’.\footnote{92} This helps authors strengthen their

\footnotetext{87}{Ibid 106.}
\footnotetext{88}{Ibid.}
\footnotetext{89}{See eg, Yeasmin and Rahman, above n 59, 154; Martin and Craig, above n 52.}
\footnotetext{91}{the Linux Information Project, \textit{Peer Review Definition} (2005) \url{http://www.linfo.org/peer_review.html}.}
writing and communication skills, the quality of which affects the dissemination of ideas.

The nature of humanity makes journal peer review imperfect. For instance, reviewers can be biased and subjective; researchers can respond poorly to criticism and fail to extract salient points. On the other hand:

At its best, the peer review system provides not only expert advice, but also a strong incentive for authors to heed the advice and to improve the paper.

This thesis mitigates some of the pitfalls of peer review by using it in combination with other methods. For instance, feedback on an early paper helped focus the legal research and analysis process on bush food commercialisation rather than all native plant commercialisation. The benefits of the peer review used in this thesis will last long after submission, through post-publication discussion and critique.

2.1.6 Sharing research findings

The rationale of this research project was to work with and for Aboriginal and Torres Strait Islander peoples in conceptualising strategies to support their interests. A logical corollary of this is the return of research findings to Aboriginal and Torres Strait Islander peoples for them to deliberate and act upon if they wish. An additional consideration is the need to generate support for Aboriginal and Torres Strait Islander preferences amongst other bush food stakeholders. This twofold basis for sharing research findings reflects the notion of applied legal research, where the...

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95 The Teaching Center, above n 93.
97 European Food Information Council, above n 94; SAGE, above n 96.
aim ‘is not scientific (the pursuit of knowledge as an end) but pragmatic (the pursuit of knowledge for applied ends).’

This research returned findings to Aboriginal and Torres Strait Islander field partners through presentations, emails and summary papers. This honours a benefit-sharing agreement reached at the outset of the Plant Business project between Aboriginal and Torres Strait Islander field partners and the CRC-REP.\(^{100}\) Over the past three years, the managing entity of the CRC-REP (Ninti One) has been sharing these research findings with other bush food stakeholders to stimulate awareness of and support for Aboriginal and Torres Strait Islander interests in bush food commercialisation. This has created a pathway for the potential further development and adoption of the findings of this research. Relevant stakeholders include government departments, regional natural resource management boards, Aboriginal and Torres Strait Islander land councils and bush food developers. These discussions are ongoing, with Ninti One committed to helping Aboriginal and Torres Strait Islander peoples advance their preferred strategic options.

### 2.2 Ethical framework

This thesis has been conducted within the ethical framework of the CRC-REP and its managing entity, Ninti One. Ninti One is an independent, not-for-profit research institute based in Alice Springs.\(^{101}\) It is governed by a majority Aboriginal and Torres Strait Islander board who approve all research projects, including Plant Business.\(^{102}\) Ninti One has internal ethical policies with which researchers must comply.\(^{103}\) The policies embody the best-practice research standards outlined in the Australian Institute of Aboriginal and Torres Strait Islander Studies *Guidelines for Ethical Research in Indigenous Studies 2012*.\(^{104}\) This section outlines the measures taken by the Plant Business project and PhD researcher in compliance with Ninti One polices.

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99 Martin and Craig, above n 52.
100 CRC-REP, *Conversations, Cups of Tea ...*, above n 19, 15.
104 See Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Australian Indigenous Studies* (AIATSIS, 2012); Ninti One (2012), above n 103, 1.
2.2.1 Ninti One Aboriginal and Torres Strait Islander research engagement protocol

The Ninti One Aboriginal and Torres Strait Islander research engagement protocol provides a starting point for negotiations between Ninti One researchers and Aboriginal and Torres Strait Islander peoples. ‘It is … an active document that is specific to each research project, within the framework of best practice outlined’.\(^{105}\)

Best practice processes for each project include:

- obtaining Aboriginal and Torres Strait Islander consent to carry out research;\(^{106}\)
- collaborating with Aboriginal and Torres Strait Islander peoples to design and deliver research aims;\(^{107}\)
- supporting the active participation, employment and training of Aboriginal and Torres Strait Islander peoples in all research stages;\(^{108}\)
- convening an Aboriginal and Torres Strait Islander advisory group;\(^{109}\) and
- sharing research benefits with Aboriginal and Torres Strait Islander partners.\(^{110}\)

One of the first actions taken by the Plant Business project leader was the convening of the Plant Business Advisory Group.\(^{111}\) Another early action was the instigation of discussions with Western Aranda elders from Ntaria and Tjuwanpa Outstations in the Northern Territory.\(^{112}\) The driving force behind approaching people from this area was their traditional connections with the bush tomato, the focus species of the scientific aspects of the Plant Business project. At the end of 2011, after more than six months of discussions and planning, the Ninti One board approved the Plant Business project proposal.\(^{113}\)

The next stage of the Plant Business project was to formalise agreed benefit-sharing arrangements with Western Aranda peoples through their legal

\(^{105}\) Ninti One (2012), above n 103, 1.
\(^{106}\) Ibid 2.1.
\(^{107}\) Ibid 2.2.
\(^{108}\) Ibid 3.4.
\(^{109}\) Ibid 2.3.
\(^{110}\) Ibid 4.2.
\(^{111}\) See CRC-REP, Conversations, Cups of Tea …, above n 19.
\(^{112}\) Ibid.
\(^{113}\) Ibid 9.
representatives, the Central Land Council.\textsuperscript{114} These negotiations are ongoing. Alongside this process was the formalisation of an agreement with Western Aranda elders to collect plant samples from their land. Ninti Aboriginal Community Researchers and Tjuwanpa Women Rangers facilitated these negotiations.\textsuperscript{115} Negotiations with elders occurred in the local language (Western Aranda). ‘Those people decided what information we could collect, what information was restricted’, and the conditions of specimen collection such as appropriate training, payment and documentation.\textsuperscript{116}

\subsection*{2.2.2 Ninti One protocol for Aboriginal and Torres Strait Islander knowledge and intellectual property}

This Ninti One protocol for Aboriginal and Torres Strait Islander knowledge and intellectual property is consistent with the principles outlined in the \textit{United Nations Declaration on the Rights of Indigenous Peoples}.\textsuperscript{117} The purpose of the protocol is ‘to guide researchers toward best practice in ethics, confidentiality, equitable benefit-sharing and in managing research information’ and Aboriginal and Torres Strait Islander knowledge ‘throughout the research process’.\textsuperscript{118} The protocol requires Ninti One researchers to:

- secure ethical clearances from university ethics committees;\textsuperscript{119}
- adhere to the Australian Institute of Aboriginal and Torres Strait Islander Studies \textit{Guidelines for Ethical Research in Indigenous Studies};\textsuperscript{120}
- respect local Aboriginal and Torres Strait Islander protocols;\textsuperscript{121}
- clarify when Aboriginal and Torres Strait Islander knowledge may be used and how, and ensure all uses accord with that agreement;\textsuperscript{122}
- start benefit-sharing negotiations on the assumption of a 50/50 share between Ninti One and Aboriginal and Torres Strait Islander knowledge providers;\textsuperscript{123}

\textsuperscript{114} Ibid 11.
\textsuperscript{115} Ibid 15.
\textsuperscript{116} Ibid.
\textsuperscript{117} Ninti One (2012), above n 103, 4.
\textsuperscript{118} Ibid 2.
\textsuperscript{119} Ibid 4.1.
\textsuperscript{120} Ibid.
\textsuperscript{121} Ibid.
\textsuperscript{122} Ibid 5.1.
\textsuperscript{123} Ibid 6.1.
• return research results to Aboriginal and Torres Strait Islander participants ‘in ways that are relevant, accessible and meaningful’; and
• regularly report on compliance with Ninti One research protocols.

Ethical clearance from an Australian university is generally only required when Aboriginal and Torres Strait Islander peoples are the subject matter of the research. Although the subject matter of Plant Business was native plants and the subject matter of this PhD was laws and institutions, both projects secured premium ethics clearance in the form of a National Ethical Application Form (NEAF) approval. These approvals committed project researchers to the *Guidelines for Ethical Research in Indigenous Studies*. In addition, the Plant Business project leader secured government approval for the project from the Central Australian Human Research Ethics Committee.

Negotiations to collect plant samples were conducted in accordance with the engagement protocols of Western Aranda elders. The collection agreement covered when and how Aboriginal and Torres Strait Islander knowledge can be used, and how research results can be returned to Western Aranda peoples. Research results have been consistently returned to other Aboriginal and Torres Strait Islander field partners through project newsletters and presentations. Annual Ninti One reporting requirements ensure continued compliance with these practices. Equal benefit-sharing arrangements were agreed early in the project, and are now being formalised through the Central Land Council (on behalf of the Western Aranda elders).

