E

Appendix E - Details of the access and benefit sharing scheme recommended in the Voumard Report

The following information is taken from Chapter 2 of the report by John Voumard on his inquiry into access to biological resources in Commonwealth areas.[1]

How the proposed scheme would operate

2.1 A major objective of the Inquiry was to develop an administration and decision-making system which is consistent, to the extent possible and appropriate, with other provisions in the EPBC Act, particularly the integrated permits scheme, environmental assessment provisions, and the objects in s3 which relate to Indigenous people.

Interaction with related provisions of the EPBC Act: the integrated permit scheme

2.2 The Inquiry has attempted to design a scheme which is consistent with, and can therefore be integrated into, the general permit scheme under the EPBC Act.

2.3 The Act provides for two main types of permits.

a) Permits for activities in Commonwealth areas including reserves, parks, conservations zones and external territories (reserve permits).

b) Permits for the taking, keeping, moving etc of listed threatened, migratory, marine and cetacean species and communities in Commonwealth areas (wildlife permits).

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1 J Voumard, *Access to Biological Resources in Commonwealth Areas*, Commonwealth of Australia, July 2000, pp 13-24, 168.

2.4 Proposed amendments to the Act would see the inclusion of the permits currently issued under the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*.

Administration and decision-making in the proposed scheme

2.5 Many submissions favoured a centralised system of administration and decision-making for the scheme. Since most Commonwealth Government agencies have had limited experience with access and benefit-sharing arrangements, the Inquiry considers there would be value, at least for the foreseeable future, in making one agency (Environment Australia) responsible for administering the scheme. This would also be administratively convenient where more than one agency was involved in access negotiations. It is also consistent with Environment Australia's responsibility for assessing other permits under the EPBC Act.

2.6 In assessing access permit applications, Environment Australia would be required to consult with relevant agencies (including independent sources of advice, where necessary) and then prepare a recommendation to the Minister for the Environment and Heritage as to whether the permit should be granted or refused. This would include assessing and making a recommendation about the proposed benefit-sharing contract. Environment Australia's role would include being the first point of contact for information about the scheme.

2.7 It may be appropriate for some administrative and decision-making functions to be delegated (with Environment Australia retained as the first point of contact) when agencies have more experience in dealing with the issues.

Recommendations

2. That the Department of the Environment and Heritage be the central administering agency for the access scheme.

3. That the Minister for the Environment and Heritage be given responsibility under the EPBC Act to make decisions whether to grant or refuse applications for access permits.

4. That applications for access permits be handled through the Department of the Environment and Heritage's permits web site which should be linked to the Access to Biological Resources in Commonwealth Areas page on the Department's web site.

5. That the Department of the Environment and Heritage's standard permit application be amended to include the information that applicants must provide when seeking access to biological resources under s301.

Timeframes

2.8 The Inquiry acknowledges that applicants will want permit applications and contract negotiations finalised within reasonable timeframes. It considered, however, that it was not consistent with the principles of prior informed consent and mutually agreed terms to impose time limits on contract negotiations. In any event, commercial contracts are complex and often require considerable negotiation before they are concluded.

2.9 Once the parties have submitted a contract to Environment Australia, however, the Inquiry considered that some limits on the timeframes within which Environment Australia should make its recommendation to the Minister and within which the Minister should make a decision were reasonable and in the interests of both parties. These should be consistent with the timeframes which apply to comparable decisions under the EPBC Act.

Recommendation

6. That the regulations include timeframes (consistent with comparable decisions under the EPBC Act) within which:

a) after receiving the benefit-sharing contract, the Department of the Environment and Heritage is required to make a recommendation to the Minister about the permit, and

b) after receiving the recommendation, the Minister is required to make a decision to grant or refuse the permit.

Register of agreements

2.10 Several submissions recommended that the agency responsible for administering the scheme should maintain a register of agreements under s301 of the EPBC Act.

