AUSTRALIAN PROPERTY INSTITUTE INC.

INQUIRY INTO DEVELOPMENT OF HIGH TECHNOLOGY INDUSTRIES IN REGIONAL AUSTRALIA BASED ON BIOPROSPECTING

SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON PRIMARY INDUSTRIES AND REGIONAL SERVICES

MARCH 2001

TABLE OF CONTENTS

TABLE OF CONTENTS		**2**
ABBREVIATIONS		**3**
EXECUTIVE SUMMARY		**4**
INTRODUCTION		**5**
COMMENT AND RECOMMENDATIONS		**6**
APPENDIX 1	**AUSTRALIAN PROPERTY INSTITUTE INC.**	**14**
APPENDIX 2	**SUBMISSION COMMITTEE**	**15**

ABBREVIATIONS

AAPI	Associate of the Australian Property Institute
API	Australian Property Institute
FAPI	Fellow of the Australian Property Institute
NSW	New South Wales

EXECUTIVE SUMMARY

The Australian Property Institute (API) represents the interests of property professionals, including Certified Practicing Valuers. The Institute's submission identifies aspects of the Committee's terms of reference where it can contribute to the Inquiry's determinations. These aspects are concerned with the appropriate identification and valuing of relevant property rights for the development of bioproduct industries in addition to accounting for their impact on the environment.

In this submission the term biota represents bioproducts and flora suitable for the manufacture of bioproducts.

The premise of the API's submission is that Australia is the potential source of a diverse and unique range of biota. This submission is restricted to flora, and in particular to flora growing on land. The API's members are land-based property professionals with no professional expertise in either fauna as property or the property of the sea. For this reason neither fauna nor flora growing at sea are considered in this submission.

This submission is also based on the premise that much of Australia's land mass is privately owned. Private land owners, in relation to potential bioproducts situated on their land, have a range of rights and interests that will require consideration, as will those of native title holders and of governments.

Essentially the API considers that the development of high technology industries in regional Australia based on bioprospecting will first require the creation of biota property rights.

The Institute's submission argues that inchoate rights in land-based biota already exist by virtue of their derivation from land, or property. Therefore in order for biota industries to develop in an orderly fashion, it will be necessary to first define these presently inchoate biota property rights in legislation. To leave biota property rights undefined inevitably exposes future governments, landowners and industries to the potential for litigation and a subsequent need for legislation.

The submission also identifies some of the issues the Commonwealth should consider in its definition of biota property rights. These include the possibility of not attributing biota property rights to endangered or rare species.

Once biota property rights are defined, the API believes the legislature will also have several options open to it for the management of these rights.

Briefly the options are for

- the Commonwealth to claim ownership over national flora and fauna and grant licences to bioprospectors to research or utilise this wild life
- the States and territories to licence the use of flora and fauna without appropriation and
- the Commonwealth to allow biota rights to be held and traded by property owners with regulation or appropriate restrictions on these rights (for example for endangered flora) defined by legislation.

The Institute recommends that the creation of privately held and traded biota property rights, appropriately regulated, is the most efficient and transparent method of achieving public and private policy outcomes. To either licence or appropriate biota rights to the state will be costly in terms of

both compensation and administration and would form a substantial impediment to the growth of these new industries.

The Institute also recommends that the Commonwealth establishes a national register of flora with commercial potential in order to ensure the market is transparent and informed. Such a register would facilitate the development of a transparent and informed market in biota. The Institute notes however that in allowing for the private ownership and trading of biota rights, state governments and local authorities should be aware of the impact this may have on land values and the pressures thus created for changes to agricultural land use in particular.

INTRODUCTION

This submission responds to two documents released by the House of Representatives Standing Committee on Primary Industries and Regional Services (Standing Committee) in respect of the *Inquiry into development of high technology industries in regional Australia based on Bioprospecting, namely:*

1) *Terms of Reference* as detailed at www.aph.gov.au/house/committee/primind

2) *Bioprospecting and regional industry development in Australia – some issues for the Committee's Inquiry* as detailed at www.aph.gov.au/house/committee/primind

This submission by the Australian Property Institute (API) is in response to an invitation contained within advertisements published in the Sydney Morning Herald for interested parties to make comments and submissions in response to the inquiry by the Standing Committee.

