DECLARATION OF ORIGINALITY

I certify that the substance of this thesis has not already been submitted for any degree and is not currently being submitted for any other degree or qualification.

I certify that any help received in preparing this thesis and all sources used have been acknowledged in this thesis.

Kylie Lingard
15 August 2015
DEDICATION

To the Plant Business Advisory Group

(Rayleen Brown, Max Emery, Pat Torres, Juleigh Robins, Andrew Fielke, Jenni
Lightowlers and Slade Lee)
ACKNOWLEDGEMENTS

The single name on the cover of this thesis does not do justice to the people who have so warmly and expertly contributed to its production.

My deepest gratitude is to my principle supervisor and mentor, Professor Paul Martin, for keeping a sense of humour when I had none, for demanding simplicity – always – and for giving me the freedom to explore my own ideas, helping me question those ideas and offering me guidance when those ideas strayed from the path of common sense.

I am also indebted to my co-supervisors. Professor Donna Craig, thank you for so warmly sharing your expertise and contrary opinions and, above all, for reminding me to go gently in the pursuit of simplicity. Ms Lindy Andren, thank you for sharing your experience with me, and for questioning my many assumptions.

It is difficult to describe my appreciation for the Plant Business Advisory Group members: Rayleen Brown, Max Emery, Pat Torres, Juleigh Robins, Andrew Fielke, Jenni Lightowlers and Slade Lee. Your willingness to talk openly with me over the years, share your experiences and expertise, and encourage, support and accept me has touched my soul and shaped the very essence of this thesis.

I am especially grateful to the funders of this research, the Cooperative Research Centre for Remote Economic Participation and Ninti One, and to the many individuals who make up these organisations. First and foremost, to Associate Professor Slade Lee: thank you for your unending faith, scientific expertise, patience and candid reviews. I hope to work with you again in the future. Special thanks to Associate Professor Kevin Williams, for your unwavering enthusiasm for the project and for making me feel like an important part of the team. Thanks also to Linda Cooper for mentoring me through policy writing – you make it look so easy – and to Alicia Gigante for the fantastic layout on the briefs.

I am eternally thankful to Miriam Verbeek for her editorial expertise, and to the editors at several journals who took the time to provide detailed feedback on my work. Without this feedback, this thesis would read very differently indeed. I hope one day to provide the same experience for others attempting a thesis-by-publication.

I could not have finished this PhD without the unending support of my wonderful friends and family – thank you for keeping me (relatively) sane, editing my work and
listening to my incessant thoughts. Biggest thanks to my son, Tomas Marsh – you’re my motivation and inspiration. Particular thanks to Tanya Hopwood, the smartest and warmest best friend in the world. Thanks also to Lureen Kirkman, Laurelle Griffiths, Kelly Shankley-Price, Danielle Lingard, Nicole Lingard, Margaret Lingard and David Lingard.

The work reported in this thesis would not have been possible without the funding from the Australian Government Cooperative Research Centres Program through the Cooperative Research Centre for Remote Economic Participation (CRC-REP). The views expressed herein do not necessarily represent the views of the CRC REP or Ninti One Limited or its participants. Errors or omissions are my own.
# CONTENTS

DECLARATION OF ORIGINALITY .................................................................................. II
DEDICATION.................................................................................................................. III
ACKNOWLEDGEMENTS ............................................................................................... IV
TABLES......................................................................................................................... VIII
FIGURES....................................................................................................................... VIII
ABBREVIATIONS ......................................................................................................... IX

ABSTRACT .................................................................................................................... X

CHAPTER 1:  INTRODUCTION ..................................................................................... 1
  1.1 Problem statement ............................................................................................. 1
  1.2 The meaning of ‘bush food commercialisation’ .................................................. 1
  1.3 How this thesis came about .............................................................................. 3
  1.4 Research aim .................................................................................................. 5
  1.5 Research problem and knowledge gap ............................................................. 6
  1.6 Research questions ........................................................................................ 7
  1.7 Social value of the research .......................................................................... 8
  1.8 Research challenges and assumptions .............................................................. 9
  1.9 Thesis structure .............................................................................................. 10
                  1.9.1 Aim and purpose of each chapter ......................................................... 11

CHAPTER 2:  RESEARCH METHODS AND ETHICAL FRAMEWORK ...................... 14
  2.1 Research methods ........................................................................................... 14
                  2.1.1 Engaged scholarship ........................................................................... 16
                  2.1.2 Desktop study ..................................................................................... 17
                  2.1.3 Transaction mapping ........................................................................... 18
                  2.1.4 Doctrinal research and analysis .......................................................... 19
                  2.1.5 Peer review ........................................................................................ 20
                  2.1.6 Sharing research findings .................................................................... 21
  2.2 Ethical framework ........................................................................................... 22
                  2.2.1 Ninti One Aboriginal and Torres Strait Islander engagement protocol.... 23
                  2.2.2 Ninti One protocol for Aboriginal and Torres Strait Islander knowledge... 24
  2.3 Summary ......................................................................................................... 25