### 2.3 Summary

This chapter has explained the rationale behind the research methodology, and described the role of each method in detail. It has also described the ethical framework from within which the research was conducted. The next chapter begins

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124 Ibid 5.3.
125 Ibid.
127 Human Research Ethics Committee (Southern Cross University, HREC Approval Number: ECN-12-050, 2012)(see Appendix 3); Human Research Ethics Committee, Final report (University of New England, HREC Approval Number; HE14-018, 2014) (see Appendix 4).
128 Central Australian Human Research Ethics Committee (Northern Territory Government, Ethics Approval Number, HREC-12-61, 2012)(see Appendix 5).
the substantive journey towards the research aim by exploring major legal issues and opportunities that pertain to key Aboriginal and Torres Strait Islander interests.
CHAPTER 3: THE POTENTIAL OF LAW

3.1 What this Chapter does

The substance of this chapter is in the form of a journal paper: ‘Key Issues and Opportunities in Developing Laws to Support the Diverse Interests of Aboriginal and Torres Strait Islander Peoples in the Commercialisation of Traditional Plant Foods’ (provided in full in section 3.2). The paper reflects findings from a scoping study undertaken at the outset of the research, the objective of which was to explore the potential of Australian law to support the interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation. Key findings include the diversity of Aboriginal and Torres Strait Islander interests and the need to complement legal measures with institutional mechanisms to advance real-world outcomes. The findings underpin the choice of method outlined in Chapter 4, and the detailed investigations in Chapters 4, 5 and 6.

To honour the applied aims of the research, the journal paper has been reworked into a policy brief. The brief is basically a simplified document for wider dissemination to Aboriginal and Torres Strait Islander individuals, groups and representative bodies, non-Indigenous bush food developers and law, policy and decision makers. It is provided in section 3.3, and serves as the summary and conclusion section of the chapter.

3.2 Journal paper one

This article is subject to copyright. It is available at the following:

The Potential of Current Legal Structures to Support Aboriginal and Torres Strait Islander Interests in the Australian Bush Food Industry

Kylie Lingard

Abstract

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.
STATEMENT OF AUTHORS’ CONTRIBUTION

We, the PhD candidate and the candidate’s Principal Supervisor, certify that all co-authors have consented to their work being included in the thesis and they have accepted the candidate’s contribution as indicated in the Statement of Originality.

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STATEMENT OF ORIGINALITY

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*The Potential of Current Legal Structures to Support Aboriginal and Torres Strait Islander Interests in the Australian Bush Food Industry*

are the candidate’s original work.

Name of Candidate: Kylie Lingard
Name/title of Principal Supervisor: Paul Martin

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15 August 2015

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15 August 2015
3.3 Policy brief one

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STATEMENT OF ORIGINALITY

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figures and tables in the policy brief entitled:

The Potential of Law to Support Aboriginal and Torres Strait Islander Interests
in Bush Food Commercialisation

are the candidate’s original work.

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Name/title of Principal Supervisor: Paul Martin

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15 August 2015
CHAPTER 4: GOURMET BUSH FOOD PRODUCTS

4.1 What this Chapter does

The previous chapter presented findings from a scoping study on the capacity of Australian law to support Aboriginal and Torres Strait Islander interests in bush food commercialisation. The findings inform the detailed examination in this chapter on strategies to support Aboriginal and Torres Strait Islander interests in the development of gourmet bush food products like sauces, jams and chutneys. The development process encompasses other bush food commercialisation pathways, including the commercial harvesting of wild plants, the commercial production of bush foods on private land and the processing of raw ingredients for sale to gourmet product developers. The other major type of bush food commercialisation in Australia is the development of new bush food plant varieties; the next chapter (Chapter 5) considers strategies to support Aboriginal and Torres Strait Islander interests in this commercial context.

The substance of this chapter is in the form of a journal paper: ‘Strategies to Support the Interests of Aboriginal and Torres Strait Islander Peoples in the Development of Gourmet Bush Food Products’ (provided in full in section 4.2). The paper has three objectives:

- explore current research and the relevance of international developments to bush food commercialisation in Australia;
- assess current avenues of support for Aboriginal and Torres Strait Islander interests in the development of gourmet bush food products; and
- identify possible strategies to support Aboriginal and Torres Strait Islander interests in gourmet bush food product development.

The introduction and parts of the paper repeat much of the information already provided in the paper reproduced in Chapter 3, a necessity to ensure that it is a stand-alone document for publication. The key findings are that:

- the incorporation of major international developments into Australian law is unlikely to support the diversity of Aboriginal and Torres Strait Islander interests in bush food commercialisation; and
there is value in mapping commercialisation transactions to identify feasible legal and institutional interventions to support Aboriginal and Torres Strait Islander interests in bush food commercialisation.

The findings lend support to the adoption of a new approach to Aboriginal and Torres Strait Islander interests in bush food commercialisation.

As with Chapter 3, the findings explained in the journal paper inform a policy brief: ‘Strategies to Support Aboriginal and Torres Strait Islander Interests in the Development of Gourmet Bush Food Products’. The brief is reproduced in full in section 4.3.

4.2 Journal paper two

This paper is subject to copyright. It is available at the following:

DOI:10.1017/S0940739116000023
Strategies to Support the Interests of Aboriginal and Torres Strait Islander Peoples in the Commercial Development of Gourmet Bush Food Products

Kylie Lingard and Paul Martin

Abstract

Indigenous groups and individuals may have different needs and aspirations in relation to their local plant foods (“bush foods”). Interests may reflect totemic relationships, customary rights and duties, social positions, political and economic motivations, and personal capacities. This article uses a systems method to identify strategies to support the diverse interests of Australia’s Aboriginal and Torres Strait Islander peoples in the commercial development of gourmet bush food products. The aim is to identify possibilities for further consideration by Aboriginal and Torres Strait Islander peoples.
Journal-Article Format for PhD Theses at the University of New England

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**Kylie Lingard**  
Candidate  
15 August 2015

**Paul Martin**  
Principal Supervisor  
15 August 2015
STATEMENT OF ORIGINALITY

We, the PhD candidate and the candidate’s Principal Supervisor, certify that the text, figures and tables in the paper entitled:

Strategies to Support the Interests of Aboriginal and Torres Strait Islander Peoples in the Commercial Development of Gourmet Bush Food Products

are the candidate’s original work.

Name of Candidate: Kylie Lingard
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CHAPTER 5:  NEW NATIVE PLANT VARIETIES

5.1  What this chapter does

Chapter 4 discussed the possible legal and institutional strategies to support Aboriginal and Torres Strait Islander interests in the development of gourmet bush food products. This chapter examines the legal and institutional arrangements shaping another type of bush food commercialisation pathway: the development of new native plant varieties. Chapters 4 and 5 combined address most types of bush food development that occur in Australia at present.

The substance of the chapter is in the form of a journal paper: ‘Strategies to Support Aboriginal and Torres Strait Islander Interests in the Development of New Native Plant Varieties’ (provided in full in section 5.2). The paper has been accepted for publication in the Australia Intellectual Property Journal. The paper has two objectives:

- assess current avenues of support for Aboriginal and Torres Strait Islander interests in the development of new native plant varieties; and
- identify legal and institutional interventions that may improve support for Aboriginal and Torres Strait Islander interests in this commercial context.

The research discussed in this chapter reveals new uses of some of the strategies identified in Chapter 4. It also affirms the difference between strategies developed ‘in-context’ and those developed by examining specific legal instruments. This lends further support to the use of transaction mapping in developing strategies to support Aboriginal and Torres Strait Islander interests in bush food commercialisation.

As with the previous chapter, the paper informs a policy brief: ‘Strategies to Support Aboriginal and Torres Strait Islander Interests in the Development of New Native Plant Varieties’ (provided in full in section 5.3). The brief in this chapter introduces key findings from the journal paper and additional findings from later research.

5.2  Journal paper three

This paper is subject to copyright. It is available at the following:
Legal Support for the Interests of Aboriginal and Torres Strait Islander Peoples in the Commercial Development of New Native Plant Varieties: Current Status and Future Options

Kylie Lingard

Abstract

Australia’s Aboriginal and Torres Strait Islander peoples have many different needs and aspirations in relation to their traditional plants (herein “interests”). Aboriginal and Torres Strait Islander peoples face particular challenges in realising these interests in the commercial development of new native plant varieties. This article offers a set of legal and institutional options that may improve support for the diverse interests of Aboriginal and Torres Strait Islander peoples in this commercial context. The “transactions systems” approach applied in this article may be useful in other commercial contexts.
STATEMENT OF AUTHORS’ CONTRIBUTION

We, the PhD candidate and the candidate’s Principal Supervisor, certify that all co-authors have consented to their work being included in the thesis and they have accepted the candidate’s contribution as indicated in the *Statement of Originality*.

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STATEMENT OF ORIGINALITY

We, the PhD candidate and the candidate’s Principal Supervisor, certify that the text, figures and tables in the paper entitled:

Legal Support for the Interests of Aboriginal and Torres Strait Islander Peoples in the Commercial Development of New Native Plant Varieties: Current Status and Future Options

are the candidate’s original work.

Name of Candidate: Kylie Lingard
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5.3 Policy brief three

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STATEMENT OF ORIGINALITY

We, the PhD candidate and the candidate’s Principal Supervisor, certify that the text, figures and tables in the policy brief entitled:

Strategies to Support Aboriginal and Torres Strait Islander Interests in the Development of New Native Plant Varieties

are the candidate’s original work.