The Institute fully supports the inquiry by the Committee into bioprospecting and considers there are important aspects of the terms of reference where it is able to provide the Committee with informed comment. The Institute also notes with approval the intention of the Standing Committee to address the many and varied issues referred to in the document entitled, *Bioprospecting and regional industry development in Australia – some issues for the Committee's Inquiry*, notably under the headings:

- *Potential Barriers to Australia reaping the benefits of bioprospecting*
- *Accessing natural resources and protecting the environment*

It is also noted that the Standing Committee intends to make recommendations to the Commonwealth government arising from its Inquiry.

The API does not present this submission on the basis that the Standing Committee will recommend that bioprospecting, bioprocessing and related technologies will be proven to have measurable contributions, benefits or impacts. The API submission is merely that, should this view prevail, the Institute considers that it will be important to the orderly development of any resulting industries that biota property rights are first defined in legislation and that the Commonwealth considers the options open to it in managing those property rights from the outset.

The Institute is happy to discuss any of the matters raised in its submission or to provide any additional information required. Arrangements can be made by contacting Ms Pru Goward, API National Director, or Mr Grant Warner, API Director Policy and Research on telephone no. 02 6282 2411.

COMMENTS AND RECOMMENDATIONS

The following comments and recommendations have been framed to respond to the headings of the Standing Committee's document entitled *Terms of Reference.*

1. *The contribution towards the development of high technology knowledge industries based on bioprospecting, bioprocessing and related biotechnologies*

1.1
The API is aware that the contribution of bioprospecting in particular to the development of high technology industries (especially in rural and regional Australia) is difficult to quantify.

In addition, the API notes in the ancillary document that it is acknowledged:

> *much needs to be done before commercial success is realized and for there to be any benefits for regional economies.*
>
> (Extract from **Bioprospecting** *and Regional Industry Development in Australia – some issues for the Committee's Inquiry*, p.1)

The Institute considers the development of biota property rights is an essential precursor to the development of any such industry; this issue is addressed in detail in the paragraphs that follow.

1.2
The API notes in the ancillary document that it is also acknowledged:

> *there is a need to ensure that the potential value of compounds is recognised from the outset and that intellectual property rights and knowledge are not sold off too early and too cheaply. Australian researchers, land owners and resource managers may require assistance to identify the potential value of naturally occurring chemicals and may have to be encouraged not to cheaply dispose of rights to offshore developers*
>
> (Extract from *Bioprospecting and Regional Industry Development in Australia – some issues for the Committee's Inquiry*, p.2)

The Institute believes that the use of biota such as genetic botanicals may not only need to be regulated but also recognised as "property" if they are to be conserved, and sustainably utilised. The Institute argues that the creation of such property rights would act as an economic incentive to the sustainable use of these natural resources.

The Institute draws to the Committee's attention the legal fact that inchoate rights in biota already reside with the private landowner. Legislative identification of a specific property right such as biota merely crystallizes the particular nature of those rights. The inchoate nature of biota rights has previously been recognised by governments. For example in the Real Property Act 1900 (NSW) s3, things such as plantations, gardens, trees and timber all fall within the definition of land.
Trees and plants can also be considered attached to the land as fixtures. A fixture is a chattel that is attached to the land other than by its own weight. The test of determining that a chattel is a fixture is whether it has been fixed with the intention that it shall remain. Trees and other plants growing in the land can be considered fixtures if there is no present intention to sever them. (Richardson v Roads and Traffic Authority(NSW) (1996) 90 LGERA 294, per Talbot J).
The Courts have also recognized the benefits of flora also constitute an interest in land. For example, where the owner derives a benefit from further growth of the trees, in terms of further vegetation and from the nutriment to be afforded to the land, the interest in them is an interest in the land. (Marshall v Green (1875) 1 CPD 35, per Lord Coleridge CJ.)

As a consequence of these precedents, the Institute considers it is not prudent for governments to pursue the development of these industries without first developing a legislative framework for biota property rights. The absence of such a framework could well involve these nascent industries and governments in legal actions with an inevitable need for legislative response in what would then be more critical circumstances and may also need to be retrospective.

1.3

The Institute notes that any attempt to isolate biota as a property right through legislative action must be undertaken in the context of a land ownership milieu which is overwhelming private. This hurdle of private ownership has already been identified in current attempts by the Commonwealth and States to statutorily preserve biodiversity, especially flora.

The Institute is strongly of the view that if rights in biota are to be recognised as "property rights", and are to be valued as such by the property profession when engaged to assess the value of the bundle of rights held by a land owner, then biota property rights must be constructed in such a way that they have features common to other more traditional property.

