THE UNIVERSITY OF QUEENSLAND
AUSTRALIA

Collecting Australian native plant materials from the Wild: Guidelines on key legal issues

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Front Cover Image:
Bunya Nuts, Bunya Dreaming Festival (Landsborough QLD) – January 2020
(Jaqueline Moura Nadolny, HDR Student, ARC Training Centre for Uniquely Australian Foods)

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1. Introduction

Australian native plants are an important cultural, economic, and scientific resource. As a result, over the years, people have collected these plants for many different reasons that range from use in kitchen gardens, botanical classification and scientific research, through to food production, breeding and product development. Increasingly, and because of their social and economic significance, the collection and circulation of native plant materials have become the subject of national and international regulation.

Native plant materials can be obtained either directly from the wild (*in situ*), or indirectly from someone who has already collected the plant material (*ex situ*). These *Guidelines* highlight the legal issues that potentially arise when native plant materials are collected from the wild in Australia. The legal issues that arise when native plant materials are obtained from an intermediary (such as a seed bank or a trader) are dealt with in *Collecting Australian native plant materials from intermediaries: Guidelines on key legal issues*.

For the purpose of these *Guidelines*:

- '*native plant material*' is taken to mean any plant material that is indigenous to Australia.
- a native plant will be understood to have been collected from the wild (*in situ*) when it is obtained directly from the ecosystem or natural habitat where it grows (such as National Parks, State Forests, Crown land, roadsides, private land, and Indigenous land).

In Australia, the collection of native plant materials from the wild is regulated by a number of different laws. These *Guidelines* focus on the laws that regulate biodiscovery of native plant materials. Biodiscovery (or bioprospecting) involves research and development on any genetic resources or biochemical compounds that are comprised or contained in the collected native plant materials. The *Guidelines* do not cover other legal issues, such as those relating to intellectual property, biosecurity, biosafety, or food regulatory standards.

The target audience of these *Guidelines* are the users and providers of Australian native plant materials including:

- individuals, enterprises, networks, and cooperatives that utilise Australian native foods and botanicals;
- public institutions such as government authorities, gene banks, herbaria, botanic gardens, and museums;
- universities;
- industries that collect plant materials for research and development; and
- Indigenous peoples and organisations.

There are a number of legal issues that arise when native plant materials are collected from the wild in Australia. The legal issues that arise will depend on:

- where the native plant material was obtained from; and
- whether the plant material or a derived product will be exported to another country.

Image 1: Green Kakadu Plum

2. Where was the native plant material obtained from?

One of the consequences of the Australian Federal system is that the legal issues that arise when native plant material is collected from the wild differ depending on whether the material was obtained from Commonwealth, State, or Territory land or waters. Because there is no unified approach across Australia, it is necessary to look at the laws that apply in each of the different jurisdictions separately.

2.1. Commonwealth

Collecting from Commonwealth land and waters

To collect native plant materials from Commonwealth land and waters, it is necessary to obtain a permit from the Commonwealth Department of Agriculture, Water and the Environment. The type of permit that is needed will depend on whether the plant is to be used for commercial (or potentially commercial) purposes, or for non-commercial purposes.

(i) Permit for commercial and potentially commercial uses

To obtain a permit to collect native plant materials for commercial and potentially commercial uses, the user and the party who provides access to the materials (the 'access provider') must enter into a benefit sharing agreement, as required by the *Environment Protection and Biodiversity Conservation Act (1999)* and the *Environment Protection and Biodiversity Conservation Regulations (2000)*. The benefit sharing agreement must include:

- full details of the parties to the agreement;
- details regarding the time and frequency of entry to the area where the plant material is located;
- name and other details of the resources to be collected, including the quantity to be collected;
- the purpose of the collection, as disclosed to the access provider;
- a statement setting out the proposed means of labelling samples;
- the agreed disposition of ownership in the samples, including details about any proposed transmission of samples to third parties;
- a statement regarding any use of Indigenous knowledge, including details about the source of the knowledge, such as, for example, whether the knowledge was obtained from scientific or other public documents, from the access provider, or from another group of Indigenous persons;
- a statement regarding the benefits to be shared with the access provider, or any agreed commitments given in return for the use of the Indigenous knowledge;
- if any Indigenous knowledge held by the access provider, or by another group of Indigenous persons, is to be used, a copy of the agreement regarding use of the

knowledge (if there is a written document), or the terms of any oral agreement, regarding the use of the knowledge;

- if applicable, the details of how the resource user will benefit biodiversity conservation in the area from which the plant materials are collected if access is granted;
- details of the benefits that the access provider will receive for having been granted access;
- where relevant, evidence that informed consent was obtained from the owners of Indigenous land and other landholders, and that mutually agreed terms of access and benefit sharing were negotiated based on the principles of fairness and equity;
- evidence that an environmental assessment (if required) was undertaken and completed; and
- a statement regarding how the proposed access is ecologically sustainable and consistent with Australia's biodiversity conservation strategy.

(ii) Permit for non-commercial uses

In order to obtain a permit to collect native plant materials for non-commercial uses, the user is required to provide:

- evidence of written permission from the access provider, and where relevant, an Indigenous land use agreement to enter the Commonwealth area, take samples from the plants of the area, and remove samples from the area;
- a copy of a statutory declaration given to each access provider. The statutory declaration, among others, must declare that the user "undertakes not to carry out, or allow others to carry out, research or development for commercial purposes on any genetic resources or biochemical compounds comprising or contained in the biological resources unless a benefit-sharing agreement has been entered into with each access provider";
- evidence that an environmental assessment (if required) was undertaken and completed; and
- a statement regarding how the proposed access is ecologically sustainable and consistent with Australia's biodiversity conservation strategy.

Exceptions

There are a number of situations where the access and benefit sharing provisions of the Commonwealth legal framework do not apply to the collection and use of native plant materials.

(i) Where the materials are covered by the Plant Treaty

The access and benefit sharing provisions of the Commonwealth legal framework do not apply when the relevant Minister declares that the native plant material is within the scope of the *International Treaty on Plant Genetic Resources for Food and Agriculture* (the 'Plant Treaty').

There are two potential ways that a plant may be within the scope of the Plant Treaty. These are when the plant:

- is one of the 64 species of plants listed in Annex I of the Plant Treaty (*see* Appendix 1 of these Guidelines), or
- is included in the Multilateral System of the Plant Treaty (either because the plant is listed in Annex I of the Plant Treaty, or because it has been placed into the Multilateral System by the relevant government authorities of members of the Treaty, or by gene banks, individuals, private institutions, or other actors).

To be covered by the Plant Treaty (and thus to fall outside the remit of the Commonwealth access and benefit sharing system), the provider and the user of the plant material must use the Standard Material Transfer Agreement (SMTA) of the Plant Treaty. The SMTA is a standardised, non-negotiable contract which provides that:

- access to plant materials is only for research, breeding, and training for food and agriculture and not for chemical, pharmaceutical, and/or other non-food uses;
- no one will obtain any intellectual property rights over the materials in the form in which the user receives them; and
- users of the plant materials will share any benefits that they realise through the utilisation of the materials by contributing to an International Benefit-sharing Fund that the Treaty Secretariat administers, or by including any new material that is derived from the initial plant material in the Multilateral System.