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CHAPTER 6: GOVERNANCE

6.1 What this Chapter does
This chapter shifts the focus from specific commercialisation pathways to the public governance processes that shape these pathways. The substance of this chapter is in the form of a journal paper: ‘An Inclusive Governance Framework for Bush Food Commercialisation’ (provided in full in section 6.2). The paper responds to an understanding that emerged in the research process, that people who are meaningfully involved in bush food governance are more likely to have their interests supported in bush food development. The objective of the paper is to identify current and future avenues of support for the meaningful involvement of Aboriginal and Torres Strait Islander peoples in these processes.

A key finding of this research stage is the failure of current law to reflect the widespread policy support for the meaningful involvement of Aboriginal and Torres Strait Islander peoples in bush food governance. This may partially explain why Aboriginal and Torres Strait Islander peoples must currently rely on voluntary support for their interests from bush food developers and government officials. On a more positive note, the research reveals some legal and institutional measures that may improve the status quo.

As with the previous chapters, the possibilities revealed in the journal paper inform a policy brief: ‘An Inclusive Governance Framework for Bush Food Commercialisation’. The brief is provided in full in section 6.3.

6.2 Journal paper
An Inclusive Governance Framework for the Australian Bush Food Commercialisation System

Kylie Lingard

Abstract

This paper looks at public governance processes that shape the commercial development of Australian native plant foods (‘bush foods’). Relevant processes include the making of administrative plans and decisions, and the setting of public research priorities. The aim is to identify legal and institutional strategies to support the equal participation of Aboriginal and Torres Strait Islander peoples in these governance processes. Such strategies may further multiple national policy goals and commitments, and provide an avenue for Aboriginal and Torres Strait Islander peoples to assert their diverse interests in this commercial context.
STATEMENT OF AUTHORS’ CONTRIBUTION

We, the PhD candidate and the candidate’s Principal Supervisor, certify that all co-authors have consented to their work being included in the thesis and they have accepted the candidate’s contribution as indicated in the Statement of Originality.

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STATEMENT OF ORIGINALITY

We, the PhD candidate and the candidate’s Principal Supervisor, certify that the text, figures and tables in the paper entitled:

An Inclusive Governance Framework for Bush Food Commercialisation

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6.3 Policy brief four

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STATEMENT OF AUTHORS’ CONTRIBUTION

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STATEMENT OF ORIGINALITY

We, the PhD candidate and the candidate’s Principal Supervisor, certify that the text, figures and tables in the policy brief entitled:

*An Inclusive Governance Framework for Bush Food Commercialisation*

are the candidate’s original work.

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CHAPTER 7: CONCLUSIONS

This thesis aimed to identify possible legal and institutional strategies to support the diverse interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation. It uses a combination of methods to address three intertwined research questions. The goal is an integrated framework of interventions which may form the basis for a series of negotiations and reforms to advance Aboriginal and Torres Strait Islander interests, even if one or more of the preferred options is closed or delayed. The approach is designed to allow maximum flexibility to achieve a pragmatic outcome. The work is both ambitious and constrained: ambitious in attempting to develop a comprehensive suite of interconnected options that in combination could achieve systematic protection even in the absence of a sui generis solution; but constrained by the inability, within the time and economic parameters of a PhD, to fully develop all the details of the proposals.

This chapter begins by synthesising key research findings, many of which make an original contribution to knowledge on this topic. It then explores the significance of the research to Aboriginal and Torres Strait Islander peoples, policy and scholarship, before proposing some areas for future research. The chapter closes by outlining a process for translating the research into something of genuine benefit to Aboriginal and Torres Strait Islander peoples.

7.1 Key findings

The main question this thesis sought to answer is:

**What legal and institutional strategies may improve support for the interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation?**

This research is based on respect for the diversity of Aboriginal and Torres Strait Islander interests and commercialisation pathways, and recognition of the limited ability of existing proposed ‘solutions’ to systematically support the diversity of Aboriginal and Torres Strait Islander interests. To take the research beyond a critique of the limits of current research and into the realm of the possible and how to achieve it, this research adopted an innovative approach: the thesis addressed the
interests of Aboriginal and Torres Strait Islander by first mapping transactions that occur along common bush food commercialisation pathways and then interrogating the laws affecting those transactions. This approach was fruitful in generating innovative alternatives to existing proposals.

An unexpected discovery from the analysis of commercialisation transactions was the limited usefulness of genetic resource and intellectual property laws (Chapter 4 and 5). This is an important finding because many popularly advocated proposals assume that these laws are central to advancing Aboriginal and Torres Strait Islander interests in their traditional resources and knowledge. Intellectual property and scientific research rules, in practice, are probably of limited value compared to the many other rules largely ignored in prior investigations.

The finding underpins two conclusions:

1. Feasible interventions must respond strategically to the context in which the interests arise (rather than respond primarily to whatever instrumental options are immediately available within the law).

2. By carefully analysing the transactions involved in bush food commercialisation, it is possible to identify new ways in which the law might support Aboriginal and Torres Strait Islander interests.

While it has been possible to use transaction mapping coupled with law and policy research to identify strategies to support many Aboriginal and Torres Strait Islander interests, the approach highlighted some important interests that the law may struggle to address. This is especially so with regard to interests related to respect for Aboriginal and Torres Strait Islander elders, knowledge and stories.

The need for ‘respect’ is often expressed, particularly by Aboriginal and Torres Strait Islander elders, but the law is a weak tool for securing this in capitalist systems that predominantly value only the commodity that is sold. Some indirect measures, such as requirements to pay Aboriginal and Torres Strait Islander peoples for their advice and provide for their meaningful inclusion in governance processes, go a small way towards this – such measures are included in the options discussed (Chapter 6). However, the ‘solution’ to respect-related interests must lie in meaningful reconciliation within society. Legal approaches can only contribute one part of a much larger change program.
The rest of this section of the chapter discusses in more detail the findings for each of the sub-questions that derive from the main question.

7.1.1 Sub-question 1: Key findings

To what extent can current legal and institutional arrangements (not limited to government) support Aboriginal and Torres Strait Islander interests in bush food commercialisation?

The transaction mapping approach applied in this research made it possible to systematically identify where law and commercial activities intersect. An analysis of the legal and institutional arrangements regulating these points of intersection highlights the currently limited support available for Aboriginal and Torres Strait Islander interests in transactions not identified by prior research (Chapter 4, 5 and 6). These findings make an original contribution to this field of knowledge.

Superficially, there are two ways in which the law has the potential to support the interests of Aboriginal and Torres Strait Islander peoples who control access to land. First, Aboriginal and Torres Strait Islander peoples who control access to land can enter into agreements with people who want to take plants from that land. Second, Aboriginal and Torres Strait Islander peoples who control access to land can harvest, grow and sell produce from that land. The law also allows Aboriginal and Torres Strait Islander peoples to exploit their non-public bush food knowledge, or enter into agreements with others who want to exploit the knowledge. Additionally, the law allows Aboriginal and Torres Strait Islander peoples to object to the use of words and symbols in plant names and product trademarks that are deceptive about cultural association. However, this research finds that, in practice, these theoretical legal possibilities are of marginal relevance.

In sum, this research uncovered a number of alternative transactions, practical realities and capacity-related constraints that undermine any theoretical avenue of support. The main issues are as follows:

- Many native plant specimens are accessed from collections (eg, tissue culture labs) and, under current arrangements, Aboriginal and Torres Strait Islander peoples are not likely to be able to assert their interests in these transactions.
• Most developed species are available from non-Indigenous people who grow bush foods for commercial purposes on private lands, and Aboriginal and Torres Strait Islander peoples cannot assert their interests in these transactions.
• A lot of Aboriginal and Torres Strait Islander knowledge on developed bush food species is freely available, with no legal mechanism for Aboriginal and Torres Strait Islander peoples to control or benefit from the use of this knowledge.
• There are few services to help Aboriginal and Torres Strait Islander peoples access the resources needed to harvest, grow, make or sell bush food products.
• There are fundamental cultural challenges with the use of most legal instruments, such as difficulties in ascribing legal rights or knowledge to specific groups of Aboriginal and Torres Strait Islander peoples.

These problems probably can be overcome, but the challenge should not be underrated. Finding effective solutions will require not only legal innovation but also complex cultural negotiation.

Thus, the research on sub-question one finds that there is a lack of useful legal support for Aboriginal and Torres Strait Islander interests in bush food commercialisation, even if conventional legal protections are strengthened. Non-Indigenous developers are largely free to make and trade bush food products without regard for the interests of Aboriginal and Torres Strait Islander peoples. In terms of the aspirations of Aboriginal and Torres Strait Islander peoples, and the desire of Australians (expressed through their governments) for the social and economic advancement of Aboriginal and Torres Strait Islander peoples, this is an unsatisfactory state of affairs.

7.1.2 Sub-question 2: Key findings

What innovative uses of current legal and institutional arrangements may improve support for Aboriginal and Torres Strait Islander interests in bush food commercialisation?
There is some potential to make better, more innovative use of existing legal and institutional arrangements to increase support for Aboriginal and Torres Strait Islander interests in bush food commercialisation.

