



**PwC's Indigenous  
Consulting**



**National  
Farmers  
Federation**

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# **Indigenous Agricultural Product Framework**

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## **Report on Indigenous Agricultural Regulatory and Best Practice Frameworks**

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**FINAL**

**23 May 2024**



**TERRI JANKE AND COMPANY**  
LAWYERS & CONSULTANTS



## Acknowledgements

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### Acknowledgment of Country

Terri Janke and Company acknowledge the Aboriginal and Torres Strait Islander peoples of the lands on which we live and work, and all Aboriginal and Torres Strait Islander peoples in Australia. We extend our respect to Aboriginal and Torres Strait Islander Elders - past, present and emerging.

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### Acknowledgement

Terri Janke and Company would like to acknowledge the input of the PricewaterhouseCoopers Indigenous Consulting team, the National Farmers Federation and the Indigenous Land and Sea Corporation staff who have guided the development of this report, and provided their time, resources and expertise.



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## GLOSSARY

<b>ABS</b>	Access and Benefit Sharing
<b>ABS Agreement</b>	Access and Benefit Sharing agreement
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ACL</b>	Australian Consumer Law, being Schedule 2 of the <i>Competition and Consumer Act 2010</i> (Cth)
<b>AANZFTA</b>	ASEAN-Australia-New Zealand Free Trade Area Agreement
<b>AIATSIS</b>	Australian Institute of Aboriginal and Torres Strait Islander Studies
<b>ANFAB</b>	Australian Native Food and Botanicals
<b>A-UK FTA</b>	Australia-United Kingdom Free Trade Agreement
<b>Bonn Guidelines</b>	Bonn Guidelines to Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization
<b>CBD</b>	United Nations Convention on Biological Diversity (1992)
<b>CATSI</b>	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth)
<b>DPIRD</b>	Western Australian Department of Primary Industries and Regional Development
<b>EPBC Act</b>	<i>Environmental Protection and Biodiscovery Conservation Act 1999</i> (Cth)
<b>FAO</b>	Food and Agricultural Organisation of the United Nations
<b>FNBBAA</b>	First Nations Bushfood & Botanical Alliance Australia
<b>FPIC</b>	Free, Prior and Informed Consent
<b>FTA</b>	Free Trade Agreement



<b>ICIP</b>	Indigenous Cultural and Intellectual Property
<b>ILUA</b>	Indigenous Land Use Agreement
<b>IUCN</b>	International Union for Conservation of Nature
<b>NAAKPA</b>	Northern Australia Aboriginal Kakadu Plum Alliance
<b>Nagoya Protocol</b>	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization
<b>NIAA</b>	National Indigenous Australians Agency
<b>ORIC</b>	Office of the Registrar of Indigenous Corporations
<b>PBR</b>	Plant Breeder's Rights
<b>TONFABS</b>	Victorian Traditional Owner Native Foods and Botanicals Strategy
<b>UEBT</b>	Union for Ethical Biotrader
<b>UNDRIP</b>	United Nations Declaration on the Rights of Indigenous Peoples (2007)
<b>WIPO</b>	World Intellectual Property Organisation



## SCOPE:

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PricewaterhouseCoopers Indigenous Consulting (**PIC**) has been engaged by the National Farmers Federation (NFF) to undertake the Indigenous Agricultural Product Framework Project. PIC has asked Terri Janke and Company (**TJC**) to advise and report on the legal and non-legal regulatory and best-practice frameworks for identifying, defining and protecting Indigenous agricultural products.

In this report TJC considers Australian legal and regulatory models, industry standards and practices, and Indigenous decision-making models (including customary laws and protocols) relevant to Indigenous agricultural products. We will also include relevant international examples that can support the development of the Indigenous Agricultural Product Framework.

Our focus is to identify frameworks that address or provide insight into:

- (1) The definition and understanding of an Indigenous Agricultural Product; and
- (2) The protection of an Indigenous Agricultural Products.

We have not reported on regulatory frameworks about the quality, safety and export of agricultural products such as food, medicine or agricultural legislation and regulations.

## **(A) THE DEFINITION AND UNDERSTANDING**

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Currently, there is no domestic or international system (or systems) for defining what an 'Indigenous agricultural product' is or identifying the characteristics of Indigenous agricultural products.

As such, we have drawn inferences and examples from existing systems and current understandings, and a definition of an Indigenous Agricultural Product could incorporate the following characteristics:

- **That the product is created by an Indigenous person, organisation or company**
- **That the product embodies Indigenous Knowledge**
- **That the product is grown on Indigenous Country or by Indigenous growers**
- **That the product ensures access and benefit sharing (ABS) to Indigenous communities**
- **That the product upholds Caring for Country practices and prioritises sustainability.**

We outline these characteristics and related considerations in more detail below.



## CONNECTION TO INDIGENOUS PEOPLES

### **That the product is created by an Indigenous person, organisation or company**

#### **Indigenous people**

In the same way that Indigenous art is art produced by an Indigenous person, this premise would apply for an Indigenous agricultural product.

An Indigenous person is a person who is of Indigenous descent, who identifies as Indigenous and is accepted as an Indigenous person in their community.<sup>1</sup> The terminology used in Australia includes 'Indigenous', 'Aboriginal' and 'Torres Strait Islander', with the wider use of the term 'First Nations' in the past 5 years. Indigenous peoples may also call themselves Koori, Murri or Blak.

This is a self-identification definition which opens the potential for conflicts and disputes, as well as false identifications. To deal with this, government, universities and service providers have developed processes which require people who are applying for Indigenous services and programs to provide proof of Indigeneity. The proof required varies from completing a 'Confirmation of Indigeneity' form, statutory declaration or providing letters of acknowledgement from Aboriginal organisations such as land councils and Aboriginal corporations.<sup>2</sup>

Indigenous people also identify within their clan or language groups that they are descended from. For example, Wuthathi, Yuin or Wiradjuri.

A definition and understanding of what an Indigenous agricultural product is will necessarily link to the producer of the product and whether they are Indigenous. Indigenous producers will also have to meet criteria for what constitutes an Indigenous businesses e.g. in accordance with Supply Nation certification requirements or similar.

Defining an Indigenous product may also require that benefits return to First Nations communities, including the employment of First Nations staff, the facilitation of skills transfer and the equitable sharing of profits.

#### **Indigenous Organisations**

Indigenous organisations are generally Indigenous community-controlled organisations that provide services or undertake activities to support Indigenous people or represent their interests, including commercial interests.

The National Agreement on Closing the Gap defines an Indigenous organisation as a business, charity, not-for-profit organisation incorporated under Commonwealth, state or territory legislation that has at least 51% Aboriginal and Torres Strait Islander ownership

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<sup>1</sup> Commonwealth Government definition developed in the 1980s was a three-part definition: Australian Law Reform Commission, *Essentially Your: The Protection of Human Genetic Information in Australia*, 2003, (ALRC Report 96, July 2010) [36.14] – [36.27]

<sup>2</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Proof of Aboriginality' (Web page, 25 May 2022) <<https://aiatsis.gov.au/proof-aboriginality>>.





and/or directorship; and is operated for the benefit of Aboriginal and Torres Strait Islander communities.<sup>3</sup>

Indigenous organisations include Aboriginal and Torres Strait Islander corporations regulated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) administered by the Office of the Registrar of Indigenous Corporations. Many of these are established to represent Aboriginal and Torres Strait Islander groups in native title processes. For example, Dugalunji Aboriginal Corporation in Camooweal who are harvesting spinifex and piloting a processing facility on Country.<sup>4</sup>

Other Indigenous organisations may be established under the *Corporations Act 2001* (Cth), as well as state-based incorporated associations and co-operatives. This includes the not-for-profit company, Noongar Land Enterprise Group Incorporated, a Western Australia based Aboriginal grower group, developing land-based businesses for its Aboriginal corporation membership.<sup>5</sup>

### **Indigenous Companies**

An Indigenous company is generally accepted to mean a company that is 50% or more Indigenous owned. Government procurement policies and Supply Nation's procedures establish 2 levels of Indigenous business:

- Registered: at least 50% Indigenous-owned; and
- Certified: at least 51% Indigenous owned, managed and controlled.<sup>6</sup>

The process of registration includes providing confirmation of Aboriginality. This can either be a confirmation letter from a recognised Indigenous institution or a statutory declaration supported by two referees. For certification, the share structure and governance documents are examined to ensure Indigenous people are holding the power as decision-makers and directors. Annual audits are conducted to ensure the company still meets the criteria.

Joint ventures have stricter rules. In addition to the establishment of a separate legal entity and development of associated governance documents, there must be a plan to grow the Indigenous business partner's capability and the business's First Nations' workforce. These plans are reviewed annually.

There has been criticism that 'black-cladding' is occurring to take benefit of Indigenous business opportunities.<sup>7</sup> Black-cladding is the practice of non-Indigenous businesses establishing a façade of Indigenous ownership.

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<sup>3</sup> National Indigenous Australians Agency, *Indigenous Procurement Policy Reform* (Discussion Paper, December 2023) 10.

<sup>4</sup> Office of the Registrar of Indigenous Corporations, '*Weaving grass into gold*', <<https://www.oric.gov.au/publications/spotlight/weaving-grass-gold>>.

<sup>5</sup> Noongar Land Enterprise Group, (2021) <<https://www.noongarlandenterprise.com.au/>>.

<sup>6</sup> Supply Nation, '*How we verify Aboriginal and Torres Strait Islander businesses*', (Web page) <<https://supplynation.org.au/benefits/indigenous-business/>>.

<sup>7</sup> Brendan Foster, '*First Nations academic says barriers need to be removed to ensure competitive playing field for Indigenous businesses*', (Web page, 19 Dec 2023) <<https://nit.com.au/19-12-2023/9022/first-nations-academic-says-barriers-need-to-be-removed-to-ensure-a-competitive-playing-field-for-australian-indigenous-businesses>>.



The National Indigenous Australians Agency has just completed a consultation process on how to strengthen the Federal Indigenous procurement policy. The discussion paper canvasses whether the definition of Indigenous business should be 51% only.<sup>8</sup>

### **Indigenous Land Councils**

Indigenous land councils include Local Aboriginal Land Councils and Recognised Aboriginal Parties established and regulated by state-based legislation.

These bodies are often representative of the local community, language, traditional owner group or area. They play a key role in the management and preservation of the lands and cultural heritage of the communities and Traditional Owner groups they serve, are generally focal points for negotiations with government bodies and others seeking to access Country, knowledge and resources, as well as assist social, economic and cultural development.

For instance, land councils may run Indigenous ranger groups or social enterprises, such as [Bush Medijina](#) on Groote Eylandt, or the [Yirralka Miyalk](#) social enterprise created through the Yirralka Rangers program. Other examples include the [membership of the Indigenous Carbon Industry Network](#), comprised of land councils, ranger and land management groups and Indigenous organisations empowered to exercise land management practices to benefit from carbon markets. Investment into these economic opportunities can provide a means to service larger markets whilst maintaining cultural values, through innovative and locally appropriate enterprise models and sustainable agricultural practice.<sup>9</sup>

In summary, a definition of Indigenous agricultural products must invariably include reference to the product being **created by, or with the involvement of, Indigenous persons, organisations or companies**. This is necessary to ensure the connection to the Indigenous peoples and communities whose knowledges, values, practices and resources are authentically and respectfully upheld.

## **CONNECTION TO CULTURE**

### **That the product embodies Indigenous Knowledge**

The inclusion of Indigenous knowledge and cultural expression in the product may also form part of the definition of an Indigenous agricultural product.

*Indigenous knowledge* refers to the cultural information collectively owned by Indigenous peoples and passed on through the generations, including traditional, ecological and scientific knowledge.

Indigenous people have knowledge of Country, and the healing properties of plants, insects and animals. This extends to knowledge of seasons, crop cultivation and harvesting, and cultural rights to fishing and hunting. Traditional knowledge systems can be considered

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<sup>8</sup> National Indigenous Australians Agency, '*Indigenous Procurement Policy (IPP) Reform Discussion Paper*' (Web Page, 13 December 2023) < <https://www.niaa.gov.au/resource-centre/indigenous-affairs/indigenous-procurement-policy-ipp-reform-discussion-paper>>.

<sup>9</sup> Gorman, J.; Ennis, G.; Wurm, P.; Bentivoglio, M.; Brady, C, 'Aboriginal Community Views about a Native Plant-Based Enterprise Development in Northern Australia' (2023) 12(5) *Land* 1096, 3.



frameworks of ongoing innovation,<sup>10</sup> and while in this context we generally we speak of native resources, these knowledge systems may also encompass modern post-colonial resources and products including wheat, beef and cotton.

Indigenous knowledge also includes stories, song, artwork, design and other cultural expressions that are associated with or used in the marketing of products, as well as the use of language words. For example:

- Commercialising and marketing the health-promoting and antimicrobial benefits of the honey sourced from WA Jarrah bees by [Ngoongar Land Enterprise](#);
- The development, cultivation and harvesting of native grains based on traditional processes and stories by [Black Duck Foods](#); and
- The [Northern Australian Kakadu Plum Alliance](#)'s commercialisation of the Kakadu Plum and its sustainable supply chain based on knowledge surrounding its cultivation and harvesting, and its nutritional and medicinal benefits; and
- WA's first Aboriginal-owned cattle backgrounding operation at [Yallalie Downs](#) managed by Beemurra Aboriginal Corporation members.

For an Indigenous person to utilise or commercialise this knowledge, they must generally have connection as part of their cultural heritage, kinship or community. This generally centres on consultation and obtaining the free, prior and informed consent of the relevant custodians, rights holders or Traditional Owners for the use of their knowledge.

### **Existing Indigenous Knowledge protection**

We have seen policy shifts that recognise this. For example, IP Australia have embedded a process for requiring trade mark applicants to provide evidence of connection and consent from the relevant cultural authority in order to register Indigenous language words.

Internationally, we have also seen legal and practical measures that identify and protect the role of traditional knowledge in commercialisation practices. The [Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture](#) provides a framework to safeguard the knowledge and expressions of Indigenous communities across the Pacific islands. This instrument explicitly targets intellectual creations and innovations based on or derived from traditional knowledge or cultural expression,<sup>11</sup> recognising the role that knowledge and culture has in relation to Indigenous products.

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation (Nagoya Protocol)* operates as an explanatory agreement to the *United Nations Convention on Biological Diversity (CBD)*. The Nagoya Protocol encourages parties to take into consideration the customary laws, community protocols and procedures of Indigenous communities and obtain their prior and informed

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<sup>10</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Knowledge: Draft Articles*, WIPO Doc No WIPO/GRTKF/IC/37 WIPO General Assembly, 40<sup>th</sup> (20<sup>th</sup> Ordinary) Session, WO/GA/40/7, (October 5, 2011), 10, Art 1, definition of "traditional knowledge".

<sup>11</sup> Secretariat of the Pacific Community, Pacific Islands Forum Secretariat and UNESCO Pacific Regional Office, *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*, (2002) Model Law, cl 4 definitions.



consent and involvement for the use of traditional knowledge associated with the use of genetic resources.<sup>12</sup>

The World Intellectual Property Organisation's Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (**WIPO IGC**) have also prepared a draft instrument for *Intellectual Property, Genetic Resources and Traditional Knowledge associated with Genetic Resources*.<sup>13</sup> The proposed drafting of this instrument will require applicants that are seeking patents for inventions that are based on genetic resources to disclose whether there is traditional knowledge involved with the patent.<sup>14</sup> This requires the patent applicant to disclose the source of traditional knowledge came from including scientific literature, patent databases or publications, as well as directly from relevant Indigenous peoples.<sup>15</sup>

### **Indigenous Cultural and Intellectual Property**

The inclusion or connection to Indigenous knowledge as a part of the definition of an Indigenous product necessitates the recognition of Indigenous Cultural and Intellectual Property (**ICIP**) rights.

ICIP rights are enshrined in Article 31 of the [United Nations Declaration on the Rights of Indigenous Peoples \(UNDRIP\)](#) and recognise Indigenous peoples' sovereign rights to their cultural heritage, traditional knowledge and traditional cultural expressions.<sup>16</sup>

ICIP comprises the tangible and intangible objects, sites, expressions and knowledge, as well as the manifestations of Indigenous sciences, technologies and cultures, including human and genetic resources, seeds, medicines and knowledge of the properties of fauna and flora.