Such common features are that:

1. interests in question are territorial, in so much as the right is contained only within defined boundaries. This is achieved by way of a legal description of the boundaries, which have been defined by means of a cadastre.
2. rights are proscribed in so far as what activities can occur within the territory.
3. manner in which the right is to be paid for is clearly stated.
4. obligations incurred or limitations imposed are clearly stated.

1.4

The API believes that for property rights in biota to be meaningful to users, purchasers, and especially those financial institutions that will use these rights as collateral for mortgage-based loans, then the test of whether they are property rights is crucial.
In constructing such a test, it is essential to gain an appreciation of existing judicial considerations of the notion of "property". Usefully, Starke J. in *The Minister of State for the Army-v-Dalziel (1944) 68 CLR at* 290 (*Dalziel*) indicated that such a definition:

> *…extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choices in action.*

Starke J. (at 290) also comments that:

> *…to acquire any such right is rightly described as an acquisition of property.*

This approach to constructing a definition of "property" has been further strengthened in a recent decision *Yanner-v-Eaton (1999)* HCA 53 (unreported 7 October 1999) (*Yanner)*, where the High Court took the opportunity to contrast property in the conventional sense with the "property" or "ownership" that the Crown asserts over natural resources.

The Court stated that:

> *The word "property" is often used to refer to something that belongs to another…."property" does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of "property" may be elusive. Usually it is treated as a "bundle of rights".*
>
> *But even this may have its limits as an analytical tool or accurate description, and it may be…that "the ultimate fact about property is that it does not really exist; it is mere illusion"*
>
> (at 8 per Gleeson CJ, Gaudron Kirby & Hayne JJ)

Also, the Court usefully stated that the common law position of natural resources was as follows:

> *At common law there could be no "absolute property", but only "qualified property" in fire, ligh,t air, water and wild animals.*
>
> (at 11 per Gleeson CJ, Gaudron Kirby & Hayne JJ)

However, "property" is generally understood as a titled right to land or to exploit natural resources such as minerals. Commonly these property rights are referred to by the terminology "real estate", with its emphasis on the immoveable nature of the "property" concerned such as land, buildings and minerals.

The range of interests that are classed as "property" while limited only by our imagination, has however been restrained by the Courts of common law countries who have only recognised a few kinds of interests in land, which are regarded as usual property rights. Some of these rights will be readily recognised such as freehold and leasehold, however a few such as mineral rights, fishing rights, and water entitlements have also been recognised.

There has also been the very recent recognition of carbon as a property right, and legislation in various states is developing this concept. The NSW Conveyancing Act 1919 now recognizes "carbon sequestration rights" as a traditional form of property (a profit a prendre"). Other state legislation has followed suit.

2. *Impediments to the growth of these new industries (* from *Terms of Reference)*

2.1

The Institute is of the view that once biota property rights are formally developed, the regime in which they are managed will be critical to the success of the industry. For this reason the terms of reference dealing with impediments to growth and the capacity to maximise the benefits will be dealt with together in this paragraph.

Governments have several options open to them for the management of biota property rights:

- **Appropriation**

The Commonwealth may choose to claim ownership over national flora and grant licences to bioprospectors to research or utilise this. Some countries, such as Costa Rica, have already enacted laws declaring the physical property of flora and fauna to be the property of the State. In Australia such legislation has so far been opposed.
Both International law and S51 of the Australian Constitution requires that compensation be paid. Under the Australian Constitution, the general requirement of acquisition of property on just terms requires the terms to provide fair, timely compensation approximating the market value of the property as far as is possible and reflecting a general notion of fairness. In the case of biota the possibilities for compensation can include either a fixed price or a percentage of the profits resulting from commercial benefits. The potential for compensation under this second option could be limitless. Even where only a single species or genus is identified in such legislation, the Institute is of the view that a claim for compensation as guaranteed by *para 51(xxxi)* of the Australian *Constitution* will arise. The valuation task, rather than focusing on the whole *corpus* of biota residing in a particular parcel of land, will require a detailed assessment of the biota in situ, together with an assessment of the industrial/commercial attributes of the species or genus within the existing compensation law framework.
Nonetheless compensation is necessary and would provide an incentive for private landowners to conserve or sustainably utilise biodiversity.

- **Licencing**.

States may be able to licence the use of flora and fauna without appropriation. For example in Western Australia, the Minister or the Department of Conservation and Land Management may grant one of a number of licences to take flora. These licences may be granted for a variety of purposes, including for scientific research.