(ii) Where the materials are protected by intellectual property

The access and benefit sharing provisions of the Commonwealth legal framework do not apply to the collection of a plant which is protected by plant breeder's rights.

(iii) Where the materials are from a genetically modified organism

The access and benefit sharing provisions of the Commonwealth legal framework do not apply to the collection of 'genetically modified' plant material that is included within the scope of Article 10 of the *Gene Technology Act 2000*. This provision defines 'genetically modified organism' as (1) an organism that has been modified by gene technology, (2) an organism that has inherited particular traits from an organism (the 'initial organism'), being traits that occurred in the initial organism because of gene technology; or (3) anything declared by the Regulations to the *Gene Technology Act 2000* to be a genetically modified organism, or that belongs to a class of things declared by the Regulations to be genetically modified organisms.

(iv) Where access to the materials are controlled by another law

The access and benefit sharing provisions of the Commonwealth legal framework do not apply to the access of the plant materials that are controlled by another Commonwealth, self-governing Territory, or State law.

(v) Where the materials are held as *ex situ* specimens

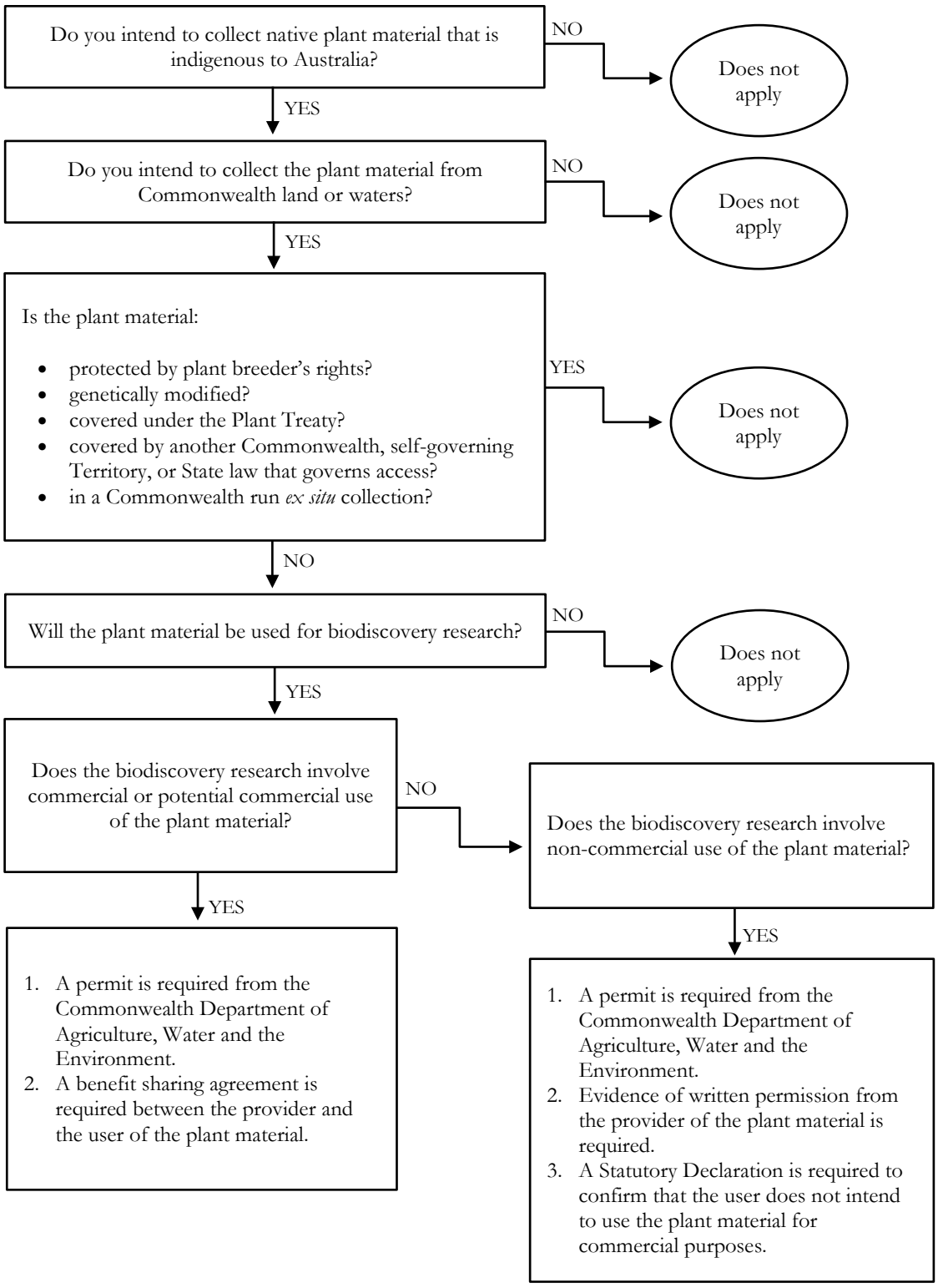
The access and benefit sharing provisions of the Commonwealth legal framework do not apply where the plant materials are held as specimens separated from their natural environment (whether in a collection or otherwise) by a Commonwealth Department or Commonwealth agency and where there are reasonable grounds to believe that access to the plant materials would be administered by the Department or agency in a manner that is consistent with the purpose of the access and benefit sharing framework.

(vi) Other exceptions

The access and benefit sharing provisions of the Commonwealth legal framework do not apply when biological resources (including plant materials) are accessed for the following activities:

1. the collection of biological resources (including plant materials) by Indigenous peoples:
    a. for a purpose other than research and development on any genetic resources, or biochemical compounds, comprising or contained in the collected resources; or
    b. in the exercise of their native title rights and interests;
2. access to human genetic resources;
3. the taking of resources that have been cultivated or tended for a purpose other than research and development on any genetic resources, or biochemical compounds, comprising or contained in the collected resources;
4. fishing for commerce or recreation, game or charter fishing or collecting broodstock for aquaculture;
5. harvesting wildflowers;
6. taking wild animals or plants for food;
7. collecting peat or firewood;
8. taking essential oils from wild plants;
9. collecting plant reproductive material for propagation; and
10. commercial forestry.

Decision Tree 1: The applicability of the Commonwealth biodiscovery law



Collecting threatened native plants

In addition to the possible need to obtain a permit to collect plant materials for commercial or non-commercial purposes, other permits may also be required. For example, a permit is required to take, trade, keep, or move the material of any native plant from Commonwealth land when the plant is classified as a threatened species or part of a threatened ecological community (*Environment Protection and Biodiversity Conservation Act 1999)*. The Environment Minister of the Commonwealth Department of Agriculture, Water and the Environment evaluates permit applications for the collection of threatened species and communities. A permit will only be granted if the applicant can demonstrate that certain conditions are present. These include that the proposed activity would contribute significantly to the conservation of the listed threatened species or community, and that the proposed activity is of particular significance to Indigenous tradition. In all cases, the applicant must show that the impact of the activity will not adversely affect the survival or recovery of the threatened species or ecological community.