An important finding from this research concerns the link between cultural connections to bush foods and land ownership or management (Chapter 3). With appropriate legal and/or institutional reforms, it is possible to extend the existing legal rights of some traditional land custodians to public lands and specimen collections. These extensions, coupled with revisions to permit procedures and public funding agreements, could expand participation opportunities for traditional custodians in bush food commercialisation, and make it easier for developers to share commercialisation benefits. However, the link between legal rights to control access to land and traditional custodianship does not fully address the scope of cultural interests. Many Aboriginal and Torres Strait Islander peoples with cultural responsibilities for bush foods do not control access to land. How this can be addressed is a matter that needs further development in consultation with traditional custodians.

A second finding concerns the lack of expertise available to help Aboriginal and Torres Strait Islander peoples start and sustain bush food businesses and commercial partnerships (Chapters 4 and 5). This is not a legal issue but it is an important complement to ensure that the potential created by legal and institutional reforms are realised in practice. Some Aboriginal and Torres Strait Islander peoples have been operating bush food businesses for years and some developers have been working with Aboriginal and Torres Strait Islander peoples to foster new agricultural opportunities. However, many Aboriginal and Torres Strait Islander peoples lack access to the skills and resources needed to become bush food entrepreneurs. Filling this skills and resource gap in ways that span the total of the transactions involved is necessary if there are to be practical benefits for Aboriginal and Torres Strait Islander peoples. It will require a concrete strategy to advance Aboriginal and Torres Strait Islander bush food opportunities and investment on a sustained basis, as well as to achieve the social inclusion outcomes to which much public policy is oriented.
7.1.3 Sub-question 3: Key findings

What more radical measures, including new laws, might further improve support for Aboriginal and Torres Strait Islander interests in bush food commercialisation, by addressing issues beyond the scope of existing rules and institutional arrangements?

The key finding from researching this question is that law reforms developed from an understanding of commercialisation transactions (the methodology used in this research) are likely to differ substantially from those arising from a conventional doctrinal approach, such as the study of intellectual property law. The former approach emphasises reshaping transactions to suit the legal instrument, whereas the latter emphasises adjusting legal instruments to fit within the commercial context. The two types of approaches do not necessarily align to create systemic improvement in the situation for Aboriginal and Torres Strait Islander peoples.

The reform proposals most often advanced in the current literature include:

- the creation of a new intellectual property right to prohibit the unauthorised use of secret Aboriginal and Torres Strait Islander knowledge; and
- the wider implementation of biodiversity access and benefit-sharing rules to ensure researchers have consent to use secret Aboriginal and Torres Strait Islander knowledge, and agree to share the benefits of knowledge use with the knowledge providers.

While desirable in themselves, this research suggests that those proposals have limited potential to improve support for Aboriginal and Torres Strait Islander interests in bush food commercialisation. The reason is that much Aboriginal and Torres Strait Islander bush food knowledge is already freely available and genetic research on wild plants is rarely the basis of bush food development. This research shows that reform proposals that more precisely reflect the commercial context are more likely to support the interests of Aboriginal and Torres Strait Islander peoples than those developed from a primary focus on laws (see especially Chapters 4 and 5).

This research identifies several radical law reforms that may benefit Aboriginal and Torres Strait Islander peoples in bush food commercialisation. They include:
● creating a legal right for traditional owners to exclusively exploit commercially undeveloped species for up to 10 years;
● making international bush food trade dependent on traditional custodian consent, or compliance with species development plans;
● expanding the objectives of many laws that shape bush food commercialisation to directly support the interests of Aboriginal and Torres Strait Islander peoples; and
● requiring public authorities to provide for the meaningful inclusion of Aboriginal and Torres Strait Islander peoples in various governance processes.

These findings are quite different to those generated by an instrument-focused approach to the same issues. The question remains whether there is a realistic chance for this type of reform to succeed. Major reforms intended to empower Indigenous peoples usually challenge established beliefs and interests, and this is always likely to create institutional impediments to desired change. For example, changes to flora governance may encounter policy-maker and business aversions to government control over economic development; changes to food and biosecurity governance may challenge the narrow mandate of authorities whose role is currently only to protect public health and safety. There may also be (perhaps largely unspoken) aversions to increasing the power of Aboriginal and Torres Strait Islander peoples to ‘interfere’ with established government and commercial arrangements.

Along with this is the reality that making many of the possibilities feasible in practice will involve investment, negotiation and innovation in the design and implementation of efficient approaches. Whether this is something that is considered worthwhile depends largely on the degree to which it is considered important to advance the economic interests of Aboriginal and Torres Strait Islander peoples in their culture and knowledge, and whether it is considered likely that the results will justify the effort. However, there is another dimension to this, which is less concerned with economics and more concerned with issues of justice. This aspect, also, needs to be weighed in the balance when deciding what degree of innovation and investment is sensible to make in advancing the interests of Australia’s first peoples in their culture and knowledge.
7.2 The significance of the work and its contributions to policy and knowledge

Already noted are the several unique contributions that this research has made, including:

- Aboriginal and Torres Strait Islander peoples have diverse interests in bush food commercialisation, and no single ‘solution’ can support every interest;
- genuine support for Aboriginal and Torres Strait Islander interests requires an integrated mix of legal and administrative measures, and it may not be possible to develop legal ‘solutions’ for every interest;
- innovative uses of existing legal and institutional structures may increase support for some Aboriginal and Torres Strait Islander interests; and
- law reforms developed from an understanding of commercialisation transactions differ from those arising from a conventional doctrinal approach.

This section further discusses the contributions of this research to international and domestic policy development, Aboriginal and Torres Strait Island peoples and legal scholarship.

7.2.1 International policy development
An unintended benefit of this research is its contribution to international policy development. In 2007, the world overwhelming accepted the provisions of the United Nations Declaration on the Rights of Indigenous Peoples as the minimum standards necessary for the survival, dignity and wellbeing of Indigenous peoples. The acceptance was the result of decades of sustained research, activism and diplomacy, and a greater understanding of the impacts of industrialisation and colonialism on Indigenous peoples.

The Declaration contains 46 articles, many of which are relevant to the interests of Aboriginal and Torres Strait Islander peoples in their traditional plant foods. These include rights to maintain, control and develop traditional resources and knowledge, and rights to participate in legislative and administrative process using traditional procedures. This thesis provides policy makers in other countries with an Australian case study of alternative approaches to honouring these provisions as they relate to bush food commercialisation. The findings and the methods that were used can
contribute something new and important to international policy development intended to advance the provisions of the Declaration.

### 7.2.2 Domestic policy development

Australian governments support the *United Nations Declaration on the Rights of Indigenous Peoples* and the improvement of Aboriginal and Torres Strait Islander wellbeing. Current national policies link Aboriginal and Torres Strait Islander wellbeing to the valuing of Aboriginal and Torres Strait Islander culture, needs and aspirations. Unfortunately, a stark wellbeing gap persists between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians. This research presents Australian policy makers with a new avenue to advance social justice goals.

The possible avenues outlined in this thesis target bush food commercialisation, a relatively unexplored policy area. The possibilities embrace notions of self-determined development, compensation, respect and inclusion. These notions may sound idealistic in light of current government preferences for mainstream employment goals and passive information exchanges between government agencies and Aboriginal and Torres Strait Islander peoples. However, this research indicates the potential for bush food commercialisation to help Aboriginal and Torres Strait Islander peoples realise their own needs, aspirations and wellbeing.

The methods used in this research can, in themselves, also contribute to domestic policy development. Australia (like many other countries) has a history of unsatisfactory outcomes from well-intentioned Indigenous welfare policies. The transaction mapping method in this thesis uses a detailed analysis of the underlying transaction system to identify with specificity the transactions that need to be adjusted to achieve a desired policy outcome. Such a systematic approach should (at the bare minimum) provide a complementary approach that will help to ensure comprehensive interventions rather than merely instrumental and administrative change. Managing the total system would seem far more likely to be effective than managing only some parts of that system.

### 7.2.3 Opportunities for Aboriginal and Torres Strait Islander peoples

This research offers Aboriginal and Torres Strait Islander peoples a different perspective on opportunities for the law and policy to support some of their interests
in bush food commercialisation. The aim of this research was to provide options for Aboriginal and Torres Strait Islander peoples to explore. It is not expected that all will be relevant or appealing. Different strategies are likely to appeal to different peoples because of their unique interests and capacities. One group may wish to carry out feasibility assessments of three strategies proposed in this research; another may use the commercialisation scaffold to identify new strategies to explore. It is likely that further exploration will identify refined or completely new options that go beyond what this research has identified. What this thesis has done is identify that there are many more options than might have been immediately obvious, and that the lack of one pathway (such as *sui generis* laws) does not mean that there are not alternative options available.

### 7.2.4 Significance to legal scholarship

Most bush food researchers are social or applied scientists who use methods traditional to their discipline to explore the physical characteristics of plants or involvement of Aboriginal and Torres Strait Islander peoples in supply chains. Legal scholars typically use doctrinal methods to develop recommendations. Doctrinal approaches to Aboriginal and Torres Strait Islander interests tend to commence with a focus on reforms to existing legal instruments, or upon *sui generis* approaches.

