



**NINTI ONE** REMOTE ECONOMIC PARTICIPATION

# THE POTENTIAL OF LAW TO SUPPORT ABORIGINAL AND TORRES STRAIT ISLANDER INTERESTS IN BUSH FOOD COMMERCIALISATION

## POLICY BRIEFING KEY HIGHLIGHTS

- ▶ **Aboriginal and Torres Strait Islander peoples have diverse interests in relation to the commercialisation of bush foods.**
- ▶ **Laws that empower Aboriginal and Torres Strait Islander peoples to realise their own interests can advance their wellbeing and the principles of the *United Nations Declaration on the Rights of Indigenous Peoples*.**
- ▶ **Few laws support Aboriginal and Torres Strait Islander interests in bush food commercialisation.**
- ▶ **The Plant Business project offers some possible legal options for Aboriginal and Torres Strait Islander peoples, non-Aboriginal and Torres Strait Islander bush food stakeholders and policymakers to consider.**

## Background

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

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

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

## Context of new plant variety development

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

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

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

- control of plants and knowledge according to customary law
- fair share of benefits from plant and knowledge use
- development of bush food enterprises and partnerships
- transfer and maintenance of knowledge to younger people
- participation in bush food law, policy and decision-making.



Although Aboriginal and Torres Strait Islander peoples are key stakeholders in bush food commercialisation, there are few laws that support their interests.

This brief highlights important legal issues that affect each interest, and some possible actions Aboriginal and Torres Strait Islander peoples might lobby government to take.

## Control of plants

### Issues

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

### Possible ways for government to improve the situation

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

## Control of knowledge

### Issues

- Existing legal arrangements provide very limited support for Aboriginal and Torres Strait Islander peoples to benefit from their plant knowledge:
  - benefit-sharing laws and confidentiality agreements at best help Aboriginal and Torres Strait Islander peoples control the use of secret knowledge
  - copyright law does not allow Aboriginal and Torres Strait Islander peoples to control the use of knowledge that is published in written works
  - patent rights provide limited help for Aboriginal and Torres Strait Islander peoples to control the use of their inventions



because the invention will be published, exclusive use is limited to 25 years, and the rights are costly to obtain and enforce.

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

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

## Fair share of benefits from plant and knowledge use

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### Issues

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

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

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

## Development of enterprises and partnerships

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### Issues

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



money, lands, premises, business advice, technology, markets and transport.

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

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

### **Transfer and maintenance of knowledge**

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#### **Issues**

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

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

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



## Participation in law, policy and decision-making

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### Issues

- There is limited opportunity for Aboriginal and Torres Strait Islander peoples to participate in the legislative and administrative processes shaping bush food development, including the setting of research agendas and making of government decisions.
- This is partly because legislative and administrative processes privilege formal scientific information over Aboriginal and Torres Strait Islander knowledge.

### Possible ways for government to improve the situation

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

## What next?

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

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

## Further information

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## Research Partners of the CRC-REP Plant Business Project

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