2.2 Queensland

Collecting from State land in Queensland

Where native plant materials are collected from State land and waters in Queensland for the purpose of 'biodiscovery', the collection must comply with the requirements in the Queensland *Biodiscovery Act 2004*. Biodiscovery is the process whereby the biological or genetic material of native plant species is collected for the purpose of subsequent research and development.

To collect native plant materials for biodiscovery research from State land or waters in Queensland, a 'Collection Authority' must be obtained from the Queensland Department of Environment and Science. The *Biodiscovery Act* imposes conditions on an applicant for a Collection Authority. Applicants must:

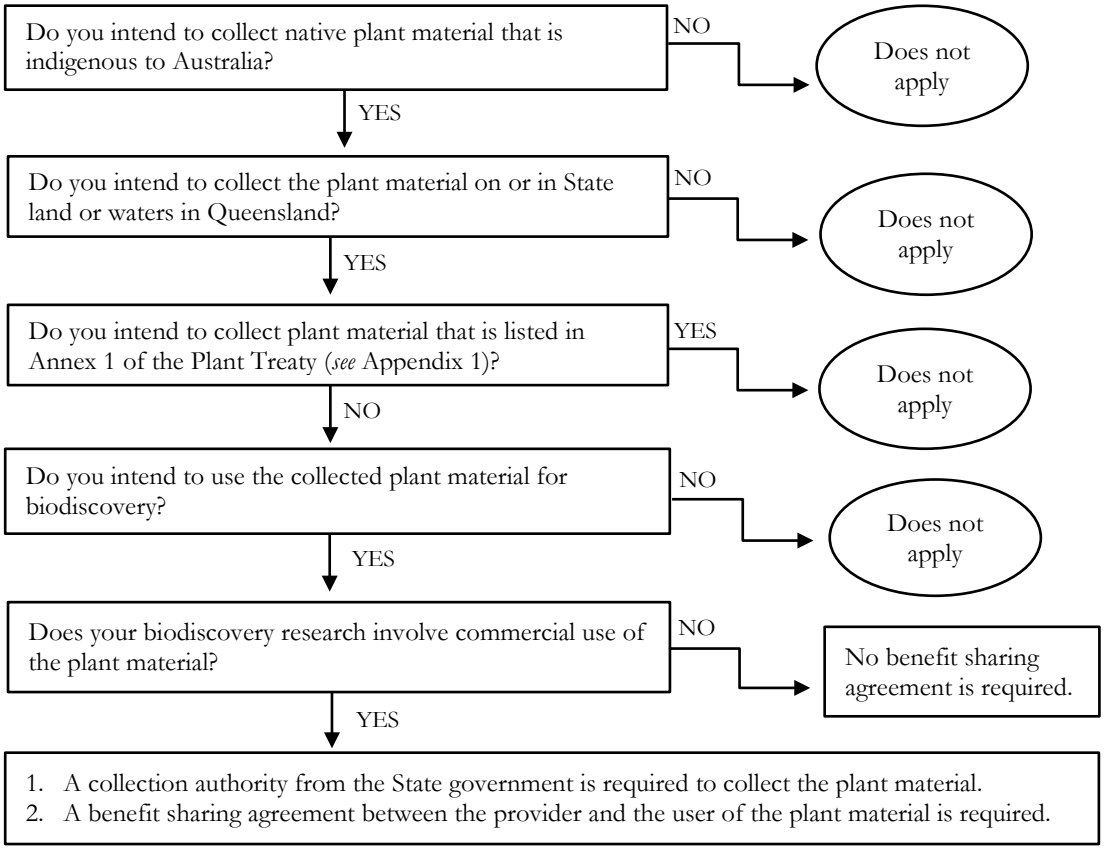
- comply with any conditions imposed on the collection of materials;
- execute a 'benefit sharing agreement' with the State government; and
- ensure that when native plant materials are transferred to a third party, the third party is subject to the same conditions that were imposed on the original collector of the materials. This requirement is designed to ensure that people who collect native plant materials do not avoid their legal obligations by transferring the materials to third parties.

The Queensland *Biodiscovery Act* does not apply where materials are collected on either private land or Indigenous land. However, after the reform of the *Biodiscovery Act* in 2020, the Queensland law now regulates the use of traditional knowledge associated with native biological resources collected from any area in Queensland. The revised Act requires biodiscovery entities to use traditional knowledge in accordance with a new set of Traditional Knowledge Code of Practice and Guidelines that the Queensland Government plans to bring into force in 2021.

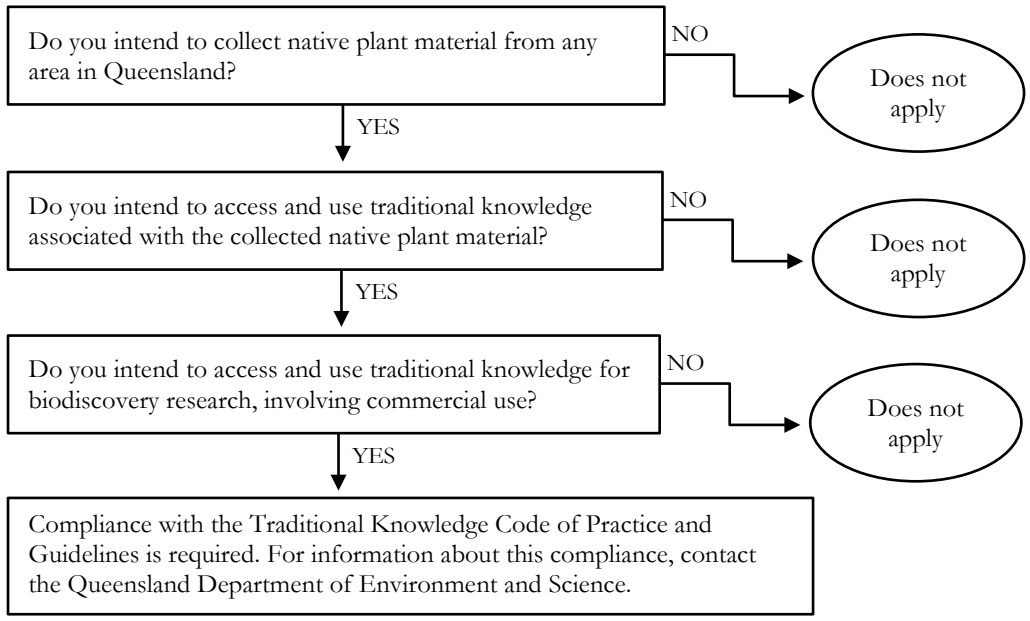
As is the case with Commonwealth and Northern Territory laws, the revised *Biodiscovery Act* of Queensland provides that materials that fall within the scope of Annex 1 of the Plant Treaty do not need to comply with the requirements of access and benefit sharing (*see* Appendix 1 for the list of materials under Annex 1 of the Plant Treaty).