Recommendation

7. That the Department of the Environment and Heritage maintain a register of contracts under s301 of the EPBC Act and the permits which relate to them. To the extent possible, allowing for reasonable concerns of the parties about confidentiality (for example, for commercial, cultural or other reasons) information about the agreements should be made public.

Detailed description of the access scheme

2.11 The following is a description of how the proposed scheme will work. A flow chart of the scheme appears below.

a) **Applicant submits an application to Environment Australia** using standard form designed for all permit applications under the EPBC Act, with specific provisions for s301 access requests.

b) **Environment Australia assesses the application** — addresses threshold questions.

- Is the collecting in a Commonwealth 'area' under s525?
  - No — Environment Australia advises applicant where to seek permit, eg State or Territory government agency.
  - Yes — Environment Australia continues to assess the application.
- Does it involve a request for wildlife, reserve and/or export permits?
- Does it involve collection of threatened species (s201), migratory species (s216), cetaceans (s238) and/or listed marine species (s258)? (wildlife permits)
  - If yes, is an environmental assessment required? (environmental assessment procedures must be completed before the permit can be granted or refused).
  - Permit for these activities may be granted or refused.
- Does it involve a request to export samples?
  - If yes, procedures must be completed so the applicant is aware of whether they will be able to export samples before proceeding with the application for permit and benefit-sharing agreement.

[**Note**: At this point Environment Australia should ensure that the applicant is aware of the requirement to conclude a contract with the resource provider and, if necessary, advise the applicant of the provider's contact details etc.]

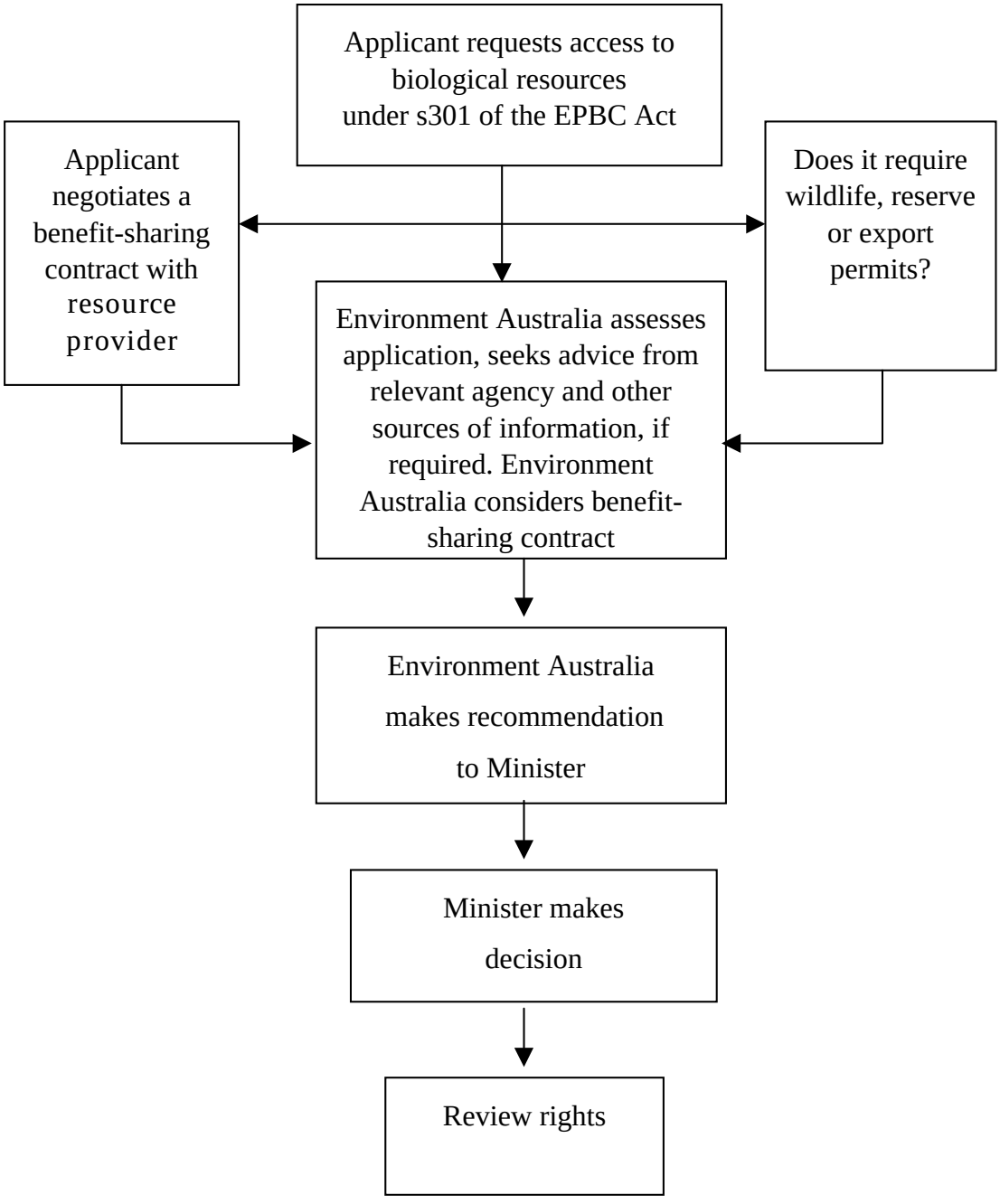
- Once these issues are resolved, **Environment Australia assesses application** to access resources under s301, **seeks advice from relevant area** (eg a division of Environment Australia such as Marine and Water Division, Parks Division, or other government agency) and **further information from other sources**, if required, as to whether the permit should be granted or refused.