While Australia is a signatory to UNDRIP, ICIP rights are not currently recognised or adequately protected under Australian legislation. However, in January 2023, the Australian Government committed to introduce stand-alone legislation to recognise and protect ICIP rights in the [National Cultural Policy, Revive](#).<sup>17</sup> The Office of the Arts on behalf of the Department of Infrastructure, Transport, Regional Development, Communications and the Arts is [taking a staged approach to developing the legislation](#), with the first stage occurring in

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<sup>12</sup> Convention on Biological Diversity, *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity ('Nagoya Protocol')* UNEP/CBD/COP/DEC/X/1 (opened for signature 2 February 2011, entered into force 12 October 2014), Art 7 and 12(1).

<sup>13</sup> Diplomatic Conference to Conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, *Basic Proposal for an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge associated with Genetic Resources*, WIPO Doc GRATK/DC/3 (14 December 2023).

<sup>14</sup> *Ibid*, Art 3 'disclosure requirement'.

<sup>15</sup> *Ibid*.

<sup>16</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('UNDRIP').

<sup>17</sup> Australian Government, *Revive: a place for every story, a story for every place – Australia's cultural policy for the next five years*, Commonwealth of Australia 2023 <<https://www.arts.gov.au/sites/default/files/documents/national-culturalpolicy-8february2023.pdf>>



2024 and involving national consultations relating to harm caused by fake First Nations style art, merchandise and souvenirs. Later stages will address broader ICIP rights.

In parallel, IP Australia has been looking at additional measures to specifically prevent registration of trade marks and designs that incorporate Indigenous knowledge without consent, and disclosure of genetic resources or traditional knowledge in patent and plant breeder's rights applications. [IP Australia's final report](#) on a scoping study into stand-alone legislation to protect Indigenous knowledge has recently been completed.<sup>18</sup>

### **Protocols for the use of Indigenous Knowledge**

As depicted in the above examples, Indigenous businesses often incorporate, adapt or commercialise Indigenous knowledge and ICIP. However, this must be done in accordance with Indigenous customary laws and cultural protocols, including the underlying sustainable development and use of products.

Community cultural protocols are the customs, lore and codes of behaviour of a particular community or cultural group, and the ways of conducting business and appropriate behaviours when engaging with that community.<sup>19</sup> These protocols can articulate the customary laws, procedures, and guidelines for engaging with or using the ICIP of a particular Indigenous community.

In addition, industry-related protocols are often developed to guide appropriate engagement with Indigenous peoples and their knowledge. For example, in 2007 the Desert Knowledge Cooperative Research Centre created the [Desert Knowledge CRC Protocol for Aboriginal Knowledge and Intellectual Property](#) to guide understanding and respectful engagement in research and knowledge sharing processes. This has been adapted by [Ninti One](#) for use in relation to all its research partnerships and community services.

We have seen a handful of groups within the native foods and botanicals industry address the use of their knowledge and ICIP in relation to agricultural products through protocols. This includes the Ninti One [Ethical guidelines for commercial bush food research, industry and enterprises](#) and the recently developed [Victorian Traditional Owner Native Foods and Botanicals Strategy \(TONFABS\)](#), aimed recognising the role of Traditional Owner's cultural knowledge and practice in the Victorian native foods and botanicals industry whilst reclaiming and protecting their knowledge and processes.

Cultural protocols around the use of language words for products also exist, including the Aboriginal Language Trust's [Working with Aboriginal Language Custodians - Guidelines for ethical and respectful collaborations](#) and TONFABS Victorian Traditional Owner [Native Food and Botanicals Protocols](#), asserting the need for free, prior and informed consent for the collection and use of ICIP.

Projects often also have Aboriginal or Torres Strait Islander governance bodies, cultural advisory and reference groups, governed by particular protocols, that participate and assist

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<sup>18</sup> Ninti One Limited, 'Scoping study on standalone legislation to protect and commercialise Indigenous Knowledge – Final report, IP Australia 2024  
<<https://consultation.ipaustralia.gov.au/policy/stand-alone-legislation-for-indigenous-knowledge/>>

<sup>19</sup> Moggridge, B, 'Indigenous Engagement Protocols for Threatened Species Researchers' (Report, *Threatened Species Recovery Hub, National Environmental Science Programme*, 2020).



in informed decision-making about development (or not) of the species for which they were culturally responsible.<sup>20</sup>

In summary, the native foods, medicines and botanicals industry, and the broader Indigenous agricultural industry, are built upon the values, knowledge and practices of Indigenous peoples. An Indigenous agricultural product would refer to a product that reflects and appropriately embeds this knowledge which is central to Indigenous culture.

## CONNECTION TO COUNTRY

### **That the product is grown on Indigenous Country or by Indigenous growers**

In the same way that a product's inclusion of or connection to ICIP may label that product as Indigenous, the extent of a product's connection to Country or Indigenous growers may also form part of the definition of an Indigenous agricultural product.

Country is the term often used by Aboriginal peoples to describe the lands, waterways and seas which they are connected to.<sup>21</sup> Country emphasises Indigenous connection and identity, and extends to the resources that are endemic to the lands, skies, waterways and seas, and their associated practices.

Australia's growing native food and botanicals industry is centred on resources and species that are endemic to Country – including sandalwood, kangaroo, emu, Kakadu plum, lemon myrtle, finger lime and wattle seed. This creates a growing expectation with consumers that an Indigenous agricultural product be native to Australia or sourced from Indigenous growers on Country, including seeds, plants, birds, insects and animals that are wild harvested or grown on Indigenous land and waters. An example is the sale of mutton birds harvested by the Palawa people in Tasmania.

The definition of Indigenous agricultural product may also extend to the sourcing of endemic species grown by Indigenous growers. For example, there are a number of Indigenous-run nurseries and growers associations that continue their connection to Country, including:

- [Black Duck Foods](#) in Mallacoota, Victoria;
- [IndigiGrow](#) in La Perouse, NSW;
- [Muru Mittigar](#)'s native nursery in Western Sydney;
- [Noongar Land Enterprises](#) in the southwest of Western Australia;
- [Girringun Biodiversity and Native Plant Nursery](#) in Queensland;
- [Northern Australia Aboriginal Kakadu Plum Alliance](#) in the Kimberley and top end of Northern Territory; and
- [Mamabulanjin Aboriginal Corporation](#)'s Skuthorpe nursery and Crab Creek seed bank in Broome.

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<sup>20</sup> Walsh, F., & Douglas, J, 'No bush foods without people: the essential human dimension to the sustainability of trade in native plant products from desert Australia' (2011) 33(4) *The Rangeland Journal*, 395–416, 412.

<sup>21</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, 'What is Country?' <<https://aiatsis.gov.au/explore/welcome-country/#toc-what-is-country>>.



### Wild Harvesting

It could also include the way the agricultural product is grown or collected. For example, wild harvesting is a cultural practice that not only supports cultural revitalisation and sustainability but can also be a characteristic of a premium product. See for example, the wild harvest sandalwood sector which is being nurtured and developed in WA.<sup>22</sup>

### Plant and Seed banks

If the resource is sourced off country or from a plant or seed bank, the development of a definition will need to consider issues such as provenance and connection with Indigenous peoples. To support and guide practices and the protection and restoration of native plants and seeds the [Florabank Guidelines](#) were developed by the NSW Government, and include a guide for *Working with Indigenous Australians: Seed Knowledge, Partnerships, Intellectual Property and Permissions*.

### Non-native produce

In addition, it is important to consider non-native produce grown by Indigenous suppliers. The definition of Indigenous agricultural product will necessarily need to extend to introduced species and produce grown by Indigenous peoples and businesses, including wheat, beef, sheep, dairy, cotton and other more generic agricultural products. See for example Aboriginal pastoralists such as the [Kimberley Agriculture and Pastoral Company](#) (KAPCO).

### Provenance and Traceability

The [Australian Agricultural Sustainability Framework](#) also provides criteria for fair trading, including that product provenance information is readily available via robust traceability.<sup>23</sup>

Internationally, Parque de la Papa (discussed below) is a great example of how provenance and traceability, as well as the use of indications of origin, can play out at a large scale. Other examples include as well as the [Taita Baskets](#) collective mark in Kenya and the [Craftmark](#) seal of authenticity for Indian hand-made arts and crafts.

We note that the growing consumer recognition and subsequent expectation in relation to native foods and botanicals may preclude the inclusion of non-native plants and animals that are grown on Indigenous land from falling within a definition of Indigenous agricultural product. However, there are tools that can be utilised to identify the source or origin of Indigenous agricultural products. This can assist in determining the product's connection to Country or Indigenous growers for the purposes of defining an Indigenous agricultural product.

There is increasing recognition of geographical indications worldwide. Geographical indications are in effect a type of certification trade mark and can be used to identify that a product originates from a specific country, region or locality that is attributable for a given

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<sup>22</sup> WA Government, 'Aboriginal leadership boost in WA's wild sandalwood sector', <<https://www.wa.gov.au/government/media-statements/Cook-Labor-Government/Aboriginal-leadership-boost-in-WA%27s-wild-sandalwood-sector-2023110>>. See also the Songman Circle of Wisdom 'Indigenous Plant Certification Protocol' (Western Australia, 2004).

<sup>23</sup> National Farmers Federation, 'Economic Resilience', C41 <<https://aasf.org.au/economic-resilience/>>.



quality, reputation or other characteristic (i.e. *champagne*; *feta cheese*).<sup>24</sup> The [Darjeeling tea](#) from West Bengal in India is an example of a foreign geographical indication protected by an Australian certification trade mark registered with IP Australia.

Geographical indications have gained traction in Australia's wine sector and have been the subject of research by IP Australia and NAAKPA in relation to Kakadu Plum. These tools may be used to identify certain agricultural products and their connection to Country or a particular Indigenous group. For example, a geographical indication certification trade mark might be used for a native crop that has been cultivated using traditional techniques unique to an Indigenous community's region.

The WIPO IGC draft instrument for *Intellectual Property, Genetic Resources and Traditional Knowledge associated with Genetic Resources* discussed above in relation to Indigenous knowledge will also require applicants seeking patents for inventions based on genetic resources to disclose the source and origin of those resources.<sup>25</sup> The 'source of genetic resources' refers to where the applicant obtained the genetic resources, such as a research or gene bank, but also whether the resource was sourced directly from Indigenous peoples.<sup>26</sup> This can assist in identifying connections to Indigenous growers or communities.

There are a number of foreign legal systems that have similar patent disclosure systems requiring the disclosure of the source of origin of resources and traditional knowledge relied upon.<sup>27</sup> This includes Switzerland,<sup>28</sup> Myanmar,<sup>29</sup> and Vietnam.<sup>30</sup>

#### **Example – Peru & the Parque de la Papa:**

The Parque de la Papa (the Co-operativa Agraria de Producción Agrícola Sumaq Sunqu Ltd) is a collective organisation of five communities located in the highlands of the Sacred Valley in Cuzco, Perú within the Andean region. More than 7,000 Indigenous community members currently work together to preserve the area of roughly 15,000 hectares,<sup>31</sup> known as the Potato Park – which is home to over 1300 varieties of native potato.

The organisation has also registered the collective native potato mark “**Sumaq Sonqo**”. This mark allows the produce to be distinguished from other products and communicate the

<sup>24</sup> *Trade Marks Act 1995* (Cth) s 6; *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995) Annex 1, 1869 UNTS 299, 33 ILM 1197 (Agreement on Trade-Related Aspects of Intellectual Property Rights), ('*TRIPS*') Article 22(1).

<sup>25</sup> *Ibid* (n 13), Article 3 'disclosure requirement'.

<sup>26</sup> *Ibid* (n 13), Article 2 'list of terms', Article 3 'disclosure requirement'.

<sup>27</sup> Note: This is relevant to the identification of the source of both the genetic resources and the traditional knowledge that are relied upon or the subject matter of the patent application.

<sup>28</sup> *Federal Act on Patents for Inventions* (Switzerland) 25 June 1954, Article 49a(1)(b).

<sup>29</sup> *The Patent Law* (Pyidaungsu Hluttaw Law No. 7/2019) (Myanmar) Chapter (10) 'Application', 20(b)(7).

<sup>30</sup> Law No. 07/2022/QH15 of June 16, 2022, Amending and Supplementing a Number of Articles of the Law on Intellectual Property (Vietnam), Article 100(1)(dd1).

<sup>31</sup> One Earth, 'Preserving Peru's Biocultural Heritage through the Quechua-led Andean Potato Park' <https://www.oneearth.org/projects/preserving-perus-biocultural-heritage-through-the-quechua-led-andean-potato-park/>.





reputation and quality of the potatoes – identifying that they are sourced from the region. Through this, the organisation does not just provide economic benefits to the community but also embeds cultural values in preserving their knowledge and traditional teachings related to the cultivation and management of the species and landscape.<sup>32</sup>

The producers are the sole users of the collective mark and have to adhere to the specific quality standards established by the group. In addition to the Potato Park, Peru has also enacted legislation embedding patent disclosure obligations.<sup>33</sup> This includes the requirement that applicants submit a license contract with the relevant holders of collective knowledge where relied upon.

The Andean region also has protections against unauthorised intellectual property rights over genetic and biological resources that do not comply with specific collection and permission requirements.<sup>34</sup>

This provides an effective system for identifying the origin of the specific agricultural products, tracing them back to the Indigenous lands and communities that they are sourced from. This system also extends to ensure the protection and sustainability of the products and their associated knowledge.

### **Accessing Country**

Mechanisms are also in place nationally to regulate access to Country and ensure that, when on Country, resources and knowledge are sourced ethically. These have the additional effect of evidencing and maintaining connections to Country and Indigenous source communities through the requirements of these mechanisms.

Australia is a signatory to the Convention on Biological Diversity (**CBD**) and the Nagoya Protocol. The Convention has three pillars that it seeks to achieve:

- the conservation of biological diversity,
- the sustainable use of the components of biological diversity, and
- the fair and equitable sharing of benefits arising out of the utilisation of genetic resources.<sup>35</sup>

Australia has ratified the CBD, meaning that its obligations are incorporated into our domestic system. However, the obligations under the Nagoya Protocol have received piecemeal incorporation into Australian state, territory and commonwealth law – including the

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<sup>32</sup> WIPO Traditional Knowledge Division, *Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities* WIPO (2017), 27.

<sup>33</sup> Law No 28216 on the Protection of Access to Peruvian Biological Diversity and Collective Knowledge of Indigenous Peoples Law No 27811 of 24 July 2002, introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources.

<sup>34</sup> Commission of the Andean Community, *Decision No. 391 of the Commission of the Andean Community Establishing the Common Regime on Access to Genetic Resources*, adopted 2 July 1996, entry into force 17 July 1996.

<sup>35</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) Art 14(1)(d) ('CBD').



federal *Environmental Protection and Biodiscovery Conservation Act 1999* (Cth) (**EPBC Act**) and state or territory biodiscovery legislation.<sup>36</sup>

The EPBC Act and Regulations govern access to biological resources and associated Indigenous Knowledge on Commonwealth land, establishing a permit system for commercial and non-commercial access to biological resources.<sup>37</sup> Where access to biological resources on Commonwealth or Crown lands is for commercial or potentially commercial purposes, parties seeking access are required to enter into an access and benefit sharing (**ABS**) arrangement with the access provider, which can include Indigenous land councils, organisations or communities.

Access and Benefit Sharing agreements (**ABS agreements**) outline the terms for sharing benefits that arise from the use of biological materials, including any commercial profits, with the traditional owners or custodians of the land from which materials are sourced. This in effect requires a level of recognition and connection with the Country and relevant Indigenous communities where resources and knowledge are sourced from.

Biodiscovery legislation and ABS agreements can also provide restrictions and stipulations for accessing Country, to ensure sustainability and respectful engagements with Indigenous growers and Country itself. However, ABS obligations pursuant to the Nagoya Protocol are generally reflected in a piecemeal fashion and only in some state and territory biodiscovery legislation.

### **Research & Development**

Instruments like the CBD and Nagoya Protocol, and Australian biodiscovery legislation, seek to target bioprospecting and ‘biopiracy’. Biopiracy refers to:

- (i) the theft, misappropriation of, or unfair free-riding on, genetic resources and/or traditional knowledge through the patent system; and
- (ii) the unauthorised and uncompensated collection for commercial ends of genetic resources and/or traditional knowledge.<sup>38</sup>

In most cases, biopiracy is an issue that is raised in relation to large or multinational pharmaceutical and bioprospecting corporations. However, biopiracy can also occur through university research & development practices that seek to engage Indigenous communities to study native bushfoods, botanicals and medicines, but do not reflect appropriate free, prior and informed consent and sever the connection to Country and source communities.