Decision Tree 2: The applicability of the Queensland biodiscovery law

For the collection of native plant material from State land or waters in Queensland



For the use of traditional knowledge associated with native biological resources collected from any area in Queensland



Collecting from private land in Queensland

The Queensland *Biodiscovery Act* does not apply to the collection of Australian native plant materials from private land or waters in Queensland. However, a harvesting license must be obtained from the Department of Environment and Science to collect plants classified as protected under the *Nature Conservation Act 1992* from private land or waters located in Queensland. Furthermore, whether or not the plant in question is classified as protected, it is always necessary to obtain permission from the landowner prior to collection.

A person or an institution collecting and removing native plant material from private land without permission from the landowner exposes themselves to the risk of criminal charges (trespass and theft) and civil action. The conditions under which the material is collected, as well as what is able to happen to the material after it has been collected (including any benefits that may flow back to the landowner) will be determined by the contract between the landowner and the collector.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

Collecting from Indigenous land in Queensland

The Queensland *Biodiscovery Act* does not apply to the collection of Australian native plant materials from Indigenous land or waters in Queensland. However, a harvesting license must be obtained from the Department of Environment and Science to collect plants classified as protected under the *Nature Conservation Act 1992* from Indigenous land or waters located in Queensland. Furthermore, whether or not the plant in question is classified as protected, it is necessary to obtain permission from the Traditional Owner(s) or local Land Council to enter the land or waters, as well as to collect native plant materials located there.

A person or an institution collecting and removing native plant material from Indigenous land without permission from the Traditional Owner(s) or local Land Council exposes themselves to the risk of criminal charges (trespass and theft) and civil action. The conditions under which the material is collected, as well as what is able to happen to the material after it has been collected (including any benefits that may flow back to the Traditional Owner(s) or local Land Council) will be determined by the contract between the Traditional Owner(s) or local Land Council and the collector. One issue of potential importance for the collection and utilisation of Australian native plants relates to the question of whether, and if so, how native title impacts on and interacts with laws that regulate intellectual property and biodiscovery research. This is a matter that needs further consideration.

Collecting protected native plants in Queensland

In addition to the possible need to obtain a permit to collect native plant materials for biodiscovery, other types of permits may also be required. For example, the Queensland Department of Environment and Science has a special licensing system that is derived from

the *Nature Conservation Act 1992*, which governs certain uses of protected native plants located within State jurisdiction. This system regulates the harvesting and growing of protected plants, regardless of whether these activities occur on State land or waters, Indigenous land, or private land. Under the *Nature Conservation Act 1992*, a 'protected plant' means a plant that is prescribed under the Act as threatened, or near threatened. This definition does not include certain kinds of processed products that are made or derived from a protected plant.

The Queensland licensing system for protected plants consists of several types of licenses. For instance, a protected plant harvesting licence is required to harvest protected plants. A separate licence is required if the licensed harvester also intends to grow protected plants from harvested plant parts. This second licence is classified as a protected plant growing licence. Harvesting will only be permitted if the applicant can demonstrate that the proposed harvest activity is sustainable. A sustainable harvest plan may be required as part of an application for a protected plant growing licence. Harvesting and growing licences allow the licensee to conduct the permitted activity for both commercial and non-commercial purposes.

In certain circumstances, protected plant parts, other than parts from endangered plants, can be collected in Queensland without a licence where the parts taken do not exceed the quantities listed in the *Code of practice for the harvest and use of protected plants*. However, even if this exception applies, as discussed before, plants harvested from private or Indigenous land or waters still require the approval of the landowner (including Aboriginal Land Councils).

2.3 Northern Territory

Collecting from Northern Territory land and waters

Where native plant materials are collected in the Northern Territory, the collection must comply with the *Biological Resources Act 2006* (NT). The Act applies to all of the Northern Territory (including the air above, the water, and the seabed or riverbed below the water). The Act does not apply to Commonwealth areas located within the Territory, which are governed by the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

Parties who want to collect native plant materials in the Northern Territory must apply for a permit from the relevant 'permit issuing authority':

- For collection on land, the permit should be obtained from the Parks and Wildlife Commission within the Department of Tourism, Sport and Culture.
- For collection in marine areas, the permit should be obtained from the Fisheries division within the Department of Primary Industries and Resources.

When the permit application is assessed, the relevant authority must determine whether the activity involves 'bioprospecting', which is defined as 'the taking of samples of biological resources, existing *in situ* or maintained in an *ex situ* collection of such resources, for research in relation to any genetic resources, or biochemical compounds, comprising or

contained in the biological resources'. If the activity involves bioprospecting, the Department of Primary Industry and Resources must determine whether a benefit sharing agreement is required. If the Department of Primary Industry and Resources decides that a benefit sharing agreement is required, such agreements must be made either with:

- the Territory Government (if the native plant materials are obtained from Crown land); or
- other relevant resource providers (if the native plant materials are obtained from private land or Aboriginal land).

Exceptions

Similar to the Commonwealth system for access to biological resources, the Northern Territory *Biological Resources Act 2006* also contains certain exceptions where it is not necessary to enter into an access and benefit sharing agreement when collecting native plant materials.

(i) Where the materials are covered by the Plant Treaty

A permit for access to certain plant materials is not required when the relevant Minister has declared that the use of the native plant materials is controlled by the *International Treaty on Plant Genetic Resources for Food and Agriculture* (the 'Plant Treaty').

(ii) Where the materials are protected by plant breeder's rights

The Northern Territory *Biological Resources Act 2006* does not apply to the collection of a plant that is protected by plant breeder's rights.

(iii) Where the materials are from a genetically modified organism

The Northern Territory *Biological Resources Act 2006* does not apply to the collection of 'genetically modified' plant material included within the scope of Article 10 of the *Gene Technology Act 2000*. This provision defines 'genetically modified organism' as (1) an organism that has been modified by gene technology, (2) an organism that has inherited particular traits from an organism (the 'initial organism'), being traits that occurred in the initial organism because of gene technology; or (3) anything declared by the Regulations to the *Gene Technology Act 2000* to be a genetically modified organism, or that belongs to a class of things declared by the regulations to be genetically modified organisms.

(iv) Where the materials are held as *ex situ* specimens

The Northern Territory *Biological Resources Act 2006* does not apply where the plant materials are 'held away from their natural environment (whether in a collection or otherwise) by an Agency or other body and there are reasonable grounds to believe that bioprospecting of the plant materials is administered by the Agency or body in a manner that is consistent with this Act'.