  [**Note**: In 'areas' not administered by Environment Australia – Environment Australia refers the application to the appropriate agency, eg Department of Defence, CSIRO, GBRMPA, etc.]

- Following submission of the benefit-sharing contract, **Environment Australia makes a recommendation to the Minister** that the permit be granted or refused, including a recommendation regarding the contract.
- **Minister refuses or grants the permit.**
- Parties may seek **review** of the decision.

[**Note**: Applicants may need to seek further permits, eg for recollection. It is suggested, however, that as far as practicable there should be only one contract (when the first permit is sought) and that this contract should anticipate the possibility of further permits. Further permits would be granted on the basis that there is an existing contract which requires no further Ministerial assessment.]

Diagram showing the process for assessing access permits and benefit sharing contracts



Matters to be covered in s301 Regulations

2.12 The regulations should incorporate the general principles of ensuring that access to biological resources in Commonwealth areas is conducted in accordance with ecologically sustainable development principles, including environmental assessment procedures where applicable, and promotes the conservation of biological diversity and the sustainable use of its components.

2.13 With regard to **operational aspects of the scheme**, the regulations should:

a) set out a simplified outline of the access scheme;

b) set out the requirements for:

i) lodging voucher specimens in Australian public institutions accredited with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);

ii) information about the specimens collected; and

iii) ensuring at least some benefits are used for biodiversity conservation in the area from where the biological resource was obtained (Recommendation 27); and

c) stipulate that bioprospectors should not collect human remains (Recommendation 42);

2.14 With respect to **access permits**, the regulations should:

c) set out the requirement to obtain a permit to access biological resources in Commonwealth areas;

d) require use of the standard permit application form, while allowing scope to include conditions for particular circumstances;

e) require that the Minister give notice of each permit application to each person and body registered under s266A of the Act, and to invite them to make written submissions about whether a permit should be issued (addressing possible environmental concerns only), and to take these into account in making his decision;

f) set out conditions to be included in the permit, including:

- the requirement that applicants enter into a benefit-sharing contract with the resource provider;
- arrangements and conditions regarding access, eg who, when, where, what (including any follow-up collecting, if applicable);
- environmental conditions, including the collecting protocols to be observed; and