This thesis contributes to law and policy scholarship by using a multi-method approach that combines applied and doctrinal research processes. The findings demonstrate the value of the methods. Similar combinations of engaged, theoretical, systems and evaluative methods may help other legal research projects that are focused on producing real-world value to the peoples affected by the subject matter.

### 7.3 Areas of future research

This thesis gives rise to future research opportunities, each substantial enough to form the basis of another thesis. Future research areas include:

- further development of the options identified in this thesis, in consultations with Aboriginal and Torres Strait Islander peoples;
- an exploration of implementation requirements and feasibility from an Aboriginal and Torres Strait Islander perspective as well as from the viewpoint of other stakeholders;
• use of transaction mapping to extend legal support for the interests of Aboriginal and Torres Strait Islander peoples in other native plant commercialisation contexts, potentially including the development of medicinal, cosmetic and essential oil products (and potentially expanding the approach to non-plant cultural products such as art); and
• extension of the transaction mapping approach to other law and policy questions.

7.4 Research limitations and a way forward

Limitations of time and resources, and a commitment to the belief that whatever strategies were to be advanced should be extensively investigated in consultation with Aboriginal and Torres Strait Islander peoples, limited the development of detailed implementation strategies. The research is a conscious first step in the journey towards implementation of an integrated framework of interventions to support the diverse interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation.

The next step is to find out which options Aboriginal and Torres Strait Islander peoples wish to develop further. This is being pursued through Ninti One, the funder of this research, through dissemination of the policy briefs and discussions with Aboriginal and Torres Strait Islander peoples.

The hardest task is likely to come after the next stage of assessment, in securing government and/or commercial support for change. To this end, Ninti One is also exploring the concepts in this thesis with government officials, developers and scientists to stimulate reconsideration of Aboriginal and Torres Strait Islander interests in bush food development. The research presented in this thesis may help convince governments and developers that their support could transform abstract social justice goals into tangible outcomes that show genuine respect for the world’s oldest living culture and for the people to whom that culture belongs.

7.5 Concluding remarks

Successive speeches by Australian Prime Ministers indicate political support for finding new solutions to the persistent wellbeing gap between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians. For instance, Paul Keating
declared in 1992 that it was time to ‘forge a new partnership’.\textsuperscript{129} Kevin Rudd declared the 13 February 2008 as the day ‘we embrace the possibility of new solutions to enduring problems where old approaches have failed’.\textsuperscript{130} Most recently, on 12 February 2014, Tony Abbott acknowledged the bi-partisan political support for turning ‘good intentions into better outcomes’:

There is probably no aspect of public policy on which there is more unity of purpose and readiness to give others the benefit of the doubt. On this subject, at least, our parliament is at its best. Our duty is to make the most of this precious moment.\textsuperscript{131}

This thesis offers some ways to transform this political commitment into practical change, helping Aboriginal and Torres Strait Islander peoples implement their preferred legal and institutional options in bush food commercialisation. Such support may help forge a new partnership between Aboriginal and Torres Strait Islander peoples and government; one based on the principles of respect, gratitude and empowerment.

\textsuperscript{129} Paul Keating, ‘Redfern speech’ (Redfern Park, 10 December 1992).
\textsuperscript{130} Kevin Rudd, ‘Apology to Australia’s Indigenous peoples’ (Parliament of Australia, 13 February 2008).
\textsuperscript{131} Tony Abbot, ‘Statement to the House of Representatives: closing the gap’ (Parliament of Australia, 12 February 2014).
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APPENDICES

Appendix 1: Asserting cultural interests through the law

Appendix 2: Embracing Diversity

EMBRACING DIVERSITY

AN INVESTIGATION INTO THE LEGAL AND INSTITUTIONAL ARRANGEMENTS THAT BEST ENSURE PATHWAYS TO BUSH FOOD COMMERCIALISATION HELP ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE ACHIEVE THEIR NEEDS AND ASPIRATIONS IN RELATION TO BUSH FOOD KNOWLEDGE

PhD Thesis Issues Paper

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October 2012

COOPERATIVE RESEARCH CENTRE FOR REMOTE ECONOMIC PARTICIPATION

UNIVERSITY OF NEW ENGLAND
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Introduction

The context of this Issues Paper

This Issues Paper is the first step in a broader research project that aims to identify legal and institutional arrangements that best ensure pathways to bush food commercialisation help Aboriginal and Torres Strait Islander people achieve their needs and aspirations in relation to bush food knowledge. The exciting challenge that lies at the heart of this research project is the identification of arrangements that embrace diverse interests. The project looks at the legal and institutional arrangements invoked along various pathways to commercialisation, and the extent that these arrangements help Aboriginal and Torres Strait Islander people achieve their needs and aspirations in relation to bush food knowledge. The analysis of current arrangements will help shape a conversation on reforms that may ensure various pathways to commercialisation help Aboriginal and Torres Strait Islander people achieve the most possible needs and aspirations. The project will lead to the compilation of a suite of legal and institutional models and a set of tools that Aboriginal and Torres Strait Islander people may pick up to pursue diverse interests in a variety of ways.

This Issues Paper reviews the knowledge-related issues and ideas raised in the current literature on the bush food industry. Bush food authors have illuminated many Aboriginal and Torres Strait Islander needs and aspirations in relation to bush food knowledge, and suggested a variety of institutional arrangements that may support certain needs and aspirations.1 The review of knowledge-related issues and ideas is enriched by recourse to key papers in the national literature on Aboriginal and Torres Strait Islander knowledge. The national literature has helped clarify the extent that current and reformed legal and institutional arrangements can protect Aboriginal and Torres Strait Islander knowledge from unauthorised or unremunerated use.2 The following review is ultimately intended to help identify various legal and institutional arrangements that merit further investigation in the broader research project.

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Aboriginal and Torres Strait Islander bush food knowledge

There is much debate in the broader literature over what to call Indigenous people’s knowledge. This is because the choice of term can affect the types of knowledge considered. For example:

- use of the term ‘Indigenous knowledge’ may homogenise Aboriginal and Torres Strait Islander people’s needs and aspirations in relation to bush food knowledge
- use of the term ‘Traditional Knowledge’ may limit consideration to ancient knowledge or knowledge held by people living ‘traditional’ lifestyles
- use of the term ‘Indigenous Ecological Knowledge’ may exclude non-environmental types of knowledge

To avoid ambiguity, this paper adopts a term similar to that used in the title of a recent Aboriginal-authored report on the bush food industry in central Australia - Aboriginal and Torres Strait Islander bush food knowledge. The phrase ‘Aboriginal and Torres Strait Islander’ is understood as referring to descendants of the original inhabitants of Australia. The term ‘bush food’ describes plants

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4 Anderson, above n 3, 5.

5 See Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 19.


7 Smallacombe, Davis and Quiggin, above n 2, 8.

8 Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1.


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traditionally eaten by Aboriginal and Torres Strait Islander people.9 ‘Knowledge’ is recognised as meaning facts, information and skills gained through experience or education.10 Aboriginal and Torres Strait Islander bush food knowledge, or bush food knowledge for short, thus refers to bush food related facts, information and skills held by descendants of the original inhabitants of Australia.

The bush food industry

Bush food includes plants such as lemon myrtle, bush tomato, quandong, desert lime, Davidson plum and riberry.11 In the 1980s, bush food moved from being an Aboriginal source of food and trade to a commercial product featuring on catering, restaurant and supermarket menus.12 Increased demand means that Aboriginal and Torres Strait Islander bush harvesters now compete with specialist growers to supply raw bush food material to traders, processors and restaurants.13 Today, the annual retail value of the bush food industry is estimated at between 5–20 million dollars.14 The upward trend experienced since the 1980s is likely to continue as people develop new bush food related products like high-end gourmet condiments, new plant variety seedlings and mechanical harvesters.15

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13 Morse, above n 13, 28.
14 Ibid 25; Cleary, above n 13, 1.
15 See generally Cleary, above n 13, 1, 4; Morse, above n 13, 28-29; Anfil, above n 12; see, e.g., Rural Industries Research and Development Corporation, above n 10; Cooperative Research Centre for Remote Economic Participation, Plant business (2012) <http://crc-rep.com/research/enterprise-development/plant-business>.
The theme of diversity

The exciting challenge that lies at the heart of this research problem is the identification of legal and institutional arrangements that embrace diverse interests. Diverse interests are inherent in pathways to commercialisation and in Aboriginal and Torres Strait Islander needs and aspirations. A pathway to commercialisation is the route taken to transform an idea into a market product. Each choice may invoke a different set of legal and institutional arrangements. For example, an individual may choose to privately finance research into a new gourmet bush food product with the intent of taking the new product to market. This pathway may invoke different laws and institutions to those governing a not-for-profit research institution that receives government funding to develop a new plant variety that will be taken to market by someone else. Similarly, Aboriginal and Torres Strait Islander individuals and groups may have a range of unique, shared or competing knowledge-related goals. For example, one Aboriginal person may want to share bush food knowledge with young Aboriginal people, while another may want to use that knowledge to foster commercial partnerships. Further, different Aboriginal and Torres Strait Islander aspirations may invoke different needs. For example, a group that aspires to enter into a knowledge-related agreement may have different cross-cultural communication requirements than another group that shares the same goal.