CHAPTER 3:  THE POTENTIAL OF LAW ................................................................. 27
  3.1 What this Chapter does ................................................................................... 27
  3.2 Journal paper one ........................................................................................... 27
                  STATEMENT OF AUTHORS’ CONTRIBUTION ........................................... 59
                  STATEMENT OF ORIGINALITY ............................................................... 60
  3.3 Policy brief one ............................................................................................... 61
                  STATEMENT OF AUTHORS’ CONTRIBUTION ........................................... 67
                  STATEMENT OF ORIGINALITY ............................................................... 68

CHAPTER 4:  GOURMET BUSH FOOD PRODUCTS ..................................................... 69
  4.1 What this Chapter does ................................................................................... 69
  4.2 Journal paper two ........................................................................................... 70
                  STATEMENT OF AUTHORS’ CONTRIBUTION ........................................... 128
                  STATEMENT OF ORIGINALITY ............................................................... 129
  4.3 Policy brief two ............................................................................................... 130
                  STATEMENT OF AUTHORS’ CONTRIBUTION ........................................... 137
                  STATEMENT OF ORIGINALITY ............................................................... 138
CHAPTER 5: NEW NATIVE PLANT VARIETIES .................................................. 139
5.1 What this chapter does ........................................................................... 139
5.2 Journal paper three .............................................................................. 140
STATEMENT OF AUTHORS’ CONTRIBUTION ............................................. 173
STATEMENT OF ORIGINALITY ................................................................. 174
5.3 Policy brief three ................................................................................ 175
STATEMENT OF AUTHORS’ CONTRIBUTION ............................................. 182
STATEMENT OF ORIGINALITY ................................................................. 183

CHAPTER 6: GOVERNANCE ........................................................................ 184
6.1 What this Chapter does ........................................................................ 184
6.2 Journal paper 4 .................................................................................... 184
STATEMENT OF AUTHORS’ CONTRIBUTION ............................................. 206
STATEMENT OF ORIGINALITY ................................................................. 207
6.3 Policy brief four .................................................................................... 208
STATEMENT OF AUTHORS’ CONTRIBUTION ............................................. 215
STATEMENT OF ORIGINALITY ................................................................. 216

CHAPTER 7: CONCLUSIONS ..................................................................... 217
7.1 Key findings .......................................................................................... 217
  7.1.1 Sub-question 1: Key findings .......................................................... 219
  7.1.2 Sub-question 2: Key findings .......................................................... 220
  7.1.3 Sub-question 3: Key findings .......................................................... 222
7.2 The significance of the work and its contributions to policy and knowledge .. 224
  7.2.1 International policy development .................................................... 224
  7.2.2 Domestic policy development ......................................................... 225
  7.2.3 Opportunities for Aboriginal and Torres Strait Islander peoples ......... 225
  7.2.4 Significance to legal scholarship ...................................................... 226
7.3 Areas of future research ........................................................................ 226
7.4 Research limitations and a way forward ................................................. 227
7.5 Concluding remarks ............................................................................. 227

BIBLIOGRAPHY ......................................................................................... 229

APPENDICES ............................................................................................ 297
Appendix 1: Asserting cultural interests through the law .............................. 297
Appendix 2: Embracing diversity ................................................................. 317
Appendix 3: Human Research Ethics Committee (SC)(ECN-12-050) .......... 342
Appendix 4: Human Research Ethics Committee (UNE)(HE14-018) .......... 343
Appendix 5: Human Research Ethics Committee (NT)(HREC-12-61) ......... 344
TABLES

Chapter 1, Table 1: Outline of the content of each chapter ......................................................... 13

Chapter 4, Table 1: Summary of current and potential support for Aboriginal and Torres Strait Islander interests at key development stages ................................................................. 126

Chapter 5, Table 1: Summary of support for the interests of remote Aboriginal and Torres Strait Islander peoples at key commercial breeding stages ...................................................... 159

Chapter 6, Table 1: Governance arrangements of public actors in the bush food commercialisation system .......................................................................................................................... 189

Chapter 6, Table 2: Current and new public governance arrangements for the bush food commercialisation system ................................................................................................................ 200

FIGURES

Chapter 2, Figure 1: Combination of research methods ................................................................ 15

Chapter 4, Figure 1: Simplified representation of the gourmet bush food product development system .......................................................................................................................... 97

Chapter 4, Figure 2: Simplified representation of the regulatory environment for gourmet bush food product development ..................................................................................................... 99

Chapter 5, Figure 1: Simplified representation of the commercial plant breeding system .......... 149