While not legally binding until incorporated into a contract such as an Access and Benefit Sharing Agreement or Research Agreement, best practice frameworks developed to address this issue include the Australian Institute of Aboriginal and Torres Strait Islander Studies (**AIATSIS**) [\*Code of Ethics for Aboriginal and Torres Strait Islander Research\*](#) and ethics

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<sup>36</sup> This includes the *Biodiscovery Act 2004* (Qld), *Biological Resources Act 2006* (Northern Territory), and *Biodiversity Conservation Act 2016* (WA).

<sup>37</sup> *Environment Protection and Biodiversity Act 1999* (Cth) s 310; *Environment Protection Biodiversity Conservation Regulations 2000* (Cth) reg 8A.06.

<sup>38</sup> Graham Duffield, ‘Traditional Knowledge, Intellectual Property and Pharmaceutical Innovation: What’s Left to Discuss?’ in Matthew David, Debora Halbert (ed) *The SAGE Handbook of Intellectual Property*, (Sage Publications, 2014) 6490664, 651.



committee processes and procedures. Universities themselves have also taken to developing protocols for researching and respecting ICIP and Country, including the University of Newcastle's [ICIP Protocol](#) and [Community Guide](#).

As a foundation, these resources and the legislative landscape are beginning to recognise a shift towards ensuring the free, prior and informed consent of Indigenous people is sought for access to and collection of resources, and the use of traditional knowledge associated with these resources.

In summary, it is imperative that a definition of Indigenous agricultural product incorporate a link to Country or Indigenous growers given the importance of Indigenous people's connection to Country. The term Country provides a range of implications for Indigenous people's law, custom, beliefs, practices and identity, which should be upheld and incorporated in authentic Indigenous products.

## ACCESS AND BENEFIT SHARING

### **That the product provides benefits to Indigenous communities**

In line with the cultural systems and communal nature of Indigenous groups, another aspect of a definition around Indigenous agricultural products may be the collective benefit it provides to source communities – for the use of traditional knowledge, access to land or resources themselves.

It cannot be said that there is a collective benefit provided to Indigenous communities or that there is a connection with Country if, for example, there is a product made by a multinational corporation such as Mary Kay from Kakadu plums grown in South America.

On the other hand, the use of spinifex grass grown and harvested by Indjalandji-Dhidhanu Traditional Owners in collaboration with the University of Queensland would likely be considered an Indigenous agricultural product.<sup>39</sup>

This necessarily ties back to the involvement of Indigenous peoples, knowledge and Country in any definition of Indigenous agricultural product, and can often be demonstrated or incorporated through the ABS agreements discussed above. In order for a product to be Indigenous, it should also be connected to and provide a collective benefit for Indigenous peoples and their knowledge, practices and resources, including Country itself.

### **Benefit Sharing**

Benefit-sharing is enshrined in international instruments like the CBD, which encourages the equitable sharing of the benefits arising from the utilisation of resources, as well as the Indigenous knowledge, innovations and practices relating to those resources.<sup>40</sup>

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<sup>39</sup> University of Queensland, '*Indigenous opportunity sprouts from desert discovery*' (Web page) <https://www.uq.edu.au/research/impact/stories/indigenous-opportunity-sprouts-from-desert-discovery/>.

<sup>40</sup>United Nations (1992), *Convention on Biological Diversity*, June 1992, Art 14(1)(d) <<https://wedocs.unep.org/20.500.11822/8340>>



The Nagoya Protocol on Access to Genetic Resources<sup>41</sup> builds upon that last pillar of the CBD to ensure that the benefits arising from the use of Indigenous resources are shared in a fair, and equitable way, and on mutually agreed terms, with the Indigenous communities involved.<sup>42</sup>

A precursor to the Nagoya Protocol, the [Bonn Guidelines to Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization](#) may also assist governments in adopting measures to govern and meet the standards of access and benefit sharing.<sup>43</sup>

The Food and Agricultural Organization of the United Nations (**FAO**) has also established an [International Treaty on Plant Genetic Resources for Food and Agriculture](#) that interplays with the CBD and Nagoya Protocol to encourage the equitable sharing of benefits arising from the use of these resources.<sup>44</sup>

This Treaty provides a model for a multilateral system of access and benefit-sharing, including sharing advancements in technology, capacity building, monetary benefits, and access to genetic materials.<sup>45</sup> The Treaty includes Indigenous communities in its recognition of contributors to plant genetic resources, and extends this to expressly link the promotion of Farmers' Rights to the protection of traditional knowledge.<sup>46</sup>

As discussed above, Australia has ratified the CBD but only adopted the principles of the Nagoya Protocol in a piecemeal way in some of its state, territory and Commonwealth biodiversity legislation. The relevant legislation in this space requires that a party seeking to access and use genetic resources and associated Indigenous knowledge on public or *Crown* land for commercial purposes must enter an ABS arrangement or agreement with the relevant access provider – often being the Indigenous land council, native title body, Indigenous organisation or community group.<sup>47</sup>

ABS agreements generally set out mutually agreed terms for the access to resources and knowledge and the subsequent sharing of benefits that arise from their use with the traditional owners or custodians.

Benefits include commercial benefits, such as profits, up-front payments or royalties from the commercial use of these resources or knowledge, as well as employment and co-ownership of resulting intellectual property rights.

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<sup>41</sup> Secretariat of the Convention on Biodiversity (2011), *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, 29 October 2010 <<https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>>

<sup>42</sup> *CBD*, Art 5.

<sup>43</sup> Secretariat of the Convention on Biological Diversity, *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization*, 2002 <<https://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>>

<sup>44</sup> *International Treaty on Plant Genetic Resources for Food and Agriculture*, opened for signature 3 November 2001, ETS L378 (entered into force 29 June 2004) Art 9.2.

<sup>45</sup> *Ibid*, Art 13.

<sup>46</sup> Peter Drahos, 'Symbolic Recognition' in *Intellectual Property, Indigenous People and Their Knowledge* (Cambridge University Press, 2014) 69–93, 88.

<sup>47</sup> *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), Division 8A.2.



Benefits can also be non-commercial. This can include recognition or advancement of rights to ICIP, land or traditional resources, capacity-building, land management support, health and healing or establishing knowledge centres, keeping places or copies of research and publications.

### **Indigenous Supply**

A key means of facilitating Indigenous collective benefit for the use of Indigenous products and associated inputs is through Indigenous supply chains and models. Supply models can protect resources found in an area or region through controlling the access and availability of that resource for market consumption.

Community-led supply models can ensure that the benefits of any use of the resources or associated knowledge flow back to or remain with the community e.g. through ABS and capacity-building of Indigenous growers and suppliers, particularly through Indigenous participation plans.

These models provide a mechanism to strengthen and reaffirm communal sovereignty and decision making over natural resources and traditional knowledge through customary law and localised control.

Following on from the Potato Park example discussed above, an example of a working Indigenous supply model in Australia is the Northern Australia Aboriginal Kakadu Plum Alliance (**NAAKPA**). NAAKPA was established to meet the growing domestic and international market demand for Kakadu plum through a supply chain that protects the community's traditional knowledge and spearheads a sustainable industry. Grower groups like Noongar Land Enterprise have also come together to engage in the agricultural sector as a collective.

Desert Knowledge Cooperative Research Centre and Ninti One have worked extensively on the economic value chain of bush tomatoes in central Australia, canvassing potential monetary and non-monetary benefits, including development of a [Bush Tomato Handbook](#) in relation to the production and commercialisation of bush tomatoes. The Department of Primary Industries and Regional Development (WA) also recently published [Setting up for Success: Bushfoods](#), providing supply model guidance for the Indigenous bushfoods businesses.

Whilst there is often limited knowledge about the value chain and what happens to resources once they leave the community, there remains a strong interest in value adding and community-based business development to create employment opportunities and promote independence and empowerment.<sup>48</sup>

However, these models can be costly to establish, run and expand, requiring a regular supply and high levels of governance, regulatory and market understanding and compliance.

Indigenous supply models and chains are the strongest example of Indigenous products that provide benefits to source communities and empower economic development. There are just so few of them in relation to the Australian agricultural, pastoral and native product markets.

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<sup>48</sup> Ibid (n 9), 13.



In summary, the flow on and provision of benefits to Indigenous peoples and source communities is necessary in any definition of Indigenous agricultural products. This aligns with best-practice, as well as Australia's obligations under instruments like the CBD and the Nagoya Protocol.

Products created through supply models are also more likely to satisfy the other prongs of a possible definition of Indigenous agricultural products – as they necessarily have connections to Indigenous peoples and communities, their knowledge and sustainable practices, and Country.

## CARING FOR COUNTRY

### **That the product upholds Caring for Country practices and prioritises sustainability**

Australian agricultural sustainability is the production of food and fibre which is environmentally, socially and economically responsible.<sup>49</sup> Sustainability is also a key theme across Indigenous land and resource management and cultivation practices, and is a foundation of caring for Country.

Incorporating caring for Country into the definition of an Indigenous agricultural product highlights the intrinsic connection between Indigenous peoples' practices and the stewardship of Country and natural resources. Here, the choices made by a generation will dictate the quantity and quality of the resources available to future generations.<sup>50</sup> This also provides the long-term viability of these methods in promoting environmental health and resilience against climate change.

Indigenous agriculture often encompasses methods that are inherently sustainable, focusing on crop diversity, seasonality, and low-impact farming techniques that preserve soil health and biodiversity.<sup>51</sup> Indigenous agricultural products will often depend on sustainable land use and biodiversity, which Indigenous communities traditionally maintain. This is evidenced through the Indigenous-run nurseries referred to above on page 12.

Of relevance, the FAO have recently prepared a publication on Indigenous people's food systems,<sup>52</sup> providing an overview of the common and unique sustainability elements of such systems and their links to traditional knowledge. The publication notes that Indigenous peoples' approaches to conservation are key, recognising the interdependent health of the food system, the local ecosystem and humans.<sup>53</sup> The publication also notes that Indigenous peoples conserve biodiversity through ancestral practices emanating from traditional knowledge passed on orally from generation to generation.<sup>54</sup>

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<sup>49</sup> National Farmers Federation, *Australian Agricultural Sustainability Framework* <https://nff.org.au/programs/australian-agricultural-sustainability-framework>.

<sup>50</sup> Australian Government Treasury (Cth), *Measuring wellbeing in theory and practice*, Working Paper 2011-02 (2011), 5.1.

<sup>51</sup> *Ibid* (n 9) 11.

<sup>52</sup> Food and Agriculture Organisation of the United Nations and Alliance of Biodiversity International and CIAT, *Indigenous Peoples' food systems: Insights on sustainability and resilience from the front line of climate change* (Report, 2021).

<sup>53</sup> *Ibid* (n48), 12.

<sup>54</sup> *Ibid*.



A key finding of the [Australian native foods and botanicals 2019/20 market study](#), developed by Australian Native Food and Botanicals (**ANFAB**) and researchers from the University of Sydney in 2020, was the increasing demand for native foods and botanical products (both domestically and internationally). This is largely driven by growing consumer interest in sustainable agriculture and ethical sourcing practices.

Sustainability also aligns with the corporate social responsibility commitments of businesses and is a common requirement across key frameworks in the agricultural space.

The sustainable use of biological diversity is one of the key pillars of the CBD.<sup>55</sup> Parties to the [International Treaty on Plant Genetic Resources for Food and Agriculture](#) are also required to develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture.<sup>56</sup> This includes measures such as pursuing fair agricultural policies, strengthening research, and promoting plant breeding efforts with the participation of farms.

Many of Australia's Free Trade Agreements also incorporate clauses that encourage or require environmental sustainability and conservation. These clauses commit parties to uphold high environmental standards and promote sustainable use of biological resources, which can be shifted to include respect for the traditional knowledge of Indigenous peoples and their sustainable harvesting, cultivation and land management practices.

The [Australian Agricultural Sustainability Framework](#) provides a level of clarity around Australia's alignment within international climate and sustainability initiatives. This framework is based on 17 principles across the following themes:

- **Environmental Stewardship:** Agricultural practices reduce greenhouse gas emissions, protect, maintain & improve environmental assets and preserve natural capital;
- **People, Animals & Community:** The agricultural industry nurtures the wellbeing of its people, animals and communities; and
- **Economic Resilience:** The agricultural industry upholds fair and ethical practices, transparent arrangements and compliance with laws.<sup>57</sup>

### **Measuring Sustainability**

There are also existing international mechanisms that provide support in measuring sustainability. For example, the [Ethical BioTrade Standard](#), developed by the Union for Ethical Bioproducts (**UEBT**), provides guidelines based on seven key principles designed to ensure that the sourcing of biological ingredients is conducted in a manner that respects both the environment and the rights of local communities – focusing on environmental and socio-economic sustainability.

The Standard promotes the sustainable collection, production, transformation, and commercialisation of biodiversity products, respecting both traditional knowledge and

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<sup>55</sup> CBD, Art 1 'Objectives'.

<sup>56</sup> Ibid (n40), Art 6.

<sup>57</sup> National Farmers Federation, *Australian Agricultural Sustainability Framework* <https://nff.org.au/programs/australian-agricultural-sustainability-framework>.



biodiversity. To measure the achievement of the Standard in relation to ethical sourcing systems and ingredients, the UEBT administers a [certification system](#). Companies that receive certification are able to use a set of labels to evidence their compliance and certification.

The [International Union for Conservation of Nature \(IUCN\)](#) have developed the [Natural Resource Governance Framework](#) as a tool to improve natural resource governance for equitable and effective conservation and sustainability. The standards and subsequent guidance established in the framework allow decision-makers to make better informed and more just decisions on the use of natural resources and the distribution of nature's benefits.

The framework also links the rights and interests of Indigenous communities with sustainability. It does so by addressing the rights of Indigenous peoples with regards to decision-making, knowledge, Country and cultural practice to ensure environmental and socio-economic sustainability.

The framework recognises that conservation may not necessarily contribute to the well-being of local people unless they have a voice in decision-making, are able to secure the use of and benefits from natural resources, and have access to protections against displacement or harm to their environment.<sup>58</sup>

The principles of the Standard and natural resource governance framework also align generally with the [Sustainable Development Goals](#) adopted by all UN member states.

In summary, incorporating Caring for Country practices and prioritising sustainability in the definition of an Indigenous agricultural product can enhance the marketability of Indigenous products, providing economic benefits to Indigenous communities while encouraging connections to Indigenous peoples, their culture and Country.

The concept of sustainability also aligns with global best-practice and the broader market trends and consumer preferences that increasingly favour environmentally responsible and ethically sourced products.

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<sup>58</sup> Springer J, Campese J, Nkangu J, 'The Natural Resource Governance Framework', (2021) IUCN Global Programme on Governance and Rights, 4.





## **(B) THE PROTECTION OF INDIGENOUS AGRICULTURAL PRODUCTS**

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As part of the report's scope, TJC examined the key legal and non-legal regulatory and best-practice frameworks for defining, identifying and protecting Indigenous agricultural products in Australia and internationally. To do this, we looked at state, territory, Commonwealth and international laws and practices that we considered were relevant to the definition, branding and understanding of Indigenous agricultural products, as well as those that offer protection for the commercialisation and marketing of these products.

### **Patents**

#### Background

Indigenous producers can apply for patents to grant them exclusive rights to market their inventions, such as devices, substances, methods and processes. This protects against unauthorised use, production or sale of the registered patented product or process. The duration of protection for a standard patent is 20 years, though biotechnology patents can be extended for another five years.

#### Use of Patents

Indigenous businesses, producers and communities can utilise patents to protect their inventions – whether it is a product itself or a new process used to extract, transform or utilise resources. We have seen Indigenous peoples seek registration or obtain co-ownership in the following examples:

- The **Mudjala** (or **nyardoo majala**) tree, known to the Nyikina Mangala community for its pain treatment properties:<sup>59</sup> Over a decade of research and development and discussions, the Jarlmadangah Burru Aboriginal Corporation and Griffith University received co-ownership of the biotechnology patent over the active analgesic compounds in the tree and methods of preparation.<sup>60</sup> Additional patents were also registered in Australia, Japan, India, New Zealand and the United States of America.<sup>61</sup>
- **Spinifex Grass** endemic across Australia: The Indjalandji-Dhidhanu peoples (represented by the Dugalunji Aboriginal Corporation's commercial arm) and the University of Queensland have partnered to transform a local species of spinifex grass to commercial products (including tyres, condoms and surgical gloves made from nanofibers), with one [patent](#) registered and owned jointly by the partners.
- **Uncha**: Indigenous knowledge holder and CEO of Chuulangun Aboriginal Corporation David Claudie (deceased) approached the University of South Australia to collaborate on a medicinal plant project in relation to the Uncha shrub – a plant that has been traditionally used by Aboriginal people for the relief of pain and

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<sup>59</sup> Virginia Marshall, Terri Janke, Anthony Watson, 'Community Economic Developments in Patenting Traditional Knowledge: a Case Study of the Mudjala TK Project in the Kimberley Region of Western Australia' (2013) *Indigenous Law Bulletin* 17.

