The Legal Regulation of Access to Native Biological Resources in Commonwealth Areas

In Commonwealth (federal) areas, accessing native biological resources for research and development is governed by Part 8A of the *Environment Protection and Biodiversity Conservation Amendment Regulations 2005* ('the Commonwealth regulations'). This fact sheet provides an overview of when the Commonwealth regulations apply and what requirements and exceptions exist in these regulations for the collection and use of native biological resources.

When do the Commonwealth regulations apply?

The Commonwealth regulations apply when (1) non-human biological resources (2) that are native to Australia (3) are collected from Commonwealth areas and (4) used for research and development purposes.

1. Non-human biological resources

The Act only applies to the collection of non-human biological resources, which include plants, animals, seeds, germplasm, microorganisms, and viruses.

2. Native to Australia

The Act only applies to the collection of biological resources that are native to Australia.

3. From Commonwealth areas

The Act only applies to native biological resources collected from Commonwealth areas. Commonwealth areas are all lands and waters that are owned or managed by the Government of Australia. Commonwealth areas include lands held under lease by the Commonwealth or a Commonwealth agency. Lands and waters owned or managed by State or Territory governments are not Commonwealth areas.

4. Used for research and development

The Act only applies when native biological resources are used for research and development.

What are the conditions for research and development on native biological resources?

For any research and development on non-human native biological resources collected from Commonwealth areas, 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 biological resource is to be used for:

a) commercial or potentially commercial research and development, or
b) non-commercial research and development.

a) Conditions for commercial or potentially commercial research and development

Prior to collecting native biological resources for commercial or potentially commercial research and development, the user and the party who provides access to the resources (the 'access provider') must enter into a benefit sharing agreement. 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 biological resource is located;
- name and other details of the resources to be collected, including the quantity to be collected;
- the purpose for collection;
- the agreed ownership of the samples, including details about any proposed transmission of samples to third parties;
- a statement disclosing any use of Indigenous knowledge, including details about the source of the knowledge, including whether the knowledge was obtained from scientific or other public documents, from the access provider, or from another group of Indigenous persons;
- a statement on 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, details of the agreement regarding use of the knowledge;
- details of the benefits that the access provider will receive for granting access; and
- 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.

b) Conditions for non-commercial research and development

Prior to collecting native biological resources for non-commercial research and development, 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, to take samples from the biological resources 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 was undertaken and completed, if required; and
- a statement on how the proposed access is ecologically sustainable and consistent with Australia's biodiversity conservation strategy.

Exceptions

There are a number of situations where the Commonwealth regulations do not apply.

(i) Where the resources are covered by the International Plant Treaty

The Commonwealth regulations do not apply when the relevant Minister declares that the resource is within the scope of the International Treaty on Plant Genetic Resources for Food and Agriculture.

(ii) Where the resources are protected by intellectual property

The Commonwealth regulations do not apply to the collection of a plant which is protected by plant breeder's rights.

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

The Commonwealth regulations do not apply to the collection of 'genetically modified' material that is included within the scope of Article 10 of the *Gene Technology Act 2000*.

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

The Commonwealth regulations do not apply to the access of the biological resources that are controlled by another Commonwealth, self-governing Territory, or State law.

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

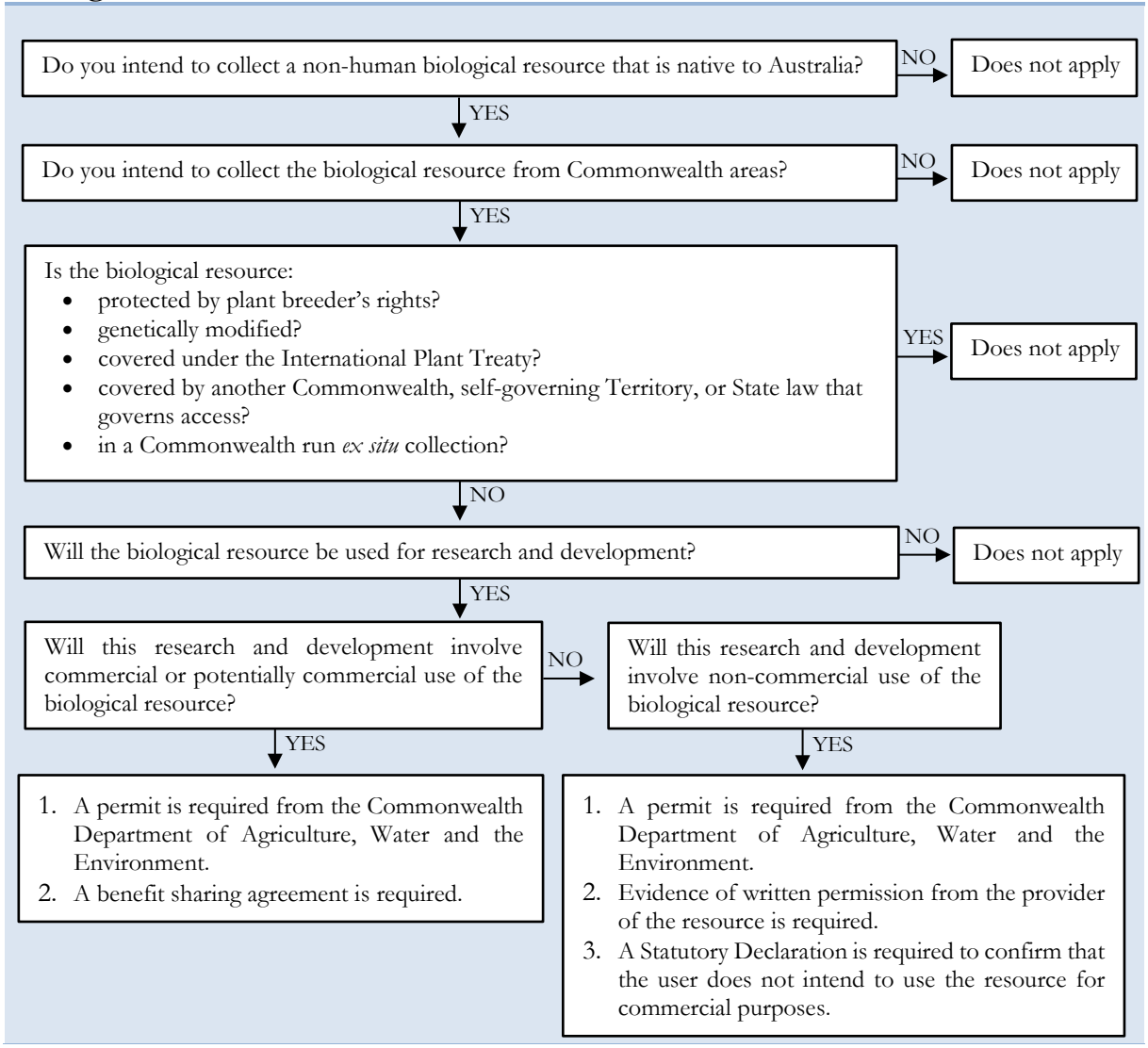
The Commonwealth regulations do not apply where the biological resources are held as specimens separated from their natural environment (whether in a collection or otherwise) by a Commonwealth Department or Commonwealth agency.

(vi) Other exceptions

The Commonwealth regulations do not apply when native biological resources are accessed for the following activities:

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

The applicability of the Commonwealth regulations for the collection of native biological resources



This fact sheet is only for information purposes, and to assist you in understanding your legal rights and obligations in a general sense. It is not tailored to any particular fact, situation or specific requirements, and must not be relied on as legal advice.

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