

Our Ref:
Your Ref: J1307/201702
Office: Perth
Date: 8 November 2019

To: Ms Melinda Hayes
Department of Jobs, Tourism, Science and Innovation

Email: melinda.hayes@jtsi.wa.gov.au

Dear Ms Hayes,

CONSULTATION – BIODISCOVERY BILL

Thank you for your correspondence of 9 October 2019 and the opportunity to comment on the Western Australian biodiscovery legislation.

Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body for the Pilbara, Mid West, Murchison and Gascoyne regions of Western Australia. The organisation has a representative area of almost one million square kilometres and represents over 20 native title claimant groups, each with their own language, culture and traditions.

YMAC is a not-for-profit organisation run by a Board of Directors comprising twelve (12) Traditional Owners; six (6) drawn from the Pilbara region and six (6) from the Yamatji region. YMAC provides a range of services to its members including legal representation throughout the native title claim process and future act negotiations, community and economic development, and natural resource management.

Given the limited timeframe at our disposal YMAC was not able to circulate your information sheet to our members, but we hope that there will be more opportunities in the future to engage in timely consultations with the groups that we represent. We have however, posted the opportunity to provide feedback on our website, encouraging members to submit separately from YMAC.

The comments below represent our initial feedback based on the preliminary information at hand and on our experience in dealing with the issues of traditional ecological knowledge, intellectual property, and rights and interests of Aboriginal people.

The matter of access and benefit sharing in relation to Indigenous knowledge is extremely complex. The simple fact that Australia has not yet been able to ratify the Nagoya Protocol since signing it in 2012 speaks volumes about the difficulty to meet this challenging international commitment. Hopefully the proposed biodiscovery legislation for WA will contribute to the implementation framework at the national level.

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In the following sections, we answer the specific questions asked in the information sheet and we then provide a series of general comments and observations to progress the discussion.

YMAC responses to the questions asked in the information sheet.

1. *The bill defines “traditional knowledge” as “knowledge that is acquired from a person of Aboriginal or Torres Strait Islander descent; **and** is communal, group or individual knowledge of Aboriginal persons or Torres Strait Islanders possessed under the traditional laws acknowledged, and the traditional customs observed, by Aboriginal persons or Torres Strait Islanders”*

Questions:

- ***Do you agree/disagree with this definition and/or the use of the term ‘traditional knowledge’?***
- ***Does it accurately capture how traditional knowledge is understood in Indigenous communities?***

YMAC response:

- The concept of traditional knowledge is a very broad one: it usually refers to the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills and innovations.
 - Traditional knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; cosmology; and biodiversity-related knowledge¹.
 - In the context of this biodiscovery bill and to remain consistent with the Nagoya Protocol YMAC suggests using this wording “traditional knowledge associated with genetic resources”.
2. *The bill will introduce a process for the CEO of the Department acting on behalf of the State to enter into, and manage a benefit sharing agreement with a researcher. To protect the rights of Indigenous people, the agreement will include terms that among other things, ensure any traditional knowledge used for biodiscovery occurs only with informed consent. This means that the researcher will have to provide details of the proposed biodiscovery activity and how traditional knowledge is to be used. The bill proposes that negotiations of terms relating to the use of traditional knowledge for biodiscovery must involve Indigenous people. Guiding principles for how negotiations are carried out will be contained within guidelines to be developed at a later stage.*

Questions:

- ***Who should negotiate benefit sharing agreements?***

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¹ Terri Janke and Maiko Sentina, *Indigenous Knowledge: Issues for Protection and Management*, IP Australia, Commonwealth of Australia, 2018

YMAC response:

- Prescribed Bodies Corporate (PBC) in the case of groups who have native title determinations;
 - Native title claim groups in the case of groups who are in the native title claim stage; or
 - Native Title Representative Bodies, or local Aboriginal corporations in the case of groups who do not have native title claims or determinations;
 - To the extent that there is a body with which to do the negotiation (i.e. suggested options above) the legislation needs to make adequate provision for the proponent of an activity to resource a group's participation in the negotiation;
 - The legislation should be clear that the biodiscovery proponent must cover the reasonable costs of the traditional owner
- ***What principles do you think should guide the negotiations of terms for benefit sharing if traditional knowledge is used for biodiscovery?***

YMAC response:

- The legislation should comply with the Nagoya Protocol, in particular with the following broad principles:
 - o Ensuring access to genetic resources is subject to prior informed consent, including from Indigenous people and local communities who have the established right to grant access to those resources.
 - o Ensuring access to traditional knowledge associated with genetic resources is subject to prior informed consent or approval and involvement of Indigenous people and local communities and that mutually agreed terms have been established.
 - o Ensuring the fair and equitable sharing of benefits from the utilisation of genetic resources, including from the use of traditional knowledge associated with genetic resources.
3. *The bill will require researchers to apply for an agreement and permit in order to use biological resources or traditional knowledge for biodiscovery. This requirement will not apply to "traditional owners of traditional knowledge" who use traditional knowledge in connection with a biodiscovery activity. The term "traditional owner" is not currently defined in the bill.*