(v) Other exceptions

The Northern Territory *Biological Resources Act 2006* does not apply when biological resources (including plant materials) are accessed in relation to the following activities:

1. where Indigenous Peoples who have traditionally used an area of land or water in accordance with Aboriginal tradition take biological resources from the area of land or water for hunting, food gathering (other than for sale) and for ceremonial and religious purposes;
2. access to human genetic resources;
3. the taking of resources that have been cultivated or tended for a purpose other than biodiscovery and where the samples are not to be used for biodiscovery;
4. taking aquatic life, within the meaning of the *Fisheries Act 1988*, that;
    a. has been caught, taken, or harvested under a licence or permit granted under that Act (other than a permit granted under section 17 of the *Fisheries Act 1988* for bioprospecting); or
    b. comprises a managed fishery or part of a managed fishery within the meaning of that Act.
5. fishing for commerce or recreation, game or charter fishing or collecting broodstock for aquaculture;
6. harvesting wildflowers;
7. taking wild animals or plants for food;
8. collecting peat or firewood;
9. taking essential oils from wild plants;
10. collecting plant reproductive material for propagation; and
11. commercial forestry.

Collecting from private land in the Northern Territory

The Northern Territory *Biological Resources Act 2006* applies to *all* land in the Northern Territory, including private land, that is not owned by the Commonwealth. Collectors of native plant materials from private land in the Northern Territory must:

- adhere to the access and benefit sharing protocols described above;
- obtain permission from the landowner prior to collection; and
- apply for a permit to take or interfere with wildlife from the Northern Territory Department of Environment and Natural Resources, as described above.

A person or an institution collecting and removing native plant material from private land without permission from the landowner exposes themselves to the risk of criminal charges (trespass and theft) and civil action. The conditions under which the material is collected, as well as what is able to happen to the material after it has been collected (including any

benefits that may flow back to the landowner) will be determined by the contract between the landowner and the collector.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

Collecting from Indigenous land in the Northern Territory

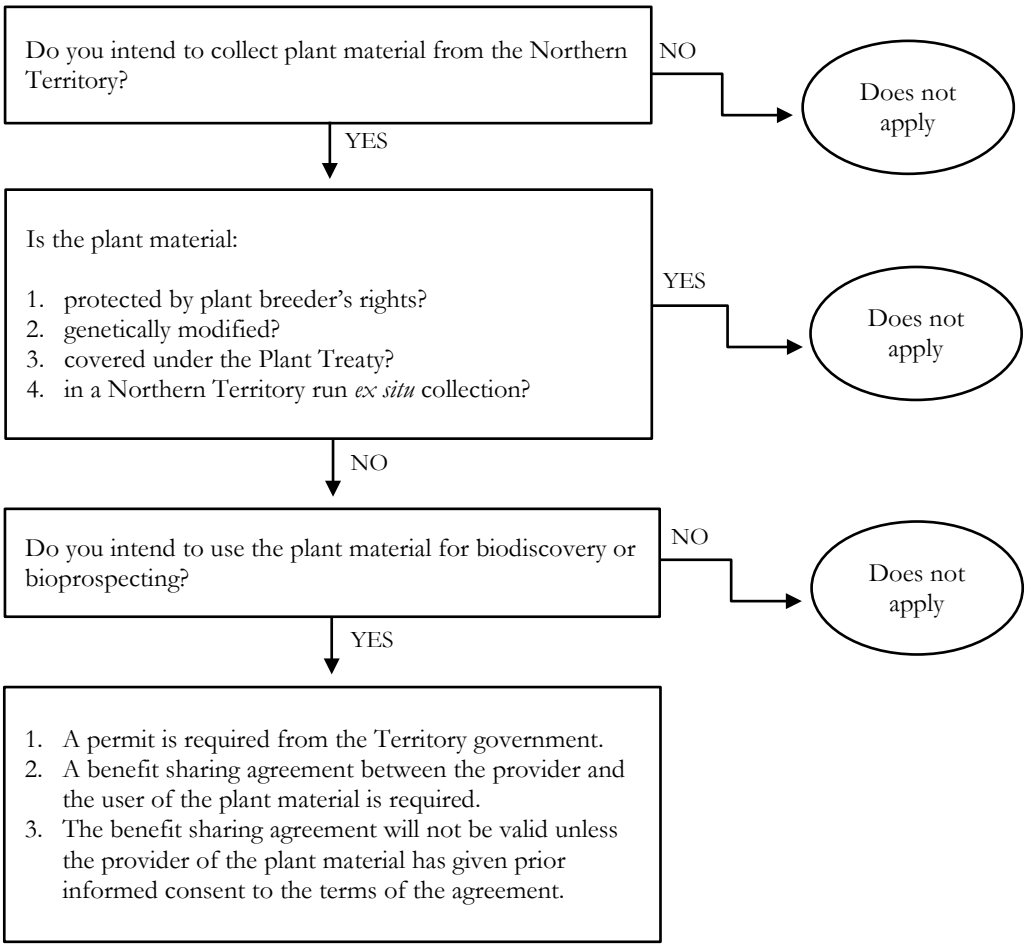
The Northern Territory *Biological Resources Act 2006* applies to all land in the Northern Territory that is not owned by the Commonwealth, including Indigenous land. Therefore, collectors of native plant materials from Indigenous land in the Northern Territory must:

- adhere to the access and benefit sharing protocols described above under the subheading 'Collecting from Northern Territory land and waters';
- obtain permission from the Traditional Owner(s) or local Land Council to enter the land or waters, as well as to collect native plant materials located there; and
- apply for a permit to take or interfere with wildlife from the Northern Territory Department of Environment and Natural Resources, as described above.

A person or institution collecting and removing native plant material from Indigenous land without permission from the Traditional Owner(s) or local Land Council exposes themselves to the risk of criminal charges (trespass and theft) and civil action. The conditions under which the material is collected, as well as what is able to happen to the material after it has been collected (including any benefits that may flow back to the Traditional Owner(s) or local Land Council) will be determined by the contract between the Traditional Owner(s) or local Land Council and the collector.

One issue of potential importance for the collection and utilisation of Australian native plants relates to the question of whether, and if so, how native title or other relevant laws impact on and interact with laws that regulate intellectual property and biodiscovery research. For example, under Section 19 of the *Land Rights Act 1976*, third parties, including Traditional Owners of Indigenous land located in the Northern Territory, must also conclude a 'Section 19 Agreement' to undertake micro-enterprise, private business, and community development activities on Indigenous land or waters. To what extent a 'Section 19 Agreement' could be considered to have addressed the obligation of benefit sharing under the Northern Territory *Biological Resources Act 2006* is a matter that needs further consideration.

Decision Tree 3: The applicability of the Northern Territory biodiscovery law



Taking or interfering with wildlife in the Northern Territory

In addition to the possible need to obtain a permit to collect native plant materials for biodiscovery, other types of permits may also be required. For example, a permit is required under the *Territory Parks and Wildlife Conservation Act 2006* to take or interfere with wildlife, including plants, for scientific and commercial purposes. This requirement applies to the collection of native plant materials from anywhere within Northern Territory jurisdiction, regardless of land tenure. Prior to applying for a permit to take or interfere with wildlife, the applicant must secure written permission from the landholder or lands authority (for public or private land), or permission from the local Land Council for collection on Indigenous land.