It is not be possible to investigate infinite pathways, needs and aspirations. It is possible to identify the legal and institutional arrangements that bear on a range of pathways to bush food commercialisation, and the extent that these arrangements help Aboriginal and Torres Strait Islander people achieve diverse needs and aspirations. The purpose of the following discussion is to identify legal and institutional arrangements that may help Aboriginal and Torres Strait Islander people achieve different needs and aspirations in relation to bush food knowledge.

Issues, recommendations and areas to investigate

Aboriginal and Torres Strait Islander authors, and others, have identified an array of Aboriginal and Torres Strait Islander needs and aspirations in relation to bush food knowledge. Aspirations include the transmission of bush food knowledge to future generations, the recognition and reward of bush food knowledge that has contributed to the development of the bush food industry, the ability to control bush food knowledge according to customary protocols, respect for bush food knowledge holders, and increased involvement in the bush food industry. Indigenous-drafted international instruments may also reflect knowledge-related aspirations that Aboriginal and Torres Strait Islander people share with the global Indigenous community. For example, the Declaration on the Rights of Indigenous People evinces an Indigenous aspiration to ‘maintain, control, protect and develop…traditional knowledge’.

Bush food authors, and Aboriginal and Torres Strait Islander authors in the national literature, have illuminated the link between Aboriginal and Torres Strait Islander aspirations and needs. For example, an Aboriginal group who wishes to enter into a commercial agreement with a product developer may require the provision of commercial information in the first language of the group. An Aboriginal person who wishes to represent knowledge-related interests in the bush food industry may require participatory mechanisms that accommodate cultural timeframes for consultation. An Aboriginal person who wishes to pass on skills to younger people may require support for the conservation of the cultural practices associated with those skills.

22 See, e.g., Merne Attyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1.
23 Ibid.
24 Ibid.
25 Ibid.
28 See Janke, above n 2, 81.
The predominant concern in the bush food literature, and the national literature on Aboriginal and Torres Strait Islander knowledge, is that existing legal and institutional arrangements do little to help Aboriginal and Torres Strait Islander people achieve their knowledge-related needs and aspirations. Authors have put forward several recommendations intended to improve the current situation. The following conversation brings together the discourse on Aboriginal and Torres Strait Islander needs and aspirations in relation to bush food knowledge, the issues that may bear on these needs and aspirations, and the recommendations intended to better support these needs and aspirations. The discussion helps identify some legal and institutional arrangements to investigate further in the broader research project.

**Transmitting, practicing, developing and maintaining bush food knowledge**

One of the biggest concerns of bush food authors is the potential for commercial values to negatively impact cultural values. Where 'most non-Aboriginal people view bush foods simply as commodities that can be traded on weight basis with a dollar value in a profit-driven market place', Aboriginal and Torres Strait Islander people view bush food as an important food source, totem and subject of cultural expressions like song, story, dance and ceremony. Increased commercial demand for bush

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9%20FA%20MAY%202005_160.pdf> 7; Miers, above n 13, iii; Morse, above n 13, 2, 4, 9-10, 51, 83, 90-93; Fiona Walsh and Josie Douglas, 'No bush foods without people: the essential human dimension to the sustainability of trade in native plant products from desert Australia' (2011) 33 *The Rangeland Journal* 395, 410; AB Cunningham, ST Garnett and J Gorman, 'Policy lessons from practice: Australian bush products for commercial markets' (2009) 74 *Geojournal* 429, 430-431, 434; Cleary, above n 13, 4-6; Smallacombe, Davis and Quiggin, above n 2, 17-18.


32 Merne Altererre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1; see also ibid 7-8, 12; Walsh and Douglas, above n 30, 413; Cunningham, Garnett and Gorman, above n 30, 430.

33 Merne Altererre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 16-17; Anpermirrentye: relationships between bush foods, people, country and all things (Arrentme People of Central Australia and Desert Knowledge Cooperative Research Centre, 2009) <http://desertknowledgeccrmmedia.com.au/media/anpermirrentye_12_min.html>; Cunningham, Garnett and Gorman, above n 30, 431; Holcombe, Yates and Walsh, above n 21, 261; see also Morse, above n 13, 10.
food means that bush harvesters now compete with specialist growers to supply raw bush food material to traders, processors and restaurants. Reduced demand for bush harvested produce may threaten the fulfilment of aspirations that occur as a matter of course in the bush harvest. These aspirations include the transmission, application, development and maintenance of bush food knowledge.

Some authors suggest that these aspirations may be alternatively enabled by the recording of knowledge in a register or database. The aspirations supported by these institutional measures depend on whether access to the recording is private or public. For example, recording knowledge in a private database may help Aboriginal and Torres Strait Islander people transmit, maintain and disseminate the knowledge according to customary protocols. While recording knowledge in a publically available register may help establish a legal claim to the knowledge, it may make it harder for Aboriginal and Torres Strait Islander people to maintain the knowledge according to customary protocols. In general, recording knowledge in a register or database may not suit communities that have limited access to technology, or who aspire to transmit, maintain, apply and develop knowledge through cultural practice or oral tradition. It may also feed the perception that Aboriginal and Torres Strait Islander knowledge is static rather than dynamic. This may have a negative impact on aspirations related to respect for bush food knowledge as an innovative science.

There is some recent literature that considers whether it is possible to reconcile commercial and cultural values. This does not preclude consideration of combined or reformed arrangements that can enable diverse aspirations while satisfying commercial demand. For example, a combination of institutional arrangements, equitable principles and the laws of trusts may help ensure that publically

34 Morse, above n 13, 28.
35 Walsh and Douglas, above n 30, 410; Cleary, above n 13, 4-6; Smallacombe, Davis and Quiggin, above n 2, 17-18.
36 Ibid.
37 Evans et al, above n 1; Janke, above n 2, 133; Smallacombe, Davis and Quiggin, above n 2, 16-17.
38 See Craig and Davis, above n 31, 22; Smallacombe, Davis and Quiggin, above n 2, 59.
39 Smallacombe, Davis and Quiggin, above n 2, 16-17.
40 Craig and Davis, above n 31, 22.
41 Smallacombe, Davis and Quiggin, above n 2, 16-17, 59, 133.
42 See, e.g., Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 19.
43 See Janke, above n 2, 133.
44 See Walsh and Douglas, above n 30, 395; Miranda Forsyth, ‘Do you want it gift wrapped? Protecting traditional knowledge in the Pacific Island countries’ in Peter Drahos and Susy Frankel (eds), Indigenous people’s innovation: intellectual property pathways to development (Australian National University E Press, 2012) 191.
45 Walsh and Douglas, above n 30, 395; see generally ibid 411; Morse, above n 13, 10; Miers, above n 13, iii; Cunningham, Garnett and Gorman, above n 32, 435; Cleary, above n 13, 2.
available knowledge is maintained according to customary protocols. Needs and aspirations connected to the bush harvest practice might be enabled by a bush food industry policy that requires stakeholders to consider the social, environmental, economic and cultural impact of choices made along the pathway to bush food commercialisation.

**Enabling recognition and remuneration for bush food knowledge**

Another major concern raised in the bush food literature is that despite wide-spread acceptance that the bush food industry is ‘overwhelmingly reliant’ on Aboriginal and Torres Strait Islander bush food knowledge, there is no formal requirement for industry stakeholders to recognise or remunerate this contribution. The knowledge accepted as underpinning the industry is twofold. It is the knowledge ‘developed and refined over thousands of years’ that has enabled the conservation of the resource and the identification of edible plants, plant locations, growing conditions, nutritional benefits and harvest, storage, preparation, processing and delivery methods. The absence of a formal requirement to recognise and remunerate this contribution means that bush food research institutions can move from ethical policies based on recognition and remuneration for direct contributions to policies based on the recognition of contributions that enhance the collective knowledge database.