<sup>60</sup> 'Novel analgesic compounds, extracts containing same and methods of preparation' by Clive Mills, Ronald Quinn (26 November 2004). Australian Patent 2004293125.

<sup>61</sup> *Ibid* (n 55), 18.



discomfort associated with infected teeth and toothache.<sup>62</sup> The project and its research led to a patent which is owned jointly by the University and Aboriginal Corporation, with David Claudie recognised as a co-inventor.

Australia does not currently have any special patent rights or processes for Indigenous products or associated knowledge. However, there are proposals at an international level for patent disclosure provisions to be brought into the application process.

As noted above on pages 8 and 12, the WIPO IGC are currently considering the drafting and application of an instrument to introduce patent disclosure requirements related to genetic resources and traditional knowledge.

As at January 2024, there are approximately **35** individual countries or regions with legislative texts that include specific disclosure requirements related to genetic resources and/or traditional knowledge,<sup>63</sup> including Switzerland and Vietnam.

Some foreign legal systems also extend and tailor their protections for Indigenous resources and knowledge further.

For example, in addition to patent disclosure obligations, India has also established a **Traditional Knowledge Digital Library** to protect Indian traditional medicinal knowledge and prevent its misappropriation at International Patent Offices. Access to the Library is subject to non-disclosure conditions to ensure ongoing confidentiality of the information, highlighting the effective incorporation of protection and promotion principles. So far more than 230 patent applications have either been set aside, withdrawn or amended based on the prior art evidence present in the library database.<sup>64</sup>

Within Australia, patents can provide a legally enforceable mechanism for protecting innovative agricultural products and processes, providing exclusive rights over the innovation for a period of time.

Patents can also provide a flexible mechanism for benefit sharing with Indigenous communities as part of research & development projects or collaborations, supply chain development and agricultural outputs – such as the *spinifex* or *uncha* examples above.

### Issues for Consideration

Within Australia, there are difficulties for Indigenous groups seeking to use patents to protect their innovations. The conventional patent system does not effectively align with the collective and traditional nature of Indigenous knowledge and innovations. Patents instead provide individual ownership.

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<sup>62</sup> Department of Environment and Science (Qld), *Biodiscovery Resource Toolkit* (2021) [https://environment.des.qld.gov.au/\\_data/assets/pdf\\_file/0021/247206/biodiscovery-resource-toolkit.pdf](https://environment.des.qld.gov.au/_data/assets/pdf_file/0021/247206/biodiscovery-resource-toolkit.pdf); Terri Janke, 'From smokebush to spinifex: Towards recognition of Indigenous knowledge in the commercialisation of plants' (2018) 1 *International Journal of Rural Law and Policy*, 1-37, 17.

<sup>63</sup> WIPO, Disclosure Requirements Table (updated 10 January 2024), available at: <[https://www.wipo.int/tk/en/docs/genetic\\_resources\\_disclosure.pdf](https://www.wipo.int/tk/en/docs/genetic_resources_disclosure.pdf)>.

<sup>64</sup> Terri Janke and Company, *Indigenous Knowledge: Issues for Protection and Management*, IP Australia, Commonwealth of Australia, 2018, 91.



This places the onus on the Indigenous party to seek collective ownership. For example, in the Uncha example above, the Aboriginal Corporation was the joint owner of the patent. This assisted with the recognition of the communities collective ICIP rights by allowing the patent rights to be managed in accordance with the community's customary laws.<sup>65</sup>

Commentators like Das have also argued that the global patent system has encouraged the appropriation of genetic resources and associated knowledge for the production of commercial agricultural and pharmaceutical goods.<sup>66</sup> This practice of biopiracy and bioprospecting is a common issue within the native food, botanicals and medicinal sector.

The knowledge provided in patent applications is made publicly available. Once the duration of patent protection expires, others are free to reverse engineer and use the patented product or process or underlying knowledge and practices without constraint. This poses the issue of Indigenous knowledges being publicly available for use and appropriation without the oversight of community practice and protocol and without benefits flowing back to community.

#### **Example – Mary Kay and Kakadu Plum:**

The Kakadu Plum (also known as Gubinge or Billy goat plum) has remarkably high concentration of vitamin C and absorbic acid and has been used in a range of products, particularly food products such as jams and teas, but also health drinks.

In 2007, the US cosmetics company Mary Kay Inc applied for an international patent with the World Intellectual Property Organisation (WIPO) under the Patent Cooperation Treaty for 'compositions comprising Kakadu plum extract or acai berry extract'. The international application status report prepared in July 2008 considered that a great deal of the patents' claims was obvious, and could be argued to lack an inventive step. The applicant was asked to come back with further clarifications.

The application was examined by IP Australia in 2010. Questions were raised in the media by the Gundjeihmi Aboriginal Corporation, representative organisation of the Mirrar people, claiming the plum had been used by the Mirrar as a food and medicine for 'as long as people can remember'. Concerns were also raised with IP Australia under section 27 which allows third parties to make statements regarding a patent's registrability.

During examination of the patent, IP Australia raised concerns about the novelty of the patent, and the patent was subsequently withdrawn by Mary Kay. However, it should be noted that Mary Kay holds patents which relate to Kakadu Plum in many other international jurisdictions, including the United States and France.

Additionally, to be registrable as a patent, an invention must be 'new' and 'inventive'. This generally poses a significant barrier to the recognition of Indigenous knowledges, practices and methods which have existed and been practiced for time immemorial. This also means that plants and species themselves cannot be registered as patents unless there is a new

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<sup>65</sup> Terri Janke, 'From smokebush to spinnifex: Towards recognition of Indigenous knowledge in the commercialisation of plants' (2018) 1 *International Journal of Rural Law and Policy*, 1-37, 17.

<sup>66</sup> Kaushiki Das, 'The Global Quest for Green Gold: Implications of Bioprospecting and Patenting for Indigenous Bioresources and Knowledge' (2020) 6(1) *Society and Culture in South Asia*, 74 – 97, 75.



and inventive step, preventing Indigenous peoples' ability to gain protection over their flora and fauna knowledge.

### **Example – Gumby Gumby:**

For thousands of years, the Gumby Gumby (Gumbi Gumbi) plant has been used by the Ghungalu people in Central Queensland as medicine.

In 2008, a non-Indigenous company based in Yeppoon, Queensland, successfully patented a process for extracting the medicine from the Gumby Gumby leaves. This was without permission or any consultation with the Ghungalu community. The patent-holders later sought to threaten a number of Indigenous businesses using Gumby Gumby in their own products, including traditional owner businesses, claiming patent and trade mark infringement.

It has been strongly argued that the extraction method used by the patent-holder should not have been patentable as there remains ambiguity whether an inventive step exists. Upon request, IP Australia has recently re-examined the patent and identified issues regarding the manner of new manufacture. The patent itself discloses some traditional uses of Gumby Gumby, including its preparation by chewing with saliva for medicinal purposes. Despite these issues, IP Australia determined that the novelty and inventiveness of the patent remain intact. The patent-holder now has 2 months to respond to these examination findings.

## **Trade Marks**

### Background

Trade marks are a sign used by a person to distinguish their goods or services created or provided in the course of trade from goods or services created or provided by another person.<sup>67</sup> Trade marks can be words, slogans, logos, packaging, shapes or colours.

Trade mark registration with IP Australia and via the Madrid Protocol internationally provides owners with exclusive, economic rights over the trade mark – including to use and authorise others to use the mark. Trade mark protection in Australia lasts for 10 years, and can be renewed indefinitely every 10 years for a fee.

There are a few different types of trade marks:

- **Standard Trade Marks:** Providing protection for a marks in classes of goods and services and owned by an individual or organisation (i.e. *Indigiearth*, *Bush Medijina*, *Nike swoosh*, *Cadbury colour purple*).
- **Certification Trade Marks:** Certification marks are trade marks that denote some type of quality or characteristic of the products and services. Use of certification marks can be licensed to approved users, who must use the mark in accordance with

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<sup>67</sup> *Trade Marks Act 1995* (Cth).



the rules attached the mark as approved by the Australian Consumer and Competition Commission (i.e. *Supply Nation, Australia Made, Australian Grown*)

- **Geographical Indications:** A type of certification trade mark that identifies that goods originate in a specific country, region or locality that is attributable for a given quality, reputation or other characteristic<sup>68</sup> (i.e. *champagne; feta cheese*). Geographical indications have gained traction in Australia's wine sector and have been the subject of research by IP Australia and NAAKPA in relation to Kakadu Plum.
- **Collective Trade Marks:** a sign used in relation to goods and services provided in the course of trade by members of an association to distinguish their goods and services in the market dealt with or provided by persons who are not members of the association. Collective trade marks are not subject to ACCC-approved rules in the same way that certification trade marks are (i.e. *Ngooka Honey registered to Noongar Land Enterprises; Chartered Accountants "CA" mark*).
- **Defensive Trade Marks:** Allow trade mark owners to register their well-known brands from being used in unrelated classes of goods or services (i.e. *Kellogg's; Vegemite*).

### Use of Trade Marks

Indigenous communities and knowledge holders can and do utilise trade mark registration to protect and promote their agricultural products by investing in the development of strong distinctive brands. For example, [Indigiearth](#) and [Bush Medijina](#) are Indigenous native food and botanicals businesses who have registered their brands as trade marks.

Trade marks can create a recognisable brand for an organisation or group's agricultural product, and can reflect the Indigenous origins and cultural significance of the products. For example, [Noongar Land Enterprises](#) has a collective trade mark Ngooka Honey® for the native bush honey sourced in Western Australia's south-west. This mark can only be used by groups that are part of the Enterprise and authorised by the community.

This use also has an additional effect of promoting the significance of traditional knowledge and cultural heritage. This is because certain uses of trade marks can help to promote the traditional knowledge, practices and stories associated with the product or producer – creating value and raising awareness of the cultural connections and its influence on the practices and products of the trader.

### Certification Trade Marks

Certification marks can be used to denote that a product is 'Indigenous' or 'produced from a particular region' or have a certain quality. Certification marks control the quality or characteristic of a product and set rules for licenced users. Supply Nation has registered two certification trade marks (Registered Supplier and Certified Supplier) that businesses can use once they have been registered or certified as Indigenous businesses according to Supply Nation's rules. These are discussed above at page 6.

Certification trade marks can be used by Indigenous individuals and communities to assert authority to dictate how native food and botanical products are sourced, developed, and

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<sup>68</sup> *Trade Marks Act 1995* (Cth) s 6; *TRIPS*, Article 22(1).



marketed, granting them control over the authenticity and quality of native food products bearing the certification mark.<sup>69</sup>

Certification trade marks can also be used as geographical indications (GI). For example, a GI might protect the name of a native crop that has been cultivated using traditional techniques unique to an Indigenous community, thereby preventing unauthorised use of the name and preserving the economic opportunities associated with the crop.

By creating a specialised certification mark for their products, Indigenous individuals and communities would have the authority to dictate how these products are sourced, developed, and marketed – this includes control over the authenticity and quality of products bearing the certification mark.<sup>70</sup>

### Issues for Consideration

A key issue faced by Indigenous peoples is the threshold for the descriptiveness of trade marks. Trade marks that are 'descriptive' of the product itself are not eligible to receive trade mark registration. This creates difficulty for Indigenous suppliers, producers or wholesalers who seek trade mark protection of a name that is or relates to the specific product they are dealing with – even extending to the use of the language name of the product. This also creates issues for Indigenous producers that wish to protect and exercise rights over their language words of their product ingredients as trade marks.

#### **Example – Gumby Gumby:**

The non-Indigenous company that successfully registered a patent over a simple extraction method in relation to Gumby Gumby also registered a composite trademark of the words 'Gumby Gumby' (which translates to 'woman woman' in traditional Ghungalu language) in conjunction with an image of the leaves in 2016.

Following this, in 2017 the company lodged an application to register a trademark of the words 'Gumby Gumby', which are descriptive of the goods and services being provided. IP Australia rejected registration of the word mark in December 2019.

The *Trade Marks Act 1995* (Cth) does not provide protection for Indigenous names, groups or language words – which can be registered by non-Indigenous businesses particularly in the agricultural sector, preventing Indigenous use, causing confusion in the marketplace, and invariably misappropriating and commercialising Indigenous culture without consent.

IP Australia now requests further information in relation to applications containing Indigenous language words and whether cultural consents from Indigenous communities have been sought for use, but this is not yet codified in regulation or legislation.

Additionally, lesser-known bushfood items from regions unfamiliar to most consumers may face considerable hurdles in marketing and promoting their products (through a trade mark). There are also a number of other challenges specific to resourcing and governing these trade mark efforts, along with cultural and logistical complexities that are inherent in

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<sup>69</sup> David J. Jefferson, 'Certification Marks for Australian Native Foods: A Proposal for Indigenous Ownership of Intellectual Property' (2021) 46(1) *Alternative Law Journal*, 53–57, 54.

<sup>70</sup> *Ibid*, 55.



coordinating between diverse Aboriginal and Torres Strait Islander communities that may have ties to a particular region, resource or product.<sup>71</sup>

## Plant Breeders Rights

### Background

Plant Breeders Rights (**PBR**) provide exclusive proprietary rights over new plants or varieties that have been developed, or 'bred', in Australia. These rights are provided under the *Plant Breeder's Rights Act 1994* (Cth) (**PBR Act**).

The Australian PBR system allows for protection of new, native plant varieties. Indigenous groups and growers can harness this capability to assist in the commercialisation of such plant varieties and prevent unauthorised commercial uses. The PBR scheme has had a long association with Australian native plant varieties, with the Macadamia being the first registered variety. The PBR Act does not, however, currently provide a definition for, or legal recognition of, Indigenous plant varieties.

### Issues for Consideration

PBR protection generally lasts for 20 years, and up to 25 years for trees and vines. In contrast, Indigenous knowledge systems are ancient and are continuously passed down through generations. As a result, PBR for fixed time periods are generally not considered,<sup>72</sup> exacerbated by the risk of future appropriation when protection expires.

Additionally, Peter Drahos raises that the cultural duties of producers or knowledge holders may preclude PBR registration, due to concerns about releasing plants into systems where third parties may exploit them without accountability to Indigenous people.<sup>73</sup> Drahos also notes that section 45 of the PBR Act permits joint applications for PBR, but queries whether Indigenous groups would embrace this option to address collective rights and competing claims with other Indigenous groups.<sup>74</sup>

The extensive criteria, information and resources required to receive registration under the PBR Act may also preclude Indigenous businesses and communities exploring this option. This is due to the considerable labour, expense and expertise from a western scientific lens that would need to be incorporated, and that does not often align with the processes and interests of Indigenous communities or Indigenous-run nurseries and growers associations.

This is similar for bush medicines developed from thousands of years of cultural knowledge infrastructure but generally prohibitive to exploit as a complementary medicine under Australia's therapeutic goods regime pursuant to the *Therapeutic Goods Act 1989* (Cth).

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<sup>71</sup> David J. Jefferson, 'Certification Marks for Australian Native Foods: A Proposal for Indigenous Ownership of Intellectual Property' (2021) 46(1) *Alternative Law Journal*, 53–57, 57; Peter Drahos; Peter Drahos, 'Protecting Country's Cosmology' in *Intellectual Property, Indigenous People and their Knowledge* (Cambridge University Press, 2014), 175-201, 198.

<sup>72</sup> Ninti One, 'Patents and Plant Breeders Rights' (Briefing Paper No 4/2010), 2.

<sup>73</sup> Peter Drahos; Peter Drahos, 'Protecting Country's Cosmology' in *Intellectual Property, Indigenous People and their Knowledge* (Cambridge University Press, 2014), 175-201, 179.

<sup>74</sup> *Ibid.*



## International Insights

Nation states that are party to the [International Convention for the Protection of New Varieties of Plants \(UPOV\) 1991](#) will have their own PBR regime. In contrast, the New Zealand system for Plant Variety Rights under their [Plant Variety Rights Act 2022](#) includes provisions for Indigenous plant species.