2.4 Western Australia

Collecting from Western Australia land and waters

Although Western Australia does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the State. Where native plant materials are collected in Western Australia, the collection must comply with the requirements in the *Biodiversity Conservation Act 2016* and the *Biodiversity Conservation Regulations 2018*. These legal frameworks apply to collection occurring on all Crown land and waters in Western Australia, and they regulate the activities of taking, disturbing, supplying, possessing, processing, dealing, importing, and exporting of native flora (and fauna) through a system of licences. Thus, the taking of native plants from Crown land and waters in Western Australia for identification, research, education, hobby, or other non-commercial purposes requires a Scientific or Other Prescribed Purposes Licence from the Department of Parks and Wildlife.

Collection from Crown land and waters in Western Australia for commercial purposes requires a Commercial Purposes Licence, which must be held by each individual taking native plant materials. If granted, this licence will be valid for one year, with the possibility of renewal. Before a Commercial Purposes Licence can be issued, the applicant must demonstrate that they have an area on which they are authorised to collect native plant materials. This includes the written permission of the government agency or authorised agent that is managing the land or water. The commercial collection of native plant materials from conservation estates in Western Australia is generally not permitted.

The licensing system of Western Australia also regulates the sale of protected flora that is collected from private property. Protected flora may only be collected from private property by the owner or occupier of the land or by a person who has the owner or occupier's permission (including the Aboriginal corporate body, where applicable), and the sale of protected flora taken from private property may only be sold under a Commercial Producer's Licence. If granted, this licence will be valid for one year, with the possibility of renewal.

Collecting from private land in Western Australia

Where Australian native plant materials are collected from private land for non-commercial purposes in Western Australia, collection requires the permission of the property owner, but no licence from the Department of Parks and Wildlife. As described above, where protected flora is collected from private land for commercial purposes, permission from the property owner is required, and the materials may only be sold under a Commercial Producer's Licence issued by the Department of Parks and Wildlife.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

Collecting from Indigenous land in Western Australia

Where Australian native plant materials are collected from Indigenous land for non-commercial purposes in Western Australia, collection requires the permission of the property owner (including the Aboriginal corporate body, where applicable), but no licence from the Department of Parks and Wildlife. As described above, where protected flora is collected from Indigenous land for commercial purposes, permission from the property owner is required (including the Aboriginal corporate body, where applicable), and the materials may only be sold under a Commercial Producer's Licence issued by the Department of Parks and Wildlife.

2.5 New South Wales

Collecting from New South Wales public land and waters

Although New South Wales does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the State. A licence is required to collect plants classified as 'protected native plants' from public land and waters in New South Wales for commercial purposes. Specifically, the New South Wales *Biodiversity Conservation Act 2016* makes it an offence to pick, possess, buy, or sell native plants listed in the Act for commercial purposes without a licence. There are different types of licences available under the Act, namely cut-flower licences and whole-plant licences for commercial uses of protected native plants, and scientific licenses for the use of protected native plants for research or conservation purposes.

The licensing system in New South Wales is narrow, such that a licence is not required to pick, possess, buy, or sell native plant species that are not listed as protected or threatened in the *Biodiversity Conservation Act 2016*. Furthermore, a licence is not required to pick, possess, buy, or sell protected plants cultivated as a hobby; or if you are an Aboriginal person using the plants for domestic purposes or on Aboriginal land with the permission of the owners. A licence is also not required to pick, possess, buy, or sell protected and threatened plants and cut flowers obtained from a licensed harvester or grower, to possess protected and threatened plant species naturally occurring on your property, or to pick protected plants cultivated on private land if you are the landholder or have the consent of

the landholder. Finally, a licence is not required to import or export protected plants interstate that are tagged as required under the *Biodiversity Conservation Act 2016* or corresponding interstate laws, nor is a licence required to buy, sell, or possess manufactured articles made from lawfully picked protected plants.

Collecting from private land in New South Wales

Where Australian native plant materials are collected from private land in New South Wales, collection requires the permission of the property owner, but no licence from the Department of Planning, Industry and Environment.

A person or an institution collecting and removing native plant material from private land without permission from the landowner exposes themselves to the risk of criminal charges (trespass and theft) and civil action.

The conditions under which the material is collected, as well as what is able to happen to the material after it has been collected (including any benefits that may flow back to the landowner) will be determined by the contract between the landowner and the collector. Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

Collecting from Indigenous land in New South Wales

Where Australian native plant materials are collected from Indigenous land in New South Wales, collection requires the permission of the property owner (including the Aboriginal corporate body, where applicable), but no licence from the Department of Planning, Industry and Environment.

2.6 Victoria

Collecting from Victorian public land and waters

Although Victoria does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the State. A permit is required to take, trade in, keep, move, or process plants classified as 'protected flora' from public land and waters in Victoria. Under the Victoria *Flora and Fauna Guarantee Act 1988*, protected flora includes plants that have been declared to be protected (section 46); plants that are listed as threatened (section 10); and plants that belong to communities that are listed as threatened (section 10). The *Flora and Fauna Guarantee Act 1988* defines 'take' to mean kill, injure, disturb, or collect. For protected flora that will be collected from public land for non-commercial purposes, a permit application must be lodged with the appropriate Department of Environment, Land, Water & Planning Regional Office. Meanwhile, to collect protected flora from two or more Department of Environment, Land, Water & Planning regions simultaneously, or from any public land for commercial purposes, an application must be lodged with the Environmental Research Co-ordinator.

A permit is not required in Victoria for flora taken from private land (other than land which is part of the critical habitat for the flora) by a person who is the owner of the land; is leasing the land; or has been given permission by the land owner or the lessee and has not taken the flora for commercial purposes. A permit is also not required to take, trade in, keep, move, or process flora that is propagated from flora that has been lawfully obtained and kept. Finally, the *Flora and Fauna Guarantee Act 1988* does not apply to a person who is a member of a Traditional Owner group entity and is acting under and in accordance with an authorisation order under the *Traditional Owner Settlements Act 2010*.

Collecting from private land in Victoria

Where Australian native plant materials are collected from private land (other than land which is part of the critical habitat for the flora) in Victoria, collection requires the permission of the property owner, but no permit from the Department of Environment, Land, Water & Planning. A permit is required, however, to collect from private land that is part of the critical habitat of protected flora.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

Collecting from Indigenous land in Victoria

Where Australian native plant materials are collected from Indigenous land (other than land which is part of the critical habitat for the flora) in Victoria, collection requires the permission of the property owner (including the Aboriginal corporate body, where applicable), but no permit from the Department of Environment, Land, Water & Planning. A permit is required, however, to collect from Indigenous land that is part of the critical habitat of protected flora.