    - the requirement to report to Environment Australia, with a copy to the resource provider;
- stipulate that the Minister's decision to grant/refuse a permit must take into account that:
    - environmental assessment (if required) was undertaken and the process is completed;
    - the Minister is satisfied that the collection protocol attached to the permit will provide adequate environmental protection;
    - the submissions from persons and bodies registered under s266A of the EPBC Act have been taken into account;
    - the precautionary principle has been applied, where appropriate;
    - any variations to the model contract are acceptable;
    - there is a benefit-sharing contract between the parties and that it addresses major issues, such as:
    - prior informed consent,
    - mutually agreed terms,
    - adequate benefit sharing arrangements, including protection for and valuing of Indigenous knowledge (where provided by the owner); and
    - some benefits will be used for biodiversity conservation in the area from which the resource was obtained;
    - where access is granted, access arrangements meet the requirements of leases, management plans and any other relevant documentation, where applicable;
- stipulate that it is an offence to access resources without a permit or to breach the conditions of a permit (including a cross reference to civil and criminal penalties in the Act;
- set a timeframe within which the access permit is valid (a maximum of three years);
- allow transfer of the access permit only with permission of the Minister;
- detail the circumstances for revocation or suspension of the access permit by the Minister;
- detail provisions to request information or set conditions relevant to particular situations, eg Defence, such as:
    - issues of safety, security and operational needs;

- requirements in respect of the length of advance notice required for entry; and
- the need to consult with a range of management staff where a training area is involved; and

- set fees (fees should be consistent with other fees charged under the EPBC Act, with provision for differential fees depending on the length and complexity of environmental assessments).

2.15 With regard to the **benefit-sharing contract**, the regulations should:

- recognise and encourage use of the model contract (but note that its use is not mandatory);
- state that the contract must include a provision that it takes effect only if an access permit has been issued;
- set out indicia which may evidence that there is prior informed consent by the party which is providing access to biological resources:
  - **where traditional owners are involved**, the regulations should provide for:
    - adequate time to consider applications, consult with other parties (eg, owners who live outside the area) and seek advice;
    - adequate information from and consultations with the applicant;
    - benefit-sharing provisions to cover the costs of consultation;
    - minimum requirements for notification and consultation to be met if beneficiaries are wider than traditional owners,;
    - availability of information and education about access and benefit-sharing issues;
    - representation by the relevant land council;
    - independent legal advice;
    - advice from the Director of National Parks, if requested;
    - confirmation from relevant land council that these procedures have been followed; and
    - where access is refused, no review and a minimum time before another application can be made;
  - **in all other cases**, the regulations should deem prior informed consent to exist unless there is evidence to the contrary;
- ensure adequate benefit sharing, including benefits to Australia through improved knowledge and sharing of information about biodiversity;

- stipulate that distribution of benefits is for the traditional owners to determine, and
- include examples of possible monetary and non-monetary benefits.

Examples of monetary benefits include:

- up-front payments;
- milestone payments;
- royalties;
- research funding;
- licence fees; and
- salaries and infrastructure provided to owners of the resource, or landholders, as part of access arrangements;

Examples of non-monetary benefits include:

- participation of Australians in research activities;
- sharing of research results;
- a set of voucher specimens left in Australian CITES-accredited institutions;
- support for research for conservation and sustainable use of biological diversity;
- strengthening the capacities for technology transfer, including biotechnology;
- strengthening the capacities of local and Indigenous groups to conserve and use their genetic resources and, in particular, to negotiate the benefits arising from the use of the intangible associated components of genetic resources and their derivatives;
- assistance for language revival and maintenance programs for traditional owners;
- recovery and recording of the biodiversity knowledge of traditional owners;
- reasonable access by Australians to duplicates or, as appropriate, originals of specimens deposited in international ex situ collections;
- receipt by providers, without payment of a royalty, of all technologies developed from research on endemic species;
- donation to national institutions of equipment used as part of research;
- reasonable access to technology and products resulting from the agreement;
- information exchange;
- protection of local existing applications of intellectual property rights;
- building capacities in controlling aspects of bioprospecting methods, such as collection and preparation of samples, biodiversity monitoring, socio-economic monitoring, and/or nursery and agronomic techniques (increased conservation capacity);
- institutional capacity-building;
- intellectual property rights; and
- participation in commercialisation or product development or manufacture.