The Act established a Māori Plant Varieties Committee,<sup>75</sup> which is consulted on to ensure that secret, sacred or sensitive information provided in applications for plant varieties protection is not publicly disclosed.<sup>76</sup> The Committee can also determine and advise on Māori relationships to species the subject of applications, including whether the granting of registration would cause offence or have adverse effects on these relationships.

These provisions recognise and respect New Zealand's obligations under the principles of Te Tiriti o Waitangi (the Treaty of Waitangi), through protecting Māori people's relationships with Indigenous plant species or other species of significance.<sup>77</sup> Where plant breeders are aware of a kaitiaki relationship with the relevant plant, the breeder must engage directly with the kaitiaki.<sup>78</sup>

## **Other Intellectual Property Tools**

### Confidential Information

Confidential information is a common law protection (developed through the courts, not codified in legislation) designed to protect trade secrets and confidential business information from unauthorised use or disclosure (including business methods, recipes and other proprietary knowledge).<sup>79</sup> Where disclosure causes detriment, the holder of confidential information may take action to stop the disclosure. Aboriginal men have used confidential information to stop the disclosure of sacred men's business.<sup>80</sup>

### Issues for Consideration

Indigenous agricultural products that are defined by their cultural practice or connection to country and people will incorporate traditional knowledge. For instance, a secret recipe for a remedy, or the healing properties of a particular plant.

Confidential Information can be used to protect this know how or cultural practices relating to Indigenous agricultural products that are not widely publicly known. It can also protect the collective and non-novel aspects of Indigenous knowledge where other intellectual property

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<sup>75</sup> *Plant Variety Rights Act 2022* (NZ) s 57.

<sup>76</sup> *Ibid*, s 58.

<sup>77</sup> *Ibid*, s 4.

<sup>78</sup> *Ibid*, s 39; See also The Conversation, 'A new law offers better protection for Indigenous plants of significance to Maori, but no requirement to share profits' (1 December 2022) <<https://theconversation.com/a-new-law-offers-better-protection-for-indigenous-plants-of-significance-to-maori-but-no-requirement-to-share-profits-195435>>.

<sup>79</sup> See, e.g. *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415.

<sup>80</sup> *Foster v Mountford & Rigby Limited* (1976) 14 ALR 71.





systems do not. Of note, there is no set time period or duration for protection. Information remains protected for as long as it is kept confidential.

Non-disclosure agreements can and should be used more widely, in particular by Indigenous groups, when negotiating or discussing potential agricultural opportunities with prospective partners, researchers, manufacturers, suppliers and retailers.

### Copyright

Copyright refers to the bundle of exclusive, economic rights that creators are granted automatically when they author or create specific types of works or recorded material. Copyright is traditionally used to protect literary, artistic and musical works, as well as films and sound recordings and generally lasts from the time of creation until 70 years after the creator passes away.

Copyright would not protect the products, biological resources or knowledge held or created itself. However, copyright can apply to Indigenous agricultural products to protect the cultural expressions, branding, language, stories or knowledge recorded in material form relating to the product. This includes knowledge, information and data about the product and its associated methods of growth, harvesting and manufacture when written down or recorded, as well as the post-production components including packaging, logos or artworks, written publications or marketing materials that are created in relation to the product and resources.

### Issues for Consideration

In line with Article 31 of UNDRIP, Indigenous peoples should be positioned to maintain, control, protect and develop not only their ICIP, but the intellectual property developed that incorporates their ICIP. In recognising this, Indigenous businesses and producers can ensure that they own the copyright in recorded materials created as part of research, collaborations, program or product development and marketing and promotion relating to or incorporating their cultural practices, processes or resources. From this, the Indigenous party can control and limit the use of the material through the licences and permissions it provides (e.g. IP licences, ABS agreement, cultural clearances).

## **Native Title & Land Rights**

### Background

At a Commonwealth level, we have the *Native Title Act 1993* (Cth). This Act codified the decision of *Mabo v Queensland* (1992), recognising the existence of native title in Australia and protecting pre-existing Aboriginal and Torres Strait Islander rights and interests in lands and water according to traditional laws and customs.

As the source of native title rights and interests in land comes from the traditional laws and customs of the native title holders, the nature of native title rights and interests varies between community.



At a state level, we have land rights legislation usually comprised of a grant of freehold or perpetual lease title to Indigenous peoples.<sup>81</sup> This includes the:

- *Aboriginal Land Rights Act 1983* (NSW);
- *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth);
- *Aboriginal Land Act 1991* (Qld) and *Torres Strait Islander Land Act 1991* (Qld);
- *Aboriginal Lands Trust Act 1966* (SA); or
- *Traditional Owner Settlement Act 2010* (Vic).

By contrast, native title arises through common law recognition of pre-existing rights and interests according to traditional laws and customs and is not a grant of right created by governments.<sup>82</sup>

Ultimately, the land rights and native title regime in Australia recognises the interconnectedness between land and culture.<sup>83</sup> Access to, and management and maintenance of, land and waters are necessary for the sustainable cultivation, harvesting and propagation of native agricultural resources and products.

Native title representative bodies, prescribed bodies corporate and land councils are Indigenous organisations established to manage, oversee and represent community interests in native title land. These organisations often negotiate on behalf of their community or group when third parties seek to access or use the relevant land. This provides an opportunity for these organisations to engage in collective bargaining through Indigenous Land Use Agreements (**ILUAs**).

### Issues for Consideration

While ILUAs are voluntary agreement between native title groups and other parties regarding the use of land and waters, they can also be used to ensure benefit sharing and economic opportunities for native title groups.

However, there is often an imbalance in negotiating powers between the Indigenous body and those parties seeking to access and use the lands and resources which must be addressed,<sup>84</sup> in order to improve the outcomes for Indigenous communities.

Specific traditional owner groups or communities will also generally have their own protocols surrounding the use of land and its resources. These protocols must be respected, and can provide protection for the community's land, practices, resources and knowledge. For

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<sup>81</sup> Australian Government Attorney-Generals Department, '*Native Title*', <https://www.ag.gov.au/legal-system/native-title>.

<sup>82</sup> Ibid.

<sup>83</sup> Terri Janke and Company, *Indigenous Knowledge: Issues for Protection and Management – Legal protection of Indigenous Knowledge in Australia Supplementary Paper 1*, IP Australia, Commonwealth of Australia, 2018, 36.

<sup>84</sup> Ciaran O'Faircheallaigh, 'Negotiating Cultural Heritage? Aboriginal–Mining Company Agreements in Australia' (2008) 39 *Development and Change*, 25, 30.



instance, [TONFABS](#) was developed by the Federation of Victorian Traditional Owner Corporations, comprised of Recognised Aboriginal Parties within Victoria.

## Consumer Law

### Misleading or Deceptive Conduct

The *Australian Consumer Law (ACL)* is provided in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*. Section 18 of the ACL provides statutory protection against misleading or deceptive conduct in the course of trade. This provision is designed to protect consumers and businesses from conduct that is likely to mislead or deceive in relation to goods, services, land, or employment and business opportunities. There is no requirement that traders intend to mislead or deceive.

### Passing Off

'Passing off' is a common law tort that protects the goodwill of a trader from misrepresentation that causes damage to their business or personal reputation. It is aimed at preventing businesses from misleading consumers into believing that their goods/services are associated with, endorsed by, or the same as those of another business. Passing off is distinct from trademark infringement. It can protect unregistered trademarks and other elements of a business's get-up that contribute to its reputation and consumer recognition.

### Issues for Consideration

#### A. Utilising Consumer Law

Indigenous agricultural products often carry significant cultural, environmental, and historical value. Passing off can be used to protect the reputation and goodwill of these products. If another party attempts to sell their goods as being associated with, or identical to, an Indigenous community's products without permission, the law of passing off can be employed to prevent this misrepresentation and protect the community's reputation.

As the demand for Indigenous products rises, more producers may attempt to falsely market their goods as 'Indigenous' or including methods or ingredients sourced from Indigenous people. Misleading and deceptive conduct provisions of the ACL can also address these situations.

In *ACCC v Birubi Arts*,<sup>85</sup> the Australian Competition and Consumer Commission successfully prosecuted Birubi Arts for misleading consumers by selling art products that falsely claimed to be hand painted by Aboriginal Australian artists when they were manufactured overseas. The Federal Court ordered Birubi Art Pty Ltd (in liquidation) to pay \$2.3 million as a result.<sup>86</sup>

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<sup>85</sup> *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996.

<sup>86</sup> *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* (2019) 374 ALR 776; [2019] FCA 996; Australian Competition and Consumer Commission, '\$2.3m penalty for fake Indigenous Australian art' (Media Release, 26 June 2019) <<https://www.accc.gov.au/media-release/23m-penalty-for-fake-indigenous-australian-art>>



By ensuring that only legitimately Indigenous products are marketed as such, these laws can assist in maintaining consumer trust and supporting the economic interests of Indigenous communities, by preventing others from unfairly capitalising on their cultural heritage and reputation. However, we note that by going into liquidation, Birubi Arts and its directors were able to avoid payment of the fine and no benefits were directed to support the sale of legitimate Aboriginal art.

We note that in relation to passing off claims, Indigenous businesses can face difficulty in demonstrating and evidencing the requirement of harm to the reputation of their business. Also, in relation to the ACL, the burden of proof lies with the claimant to demonstrate that conduct is misleading or deceptive. This is often a resource-intensive and challenging step.

The scope of what constitutes misleading or deceptive conduct can also be subject to interpretation and may not fully encompass the cultural and traditional aspects unique to Indigenous products in all circumstances.

#### B. Truth in Advertising and Ethical Trade

There is an international movement towards truth in advertising, with specific legislation in the United States of America accompanied by an independent [Truth in Advertising](#) watchdog. This movement is aimed at ensuring claims made in advertisements are truthful, are not deceptive or unfair, and are evidence-based.

In particular, the *Indian Arts and Crafts Act of 1990* is a form of truth in advertising law that prohibits misrepresentations in marketing of American Indian or Alaska Native arts and crafts products within the United States.<sup>87</sup>

Within Australia, the [Indigenous Art Code](#) aims to address a similar issue. The Code is a voluntary industry code of conduct that promotes fair and ethical trade between art dealers and Indigenous visual artists in Australia. By adhering to the Code, those promoting and selling Indigenous art ensure transparency and authenticity in relation to the art and engagements with artists. It is, however, voluntary and based entirely on good will.

The Australian Productivity Commission also delivered a report on [Aboriginal and Torres Strait Islander Visual Arts and Crafts](#), examining the growing sector and providing recommendations to address ICIP protections and the regulation of inauthentic products.<sup>88</sup>

These recommendations include:

- Mandatory disclosure for Indigenous-style products that are not made or licensed by Aboriginal or Torres Strait Islander artists;
- New laws to provide traditional owners with greater control over how their cultural assets are used in visual arts and crafts; and

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<sup>87</sup> *Indian Arts and Crafts Act of 1990* P.L. 101-644.

<sup>88</sup> Productivity Commission, *Aboriginal and Torres Strait Islander Visual Arts and Crafts*, Study Report (2022).



- Comprehensive evaluation of government funding, increased funding to strengthen the Indigenous Art Code and explicit focus on workforce development.<sup>89</sup>

Coming out of these recommendations, and as discussed in more detail in Part A above, the [National Cultural Policy, Revive](#) calls for the development of stand-alone legislation for protection of ICIP in the arts, and is currently the subject of Australia-wide consultations being undertaken by the Office of the Arts on behalf of [the Department of Infrastructure, Transport, Regional Development, Communication and the Arts](#).

## Industry Practice

The developing practices within the agricultural and native food and botanicals industries can also provide some level of protection for Indigenous agricultural products. There is growing consumer awareness and recognition of key issues within the industry – including the importance of authentic, sustainable and ethically sourced products. This influences the practices of businesses, suppliers and researchers, and reflects a more *laissez-faire* approach to industry regulation.

### Industry Bodies:

Indigenous companies, organisations and collectives in the sector are also developing and driving protections in this area through their practices. For example, the [First Nations Bushfoods & Botanical Alliance Australia \(FNBBAA\)](#) is a national Indigenous-led peak body supporting the interests and rights of Indigenous peoples, communities and businesses in the bushfood and botanicals industry through the following key action items (arising out of the inaugural Indigenous Native Foods Symposium in Sydney in November 2019):

- **Standardisation:** Implementing protocols to set national standards on how to work with First Nations people in the industry.
- **Provenance & Authenticity:** To protect First Nation producers, respect our protocols and recognise our custodianship.
- **Changes to the Law:** To respect and protect First Nations knowledge in bushfoods and bush products should be protected by the laws of this land and business practice. This includes intellectual property; penalties for misappropriation and implementation of the Nagoya Protocol on Access and Benefit Sharing.
- **Education & Awareness:** Promote respect for our First Nations Knowledge values and protocols.

NAAKPA, through its strengthening and monitoring of the Kakadu plum supply chain in Northern Australia, also provide a similar function within the industry.

Another example is [AgriFutures Australia](#), who are undertaking work to examine and realise opportunities for supporting Indigenous communities to develop agricultural enterprises centred on land management and the achievement of their material, cultural and social

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<sup>89</sup> Ibid, 29.



needs.<sup>90</sup> AgriFutures Australia also claim to support a sustainable, transparent and authentic native food industry<sup>91</sup>, although it is unclear how much support is provided to Indigenous producers and businesses in this industry.

AgriFutures has a knowledge hub that can assist Indigenous researchers, producers and companies in growing their industry knowledge. This hub has been framed by AgriFutures as a potential public digital library for native foods, serving a purpose similar to the Indian Traditional Knowledge Digital Library discussed above on page 21.<sup>92</sup>

[Australian Native Food and Botanicals \(ANFAB\)](#) is another industry body aimed at leading a culturally inclusive, sustainable, ethical, agile and profitable native foods and botanicals sector through growth and development values.

### Issues for Consideration

Bodies such as FNBBAA, NAAKPA, AgriFutures and ANFAB have a unique position within the industry and can spearhead the implementation of frameworks aimed at protecting Indigenous agricultural products and associated practices and knowledge. This can be achieved both through distinguishing Indigenous agricultural products in the market and safeguarding them against misappropriation and exploitation through advocacy and monitoring industry practice.

### Certification and Labelling Systems:

Certification bodies play a unique role in supporting Indigenous businesses, providing certification that authenticates the legitimacy of their Indigeneity and associated products. This includes the role and certification marks of Supply Nation and the Indigenous Art Code discussed above on pages 23 and 29 respectively.

There are also supplier diversity networks globally supporting minority-owned business and economic development. The [Global Supplier Diversity Alliance](#) is comprised of global supplier diversity networks aimed at developing and strengthening inclusive supply chain practices through research, tools and resources. Supply Nation is a member of this Alliance. Each member has a system for certifying that its suppliers are Indigenous, or minority-owned, ahead of facilitating procurement and business opportunities.

### **Example – National Indigenous Arts Advocacy Association’s [Label of Authenticity](#):**

Now discontinued, the Label operated as a certification trade mark distinguishing authentic Indigenous artwork in Australia and ensuring that Indigenous artists received adequate payment for the sale of their works.

<sup>90</sup> Jason Alexandra and Jane Stanley, *Aboriginal Communities and Mixed Agricultural Businesses: Opportunities and future needs* (Report, RIRDC Publication No 07/074, 2007). <https://agrifutures.com.au/product/aboriginal-communities-and-mixed-agricultural-businesses-opportunities-and-future-needs/> title (Report, Series, Number Date), pinpoint

<sup>91</sup> Dr Christine Pitt and Peter Crane, *Growing the native ag+food sector* (AgriFutures Australia Report, No 23-080, August 2021), iii.

<sup>92</sup> Kamallesh Adhikari, Jocelyn Bosse, Allison Fish and Brad Sherman, *Intellectual property related legal issues facing the Australian Native Food Industry*, (AgriFutures Australia Report, No. 18/084, September 2018), vii.



Artists could be registered by the NIAAA if they demonstrated that they were Aboriginal or Torres Strait Islander, and had permission from the relevant community to make the artwork.<sup>93</sup> Once registered, artists could attach the Label to their artwork, signalling to buyers that the artwork was authentic.<sup>94</sup>

#### **Example – Mukurtu CMS:**

The Mukurtu Content Management System is a digital platform aimed at respecting and protecting Indigenous knowledge.

Developed initially for the Warumungu community in Central Australia, Mukurtu facilitates the management and sharing of digital cultural materials and knowledge by embedding Indigenous protocols directly into the platform's architecture.

Of note, Mukurtu utilises flexible and customisable traditional knowledge labels and categories that align with specific community norms around access and sharing particular material or information. These TK labels allow communities to determine and control who can see and interact with certain types of content based on cultural significance and sensitivity.