Chapter 6, Figure 1: Simplified representation of the bush food commercialisation system ....... 188
# Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACIPA</td>
<td>Australian Centre for Intellectual Property in Agriculture</td>
</tr>
<tr>
<td>AIATSIS</td>
<td>Australia Institute of Aboriginal and Torres Strait Islander Studies</td>
</tr>
<tr>
<td>ACIP</td>
<td>Advisory Council on Intellectual Property</td>
</tr>
<tr>
<td>ALRC</td>
<td>Australian Law Reform Commission</td>
</tr>
<tr>
<td>ANBG</td>
<td>Australian National Botanic Gardens</td>
</tr>
<tr>
<td>ANFIL</td>
<td>Australian Native Food Industry Limited</td>
</tr>
<tr>
<td>ANH</td>
<td>Australian National Herbarium</td>
</tr>
<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
</tr>
<tr>
<td>CLC</td>
<td>Central Land Council</td>
</tr>
<tr>
<td>CRC-REP</td>
<td>Cooperative Research Centre for Remote Economic Participation</td>
</tr>
<tr>
<td>CSIRO</td>
<td>Commonwealth Science and Industrial Research Organisation</td>
</tr>
<tr>
<td>DKCRC</td>
<td>Desert Knowledge Cooperative Research Centre</td>
</tr>
<tr>
<td>FAO</td>
<td>Food and Agriculture Organisation</td>
</tr>
<tr>
<td>HAL</td>
<td>Horticulture Australia Limited</td>
</tr>
<tr>
<td>HIA</td>
<td>Horticulture Innovation Australia</td>
</tr>
<tr>
<td>IAC</td>
<td>Indigenous Advisory Council</td>
</tr>
<tr>
<td>IBA</td>
<td>Indigenous Business Australia</td>
</tr>
<tr>
<td>NGIA</td>
<td>Nursery and Garden Industry Australia</td>
</tr>
<tr>
<td>NLC</td>
<td>Northern Land Council</td>
</tr>
<tr>
<td>NNTT</td>
<td>National Native Title Tribunal</td>
</tr>
<tr>
<td>PBR</td>
<td>Plant Breeder’s Right</td>
</tr>
<tr>
<td>RAP</td>
<td>Reconciliation Action Plan</td>
</tr>
<tr>
<td>RIRDC</td>
<td>Rural Industries Research and Development Corporation</td>
</tr>
<tr>
<td>TRIPS</td>
<td>Agreement on Trade Related Aspects of Intellectual Property</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environment Programme</td>
</tr>
<tr>
<td>WIPO</td>
<td>World Intellectual Property Organisation</td>
</tr>
</tbody>
</table>
ABSTRACT

Australia’s Aboriginal and Torres Strait Islander peoples are an eclectic society with diverse needs and aspirations in relation to the commercialisation of their traditional plant foods (bush foods). Their interests reflect different worldviews, social structures, personal circumstances and development goals. There is very little legal support for the interests of Aboriginal and Torres Strait Islander peoples in bush food commercialisation. This thesis uses a combination of methods to develop an integrated framework of legal and institutional strategies to better support the diverse interests of Aboriginal and Torres Strait Islander peoples in this commercial context.

The research draws upon legal and systems-based analysis to identify pivotal transactions that occur along bush food commercialisation pathways and interventions that might better enable Aboriginal and Torres Strait Islander peoples to realise their goals. While a central focus of the research is legal arrangements, of necessity the proposals suggested in this thesis go beyond the conventional bounds of legal research. This is because useful applications or reforms of the law depend upon there being potential strategies that the law might enable. A large part of this research has been to identify potential strategies and then place possible legal arrangements within this context.

The integrated framework of possibilities outlined in this thesis combines innovative uses of existing arrangements with new interventions to support as many interests as possible. This differs to current academic approaches that tend to propose single-instrument solutions for specific problems, especially those related to the use of Aboriginal and Torres Strait Islander knowledge. Such narrowly focused solutions cannot comprehensively support the diverse set of interests identified in discussions with Aboriginal and Torres Strait Islander peoples throughout this research project.

The thesis fills a gap in knowledge on ways to improve the laws regulating bush food commercialisation to better support the interests of Aboriginal and Torres Strait Islander peoples. It makes several original contributions, including the further development of a systems-based legal research method and identification of strategies that may provide real-world benefits for Aboriginal and Torres Strait Islander peoples. Most exciting is the identification of new ways through which governments and Aboriginal and Torres Strait Islander peoples can work together to advance social
justice goals and wellbeing outcomes. It is not part of the scope of this research to evaluate the acceptability or feasibility of these proposals in practice. This is a further task being advanced by the Cooperative Research Centre for Remote Economic Participation and its managing entity Ninti One, the funding agency for this work. A series of briefing papers included in the thesis are the starting point for this dialogue and further investigation.