Some **other important non-monetary benefits** may include:

- biological inventories and taxonomic studies, integral components of many bioprospecting activities, which can provide important benefits for conservation and sustainable use of biological diversity;
- contributions to the local economy through value-added activities such as the cultivation of a species that is needed in large quantities for natural-products research, development and production as a commercial commodity;
- public-health benefits, for example, in cases where access and benefit-sharing agreements encompass a commitment by a firm seeking genetic resources to invest in or support research on locally important diseases for which there is relatively little private sector investment;
- the institutional and personal relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities under it, such as between a local university and an international research centre, for example, are in themselves an extremely important non-monetary benefit. Often these relationships lead to important follow-on scientific collaboration and increased access to international funding sources; and
- human and material resources to strengthen the capacities of personnel responsible for administering and enforcing access regulations.

Recommendation

8. That the proposed scheme be implemented through regulations under s301 of the EPBC Act.

Matters to be covered in the EPBC Act

Review provisions

2.16 Review provisions should provide:

- that the decision of the Indigenous owners of biological resources to deny access to their resources (ie not to enter into a contract) is not reviewable (and to prevent undue pressure on them to negotiate, there should also be a time limit before the application may be re-activated);
- merits review by the parties of the Minister's decision not to grant an access permit; and
- merits review by third parties of that part of the Minister's decision which relates to the conditions in the access permit itself, but not the conditions in the contract.

Recommendations

9. That the decision of Indigenous owners of biological resources to deny access to their resources (ie not to enter into a contract) not be reviewable.

10. That the parties to the contract be able to seek merits review of the Minister's decision not to grant an access permit.

11. That third parties only be able to seek merits review of that part of the Minister's decision which relates to the conditions in the access permit itself, but not the conditions in the contract.

Penalties

2.17 The Act should also provide for penalties for bioprospecting without a permit and for breaches of the terms and conditions of a permit which are consistent with other penalties in the EPBC Act for comparable offences. In this regard the level of penalty must be sufficient to deter biopiracy.

2.18 Biopiracy denies the community from which the resource originates the opportunity to share in benefits which may flow from its use. While its incidence is difficult to quantify, enough examples have been cited internationally and drawn to my attention in submissions and discussions for me to conclude that this is a matter which warrants a serious penalty response to create a deterrent.

Level of penalty

2.19 The EPBC Act contains both civil and criminal penalties, with the civil penalties having a lower standard of proof and higher maximum fines than the criminal offences. It also has some strict liability offences (see Division 1 of Part 13).

2.20 The civil penalties relating to listed biodiversity and protected areas range from 500 to 5,000 Penalty Units (PUs), and the criminal penalties range from 500 to 1,000 PUs, and two years' gaol. I suggest the Act include both civil and criminal penalties for accessing biological resources within Commonwealth areas without a permit.

2.21 To be consistent with the biodiversity provisions of the Act, the criminal penalties should probably be within the ranges indicated above (the criminal penalties mentioned above apply to various activities involving listed biodiversity unless the Minister has granted a permit for the activity).

2.22 However, I would support much higher civil penalties (eg, 50,000 PUs), given the amount of potential profit to be made from bioprospecting, and given the 50,000 PUs penalties set out in the environmental assessment provisions of the Act. This will require an amendment to the Act.

Recommendation

12. That civil and criminal penalties in the EPBC Act for unlawfully accessing biological resources be sufficient to deter such activities, having regard to the potential profits from biopiracy.