This approach not only protects sensitive information but also respects the traditional knowledge governance practices that vary from community to community, ensuring that digital archives can be managed in a way that is culturally appropriate and secure.

#### Issues for Consideration

Although not specific to the agricultural sector, these examples of certification and labelling systems provide an opportunity for, and insight into the effectiveness of, addressing the issues identified throughout this Report.

There are also examples of certification and labelling systems within the agricultural and native food and botanicals sector specifically, both in practice and proposed.

The UN Food and Agriculture Organisation have undertaken a review of *Labelling and Certification Schemes for Indigenous Peoples' Foods*,<sup>95</sup> providing an analysis on the potential of labelling and certification schemes to market Indigenous food products.

The review focuses on schemes that are designed by, with and for Indigenous Peoples, examining examples of innovative schemes and their capacity to provide economic, social

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<sup>93</sup> Arts Law Centre of Australia, *AITB Information Sheet - Certificates of Authenticity*, 1 <[https://www.artslaw.com.au/images/uploads/aitb/AITB\\_information\\_sheet\\_-\\_Certificates\\_of\\_authenticity\\_1.pdf](https://www.artslaw.com.au/images/uploads/aitb/AITB_information_sheet_-_Certificates_of_authenticity_1.pdf)>.

<sup>94</sup> Ibid.

<sup>95</sup> FAO and Alliance of Diversity and CIAT 2022. *Labelling and certification schemes for Indigenous Peoples' foods – Generating income while protecting and promoting Indigenous Peoples' values* <<https://www.fao.org/documents/card/en/c/CC0155EN/>>.



and environmental benefits based on Indigenous priorities and interests. These schemes include territorial labels,<sup>96</sup> geographical indications,<sup>97</sup> and participatory guarantee schemes.<sup>98</sup>

Within Australia, we have also seen development of a proposed Accreditation (Labelling) system as part of TONFABS in Victoria. This system would be implemented through a set of trade marks – whether logos or symbols – that inform consumers about the sourcing of the native food or botanical product, the associated cultural knowledge and the degree of involvement of and engagement with Traditional Owners.<sup>99</sup>

Consultations with Traditional Owners revealed a preference for a multi-level scaled rating system, with differing levels of accreditation dependent on the level of engagement and compliance with the TONFABS protocols and ABS requirements. This reflects the current set up of Reconciliation Australia's RAP system, or the Energy Australia rating model.

AgriFutures Australia have also recommended a system of certificates of compliance when transferring native materials within Australia.<sup>100</sup> AgriFutures propose this model as a means of further embedding the Nagoya Protocol, with certificates of compliance accompanying genetic materials when passed between parties.<sup>101</sup>

### **Protection of Biological Diversity and Access and Benefit Sharing**

The 1992 *United Nations Convention on Biological Diversity (CBD)*<sup>102</sup> introduced an international framework for the fair and equitable sharing of benefits arising from the utilisation of genetic resources. Article 8(j) of the CBD focuses on respecting, preserving, and maintaining the traditional knowledge and practices of Indigenous and local communities, recognising their importance in the conservation and sustainable use of biodiversity. It mandates parties to promote the application of this knowledge, with the consent and involvement of its holders, and encourages equitable benefit-sharing from its use. Article 8(j) underscores the critical role of Indigenous communities in environmental stewardship and biodiversity management.

The complementary *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* builds upon the CBD to ensure free, prior and informed consent, and fair and equitable benefit sharing based on mutually agreed terms. The Nagoya Protocol encourages parties to consider Indigenous and local

<sup>96</sup> Ibid, 13. Examples: Mapuche ethical label (Chile); Hua Parakore Indigenous label (New Zealand); Last Forest Products (India); The Chakra label (Ecuador).

<sup>97</sup> Ibid, 18. Examples: Northern Neuquen creole goat meats (Argentina); T'lanak handicraft (Philippines); Sateré-Mawé Waraná (Brazil).

<sup>98</sup> Ibid, 21. Examples include Mexican Network of Tianguis and Organic Markets (Mexico), Participatory guarantee system in Meghalaya (India), and Organic Pasifika (Pacific Island Countries and Territories).

<sup>99</sup> Federation of Traditional Owners Victoria, '*TONFABS Communiqué*' (Vol 3, 2022), 5 [https://fvtoc.com.au/wp-content/uploads/2023/04/Volume3FVTOCCommunityCommunique\\_web.pdf](https://fvtoc.com.au/wp-content/uploads/2023/04/Volume3FVTOCCommunityCommunique_web.pdf).

<sup>100</sup> Kamallesh Adhikari, Jocelyn Bosse, Allison Fish and Brad Sherman, *Intellectual property related legal issues facing the Australian Native Food Industry*, (AgriFutures Australia Report, No. 18/084, September 2018), v.

<sup>101</sup> Ibid.

<sup>102</sup> United Nations *Convention on Biological Diversity*, June 1992 <<https://wedocs.unep.org/20.500.11822/8340>>





communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.<sup>103</sup> Though this is relatively weak language (encourage and consider), this framework would be useful for Indigenous people to enable greater agreement making when plants and associated traditional knowledge is used.

Australia signed the Protocol in 2012 but has not yet ratified the Protocol. There have been some legislative responses discussed above and below.

### Biodiscovery and Conservation Laws

Australia has biodiscovery and conservation legislation that govern access to genetic resources on public lands.

The *Environmental Protection and Biodiscovery Conservation Act 1999* (Cth) (**EPBC Act**) recognises the role of Indigenous peoples in the conservation and ecologically sustainable use of biological resources. The EPBC Act and Regulations govern access to biological resources and associated Indigenous Knowledge on Commonwealth land, establishing a permit system for commercial access to biological resources.<sup>104</sup> This is aimed at ensuring that the requirements of prior informed consent and mutually agreed terms of ABS are met by providers and users of genetic resources.<sup>105</sup>

There are also some state and territory laws that recognise the rights and connections that Indigenous peoples, and their knowledges, have with genetic and biological resources. This includes:

- [\*Biodiscovery Act 2004 \(Qld\)\*](#);
- [\*Biological Resources Act 2006 \(NT\)\*](#);
- [\*Biodiversity Conservation Act 2016 \(WA\)\*](#).

The Western Australian Department of Jobs, Tourism, Science and Innovation is leading the development of the [WA Biodiscovery Bill](#) to ensure fair and equitable access to Western Australia's biological resources in line with the principles of the Nagoya Protocol. The Bill proposes that any use of traditional knowledge in biodiscovery activities must be acknowledged. Additionally, if biodiscovery research aims for commercial gain, the custodians of this traditional knowledge should receive a share of the benefits.<sup>106</sup> However, it has been noted that ongoing delay and lack of consultation has led to a watering down of the effect of these provisions.

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<sup>103</sup> *Nagoya Protocol*, Article 12(1).

<sup>104</sup> *Environment Protection and Biodiversity Act 1999* (Cth) s 310; *Environment Protection Biodiversity Conservation Regulations 2000* (Cth) reg 8A.06).

<sup>105</sup> Uniquely Australian Foods, *Legal Regulation of Biodiscovery in Australia* (Fact Sheet, No 16, July 2021).

<sup>106</sup> Department of Jobs, Tourism, Science and Innovation (Western Australia), '*WA Biodiscovery Bill: Benefits*' <<https://www.wa.gov.au/organisation/departments-of-jobs-tourism-science-and-innovation/wa-biodiscovery-bill-benefits>>.



South Australia is also currently undertaking consultations and seeking feedback on the development of a Biodiscovery Act.<sup>107</sup> This Act is proposed to establish a way to recognise and safeguard biodiversity that has cultural value or importance to First Nations peoples, in line with international commitments such as UNDRIP and the Nagoya Protocol.<sup>108</sup>

### Issues for Consideration

There is no holistic adoption of the Nagoya Protocol in Australia. What we have is piecemeal adoption through these fragmented laws, that only apply to public lands. Australia's domestic legislation is mainly based upon permits and ABS agreements, which generally require the prior and informed consent and mutually agreed terms with the resource or access provider. The legislative landscape is also targeted at ensuring sustainable uses of Australia's biodiversity.

However, of note, Queensland is the only jurisdiction which has implemented the Nagoya Protocol in its entirety in its *Biodiscovery Act 2004* (Qld). The Act is also accompanied by a [Traditional Knowledge Code of Practice](#), which provides the minimum requirements that entities must satisfy to meet their obligations under the Act, and the [Traditional Knowledge Guidelines – Using publicly accessible traditional knowledge](#), which provide practical information and best practice advice for entities to meet the Code requirements and engage appropriately with Traditional Owners.

Through the use and enforcement of ABS agreements, provided on mutually agreed terms and on the basis of prior informed consent, Indigenous communities can be recognised and compensated for the use of their knowledge and resources.

For example, under the Northern Territory Act, ABS agreements must provide for reasonable benefit sharing arrangements that include protection for, recognition of and valuing of any Indigenous people's knowledge to be used.<sup>109</sup>

Australia's recognition and protection of Indigenous biological resources and associated knowledge through biodiscovery legislation is a developing area – as seen through the movements in Western Australia and South Australia.

Other nations' adoption of the principles of the CBD and Nagoya Protocol can provide some guidance in this area.

#### **International Example – Brazil:**

Brazil's legal system, through the Biodiversity Law,<sup>110</sup> regulates research and development activities that draw on the genetic heritage of species and the traditional knowledge

<sup>107</sup> Department of Environment and Water (South Australia), '*Biodiscovery Act*' <<https://www.environment.sa.gov.au/topics/biodiversity/biodiscovery-act>>.

<sup>108</sup> Department for Environment and Water (South Australia), 'Developing a Biodiversity Act for South Australia Discussion paper' (Community Consultation Paper, 2024), 5.

<sup>109</sup> *Biological Resources Act 2006* (NT), s 29.

<sup>110</sup> Federal Law No. 13,123 / 2015 (Brazil): regulates art. 225 of the Federal Constitution; Articles: 1, 8, 10, 15 and 16 of the CBD, promulgated by Decree No. 2.519 on the access to genetic resources, protection and access to associated traditional knowledge and the sharing of benefits for conservation and sustainable use of biodiversity.



associated with it, in order to promote their sustainable use and the fair and equitable sharing of benefits arising from these activities.<sup>111</sup>

The law prohibits foreign parties from accessing Brazilian genetic heritage or associated traditional knowledge. Instead, parties must always act through an authorised legal entity.<sup>112</sup>

The law also provides the following key obligations in relation to the development of products relating to these resources:<sup>113</sup>

**Registration:** research and development activities using the genetic heritage of biodiversity and the traditional knowledge associated with it must be registered on an electronic platform called the National Management System for Genetic Heritage and Associated Traditional Knowledge.<sup>114</sup>

**Notification:** finished products and reproductive materials developed from such research and development must be notified prior to the start of their commercialisation (through the above System).<sup>115</sup>

**Benefit Sharing:** the manufacturer of the finished product or producer of the reproductive material must share the benefits resulting from its economic exploitation.<sup>116</sup>

## Cultural Heritage Legislation

There are cultural heritage laws that protect Aboriginal and Torres Strait Islander heritage in Australia. Mostly, these laws, like the [Aboriginal and Torres Strait Islander Heritage Protection Act 1984 \(Cth\)](#), focus on protecting areas and objects of significance to Indigenous people from destruction and harm. Protection is for the tangible aspects of heritage rather than the intangible knowledge attached to areas.

### Issues for Consideration

Indigenous people's understanding of heritage includes connections to plants, animals, and the eco-systems attached to areas.<sup>117</sup> It would also include seasonal knowledge and knowledge of food gathering and preparation techniques. But generally, these intangible aspects are not the focus of Australian heritage laws.

Victoria is the exception. Since 2016, the [Victorian Aboriginal Heritage Act 2006 \(Vic\)](#) has included protection of Aboriginal intangible heritage which is defined as 'any knowledge of or expression of Aboriginal tradition, other than Aboriginal Cultural Heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and

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<sup>111</sup> Escolhas Institute, *Biodiversity Law Handbook* (Sao Paulo, March 2021), 10.

<sup>112</sup> Federal Law No. 13,123 / 2015 (Brazil), Art 11, §1.

<sup>113</sup> Ibid (n 106), 14.

<sup>114</sup> Federal Law No. 13,123 / 2015 (Brazil), Art 12.

<sup>115</sup> Ibid, Art 16, I. (art. 16, I).

<sup>116</sup> Ibid, Art 17 and 18.

<sup>117</sup> Terri Janke and Company, *State of Victoria's Aboriginal Cultural Heritage Report 2016 – 2021* (Report, Victorian Aboriginal Heritage Council, October 2021) 46.



environmental and ecological knowledge, but does not include anything that is widely known to the public.”<sup>118</sup> Traditional owners can apply for their intangible heritage to be registered on the Victorian Aboriginal Heritage Register. The registration forms include a form for nature and the universe, which include knowledge or practice that relate to animal or plant use.

If registered, anyone who want to use the intangible heritage for commercial purposes has to seek the permission of the representative group of the traditional owners and may enter into an Aboriginal intangible heritage agreement. The agreements allow traditional owners to set the terms of use, and this can include opportunities for collaborating and benefit sharing.<sup>119</sup> We note that provisions are limited to commercial uses only, and there has been limited uptake from community fearing naming of important cultural sites in a government register.

There is ample scope for Australia’s state, territory and Commonwealth Aboriginal Heritage Acts and associated legislation and regulations to be amended to better reflect the nuances of cultural heritage as understood and interpreted by Indigenous peoples. However, substantive, and meaningful change has proven slow and reactionary, as evidenced by the recent repeal of WA’s controversial *Aboriginal Cultural Heritage Act 2021* (WA).

The Act was introduced to provide a modern framework for protecting Aboriginal cultural heritage and was based on years of state-wide consultation with Indigenous community groups. The Act was in force for only 6 weeks before it was repealed in the face of significant backlash, in particular from the agricultural industry, and the *Aboriginal Heritage Act 1972* (WA) was reinstated. While some amendments including to section 18 followed, criticism remains about the alignment of the 1972 Act with national and international best practices for cultural heritage protection.

## Cultural Laws and Protocols

### Community Protocols

As identified in Part A, community cultural protocols refer to the customs, lore and codes of behaviour of a particular community or cultural group, and the ways of conducting business and appropriate behaviours when engaging with that community.<sup>120</sup>

Community protocols will provide guidance and recognition of the rights and interests of Indigenous communities, despite not necessarily being legally binding.<sup>121</sup>

It is important to recognise that Indigenous peoples are not homogenous, and often have different ways of regulating or utilising certain agricultural products and processes. The customary laws, practices and protocols of particular communities will necessarily guide protection of Indigenous agricultural products specific to that community or area, in line with

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<sup>118</sup> *Aboriginal Heritage Act 2006* (Vic) s 79B(2).

<sup>119</sup> Victorian Government, First Peoples – State Relations, ‘*Protecting Aboriginal intangible heritage*’ <<https://www.firstpeoplesrelations.vic.gov.au/protecting-aboriginal-intangible-heritage>>.

<sup>120</sup> See Moggridge, B, ‘Indigenous Engagement Protocols for Threatened Species Researchers’ (Report, *Threatened Species Recovery Hub, National Environmental Science Programme*, 2020).

<sup>121</sup> Note: Compliance with community protocols can be made a legally binding obligation through their incorporation into contracts and legal instruments.



the proposed definition and considerations set out in THE DEFINITION AND UNDERSTANDING of this Report.

These laws, practices and protocols can guide, restrict and permit the commercialisation of products and identify their connections to culture and Country – in line with consent or decision-making processes for the collective benefit of the community. These systems can also provide insight into the particular ecological, environmental, agricultural, cultural and land management practices relevant to the community, which are generally centred on sustainability and caring for Country.

Communities may have clear, written processes and terms or conditions for engaging with that community and accessing their traditional knowledge or resources, whilst others may be more ad hoc and informal. For instance, south western Noongar communities will have specific protocols for respecting their rights, customs and connections to Country and kinship (see for example [the Noongar Consultation Protocol Guidelines for the Swan and Canning Rivers Iconic Trails Project](#)).

In contrast, under community protocols or cultural law, some knowledge cannot be specified by means of rules and can only be passed on through kinship and relationships.<sup>122</sup>

The Nagoya Protocol encourages parties to consider and support community protocols.<sup>123</sup> At a domestic level, the [Queensland Biodiscovery Traditional Knowledge Guidelines](#), implemented under the *Biodiscovery Act 2004* (Qld), also identifies the need for biodiscovery entities to recognise and respect the cultural protocols relating to the use of traditional knowledge in all circumstances.<sup>124</sup>

When recognised and respected, local cultural protocols, laws and practices provide an essential tool for asserting rights and negotiating with external parties, including governments and third-party organisations and industry. Through this, the tools can protect the connections, knowledge and resources associated with agricultural products where western law fails to.