2.7 Tasmania

Collecting from Tasmania public land and waters

Although Tasmania does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the State. A permit is required to take plants classified as 'native plant species' in the *Threatened Species Protection Act 1995* from public land and waters in Tasmania. Under the *Threatened Species Protection Act 1995*, the definition of 'take' includes to kill, catch, damage, and collect native plant species. The Act also mandates that a permit be obtained to take native plant species listed as endangered, vulnerable, or rare regardless of land tenure. Likewise, a permit is required to take any native plant species listed in the regulations of the *Nature Conservation Act 2002* regardless of land tenure. A permit is also required to take any native plant species from public lands managed by the State government, or from Private Sanctuaries and Private Nature Reserves named in the *Nature Conservation Act 2002*, where the collector is not the owner of the land.

Under the permitting framework of Tasmania, a permit is not required to take a native plant species from private land if the species in question is not protected by the *Threatened Species Protection Act 1995,* the regulations of the *Nature Conservation Act 2002*, or the *Environmental Protection and Biodiversity Conservation Act 1999*. A permit is also not required to take native plant species from private land that is not a Private Sanctuary, Private Nature Reserve, or protected by a Conservation Covenant.

Collecting from private land in Tasmania

Where Australian native plant materials are collected from private land in Tasmania, collection requires the permission of the property owner, but no permit from the Department of Primary Industries, Parks, Water and Environment, unless the species to be collected is protected by the *Threatened Species Protection Act 1995,* the regulations of the *Nature Conservation Act 2002*, or the *Environmental Protection and Biodiversity Conservation Act 1999*.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

Collecting from Indigenous land in Tasmania

Where Australian native plant materials are collected from Indigenous land in Tasmania, collection requires the permission of the property owner (including the Aboriginal corporate body, where applicable), but no permit from the Department of Primary Industries, Parks, Water and Environment, unless the species to be collected is protected by the *Threatened Species Protection Act 1995,* the regulations of the *Nature Conservation Act 2002*, or the *Environmental Protection and Biodiversity Conservation Act 1999*.

2.8 South Australia

Collecting from South Australia land and waters

Although South Australia does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the State. A permit is required to collect native plant material from public land and waters in South Australia. Under the *Native Vegetation Act 1991*, collecting native plant materials means removing the material without causing substantial damage or death to the plant. Any other activity, such as severing branches, limbs, stems, or trunks of vegetation is defined as clearance and is regulated by a separate permitting system and subject to approval from the Native Vegetation Council. The South Australia framework for collection mandates different types of permits depending on the intended use of the native plant material. If the intended use of the material is for scientific research, a Scientific Research Permit is required for all plant species if collection will occur on public land. A Scientific Research Permit is also required to collect from private land, pastoral leases, and Indigenous land if the species is classified as 'protected'. This type of permit is valid for a maximum of twelve months from the date of issue.

Where collection is for non-scientific purposes, South Australia law delineates different classes of permits. According to this scheme, a Commercial (Class A) permit is required for large-scale commercial collection and large-scale revegetation projects. A Bush Food Collection (Class B) permit is required for the use of native plant material as cuisine. A Small-scale (Class C) collection permit is required for activities such as individual or community-based revegetation projects, propagation and sale, botanic garden collections, artistic display, and individual projects and other purposes. Finally, a Threatened Species (Class D) collection permit is required to collect material from plants or ecological communities that are listed as threatened under State or Commonwealth legislation. All of these permits are valid for a maximum of twelve months from the date of issue. For non-scientific plant collection, a permit is not required to collect on private land unless the species is prescribed, however, written permission from the landowner is required. Permission must also be obtained from local councils or the agency responsible for care and control of the land prior to collecting on public land.

Collecting from private land in South Australia

Where Australian native plant materials are collected for non-scientific purposes from private land in South Australia, collection requires the written permission of the property owner, but no permit from the Department for Environment and Water. If the collection of Australian native plant materials for scientific purposes involves protected species, a Scientific Research Permit from the Department for Environment and Water is required if collection will occur on private land (including pastoral leases).

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

Collecting from Indigenous land in South Australia

Where Australian native plant materials are collected for non-scientific purposes from Indigenous land in South Australia, collection requires the written permission of the property owner (including the Aboriginal corporate body, where applicable), but no permit from the Department for Environment and Water. If the collection of Australian native plant materials for scientific purposes involves protected species, a Scientific Research Permit from the Department for Environment and Water is required if collection will occur on Indigenous land.

2.9 Australian Capital Territory

Collecting from Australian Capital Territory land and waters

Although the Australian Capital Territory does not have any legal framework in place for access and benefit sharing related to biodiscovery or bioprospecting, there are other laws that must be considered when collecting native plant materials located in the Territory. Under *The Nature Conservation Act 2014*, many activities related to Australian native plants require a licence from the Environment, Planning and Sustainable Development

Directorate – Environment of the ACT Government. These activities include taking, and taking and selling native plants from unleased (public) land. A licence is also required to take plants that are classified as 'protected native species' or as having 'special protection status' regardless of land tenure, and regardless of the purpose of collection.

Collecting from private land in the Australian Capital Territory

Where Australian native plant materials are collected from private land in the Australian Capital Territory, collection requires the permission of the property owner, but no permit from Environment, Planning and Sustainable Development Directorate – Environment of the ACT Government. A permit is required, however, to collect plants that are classified as 'protected native species' or as having 'special protection status' from private land.

Private landowners have considerable flexibility to define the terms and conditions they seek to impose on people collecting native plant material from their land. Options could include a straightforward sale with no conditions, terms that specify how benefits are to be shared, or use of the Plant Treaty's SMTA and all of its terms and conditions.

Collecting from Indigenous land in the Australian Capital Territory

Where Australian native plant materials are collected from Indigenous land in the Australian Capital Territory, collection requires the permission of the property owner (including the Aboriginal corporate body, where applicable), but no permit from the Environment, Planning and Sustainable Development Directorate – Environment of the ACT Government. A permit is required, however, to collect plants that are classified as 'protected native species' or as having 'special protection status' from Indigenous land.

Image 2: Wild Rice

3. Where the plant material or a derivative product will be exported to another country

If Australian native plant materials, derivatives thereof, or products that contain either of these are exported to a country that has adopted the Nagoya Protocol, the exporters may be required to demonstrate that they acquired the items in accordance with the Protocol. The Nagoya Protocol came into force in 2014 as a supplementary international agreement to implement the access and benefit sharing provisions of the *Convention on Biological Diversity* (CBD). As of 2020, 124 countries, including the European Union, had joined the Nagoya Protocol.

Although Australia signed the Nagoya Protocol in January 2012, it has not yet ratified the Protocol. Nevertheless, the Nagoya Protocol is still important where native plant materials are collected and utilised in Australian. This is because countries that have ratified the Protocol are required to ensure that all relevant imported plant materials (including those obtained from countries that are not members of the Nagoya Protocol) were collected, used, and/or developed in compliance with the Protocol. Specifically, Nagoya Protocol member countries are required to ensure that imported plant materials are accompanied by relevant documentary evidence including:

- access permits from the relevant authorities;
- prior informed consent from the authorities and providers of the materials; and
- benefit sharing agreements between users and providers of the materials.

This evidence, which is needed in order to obtain an 'internationally recognised certificate of compliance', must be provided to relevant authorities and the 'Access and Benefit Sharing Clearing-House of the Nagoya Protocol'.