Questions:

- *Do you agree that traditional owners of traditional knowledge should be exempt?*

YMAC response:

- Yes, provided the group of traditional owners is endorsed by the appropriate representative body (PBC, claim group or other).
- *Do you think that the term "traditional owner" needs to be defined?*
- The term 'traditional owners' usually refers to traditional ownership of land, or country. To avoid any confusion, we suggest using the term



'custodians of the traditional knowledge' instead of 'traditional owners of traditional knowledge'.

General YMAC comments and observations

1. Definition of "public domain".

In the second paragraph of page two, the Information Sheet states that "*If traditional knowledge associated with a genetic resource is used for biodiscovery, then the benefits must be shared with the owner of the traditional knowledge. This must be set out in a benefit sharing agreement negotiated with the traditional knowledge owner, except where the traditional knowledge being used is already in the public domain*".

- It is essential to clarify the meaning of what constitutes "public domain". For instance, quite a few Aboriginal groups and communities have produced reports or books that contain information on bush foods and bush medicine, as part of the collective traditional ecological knowledge. Those documents are typically part of the overall process of "passing down" the knowledge from generation to generation, for instance from elders to rangers or to school children, or sometimes used in the context of cultural tourism activities to target the broader public interested in knowing more about traditional customs and practices. In these cases, the ownership of the knowledge is clearly with the group or community of traditional owners, but that knowledge is also, to some extent, in the public domain.

2. Links with the *Aboriginal Heritage Act Amendment Bill* and the Commonwealth legislation on intellectual property rights

- In its submission to the Review of the *Aboriginal Heritage Act 1972* (31 May 2019)², YMAC recommended that the definitions and scope of Aboriginal heritage proposed in the Amendment Bill be expanded with respect to Intellectual Property (IP) and Intangible Heritage. The latest iteration of the Amendment Bill that YMAC has seen does not incorporate intangible heritage beyond reference to intangible heritage of *places*. This means that traditional ecological knowledge and its associated intellectual property rights belonging to a particular group or Country is not considered by the Amendment Bill.
- Whilst the Commonwealth Government has jurisdiction over copyright, trademarks, patents etc. which are key intellectual property (IP) matters, it may depend on how it is framed as the Commonwealth legislation does not appear to cover the field in terms of intangible Aboriginal heritage and therefore does not prevent the States from legislating in that area.
- YMAC believes that the Aboriginal Heritage Amendment Bill should include a stronger framework to protect intellectual property rights for

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² This submission is accessible here : [https://www.dplh.wa.gov.au/getmedia/5c934817-1789-4299-8682-008e800ff6a7/Stage-2-Submission-071-Yamatji-Marlpa-Aboriginal-Corporation-\(YMAC\)](https://www.dplh.wa.gov.au/getmedia/5c934817-1789-4299-8682-008e800ff6a7/Stage-2-Submission-071-Yamatji-Marlpa-Aboriginal-Corporation-(YMAC))



aspects such as traditional ecological knowledge. Some jurisdictions, such as Victoria, Queensland and New South Wales, provide for registers to afford protection for intangible heritage.

- A similar register in Western Australia would not only offer a similar level of protection but would also be extremely useful in the context of a biodiscovery legislation for benefit sharing purposes.

3. Access to Aboriginal lands

The information sheet indicates that *“Western Australian genetic resources on WA lands (including Indigenous-owned lands and private lands) must be accessed with prior and informed consent, and terms for access must be negotiated and mutually agreed. Those seeking access for biodiscovery activities must first obtain the permission of the land owner (or lessee), then apply to the Western Australian Government for a biodiscovery permit to authorise the biodiscovery activity. Applicants are required to disclose the proposed biodiscovery activity on the genetic resource, including any use of traditional knowledge associated with the genetic resource”*.

- This paragraph talks about Indigenous-owned land and permission of land owners, but it is unclear if native title is considered to be “Indigenous owned” lands. This needs to be made explicit, so that people conducting biodiscovery would first require the permission of the native title holders.

These are only preliminary comments and suggestions, mainly based on the information provided by the Department. It will be critical for YMAC to see the draft bill well ahead of time, to enable a proper consultation process with our members and other Aboriginal entities such as Prescribed Bodies Corporate and peak organisations in the region.

Again, thank you for the opportunity to comment on the Information Sheet. YMAC looks forward to seeing how this will progress.

Yours sincerely,

Simon Hawkins
Chief Executive Officer

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