Australian Government Response to Notification 2011-216
Access to Genetic Resources and Benefit-sharing
Ref.: SCBD/ABS/VN/SG/74553

Australia's access and benefit-sharing (ABS) policy and legislation have been operating since 2005. Its experiences in developing and operating a regulatory system may be of interest in implementing the Nagoya Protocol and in the development of the ABS clearing house.

Australia's ABS system
Under Australia's Federal system, existing ownership rights to native biological resources depend on whether they are found in Commonwealth, State or Territory government lands or waters, indigenous lands (of which there are different types with different associated rights), freehold or leasehold lands.

In 2002, Australian governments reached agreement on the 'Nationally consistent approach for access to and the utilisation of Australia's native genetic and biochemical resources'[1] to promote consistency in the regulation and management of access to genetic resources. This sets out the general principles on which legislation would be based in each jurisdiction and some common elements for ABS arrangements. The 'Nationally Consistent Approach' is also consistent with the Bonn Guidelines.

Website
The Australian Government website on 'Australia's biological resources' (http://www.environment.gov.au/biodiversity/science/access/index.html) provides general information on accessing Australian genetic resources. It also provides a list of competent national authorities for each jurisdiction and key operational contacts. This has proved to be a useful mechanism for researchers and industry to find appropriate government contacts to facilitate their work. The website also provides specific information on the access process to biological resources in Commonwealth areas.

Regulatory environment
Access to biological resources in Commonwealth areas is governed by the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) ("the EPBC Regulations").[2] Under the EPBC Regulations, those seeking access to genetic resources must apply to the Department of Sustainability, Environment, Water, Population and Communities (SEWPAC) for a permit to access biological resources of native species for research and development of any genetic resources, or biochemical compounds, comprising or contained in the biological resource.

Permits
Permits for access to biological resources are available for either commercial, potentially commercial or non-commercial purposes. If the biological resources are for commercial or potentially commercial uses, the permit will not be granted until the applicant has entered into a benefit-sharing agreement with the provider of the biological resources.

Applicants for permits for non-commercial purposes must provide a statutory declaration[3] stating that the applicant will not conduct, or allow others to conduct, commercial research without agreeing on appropriate benefit-sharing arrangements. The applicant also agrees to report on the results of the research and offer a taxonomic duplicate of each sample to an Australian public institution that is a taxonomic repository.

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[1] The text can be seen at:
http://www.environment.gov.au/biodiversity/publications/access/nca/index.html

[2] The full text of the Commonwealth access regime is set out in Part 8A and Part 17 of the EPBC Regulations and is available at http://www.austlii.edu.au/au/legis/cth/consol_reg/epabcr2000697/

[3] The Declaration can be seen at:
http://www.environment.gov.au/biodiversity/science/access/permits/index.html

Where access is to genetic resources on indigenous people's land, the regulations require the prior informed consent of the indigenous owner or native title holder. A benefit sharing agreement must provide for reasonable benefit-sharing arrangements, including protection for and valuing of any indigenous people's knowledge to be used.

The permits describe the name of the applicant, the period for which access is permitted, the access area, a description of the type and quantity of biological resources and specific conditions relating to the access request. As it is not always possible for researchers to provide a detailed description of biological resources prior to access (particularly where the biodiversity is poorly known, not taxonomically described or because of the nature of the collection methodology) permit holders are required to provide updated lists as this information becomes known. These are loaded on the GRID database.

The Australian permit system has been developed to be transparent. The Genetic Resources Information Database (GRID) has been developed to provide a mechanism to manage permit applications, approvals and related reporting. The database generates a list of permits that have been issued and samples collected under those permits[4] which is available for public viewing[5]. At 1 March 2011, 98 permits have been issued through the Protected Areas Policy and Biodiscovery Section under Part 8A of the EPBC Regulations since December 2005. All but one of these permits have been for non-commercial purposes.

Benefit-sharing agreements

SEWPAC has developed model contracts as a guide to assist parties developing benefit-sharing agreements, where the Commonwealth is the access provider and where the Commonwealth is not the access provider (such as Indigenous people in the Commonwealth's jointly managed national parks)[6]. Benefits are as determined by the parties to the contract, and can include contributions to conservation and scientific knowledge or any other agreed benefit as well as any revenue generated by the commercialisation of IP related to the genetic resource.

There are currently seven access and benefit-sharing contracts completed for organisations engaged in commercial research. Four of these are with Australian Public Institutions and three with foreign research organisations. A further contract with an Australian research institution is under consideration. The mutually agreed terms for benefit-sharing followed the model contracts provided by SEWPAC closely.

Accreditation

Further, the EPBC Regulations also provide a mechanism to accredit existing administrative or regulatory regimes that are consistent with the EPBC Regulations' purpose to minimise duplication. Agreements that bring existing permit arrangements within the benefit-sharing policy of the Australian Government have been made with the Great Barrier Reef Marine Park Authority, the Australian National Botanic Gardens, the Australian Institute of Marine Sciences and the Australian Antarctic Division. In total, over 450 permits have been issued under Part 8A of the EPBC Regulations and other regimes accredited under the Regulations.

Awareness-raising

To build awareness of ABS arrangements Australia has established several consultative forums to represent the views of government, industry and the scientific community. The Biodiscovery Working Group includes officials from all jurisdictions and provides a forum to exchange views on ABS administrative and policy arrangements and to keep officials up-to-date with ABS development, such as the negotiations surrounding the Nagoya Protocol. The Biodiscovery Industry Panel is a forum for biodiscovery practitioners and includes representative of universities, research institutions and private sector firms. This panel provides a valuable insight into the practical issues associated with biodiscovery research and development and its interface with government regulation. The panel has

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[4] Browse the record of permits at http://www.environment.gov.au/grid/public/perrep.jsp

[5] Provision is made for applicants to request that permit information is treated as confidential, no requests have been made to date.

[6] The model contracts are available at http://www.environment.gov.au/biodiversity/science/access/model-agreements/index.html.

also been invaluable in informing the practitioner community of ABS requirements and international developments in this area.

Direct consultation with other key stakeholders has also been important in building knowledge and understanding of ABS issues. Key stakeholders in the Australian context have been university research offices, specialist legal associations (such as licensing executives) and government funded research institutions.

Compliance

Australia's experience has been that an educative approach to compliance has had very positive results. Using consultative mechanisms such as the Biodiscovery Industry Panel, it has been possible to build an understanding of regulatory requirements and minimise the need for compliance actions. The maintenance of on-going relationships with researchers has been important in building networks of practitioners and in managing arrangements where initially non-commercial research becomes commercial.

Other compliance mechanisms are also available. Under the EPBC regulations, criminal penalties are available for access without a permit, indicating in the terms of the CBD access without prior informed consent. Further penalties apply to breach of conditions stipulated in the permit. Mutually agreed terms are established as a precondition of access, and are set out in a contract. Civil remedies exist for breach of contractual arrangements, and particular remedies may of course be negotiated and specified in the contract.