### Industry Protocols

In addition to the community protocols discussed above, there are also best-practice frameworks for engaging with Indigenous peoples and their knowledges, resources and land in the agricultural, pastoral, bushfoods, research and agribusiness sectors. A handful of these frameworks are outlined in this sub-section.

As part of **TONFABS**, a [Protocol](#) was developed to empower Traditional Owners and assist in protecting their knowledge and processes when engaging with and leading the native foods and botanicals industry. It is also there to guide the industry on best practice engagement with Indigenous peoples, knowledge and native food and botanical resources.

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<sup>122</sup> Peter Drahos, 'The Non-Developmental State' in *Intellectual Property, Indigenous People and their Knowledge* (Cambridge University Press, 2014), 175-201, 198.

<sup>123</sup> *Nagoya Protocol*, Art 12.

<sup>124</sup> Queensland Government, *Traditional Knowledge Guidelines: Biodiscovery Act 2004* (State of Queensland, 2021), 8.



The Western Australian Department of Primary Industries and Regional Development (**DPIRD**) have also worked with the sector to develop a series of guides for protecting Indigenous ecological knowledge and ICIP and to assist Indigenous businesses navigate Australian pastoral, bushfoods and carbon industries. These guides are outlined below:

- [Setting up for Success: A Practical Guide to the Bushfoods Industry for Aboriginal Businesses](#);
- [Protection of Indigenous Ecological Knowledge for bushfoods businesses](#);
- [Setting up for Success Guide for Carbon Farming](#);<sup>125</sup> and
- [Business Model for Aboriginal Pastoral Businesses Setting up for Success Guide](#).

Together these guides provide practical strategies to strengthen the capacity of Indigenous communities in these industries, building industry involvement, economic development and cultural resilience and ensuring sustainability and rights management through compliance, cultural protocols, contract law, and negotiation of ABS.

Led by Anangu wild harvesters in and around Alice Springs and Ti Tree in the Northern Territory, **Ninti One** developed the [ethical guidelines for commercial bush food research, industry and enterprises](#) in 2011. These guidelines provide a framework designed to ensure that the commercialisation of bushfoods in Central Australia respects Indigenous rights and promotes equitable benefits in line with key guiding principles and practical actions.

We understand that AgriFutures Australia have also developed an internal ICIP policy to guide its staff when engaging or delivering projects in collaboration with Indigenous businesses, communities and knowledge systems.

Another example is the [Florabank Guidelines](#), developed with the assistance of the NSW Government's Environmental Trust, comprised of 15 modules that roughly follow the seed supply chain, and recognise Indigenous peoples rights and need for engagement.

A key resource in relation to research relating to Indigenous knowledges, land and management practices and the development of Indigenous agricultural products, is the Australian Institute of Aboriginal and Torres Strait Islander Studies' [Code of Ethics for Aboriginal and Torres Strait Islander Research](#) (formerly GERAIS).

Compliance with the AIATSIS Code of Ethics ensures that research with and about Australian Indigenous peoples follows a process of meaningful engagement and reciprocity between the researcher and the individuals and/or communities involved in the research.

The [Dhawura Ngilan Guide](#) and accompanying Guiding Principles provide a framework to assist organisations and businesses across all sectors to work alongside First Nations peoples in the protection and celebration of cultural heritage in alignment with culturally appropriate expectations and best practice standards. The Guide and accompanying Principles are the only First Nations-led guidance document designed to support businesses and investors to protect Indigenous cultural heritage in Australia, providing advice to

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<sup>125</sup> Note: Guide also provides reference to the [Carbon Industry Code of Conduct](#), developed by the Carbon Market Institute.



investors, funders and philanthropists, on what to look for in potential investees in order to support and signal best practice.

*Dhawura Ngilan* was informed by the **True Tracks® Principles** developed by TJC. True Tracks® has been developed as the best-practice framework for ensuring respectful and ethical engagement with Indigenous knowledges and cultures. This framework has been applied and has informed protocols across many sectors, including the arts, culture, research, health, business and government, and continues to instil best-practice for engaging, collaborating and incorporating Indigenous peoples' perspectives, knowledges and culture.

### Issues for Consideration

In the face of ad hoc laws for the protection of Indigenous cultural heritage, and the current lack of Australian legislative recognition of ICIP, protocols are a means of recognising Indigenous peoples' sovereign rights to their culture, as well as going beyond what our western legal system has to offer in relation to piecemeal protection mechanisms.

Protocols once embedded in contract, including ABS agreements and any other contractual arrangement that may be entered into in relation to Indigenous agricultural products (whether at the grass roots, community and local level, or more broadly), must be complied with and provide a legal remedy under contract law for breach.

### **United Nations Declaration on the Rights of Indigenous Peoples**

The [\*United Nations Declaration on the Rights of Indigenous Peoples\*](#) (**UNDRIP**) is an international instrument outlining the sovereign rights that Indigenous peoples are seeking globally. UNDRIP sets the benchmark and standards informing the way in which nations should engage with and protect the rights of Indigenous peoples.

Being a declaration, UNDRIP is considered 'soft law' – that is, it does not create legal obligations unless it is 'ratified' or incorporated into the legislation of a signatory country.<sup>126</sup> Australia is still yet to ratify UNDRIP, and has not substantively recognised and implemented UNDRIP domestically in a formal and comprehensive manner.<sup>127</sup>

Key rights provided for Indigenous peoples under UNDRIP include the right to:

- self-determination;<sup>128</sup>
- practice and revitalise cultural traditions and customs;<sup>129</sup>
- maintain and develop political, economic and social systems and engage freely in traditional and other economic activities;<sup>130</sup>

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<sup>126</sup> Countries such as Canada have ratified UNDRIP through domestic legislation: *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

<sup>127</sup> Law Council Submission to JCATSIA. It is worth noting that there are current steps to embedding the rights within Australia – including piecemeal adoptions, a parliamentary inquiry and proposed legislation.

<sup>128</sup> *UNDRIP*, Art 3.

<sup>129</sup> *Ibid*, Art 11.

<sup>130</sup> *Ibid*, Art 20.



- participate in decision-making in matters affecting Indigenous peoples rights, and to be consulted on in good faith in order to obtain free, prior and informed consent;<sup>131</sup>
- traditional medicines and to maintain health practices, including the conservation of vital medicinal plants, animals and minerals;<sup>132</sup>
- Indigenous lands, territories and resources, and to own, use, develop and control the lands, territories and resources;<sup>133</sup>
- maintain, control, protect and develop ICIP and manifestations of Indigenous sciences, technologies and cultures – including seeds, medicines and knowledge of fauna and flora – as well as the intellectual property over such ICIP and manifestations.<sup>134</sup>

As discussed, UNDRIP identifies rights that relate to the maintenance, protection, control and development over cultural heritage, traditional knowledge, seeds and other things,<sup>135</sup> including Country, resources and practices. Indigenous peoples can assert their rights and ensure they are recognised and respected in all aspects of engagement, development and commercialisation of Indigenous agricultural products.

This includes recognising Indigenous peoples' sovereign rights to Country, resources and associated knowledges that are necessary in the development and commercialisation of Indigenous agricultural products.

This instrument can also be used to ensure that Indigenous agricultural products are marketed in a way that respects cultural heritage, guarantees economic benefits for the communities, and protects against exploitation or biopiracy.

### Free, Prior and Informed Consent

The notion of free, prior and informed consent, or **FPIC**, is growing in recognition globally and within Australia. FPIC stems from the right to self-determination.

As provided under UNDRIP, Indigenous peoples have the right to participate in decision-making in matters which would affect their rights and to maintain and develop their own Indigenous decision-making institutions.<sup>136</sup>

UNDRIP further requires that States consult and cooperate in good faith with the relevant Indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>137</sup>

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<sup>131</sup> Ibid, Art 18 & 19.

<sup>132</sup> Ibid, Art 24.

<sup>133</sup> Ibid, Art 26. See also, Art 29 and 32.

<sup>134</sup> Ibid, Art 31.

<sup>135</sup> Peter Drahos, 'Symbolic Recognition' in *Intellectual Property, Indigenous People and Their Knowledge* (Cambridge University Press, 2014) 69–93, 4.11. See also *UNDRIP*, Art 31.

<sup>136</sup> *UNDRIP* Art 18.

<sup>137</sup> Ibid, Art 19.





FPIC can mean different things to different communities. As a general starting point, FPIC components are recognised as requiring:

- **Free:** an absence of coercion, intimidation or undue influence, allowing the community to negotiate based on good faith.
- **Prior:** that consent is sought in advance of decision-making, with respect for time for Indigenous consultation processes and decision-making authorities.
- **Informed:** that there is a full disclosure of the nature, size, scope, affected area and use of the proposed resource or project, including its potential risks.
- **Consent:** that there is an agreement reached in good faith. This generally requires a formal, documented social licence to operate.

FPIC ensures that Indigenous peoples are involved in all stages of the decision-making process, and are provided with the requisite information to either authorise or prevent particular actions or uses of ICIP. This protects against unauthorised or harmful uses of Country, resources, knowledge and heritage in agricultural projects.

There are a number of leading FPIC guides available:

- The UN Global Compact have published a report on the [FPIC good practice](#), as well as a useful resource within the Global Compact Network Australia's '[The Australian Business Guide to Implementing the UN Declaration on the Rights of Indigenous Peoples](#)' (see Chapter 4).
- The UN Food and Agriculture Organisation have developed an [FPIC Toolkit](#) that details the rights, dialogue and respect necessary in FPIC processes.
- The Department of Economic and Social Affairs have prepared an [FPIC Manual](#) as well.
- Within Australia, AIATSIS have also published a helpful [FPIC Policy](#) for understanding FPIC in practice.

However, it is imperative that Indigenous communities advise on appropriate FPIC process.

FPIC has gained traction in the standards of particular industries – which may set out both the content of FPIC and when FPIC is required by organisations in different sectors. For instance, this is a developing space in mining and land management industries and is established in the native title and heritage spaces.<sup>138</sup> FPIC is also an emerging practice in corporate spheres, based on the growing importance of ethical practice and corporate social responsibility.

FPIC must be interpreted beyond being a right of Indigenous peoples – it must be framed as a necessary step to ensure respectful projects and engagements, and to realise the flow on effect of other rights of Indigenous peoples. FPIC is essential to ensure the success and

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<sup>138</sup> Department of Agriculture, Water and the Environment, 'Free, Prior and Informed Consent in the work of the Australian Heritage Council' (2021) <<https://www.dcceew.gov.au/parks-heritage/heritage/organisations/australian-heritage-council/publications/free-prior-informed-consent-work-of-australian-heritage-council>>.



performance of developments and programs, including agricultural support, aimed at improving the well-being of Indigenous Peoples.<sup>139</sup>

### Issues for Consideration

While not currently a recognised legal requirement in Australia, a moral and ethical obligation to respect and protection sovereign rights of Indigenous peoples as identified in UNDRIP, including in relation to self-determination (Art 3), FPIC (Art 19) and ICIP (Art 31), continues to gain traction. At a national level, this can be seen by the call for stand-alone legislation for the protection of ICIP as part of the National Cultural Policy, *Revive* and through the work of IP Australia, as well as the [Joint Standing Committee of Aboriginal and Torres Strait Islander Affairs inquiry into the application of UNDRIP in Australia](#), delivered to Parliament in November 2023.

Recognition of these rights, advocating for ratification by Australia, and embedding an obligation to comply with UNDRIP and FPIC requirements in contracts are ways to do this while we await appropriate national legislation.

### **International Agreements**

Trade agreements, including bilateral and multilateral free trade agreements (**FTA**), provide another avenue for nations to incorporate protections for Indigenous agricultural products in international trade.

As it stands, there is not much clarity in this space. There are currently little to no discernible Indigenous inclusions in Australia's international trade landscape. However, there is a growing recognition of the capacity of FTAs to regulate the export and import of Indigenous agricultural products (such as through traditional knowledge provisions).

For example, there is a commitment under the **Australia-United Kingdom FTA** towards recognising of the importance of genetic resources, traditional knowledge and traditional cultural expression (as well as to work with WIPO at the UN to progress a multilateral solution to the protection of Indigenous traditional knowledge).<sup>140</sup> The Australia-United Kingdom FTA also provides a commitment from both nations to address the issue of geographical indications.

The ASEAN-Australia-New Zealand Free Trade Area Agreement (**AANZFTA**) also addresses the topic of traditional knowledge protections. Chapter 13 Article 8 of the FTA, as it relates to Intellectual Property, states that “[s]ubject to each Party’s international obligations, each Party may establish appropriate measures to protect genetic resources, traditional knowledge and folklore”.<sup>141</sup>

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<sup>139</sup> Food and Agriculture Organisation of the United Nations and Alliance of Biodiversity International and CIAT, *Indigenous Peoples’ food systems: Insights on sustainability and resilience from the front line of climate change* (Report, 2021), 8.

<sup>140</sup> <https://www.dfat.gov.au/sites/default/files/a-ukfta-benefits-for-indigenous-business.pdf>

<sup>141</sup> Agreement Establishing the ASEAN Australia–New Zealand Free Trade Area, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010), as amended by the First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, signed 26 August 2014, [2015] ATS 14 (entered into force 1 October 2015) ch 8 art 1.4(a) ('AANZFTA'); Chapter 13 Art 8.



Through this, parties to the AANZFTA can encourage cooperation to share best practice protections for traditional knowledge, traditional cultural expressions, and genetic resources. This includes efforts to prevent the misappropriation of such knowledge and to ensure that benefits arising from its use are shared fairly and equitably. The AANZFTA also provides recognition from the parties that geographical indications can be protected through the trade mark system.<sup>142</sup>

Of note, Australia and the **European Union** are also negotiating the finalisation of a FTA, with a key focus on the improvement of market access for Australian agricultural products – this focus is not necessarily on Australia’s Indigenous agricultural products.

As with the other FTA examples, the Australian-European Union FTA negotiations have addressed the issue of geographical indications, with the EU pushing for Australia’s recognition of geographic indication protection to product names such as ‘feta’ cheese and ‘kalamata’ olives. A question to consider is whether Australia will seek to protect any of their own geographic indications.<sup>143</sup>

### Issues for Consideration

Australia’s FTAs can play a significant role in protecting traditional knowledge and genetic resources with regards to international trade and sustainability efforts. These agreements, and their provisions and commitments, can be used to balance economic cooperation and development with the recognition and advancement of Indigenous knowledge and resources.

There is a common trend around seeking to address the use of geographical indications, as discussed throughout this Report. There is also a theme of Australia’s FTAs addressing environmental sustainability and conservation, which is a key characteristic of an Indigenous agricultural product.

## **Investment and Ethical Approaches**

Internationally and within Australia, investor groups are developing agricultural products and are also supporting Indigenous foodways and are promoting ethical approaches that are based in sustainability and corporate social responsibility.

### Issues for Consideration

For these groups the recognition of ICIP rights becomes an important part of the work in developing these products for markets. Investing in Indigenous-owned ventures supports self-determination.

The Indigenous Land and Sea Corporation has developed processes and an Agribusiness Sector Principles for Investment document.<sup>144</sup> In addition, the OECD-FAO Guidance for

<sup>142</sup> AANZFTA, Chapter 13 Ar 7(4).

<sup>143</sup> Ian Zhou and Rob Dossor, Parliament of Australia, *Geographical Indications and the Australia-EU Free Trade Agreement*, (Parliamentary Research Paper Series 2021-22, July 2021), 24.

<sup>144</sup> <https://mneguidelines.oecd.org/oecd-fao-guidance.pdf>



Responsible Agricultural Supply Chains (2016) includes guidance on engaging with Indigenous peoples, and gaining free, prior and informed consent.<sup>145</sup>

Momentum from consumers and markets will continue to grow in the search for authentic and genuine Indigenous agricultural products. Indigenous leadership and design, supported by investment, skills and capability transfer, and recognition of sovereign rights is imperative to achieve that authenticity.