An Australian individual or entity that wants to export native plant materials or products to one of the Nagoya-compliant countries would need to be able to demonstrate that:

- prior informed consent was obtained from the relevant authorities or the providers of the materials when they were collected;
- benefit sharing agreements were concluded between providers and users of the materials; and
- all measures were undertaken to involve and to address the interests of Indigenous peoples in cases of the access and use of Indigenous knowledge and/or native plant materials obtained from Indigenous land.

When the relevant information is not confidential, an internationally recognised certificate of compliance must contain the following minimum details:

- Issuing authority;
- Date of issuance;

- The provider;
- Unique identifier of the certificate;
- The person or entity to whom prior informed consent was granted;
- Subject-matter or specific plant materials covered by the certificate;
- Confirmation that mutually agreed terms were established;
- Confirmation that prior informed consent was obtained; and
- Specification of whether the use will be commercial and/or non-commercial.

Appendix 1: Materials under Annex I of the Plant Treaty

Crop	Genus	Observations
Breadfruit	Artocarpus	Breadfruit only.
Asparagus	Asparagus	
Oat	Avena	
Beet	Beta	
Brassica complex	Brassica et al.	Genera included are: Brassica, Armoracia, Barbarea, Camelina, Crambe, Diplotaxis, Eruca, Isatis, Lepidium, Raphanobrassica, Raphanus, Rorippa, andSinapis. This comprises oilseed and vegetable crops such as cabbage, rapeseed, mustard, cress, rocket, radish, and turnip. The species Lepidium meyenii (maca) is excluded.
Pigeon Pea	Cajanus	
Chickpea	Cicer	
Citrus	Citrus	Genera Poncirus and Fortunella are included as root stock.
Coconut	Cocos	
Major aroids	Colocasia, Xanthosoma	Major aroids include taro, cocoyam, dasheen and tannia.
Carrot	Daucus	
Yams	Dioscorea	
Finger Millet	Eleusine	
Strawberry	Fragaria	
Sunflower	Helianthus	
Barley	Hordeum	
Sweet Potato	Ipomoea	
Grass pea	Lathyrus	
Lentil	Lens	
Apple	Malus	
Cassava	Manihot	Manihot esculenta only.
Banana / Plantain	Musa	Except Musa textilis.
Rice	Oryza	
Pearl Millet	Pennisetum	
Beans	Phaseolus	Except Phaseolus polyanthus.
Pea	Pisum	
Rye	Secale	
Potato	Solanum	Section tuberosa included, except Solanum phureja.
Eggplant	Solanum	Section melongena included.
Sorghum	Sorghum	
Triticale	Triticosecale	
Wheat	Triticum et al.	Including Agropyron, Elymus, and Secale.
Faba Bean/Vetch	Vicia	
Cowpea et al.	Vigna	
Maize	Zea	Excluding Zea perennis, Zea diploperennis, and Zea luxurians.

Forages

Genera	Species
LEGUME FORAGES	
Astragalus	chinensis, cicer, arenarius
Canavalia	ensiformis
Coronilla	varia
Hedysarum	coronarium
Lathyrus	cicera, ciliolatus, hirsutus, ochrus, odoratus, sativus
Lespedeza	cuneata, striata, stipulacea
Lotus	corniculatus, subbiflorus, uliginosus
Lupinus	albus, angustifolius, luteus
Medicago	arborea, falcata, sativa, scutellata, rigidula, truncatula
Melilotus	albus, officinalis
Onobrychis	viciifolia
Ornithopus	sativus
Prosopis	affinis, alba, chilensis, nigra, pallida
Pueraria	phaseoloides
Trifolium	alexandrinum, alpestre, ambiguum, angustifolium, arvense, agrocicerum, hybridum, incarnatum, pratense, repens, resupinatum, rueppellianum, semipilosum, subterraneum, vesiculosum
GRASS FORAGES	
Andropogon	gayanus
Agropyron	cristatum, desertorum
Agrostis	stolonifera, tenuis
Alopecurus	pratensis
Arrhenatherum	elatius
Dactylis	Glomerate
Festuca	arundinacea, gigantea, heterophylla, ovina, pratensis, rubra
Lolium	hybridum, multiflorum, perenne, rigidum, temulentum
Phalaris	aquatica, arundinacea
Phleum	pratense
Poa	alpina, annua, pratensis
Tripsacum	laxum
OTHER FORAGES	
Atriplex	halimus, nummularia
Salsola	vermiculata

Appendix 2: Definitions of Key Terms

Access or *collection* means the taking of native plant materials for research and development purposes, including taxonomic research, breeding and development of novel crops and foods, etc.

Benefit Sharing means the sharing of benefits derived from the access and use of the collected native plant materials. 'Access' and 'benefit sharing' are two important objectives of the *Convention on Biological Diversity* (CBD), the *Nagoya Protocol,* and the *International Treaty on Plant Genetic Resources for Food and Agriculture* (the Plant Treaty).

Biodiscovery or *bioprospecting* is the process whereby any genetic resources or biochemical compounds that comprise or are contained in the collected native plant materials are used for the purpose of subsequent research and development.

Collected from the wild means the collection of native plant materials from the ecosystem or natural habitat where they grow (such as National Parks, State Forests, Crown land, roadsides, private land, and Indigenous land).

International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty) is an international agreement that came into effect on 29 June 2004. The Plant Treaty provides for the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits that accrue from the use of these resources. A key feature of the Plant Treaty is its 'Multilateral System', which is a global mechanism to ensure access to plant materials and benefit sharing. The Multilateral System covers plant materials of 64 food and forage crop species that are listed in Annex 1 of the Plant Treaty. Plant materials that are included in the Multilateral System must be accessed by using the non-negotiable Standard Material Transfer Agreement (SMTA).

Nagoya Protocol is an international agreement that came into force on 12 October 2014. The Nagoya Protocol establishes binding legal obligations relating to the access and use of genetic resources. The Nagoya Protocol is a supplementary agreement to the United Nations *Convention on Biological Diversity* (CBD). The Nagoya Protocol requires the user of genetic resources and traditional knowledge to obtain prior informed consent from the provider of these resources and to establish with him/her mutually agreed terms of access and benefit sharing.

Native plant material means any plant material that is indigenous to Australia.

Plant Breeder's Rights are a set of exclusive intellectual property rights to produce or reproduce, offer for sale, sell, and to import and export propagating material of the registered plant variety. To be registered for plant breeder's rights protection, the plant variety must be distinct, uniform, and stable. In addition, the variety must not have been previously commercially exploited (i.e. it has to be 'new'). Plant breeder's rights last for a minimum of 25 years in the case of trees and vines, and 20 years in the case of all other varieties.

Standard Material Transfer Agreement (SMTA) is a standardised, non-negotiable agreement for access and benefit sharing in relation to plant genetic resources that are included in the Multilateral System of the *International Treaty on Plant Genetic Resources for Food and Agriculture* (the 'Plant Treaty').