The proposed model contract

Comments about particular contractual issues

Exclusivity of agreements

2.23 With respect to the issue of 'exclusivity' of agreements, the Queensland Government commented as follows:

> 'Exclusivity' terms in agreements should be explicit as to the extent and duration of their exclusivity. In negotiating exclusivity, it would be more appropriate to offer biodiscovery agencies the exclusive utilisation of the samples collected for a stipulated period as opposed to providing exclusive access to natural resources, as has sometimes been the case. It should be explicit in any exclusivity agreement that access to particular biological resources is conditional and
>
> 1. assigned only to the physical samples and not extending to the species or localities from which they were collected; and
>
> 2. assigned for set periods after which time the resources become publicly accessible.

2.24 The Inquiry notes these comments, as well as the concerns of Indigenous communities that by allowing access to biological resources on their lands, they may be prevented from continuing to use the biological resources from which samples are derived. However, the Inquiry also notes that the parties to the contract are free to negotiate 'exclusivity' terms in whatever manner they wish and that a range of terms is possible. The example Queensland proposed is one possibility.

2.25 The Inquiry has decided that it is not necessary to make any recommendations on this matter as the proposed scheme requires the Minister, in deciding whether to grant or refuse a permit, to consider the fairness of 'exclusivity' clauses in the

contract, among other issues, against the indicia of prior informed consent, mutually agreed terms and adequate benefit sharing.

2.26 The Inquiry does suggest, however, that terms of a more 'exclusive' nature which benefit the bioprospector should be reflected in the nature and/or amount of benefits payable to the resource provider.

Research or commercial interests

2.27 Many submissions, particularly those from research organisations, commented on the importance of access to biological resources for scientific research and of ensuring that an access system does not inhibit access for such purposes. The Inquiry considered possible implications of these concerns for the proposed system and, in particular, for the model contract. In view of the fact that in many cases research will have unforeseen commercial implications or possibilities at some point, the Inquiry decided that, as far as possible, this should be considered at the outset of contract negotiations and reflected in the contract.

Recommendation

13. That terms in the proposed model contract anticipate that most contracts will be for commercial purposes but that in some cases, terms which reflect non-commercially motivated research purposes may need to be drafted, and benefit sharing negotiated accordingly.

Possible provisions

2.28 This section lists possible provisions for the model contract to aid later discussions with stakeholders.

- The parties – names and brief descriptions of functions and objectives. [Note: there may be cases where there are more than two parties to the contract, eg Environment Australia in relation to Norfolk Island (see discussion in Chapter 8 'Norfolk Island').]
- Definitions of, for example:
    - sample,
    - bioprospecting,
    - monetary and non-monetary benefits, and
    - resource owner.
- Interpretation.

- Purpose of the contract.
- Duration of the contract.
- Monitoring and review of the contract.
- Collector becomes owner of the samples/continuing rights of provider in relation to the samples and biological resources.
- Exclusivity or otherwise of the Agreement.
- Benefit sharing arrangements (Schedule), including provision to ensure at least some benefits are used for biodiversity conservation in the area from where the biological resource was obtained.
- Any other conditions, such as requirements for applicant to provide information about developments to the resource provider.
- Agreement regarding intellectual property rights.
- Contract takes effect only if Minister issues an access permit.
- Provision anticipating the possibility that further permits may be required, and consequences for the contract if refused.
- Provision regarding effect on the contract if the permit is breached, suspended or revoked etc.
- Successors are bound by the contract.
- Arrangements where third parties are involved, eg where there is a series of contracts, to ensure there is no dilution of benefits, eg royalties.
- Standard clauses, eg variations (including that the contract and any amendments be subject to the Minister's approval), waiver, severability of provisions, governing law, entire agreement, dispute resolution, termination, notices costs, goods and services tax.
- Permit could be included as a Schedule.

Recommendations

14. That the Department of the Environment and Heritage develop a model contract to guide and assist the parties in their negotiations over possible benefit-sharing arrangements.

15. That the model contract be endorsed by stakeholders including Biotechnology Australia, the Australian Biotechnology Association, the Indigenous Advisory Committee, key land councils and peak environment organisations and subsequently submitted for endorsement by the Minister for the Environment and Heritage.

16. That the regulations and model contract be used in discussions with State and Territory Governments as the basis of a proposed nationally consistent scheme.