## (C) Overview of Potential Protection Strategies

Tool	Strategy	Limitations
<b>Patents</b>	<p>By granting exclusive rights to exploit an invention, namely a device, substance, method or process, patents provide a legally enforceable mechanism to protect new and useful Indigenous agricultural products and processes, such as innovative harvesting technologies, sustainable manufacturing processes, or soil enhancement techniques.</p> <p>These rights typically last for 20 years, with a possible 5-year extension for biotech or pharmaceutical inventions. Patents can be jointly owned, enabling benefit-sharing with Indigenous communities in research, development, or supply chain collaborations.</p>	<p>The patent system requires patentees to publicly disclose their invention which can disincentivise Indigenous communities from seeking patent protection due to the risks of cultural knowledge appropriation.</p> <p>To qualify for patent protection, inventions must be novel and involve an inventive step when compared with the prior art base, posing challenges for Indigenous communities where traditional knowledge has been documented and published by researchers and is therefore already in the public domain.</p>
<b>Trade Marks</b>	<p>Trade marks offer a means of protecting distinctive signs or symbols associated with Indigenous agricultural products, such as logos, names, or packaging designs. By registering a trade mark, Indigenous communities can establish brand recognition and prevent unauthorised use of their product identifiers in the marketplace.</p>	<p>Trade marks only protect against unauthorised use of identical or similar marks in the marketplace and do not inherently protect the underlying Indigenous knowledge or cultural significance of the products or the associated story, language, art and design.</p> <p>A trade mark must be distinctive and not descriptive of the goods or services sought to be registered. This can pose challenges for Indigenous producers seeking to register plant or resource names related to their products.</p>
<b>Certification Trade Marks (CTMs)</b>	<p>CTMs are a type of trade mark that can be used to signify that a product is Indigenous, from a specific region, or has a certain quality, characteristic, or reputation.</p> <p>CTMs can ensure authenticity and quality control, as licenced users must comply with specific rules which are approved by the ACCC.</p> <p>A well-known example of a CTM is the "Australian Made" logo, as well as the Supply Nation "Registered" and "Certified" Supplier logos. Similar CTMs could be used for Indigenous agricultural products, whether for a specific type of product or a category of Indigenous agricultural products more broadly.</p>	<p>While CTMs can enhance consumer trust and marketability, costs associated with monitoring and defending against infringement may limit their viability for smaller enterprises or remote communities. Establishing larger collectives or industry bodies to administer the CTMs can help mitigate these challenges by pooling funding sources.</p>



<p><b>Geographical Indications (GI)</b></p>	<p>CTMs can also serve as Geographical Indications (<b>GI</b>) to protect names of native crops cultivated in a specific region, preventing unauthorised use and preserving economic opportunities for Indigenous communities who have conserved and cared for a type of flora or fauna for millennia.</p> <p>By creating a specialised CTM GI, Indigenous communities can control and set consumer expectations on sourcing, development, and marketing of their agricultural products.</p>	<p>It will be necessary to establish culturally appropriate criteria for determining eligibility for GI protection of Indigenous agricultural products, especially where various communities may have unique knowledge systems, cultural practices, and cosmologies associated with the same plant or animal varieties.</p> <p>Additionally, challenges may arise in enforcement and monitoring against infringement in the market, particularly in regions with limited resources or infrastructure.</p>
<p><b>Plant Breeder's Rights (PBR)</b></p>	<p>PBRs grant exclusive rights to persons who have bred or developed a new plant variety.</p> <p>This can allow Indigenous growers and producers to profit from new native plant varieties and prevent unauthorised commercial use for up to 25 years.</p>	<p>PBRs do not acknowledge Indigenous communities' deliberate manipulation of plants through traditional knowledge of ecosystems and innovative agricultural practice over thousands of years.</p> <p>Additionally, Indigenous knowledge systems and practices are not limited to a fixed time period, and cultural duties of Indigenous knowledge keepers may disincentivise PBR registration due to risks of future appropriation when protection expires.</p> <p>Gaining PBR registration mandates meeting strict criteria, significant investment in resources for research and development activities, and supplying comprehensive information on plants which could contain Traditional Ecological Knowledge (<b>TEK</b>).</p>
<p><b>Confidential Information</b></p>	<p>Non-disclosure agreements, or confidentiality clauses in contractor, manufacturer, distribution and material transfer agreements can be used to safeguard confidential information shared by Indigenous growers, producers, entrepreneurs, businesses and communities throughout the agricultural production cycle and supply chain.</p> <p>Unauthorised use or disclosure of confidential information can give rise to equitable remedies, such as an injunction to restrain a party from further disclosing or using such information, or holding a person liable to account for any profits gained from improper use.</p> <p>Indigenous communities can utilise confidential information, such as trade secrets, to safeguard Indigenous knowledge in the agricultural products lifecycle. This includes protecting traditional knowledge, cultural practices, cultivation and manufacturing techniques, and</p>	<p>Maintaining confidentiality can be difficult, especially in supply chain settings where information sharing is necessary. Disclosure risks and the potential for breaches of confidentiality pose ongoing challenges for Indigenous communities, entrepreneurs and businesses seeking to safeguard their traditional knowledge, agricultural practices and unique saleability.</p> <p>Parties should ensure that recipients of the information comply with confidentiality obligations by signing a written contract.</p>



	retail methodology, which also constitute commercial information and can be protected as a trade secret.	
<b>Copyright</b>	<p>Copyright can apply to Indigenous agricultural products to protect cultural expressions, branding, language, stories, or knowledge recorded in material form related to the product. This includes written materials, artwork, photographs or recordings documenting traditional cultivation techniques, cultural practices, or ceremonies, and post-production components like packaging, logos and marketing materials.</p> <p>Indigenous businesses and producers can assert copyright ownership over recorded materials from research, collaborations, and marketing that incorporate their cultural practices, processes, or resources. They can further control and limit the use of these materials through licences and permissions provided through ABS agreements or cultural clearances.</p>	<p>Copyright does not protect the agricultural products, biological resources, or knowledge itself.</p> <p>Additionally, copyright protection may not extend to traditional knowledge embedded in agricultural practices or processes unless they are recorded in material form, which can be a limitation for Indigenous communities where much knowledge is transmitted orally or through practical experience.</p>
<b>Australian Consumer Law</b>	<p>With the growing demand for Indigenous products, the Australian Consumer Law (<b>ACL</b>) provides a safeguard against misleading and deceptive conduct and marketing practices.</p> <p>By ensuring that only genuine Indigenous products are marketed as such, the ACL can uphold consumer trust and supports Indigenous communities' economic interests, particularly relevant for Indigenous agricultural producers, entrepreneurs and businesses seeking to protect their cultural heritage, identity and brand authenticity.</p>	<p>Proving misleading conduct under the ACL can be resource-intensive and costly for Indigenous businesses, creating barriers to legal recourse. Navigating the legal process may pose challenges for smaller businesses and agricultural producers with limited resources.</p>
<b>Passing Off</b>	<p>Passing off provides protection for Indigenous businesses against misrepresentation or false association of their products or services by other traders. It can offer legal recourse for unauthorised use of Indigenous businesses branding, or cultural knowledge, stories, language, art or symbols used on agricultural products.</p>	<p>Indigenous businesses may encounter difficulty in proving the necessary reputation and harm for a passing off claim, particularly if cultural symbols or expressions associated with an Indigenous agricultural product are not widely recognised outside the community.</p>
<b>Certification and</b>	<p>Certification systems can authenticate Indigenous businesses and products. Bodies like Supply Nation and industry codes such as the Indigenous Art Code can establish standards and deter misuse,</p>	<p>Certification labels lack legal remedies for misuse and rely on goodwill and trust for authenticity.</p>



<b>Labelling Systems</b>	<p>misappropriation and deceptive conduct while ensuring fair remuneration for Indigenous creators.</p> <p>Traditional Knowledge (<b>TK</b>) labels can also be used to attribute custodianship and act as cultural notices, enhancing recognition of the cultural knowledge or connection incorporated in Indigenous agricultural products.</p>	<p>Moreover, the effectiveness of TK labels may vary, depending on consumer awareness and understanding of cultural significance, potentially limiting their impact in markets where such knowledge is less recognised or undervalued.</p>
<b>Native Title &amp; Land Rights</b>	<p>Native title rights and interests in land provide a legal identification framework to define Indigenous agricultural products by reference to location and where they are grown.</p> <p>Representative bodies and land councils can oversee negotiations regarding land use and commercial agricultural activities, ensuring benefit-sharing and broader economic advantages for the traditional owners by operating through established legal entities.</p>	<p>While native title rights offer opportunities to define Indigenous agricultural products based on location and where they are cultivated, Indigenous communities still face regulatory and legal requirements when commercialising natural resources on native title land. In addition, dispossession of Indigenous peoples has meant that many peoples connection to land has been severed and many Indigenous peoples live or work away from Country.</p> <p>Furthermore, native title and land rights mechanisms do not always provide exclusive control over land, limiting Indigenous communities' ability to fully control and benefit from agricultural activities on their traditional lands.</p>
<b>Biodiscovery and Conservation Laws</b>	<p>Indigenous agricultural producers can look to leverage biodiversity and conservation laws to protect their traditional knowledge and genetic resources.</p> <p>By entering into ABS agreements, Indigenous communities can negotiate terms of access to their traditional lands and resources, ensuring FPIC and mutually agreed benefit-sharing arrangements with external parties seeking to commercialise genetic resources to create Indigenous agricultural products.</p>	<p>Inconsistent implementation of the Nagoya Protocol in biodiversity laws across Australian jurisdictions have resulted in uneven protection and benefit-sharing outcomes for Indigenous communities.</p> <p>Further challenges for Indigenous communities include the complexity of negotiating ABS agreements and ensuring effective implementation of FPIC requirements as industry-standard.</p>
<b>Cultural Heritage Laws</b>	<p>Cultural heritage laws can protect Indigenous cultural sites, artifacts, and intangible heritage, providing recognition and legal protection for Indigenous knowledge and practices associated with agricultural products. By recognising that cultural heritage incorporates both tangible and intangible heritage and safeguarding this heritage, these laws can contribute to the preservation and promotion of Indigenous agricultural traditions.</p>	<p>Cultural heritage laws vary greatly across jurisdictions, and many do not recognise intangible as well as tangible aspects of cultural heritage.</p> <p>Moreover, they may not fully encompass all aspects of Indigenous agricultural knowledge and practices that inform the development and production of Indigenous agricultural products.</p>





	As seen in Victoria, cultural heritage laws could provide a legal framework for consent and consultation where anyone seeking to commercialise resources associated with cultural heritage must enter into an agreement outlining the terms of access and use (effectively an ABS agreement), ensuring Indigenous self-determination over the commercialisation of their cultural heritage.	
<b>Community Protocols</b>	Community protocols offer guidance and recognition of cultural rights, interests, and ways of regulating or utilising specific agricultural products and processes. When recognised and respected, community protocols become essential tools for asserting rights and negotiating with external parties, including governments, third-party organisations, and the broader industry, protecting the connections, knowledge, and resources associated with agricultural products where Western law falls short.	<p>Protocols are not legally binding unless embedded in contracts. Implementing community protocols may require significant resources and capacity building within Indigenous communities.</p> <p>Indigenous communities may face challenges in having their protocols recognised and respected by external stakeholders. In addition, variations in protocols between communities and regions may lead to inconsistencies in protection and engagement with external parties.</p>
<b>Industry Protocols</b>	Industry protocols serve as a best practice framework for engaging with Indigenous peoples, their knowledge, resources, and land in the agricultural, pastoral, bushfoods, research and agribusiness sectors. Once embedded in contracts, including ABS agreements and other contractual arrangements related to Indigenous agricultural products, they must be complied with, providing a legal remedy under contract law for breaches.	Despite their utility, industry protocols may lack enforcement mechanisms, relying on voluntary compliance from industry actors. Variations in the adoption and implementation of industry protocols across different sectors and regions may lead to inconsistencies in practice and protection. Indigenous communities may face challenges in negotiating fair and equitable terms within contractual arrangements and enforcing protocol compliance, particularly in cases of power imbalances with industry partners.
<b>UNDRIP</b>	<p>UNDRIP provides a comprehensive framework of rights that can inform the regulation, identification, definition, and protection of Indigenous agricultural products, as well as the agricultural production cycle.</p> <p>UNDRIP addresses rights that apply at all stages of the agricultural system, affirming Indigenous peoples' rights to self-determination, cultural revitalisation, and control over lands and resources.</p>	<p>UNDRIP has not been ratified in Australia, leading to inconsistent implementation and enforcement across different jurisdictions and industries, and posing significant challenges for the effective application of UNDRIP in protecting Indigenous agricultural products.</p> <p>Furthermore, varying interpretations of UNDRIP's provisions among governments, coupled with limited mechanisms for accountability and enforcement, can lead to disparities in the safeguarding of Indigenous agricultural knowledge and resources.</p>



<b>Free Trade Agreements</b>	Australia's FTAs can play a significant role in protecting traditional knowledge and genetic resources with regards to international trade and sustainability efforts. These agreements, and their provisions and commitments, can be used to balance economic cooperation and development with the recognition and advancement of Indigenous knowledge and resources.	There is currently little to no discernible Indigenous inclusions in Australia's international trade landscape.
<b>Investment and Ethical Approaches</b>	Momentum from consumers and markets will continue to grow in the search for authentic and genuine Indigenous agricultural products. Investor groups are looking to develop agricultural products, support Indigenous foodways and promote ethical approaches that are based in sustainability and corporate social responsibility.	Indigenous leadership and design, supported by investment, skills and capability transfer, and recognition of sovereign rights is imperative to achieve authenticity.

## **(D) Conclusion / Reflections / Commentary**

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TJC have considered an array of regulatory and best-practice frameworks relevant to the potential identification, definition and protection of 'Indigenous agricultural products'. This includes a number of existing legal tools and instruments, industry bodies, practices and mechanisms and Indigenous-specific frameworks that can be drawn from in establishing and implementing an Indigenous agricultural product framework.

We note that PIC have, through their consultations, proposed 5 characteristics that could be incorporated into a definition of an 'Indigenous Agricultural Product'. These are:

- (1) Connection to Indigenous Peoples
- (2) Connection to Culture
- (3) Connection to Country
- (4) Collective Benefit
- (5) Caring for Country

Based on our analysis of the existing frameworks, programs and instruments in this space, we have identified the potential parameters and guiding considerations of these characteristics, broken down into 5 potential requirements. These requirements fit within the characteristics identified above, and provide that:

- (1) The product is created by an Indigenous person, group, organisation or company;
- (2) The product embodies Indigenous Knowledge;
- (3) The product is grown on Indigenous Country with the support of an Indigenous group or by Indigenous Growers;
- (4) The product ensures access and benefit sharing (ABS) to Indigenous community;
- (5) The product upholds Caring for Country practices and prioritises sustainability.

TJC considers that these requirements must be met to satisfy and incorporate our findings in relation to the current regulatory and best-practice landscape. Whilst it may not be necessary to satisfy all the characteristics all at once, any definition of Indigenous agricultural product should look to incorporate reference to these 5 requirements. We do consider that at a minimum, Indigenous people must be involved for there to be any connection to Indigenous agricultural product e.g. (1) and/or (3).

We have also provided, where relevant, guidance around implementing, determining and monitoring these definitions, their requirements and their compliance within the agricultural industry, with key takeaways from existing frameworks, international examples and the practices of particular industries.

TJC have also set out our findings in relation to current, proposed and best-practice means of protecting such Indigenous agricultural products.

Through researching and developing this report, it has become clear that there is a need for overarching guidance and clarity in this space – to appropriately set a definition and parameters of what an Indigenous agricultural product is.



TJC have also identified the need for tailored protections for such products. We have examined the Western, cultural and industry practices and tools that currently exist or have been proposed within the agricultural industry.

However, these mechanisms do not provide holistic and overarching protection that is required to recognise the interconnected nature of these products – which draw upon Indigenous knowledges, practices, concepts of Country and cultural expressions.

The piecemeal protections currently available to Indigenous communities, organisations and producers to protect their products, lands, resources and associated knowledges are insufficient.

They do not address the intricacies of Indigenous cultures from a foundational understanding. For example, Western legal protections are focused on providing economic rights to individuals – this differs greatly from the protections and rights sought by Indigenous communities that are inherently cultural and on a collective or communal basis.

Whilst these existing protections lack comprehensive coverage and recognition of the nature and substance of Indigenous rights, they provide a useful starting point that can be drawn upon in developing an Indigenous agricultural product framework. This presents an opportunity to establish and implement tailored, overarching guidance and protections based on the five characteristics identified – connection to Indigenous peoples, embodying Indigenous knowledge, connection to culture, access and benefit sharing and collective benefit, and Caring for Country – to better align with Indigenous values, practices and interests within the sector.