The main challenge in devising arrangements that support recognition and remuneration is the uncertain commercial value of the contribution, particularly when ‘the potential value of the resource is independent of [Aboriginal and Torres Strait Islander] knowledge’. Legally, authors support contracts as a vehicle to ‘regulate access to resources and knowledge, and benefit-sharing in any outcomes of the project or process’. Knowledge-based contracts can avoid the challenge of valuing

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47 See, e.g., Marinova and Raven, above n 3; Morse, above n 13, 2, 10, 86; Holcombe, Yates and Walsh, above n 21, 258.
48 Morse, above n 13, 3; see also Miers, above n 13, iii; Cunningham, Garnett and Gorman, above n 32, 432; Vincent, above n 13, 1; Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 14.
49 See, e.g., Morse, above n 13, 3, 7, 13, 27, 79; Miers, above n 13, iii; Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 6; CSIRO, Economic development: bush tucker dreaming <http://www.csiro.au/files/files/p5e8.pdf>; Cunningham, Garnett and Gorman, above n 32, 432; Cleary, above n 13, 1; Evans et al, above n 13, 20.
50 Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 19.
51 See, e.g., ibid 8, 12-16, 19-20; Morse, above n 13, 10, 39, 79, 83; Holcombe, Yates and Walsh, above n 21, 255, 260-261; Walsh and Douglas, above n 30, 395, 410, 413; Miers, above n 13, 34; Cunningham, Garnett and Gorman, above n 32, 430-431; Cleary, above n 13, 4-6; Smallcombe, Davis and Quiggin, above n 3, 17-18.
52 Morse, above n 14; Rural Industries Research and Development Corporation, above n 10, 4.
53 Morse, above n 13, 17.
knowledge by stipulating an annual fee or percentage of profits to be paid to Aboriginal and Torres Strait Islander parties to the agreement.\textsuperscript{55} However, authors recognise that contractual arrangements are limited by voluntariness, scope and disparate bargaining power.\textsuperscript{56} These factors may explain why:

*In Australia there are currently few examples of ethical and equitable intellectual property negotiations in relation to IEK [Indigenous Ecological Knowledge] of plants used in the food, biopharmaceutical or biomedical industries. There are even fewer, if any, examples of substantive payments or other benefit-sharing returns to Aboriginal and Torres Strait Islander groups.*\textsuperscript{57}

This suggests it is timely to investigate how previously unexplored laws might, in isolation or in combination, help Aboriginal and Torres Strait Islander people achieve respect and reward for bush food knowledge. For example, an examination of environmental law, contract law, tort law, corporate law and administrative law might reveal new contractual opportunities and mechanisms that enable fair and equitable outcomes.

Various institutional recommendations may also enhance the potential of contracts to help Aboriginal and Torres Strait Islander people achieve recognition and remuneration for their knowledge. These recommendations include community knowledge protocols to outline how prior informed consent should be sought, how power imbalances might be addressed and what benefits communities want ‘from use of their knowledge’;\textsuperscript{58} a model agreement to guide the making of knowledge-related contracts;\textsuperscript{59} and a national bush food industry code of conduct to help Aboriginal and Torres Strait Islander people move beyond reliance on ‘sympathetic partnerships’ for a share of the profits from knowledge-based products.\textsuperscript{60} The call for a national bush food industry code of conduct is premised on the view that existing codes are inadequate ‘to guide ethical engagement with Aboriginal people in the bush foods industry and to appropriately value and reward Aboriginal people’s knowledge.’\textsuperscript{61}

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Morse, ‘Know your rights to your Aboriginal plant knowledge: a guide for Aboriginal knowledge holders on recording and commercialising Aboriginal plant knowledge’ (2010)
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\textsuperscript{56} See, e.g., Janke, above n 2, 64-65; Smallacombe, Davis and Quiggin, above n 2, 51-54; Morse, above n 13, 10, 27; Marinova and Raven, above n 3; Craig and Davis, above n 31, 13-14; Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 14.
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\textsuperscript{57} Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 23; see also Janke, above n 31, xix.
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\textsuperscript{58} Janke, above n 2, 81; see also Anderson, above n 3, 7.
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\textsuperscript{59} Janke, above n 2, 73.
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\textsuperscript{60} Morse, above n 13, 15; see also Smallacombe, Davis and Quiggin, above n 2, 40.
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\textsuperscript{61} Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 7.
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because they only apply to certain people and do not specifically relate to the commercialisation of bush food. Some authors also consider that a national code might be preferable to legislative reform because codes can respond to a variety of values, situations and subject matter, and can be altered and implemented without undue bureaucracy.

The above institutional recommendations merit further investigation, particularly with regards to the mechanisms necessary to ensure their effective implementation. For example, what mechanisms might be contained in a community protocol to help resolve issues that arise when knowledge is shared across several communities? What mechanisms might be contained in a model agreement to help determine fair remuneration? What mechanisms might be contained in a national industry code of conduct to help ensure that contracts are negotiated within an ethical framework? It is also necessary to consider the potential scope of any protocol, agreement or code. For example, should compliance be voluntary or mandatory? Consideration of scope and effective implementation mechanisms might be assisted by an evaluation of existing codes and benefit-sharing initiatives.

**Ensuring knowledge use is authorised and remunerated**

Perhaps the greatest concern of all authors is the lack of legal protection for Aboriginal and Torres Strait Islander knowledge from unauthorised and unremunerated use. The concern is largely premised on the classification of Aboriginal and Torres Strait Islander knowledge as a form of intellectual property and the subsequent finding that intellectual property laws are ill-designed to

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63 See generally Merne Atyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 7-8; see, e.g., Morse, above n 54, 21; Smallacome, Davis and Quiggin, above n 2, 14-15; Janke, above n 2, 110-111; Convention on Biological Diversity, *Existing instruments, guidelines, codes of conduct and tools addressing ABS* <http://www.cbd.int/abs/instruments/>.
64 Merne Atyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 24; see also Darrell Posey and Graham Dutfield, *Beyond intellectual property: toward traditional resource rights for Indigenous peoples and local communities* (International Development Research Centre, 1996) 103; Anderson, above n 3, 28-29.
66 Merne Atyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 10; see, e.g., Marinova and Raven, above n 3.
67 See generally Morse, above n 13, 7, 13; Smallacome, Davis and Quiggin, above n 2, 29; Janke, above n 2.
protect this knowledge. Intellectual property laws grant an individual or company the exclusive, time-limited right to exploit an original creation of the mind that has been reduced to material form. Conversely, authors note that Aboriginal and Torres Strait Islander knowledge is:

- held and disseminated by ‘owners and their descendants in perpetuity’ and in accordance with customary protocols
- shared among community members or already in the public domain
- developed over many generations from the skills and experience of clans, families or other socio-political groups
- generally in oral form

Further, intellectual property protection may require a financial investment beyond the resources of most people.

Aboriginal and Torres Strait Islander knowledge that is not protected by law can be freely used by others to develop products that are amenable to intellectual property protection. Authors recommend several mechanisms to prevent this unauthorised and unrenumerated use of knowledge. For example, there is some recent literature that calls for an integration of western and traditional knowledge systems. The challenge here lies in the identification of practical methods for achieving

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69 See, e.g., Morse, above n 13, 7, 39; World Intellectual Property Organisation, *Traditional knowledge* [http://www.wipo.int/tk/en/].
70 See generally IP Australia, Australian Government [http://www.ipaustralia.gov.au/].
71 Smallacombe, Davis and Quiggin, above n 2, 42-43.
72 Morse, above n 13, 7, 13, 39, 80-81; Cunningham, Garnett and Gorman, above n 32, 432; Merne Altyerre-ipernet (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 19; Stephen Munzer and Kal Austiala, ‘The uneasy case for intellectual property rights in traditional knowledge’ (2009) 27 *Cardozo Arts & Entertainment Law Journal* 37, 53.
73 Smallacombe, Davis and Quiggin, above n 2, 42-43; Merne Altyerre-ipernet (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 19; Morse, above n 13, 7.
74 Merne Altyerre-ipernet (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 19.
76 See Miers, above n 13, 10; IP Australia, *Plant breeders rights* (1 June 2012) [http://www.ipaustralia.gov.au/get-the-right-ip/plant-breeders-rights/]; Morse, above n 54, 22; Australian Centre for Intellectual Property in Agriculture, above n 75.
77 See generally Anderson, above n 3, 5; see, e.g., Suzanne Prober, Michael O’Connor and Fiona Walsh, ‘Australian Aboriginal peoples’ seasonal knowledge: a potential basis for shared understanding in environmental management’ (2011) 16(2) *Ecology and Society* 12; Posey and Dutfield, above n 64, 17; Smallacombe, Davis and Quiggin, above n 2, 6; Merne Altyerre-ipernet (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 16; Anil Gupta, ‘WIPO-
inclusiveness when the two systems use different techniques and methods to validate findings, and different media to communicate results. Another recommendation is that Aboriginal and Torres Strait Islander people record their knowledge in a register or database so they can object to intellectual property applications for products based on that knowledge. What needs to be considered here is how Aboriginal and Torres Strait Islander people might be made aware of intellectual property applications, and how defensive protection might be exerted without sacrificing the knowledge to the public domain. This is especially so in light of the evidence that suggests a great deal of bush food knowledge is not publically known.

There is emerging research on how Aboriginal and Torres Strait Islander people can use geographical indicators and certification marks to distinguish products developed by Aboriginal and Torres Strait Islander people from products developed by others. This is because geographical indicators certification marks allow for perpetual and collective ownership. However, the protection that comes with these marks currently only extends to products and may require significant financial resources to maintain and enforce. Also, Aboriginal and Torres Strait Islander people might have to incorporate before they can apply for a mark. It is worthwhile considering how the laws governing geographical indicators and certification marks might be arranged to protect the knowledge behind the product. Further, more reflection is needed on the impacts of incorporation on Aboriginal and Torres Strait Islander people and communities.


Prober, O'Connor and Walsh, above n 77; see also Posey and Dutfield, above n 64, 17.

See, e.g., Janke, above n 2, 42-44, 132; Smallacombe, Davis and Quiggin, above n 2, 16, 59; Evans et al, above n 1, 391; Desert Knowledge Cooperative Research Centre, above n 75.