- **Regulation**

The Commonwealth may directly control or manage the relationship between bioprospectors and private landowners. Within such a regulatory scheme, some adaptation of PIC (Prior Informed Consent procedures) could be used. Nothing prevents PIC being extended to include to include all parties involved in an access procedure. However, much would depend on national and sub-national legislative definitions of what constitutes PIC as well as mechanisms for enforcing it.

Discussion:
Regulated trading in biota rights is the closest approximation to a free market. It does not entail compensation or the administrative complexity of licencing, although the enforcement of a regulatory regime will require administrative resources. Under this regime, the Commonwealth would need to consider a number of issues. The Institute believes the regime would, among other things, need to address:

- the treatment of endangered or rare species of flora and
- the difficulty of adequately informing property owners, including Native Title owners, of the nature and value of the flora in question.

2.2
In order to address both the issues of a properly informed market and the need to protect endangered or rare species of flora, the API strongly believes that there is an urgent need for a structured national approach to data on biota. This will be fundamental to any attempt to regulate or protect biota. Furthermore, for a true market for a property right to exist there is the fundamental

requirement for confidence in and accessibility to this data. The API proposes that the Committee consider the development of a national register of potential biota products in which rare and endangered species of flora are identified as such.
The API further proposes that the Committee recommend the development of guidelines for the regulation of trade in rare or endangered species.

Alternatively, the Parliament may choose not to attribute property rights to rare or endangered flora, although this is unlikely to prevent their illegal trade.
Without a national register of some sort, rare and endangered species are at risk and landowners are also at risk of selling materials possessing great commercial potential for less than their market value. Likewise Certified Practicing Valuers are at risk and many would find it almost impossible to adequately inform themselves were a landowner to approach them in the circumstances of a sale.
The Institute notes that in the National Local Government Biodiversity Survey it is shown that biodiversity appears to be unevenly spread over local government areas. Unsurprisingly the capacity of API members to obtain factual information on valuable genetic botanicals residing on a particular property will otherwise be constrained by the capacity of particular local councils to assemble such information.

2.3
The Institute notes that advice to the Standing Committee in an ancillary document that:

> *…the potential value of compounds is recognised from the outset and that intellectual property rights and knowledge are not sold off too early and too cheaply.*
>
> (Extract from *Bioprospecting and Regional Industry Development in Australia – some issues for the Committee's Inquiry*, p.2)

The Institute supports this statement as it is aware of an only limited appreciation of the potential value of biota, notably genetic botanicals, by landowners on whose land specific biota resides. As stated earlier, there is an urgent need for a national response to data collection and access, and also a need for valuers, who in most states of Australia are the only individuals permitted by law to undertake a valuation, to be trained in concert with the development of a property right in biota.

Already Certified Practicing Valuers are responding to this where there is knowledge of the flora involved. For example in Western New South Wales, the State Valuation Office is training its valuers to recognise specific species such as Grey Mallee, that have already been shown to have a worth greater than that of the surrounding vegetative cover in the region.

2.4
Accommodation of International Principles and the Rights of Indigenous Communities:

Australia ratified the Convention on Biological Diversity on 18 June 1993. A key measure that emerged was the requirement that bioprospectors obtain the prior informed consent (PIC) of the relevant indigenous community or communities before collecting biological resources and associated traditional knowledge from Indigenous peoples and their territories.
PIC is broadly understood to mean consent given to an activity after full disclosure of the reasons for the activity, the specific procedures the activity would entail, the potential risks involved and the full implications that can be realistically foreseen. It is an administrative process requiring full

disclose of all information that enables the government, as well as interested parties, to assess costs and benefits and thus to decide whether to grant access to bio-resources.
Where the PIC of the local indigenous community(ies) is given, mutually agreed terms and equitable benefit-sharing arrangements become a part of contractual arrangements between the local community and the researcher/collector.
In Australia Commonwealth legislation already provides for the regulation of access to biological resources. The legislation provides scope for implementing PIC-type requirements but these will only apply in Commonwealth areas. However the Commonwealth's constitutional responsibilities in areas such as trade, commerce, export control and corporations, and the power to make laws for "people of any race" will necessitate some additional Federal monitoring of access to and use of non-Commonwealth resources also.

3. ***The Impacts on and benefits to the environment (terms of reference)***.