See generally Smallacombe, Davis and Quiggin, above n 2, 9, 16.

See, e.g., Merne Altyerre-epenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 19; Evans et al, above n 13, 20; Holt, above n 7; Rural Industries Research and Development Corporation, above n 10, 11.


Ibid.

See, e.g., Morse, above n 54, 19, 22; Smallacombe, Davis and Quiggin, above n 2, 48; Merne Altyerre-epenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 23.

Merne Altyerre-epenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 24.

Morse, above n 54, 20.

See, e.g., ibid 7; Shane Greene, 'Indigenous people incorporated? Culture as politics, culture as property in pharmaceutical bioprospecting' (2004) 45(2) Current Anthropology 211.
The concern over the lack of legal protection for Aboriginal and Torres Strait Islander knowledge from unauthorised or unremunerated use has led many authors to recommend a new approach:

*Such a new approach is often termed a sui generis—literally: ‘of its own kind’. A sui generis approach usually comprises a specially formulated legislative regime that takes into account the unique elements of Indigenous collective rights in Traditional Knowledge.*

Sui generis regimes generally involve the creation of a new intellectual property right based on the principles of informed consent and equitable benefit sharing. The capacity of sui generis regimes to help Aboriginal and Torres Strait Islander people achieve their knowledge-related needs and aspirations must be considered in light of the emerging negative evaluations of foreign sui generis regimes, the limited international reach of domestic legislation, and the impacts of creating a new class of ownership rights. As Miranda Forsyth recently noted in regard to the long-commended Pacific Traditional Knowledge (TK) Model Law:

*By introducing the concept of ‘ownership’ of TK by a finite group of people whose rights are backed by the state, the Model Law is therefore introducing a new and almost certainly troublesome concept into the regulation of TK in the region. The fact that it recognises that there may be communal or individual ownership does not avoid the difficulties that are likely to arise in determining the membership of the ownership group.*

There is growing support for a national cultural authority to resolve these issues. Consideration of institutional arrangements like this must take into account the difficulties faced by similar bodies in resolving ownership issues in cultural heritage, and the potential impacts of additional bureaucracy and external determinations of rights on Aboriginal and Torres Strait Islander needs and aspirations.

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88 Smallacombe, Davis and Quiggin, above n 2, 29; Merne Altyerre-ienpenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 5-6, 14.

89 Forsyth, above n 44, 202-203; Smallacombe, Davis and Quiggin, above n 2, 11; see also OseiTutu, above n 6, 186.


91 Forsyth, above n 44, 207.

92 ibid 202-203; see generally Merne Altyerre-ienpenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 19-20.


95 See Merne Altyerre-ienpenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 19; Antons, above n 3; see also Forsyth, above n 44, 210.
Ultimately, the ability of a sui generis regime to help Aboriginal and Torres Strait Islander people achieve diverse needs and aspirations merits more examination. Such an examination would be complemented by an analysis of the legal and institutional arrangements that pertain to knowledge that is classified as a resource or capital rather than a form of intellectual property.\textsuperscript{96} Existing arrangements outside the purview of intellectual property may very well contain innovative tools to help Aboriginal and Torres Strait Islander people achieve their diverse needs and aspirations. For example, as Martin and Jeffrey found:

...the combination of four existing areas of law: confidential information, equitable estoppel, statutory prohibitions against misleading or deceptive conduct, and unjust enrichment may in effect provide a comprehensive protection to Indigenous peoples against the misuse of knowledge...\textsuperscript{97}

Of most importance is the development of participatory mechanisms that ensure any new arrangement develops on the basis of information supplied by Aboriginal and Torres Strait Islander resource custodians and communities. Such information might include, but is not limited to:

- Aspirations and needs in relation to Aboriginal and Torres Strait Islander knowledge
- measures to help existing customary institutions meet these aspirations and needs
- mechanisms that support commercialisation 'while retaining key cultural principles'\textsuperscript{98}

As Jane Anderson succinctly notes:

The more that Indigenous peoples are consulted about what the problems being experienced are, and what options are available to deal with the problems when they emerge, the more likely it is that appropriate policy and legal strategies will be developed that address the vast range of interests in accessing Indigenous knowledge.\textsuperscript{99}

**Participation and representation in industry development and governance**

Bush food authors are increasingly concerned that Aboriginal and Torres Strait Islander involvement in the bush food industry is limited to the supply of raw produce.\textsuperscript{100} Potential barriers to increased

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\textsuperscript{97} Martin and Jeffrey, above n 46, 1.

\textsuperscript{98} See Merne Alyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 19-20, 6; Forsyth, above n 44, 211 ; see also Smallacombe, Davis and Quiggin, above n 2, 61-62; Craig and Davis, above n 31, 13-14; but see Juanita Sherwood, 'Community - what is it?' (1999) 4(19) Indigenous Law Bulletin 4 [<http://www.austlii.edu.au/au/journals/ILB/1999/21.html>].

\textsuperscript{99} Anderson, above n 3, 7; see also Drahos, above n 83, 238-239.

\textsuperscript{100} Vincent, above n 13, 2; Cleary, above n 13, 1.
involvement include distance from markets, technology and information. Authors agree that unless Aboriginal and Torres Strait Islander people become more involved in the industry, their ‘interests…will be sidelined and left behind’. As such, authors recommend Aboriginal and Torres Strait Islander people increase involvement through commercial enterprises and land management services. However, Aboriginal and Torres Strait Islander people might also seek to represent knowledge-related needs and aspirations through industry governance roles. Consideration of arrangements that enable this aspiration requires consideration of legal and institutional participatory mechanisms that embrace diverse cross-cultural communication needs.

**Conclusion**

To date, bush food authors have identified a range of Aboriginal and Torres Strait Islander needs and aspirations in relation to bush food knowledge. Many authors have examined and proposed a number of legal and institutional arrangements that may enable these needs and aspirations. In regard to legal arrangements, the literature reveals how contracts and intellectual property laws can help and hinder aspirations related to respect, authorisation and reward. There are several laws that await exploration. These include contract law, tort law, partnership law, corporate law, administrative law, commercial law and the various laws invoked by different classifications of Aboriginal and Torres Strait Islander knowledge. Also meriting further investigation is the potential of geographical indicators and certification marks to apply to Aboriginal and Torres Strait Islander knowledge, and how various laws might combine to help Aboriginal and Torres Strait Islander people achieve more needs and aspirations in relation to bush food knowledge.

In regard to institutional arrangements, authors have illuminated the advantages and disadvantages of registers, databases and codes. The literature reveals the important supporting role that institutional arrangements may play in the implementation of legal arrangements, and the importance of

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101 Morse, above n 13, 3, 27; Cunningham, Garnett and Gorman, above n 32, 430; Cleary, above n 13, 4-6; Walsh and Douglas, above n 30, 410.
102 Morse, above n 13, 13; see also Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 6.
103 See, e.g., Morse, above n 13, 3, 83, 86; Miers, above n 13, x; Morse, above n 75; Walsh and Douglas, above n 30; Holcombe, Yates and Walsh, above n 21, 263; Cunningham, Garnett and Gorman, above n 32, 430-431; see generally Smallacombe, Davis and Quiggin, above n 2, 21; Slade Lee, ‘ Horticultural development of bush food plants and rights of Indigenous traditional custodians - the Australian Bush Tomato (Solanum centrale) case study ’ (2012)
104 Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 6.
105 See, e.g., ANFIL, above n 12; Janke, above n 31; Posey and Dutfield, above n 64; Sherwood, above n 98; see Smallacombe, Davis and Quiggin, above n 2, 13-14, 21; Kuruk, above n 31, 123, 128-129; Janke and Quiggin, above n 54, 492-493; Anderson, above n 3, 5; Craig and Davis, above n 31, 13-14; Merne Altyerre-ipenhe (Food from the Creation time) Reference Group, Douglas and Walsh, above n 1, 14; Cleary, above n 13, 6; Anderson, above n 3, 5-6.
institutional values to equitable engagement. An evaluation of existing international, national and institutional instruments might help reveal effective mechanisms for resolving issues invoked by competing values, complex ownership rules and uncertain economic value. Also awaiting identification and examination are the institutions that bear on various pathways to bush food commercialisation. An exploration of the governance and policy instruments of these institutions may lead to the development of innovative institutional arrangements that ensure Aboriginal and Torres Strait Islander people achieve as many of their knowledge-related needs and aspirations as possible.

This Issues Paper has helped highlight various legal and institutional arrangements that may help Aboriginal and Torres Strait Islander people achieve certain needs and aspirations. The next step is to identify the legal and institutional arrangements invoked by different choices along the pathway to bush food commercialisation. Those arrangements will then be examined to determine the extent they facilitate diverse needs and aspirations, and the extent that combined or reformed arrangements may facilitate more needs and aspirations. The analysis of legal and institutional arrangements will help shape the development of a suite of legal and institutional models that ensure pathways to bush food commercialisation help Aboriginal and Torres Strait Islander people achieve the most possible needs and aspirations in relation to bush food knowledge, and a set of tools that Aboriginal and Torres Strait Islander people may pick up to pursue diverse interests in a variety of ways.
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Confidential

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