Were property rights to be attributed to biota, the API recognizes that there may be unintended consequences for environmental land management.
In the case of the development of a regime for carbon-based credits, for example, there has already been a measurable impact on the price of rural land in areas such as Oberon and Tumut, and probably elsewhere. In some senses the result of such market activity for land based carbon credits has had unforeseen consequences. There is some evidence that quality arable land, always scarce in Australia, is being acquired for plantation purposes rather than being kept in agricultural production. Clearly the market is responding to the ability of some buyers to pay more for land based on externalities derived from the market for carbon credits, than what the economic utility of the land for usual rural purposes can justify.

Another consequence for environmental management has been that generic rural land use planning in the form of the old *1(a) Rural* zoning in NSW environmental planning instruments is markedly failing to protect arable land from being lost. There have been suggestions that arable land might have to be protected from the carbon credits market in a manner not dissimilar to heritage controls. Paradoxically rural land that is currently the least regulated could, in the Institute's view conceivable become our most regulated.

SUMMARY OF COMMENT AND RECOMMENDATIONS:

- The Institute believes that the use of biota such as genetic botanicals should be recognized as the use of "property" if they are to be sustainably utilised. The Institute argues that the creation of such property rights would act as an economic incentive to do so.

- The Institute draws to the Committee's attention the legal fact that inchoate rights in biota already reside with the private landowner.

- The Institute is strongly of the view that if rights in biota are to be recognised as "property rights", and are to be valued as such by the property profession when engaged to assess the value of the bundle of rights held by a land owner, then biota property rights must be constructed in such a way that they have features common to other more traditional property.

- The Institute is of the view that once biota property rights are formally developed, the regime in which they are managed will be critical to the success of future industry. Regulated trading in biota rights is the closest approximation to a free market. It does not entail the Government paying compensation upon acquisition or the administrative complexity of licencing, although even the enforcement of a regulatory regime will require administrative resources.

- In a regulated market-based regime, the Commonwealth would need to consider a number of issues. The Institute believes the regime would, among other things, need to address:
  -treatment of endangered or rare species of flora and
  -difficulty of adequately informing property owners, including Native Title owners, of the nature and value of the flora in question.

- In order to address both the issues of a properly informed market and the protection of endangered or rare species of fauna, the API strongly believes that there is an urgent need for a structured national approach to data on biota. The API proposes that the Committee consider the development of a national register of potential biota products in which rare and endangered species of fauna are identified as such.

- The API further proposes that the Committee recommend the development of guidelines for the regulation of trade in rare or endangered species.

- In Australia Commonwealth legislation already provides for the regulation of access to biological resources. However the Commonwealth's constitutional responsibilities in areas such as trade, commerce, export control and corporations, and the power to make laws for "people of any race" will necessitate some additional Federal monitoring of access to and use of non-Commonwealth resources.

- the API recognizes that there may be unintended consequences for environmental land management arising from the recognition of biota property rights. Paradoxically rural land which is currently the least regulated could, in the Institute's view, conceivably become our most regulated.

APPENDIX 1 AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute, (formerly known as the Australian Institute of Valuers and Land Economists), has enjoyed a proud and long history.

Originally formed over seventy years ago in 1926, the Institute today represents the interests of more than 7000 property experts throughout Australia. As the peek professional property organisation the API has been pivotal in providing factual and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by overseas bodies such as the United Nations and the World Bank, evidencing a level of expertise within the API and its membership that is recognised globally.

However, as a professional organisation the primary role of the Australian Property Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members.

Institute members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, and architecture. Membership of the Australian Property Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and life long continuing professional development.

Members are the Institute's greatest asset, and the Australian Property Institute is committed to maintaining a strong base for the future of the property profession through the broadening of the expertise, and knowledge of the membership.

Integrity

The Membership of the Australian Property Institute is bound by:

- A Code of Ethics and
- A Code of Conduct

APPENDIX 2 SUBMISSION COMMITTEE

Mr Bill Hall AAPI
Operations Manager, Land Services,
Burnett District,
Department of Natural Resources, Bundaberg

Mr Phillip Harris, FAPI
Property Investments Manager,
Major Developments Branch,
NSW Department Public Works and Services, Sydney

Mr Grant Kennett, AAPI
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State Valuation Office, Griffith

Mr Stuart Prowse, AAPI
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Tremain Prowse Pty Ltd, Tamworth

Mr John Sheehan , FAPI (Chair of Submission Committee)
NSW Vice President, and API national Native Title Spokesman

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