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# **FARMERS' RIGHTS IN AUSTRALIA: COMMUNITY GARDENS MAY BE A WAY IN WHICH A DEVELOPED COUNTRY COMPLIES WITH ITS INTERNATIONAL OBLIGATIONS**

DANIELA GUITART, DR CATHERINE PICKERING, DR JASON BYRNE & DR CHARLES LAWSON\*

*The Food and Agriculture Organization of the United Nations (FAO) International Treaty on Plant Genetic Resources for Food and Agriculture provides for farmers' rights as recognition of the contribution farmers make to the conservation and development of plants for food and agriculture production. This article reports on a pilot study to illustrate how community gardens are one way that farmers' rights can be realised in a developed country. The study of community gardens in Brisbane and the Gold Coast cities in South East Queensland Australia found that these gardens represent important dynamic reserves of agro-biodiversity and farming practices that are likely to foster the conservation of germplasm that is poorly represented in industrial agricultural practices. Within the matrix of governmental laws, community gardens are a measure that promotes and protects a realised conception of farmers' rights.*

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## I INTRODUCTION

Farmers' rights are formally recognised in the Food and Agriculture Organization of the United Nations (FAO) *International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Treaty)* as recognition of the contribution farmers make to the conservation and development of plants for food and agriculture production.<sup>1</sup> The purpose of this article is to address Australia's commitment to the *Plant Treaty's* farmers' rights obligations using the specific example of community gardens. These gardens represent important dynamic *in situ* reservoirs of agro-biodiversity and they are a case study of how a developed country is promoting a particular conception of farmers' rights.

The major focus of recent work and analysis on *in situ* agricultural conservation has been on farming systems in developing countries.<sup>2</sup> This article focuses instead on urban community gardens in Brisbane and the Gold Coast cities in South East Queensland, Australia. Community gardens, in this context, are spaces used for communally shared gardening that, among a whole range of other benefits, promote the socio-cultural importance of food, maintain diverse food plants and use gardening practices that promote the continuity of different germplasm lines to those maintained in industrial

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<sup>1</sup> *International Treaty on Plant Genetic Resources for Food and Agriculture*, opened for signature 4 November 2002, 2400 UNTS 303 (entered into force 29 June 2004) art 9.1.

<sup>2</sup> See, for examples, S Padulosi, N Bergamini and T Lawrence (eds), *On-farm Conservation of Neglected and Underutilized Species: Status, Trends and Novel Approaches to Cope with Climate Change* (Bioversity International, 2012) and the various contributions therein; Devra Jarvis and Toby Hodgkin, 'The Maintenance of Crop Genetic Diversity On Farm: Supporting the Convention on Biological Diversity's Programme of Work on Agricultural Biodiversity' (2008) 9 *Biodiversity* 23; U Hodel, M Gessler, H Cai, V Thoan, N Ha, N Thu and T Ba, *In Situ Conservation of Plant Genetic Resources in Home Gardens of Southern Vietnam: A Report of Home Garden Surveys* (IPGRI, 1999); and so on.

agricultural practices, and all within an urban environment.<sup>3</sup> In this sense community gardens are a focus for *in situ* conservation of valuable plant genetic resources and the gardening practices used in these gardens promote the maintenance of these resources that attract the gaze of farmers' rights.

The article is structured as follows: the next part outlines the *Plant Treaty* basis for farmers' rights including the scope and content of farmers' rights; the following parts then address community gardens outlining a pilot study of practices and plant materials used in community gardens and the relevant governmental laws covering community gardens; and then the final part sets out a discussion and conclusion that community gardens are within a conception of farmers' rights consistent with the *Plant Treaty*, and most importantly, that governmental support is instrumental to realising these Farmers Rights, primarily through laws and limited financial resources that promote particular farming practices (such as those manifest in community gardens) that conserve plants food and agriculture production.

## II *PLANT TREATY* 'FARMERS' RIGHTS

The *Plant Treaty* was adopted in 2001,<sup>4</sup> entered into force in 2004,<sup>5</sup> and was the first formal treaty recognising farmers' rights. The concerns addressed by farmers' rights first crystallised in 1981.<sup>6</sup> They found expression in the *International Undertaking on Plant Genetic Resources (International Undertaking)* in 1983.<sup>7</sup> In an attempt to engage some of the developed countries' reservations about the inconsistency between plant breeder's rights and farmers' rights,<sup>8</sup> the *International Undertaking* was rendered more acceptable

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<sup>3</sup> See Laura Saldivar-Tanaka and Marianne Krasny, 'Culturing Community Development, Neighborhood Open Space, and Civic Agriculture: The Case of Latino Community Gardens in New York City' (2004) 21 *Agriculture and Human Values* 399; Karen Schmelzkopf, 'Urban Community Gardens as Contested Spaces' (1995) 85 *Geographical Review* 364.

<sup>4</sup> Food and Agriculture Organization of the United Nations, *Report of the Conference of FAO, Thirty-first Session* (2001) C 2001, [58] (Resolution 3/2001); and Appendix D.

<sup>5</sup> Commission on Genetic Resources for Food and Agriculture, *Second Meeting of the Commission on Genetic Resources for Food and Agriculture acting as Interim Committee for the International Treaty on Plant Genetic Resources for Food and Agriculture* (2004) CGRF A/MIC-2/04/REP, [7].

<sup>6</sup> Food and Agriculture Organisation of the United Nations, *Report of the Conference of FAO, Twenty-first Session* (1981) C 1981, [153] (Resolution 6/81, Preamble).

<sup>7</sup> Food and Agriculture Organisation of the United Nations, *Report of the Conference of FAO, Twenty-second Session* (1983) C 1983, [285] (Resolution 8/83).

<sup>8</sup> The developed countries reservations were essentially that their intellectual property protections and various 'other domestic considerations' were inconsistent with recognising a farmer's 'right', albeit these reservations might be overcome if the undertakings were 'modified': Food and Agriculture Organisation of the United Nations, *Report of the Conference of FAO, Twenty-third Session* (1985) C 1985, [291].

through a series of agreed interpretations.<sup>9</sup> These agreed interpretations in 1989 recognised a balance between plant breeder's rights and Farmer's Rights,<sup>10</sup> and the acceptance that the plant breeder's rights advocated by the *International Undertaking* were to be interpreted as accepting Farmer's Rights.<sup>11</sup> In 1991 parties endorsed a farmers' rights mechanism (albeit never realised).<sup>12</sup> At this stage farmers' rights were conceived, in the terms of the resolution, to:

- (a) ensure that the need for conservation is globally recognized and that sufficient funds for these purposes will be available;
- (b) assist farmers and farming communities, in all regions of the world, but especially in the areas of origin/diversity of plant genetic resources, in the protection and conservation of their plant genetic resources, and of the natural biosphere;
- (c) allow farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources, through plant breeding and other scientific methods (Resolution 5/89).<sup>13</sup>

There were ongoing discussions about farmers' rights that were given fresh impetus at the conclusion of the *Convention on Biological Diversity* negotiations,<sup>14</sup> the *Nairobi Final Act* and the Agenda 21 commitments in 1992 that directed discussions at the FAO.<sup>15</sup> The subsequent FAO discussions addressed, among other matters, 'the issue of realisation of

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<sup>9</sup> See Food and Agriculture Organisation of the United Nations, *Report of the Conference of FAO, Twenty-sixth Session (1991) C 1991, [104] (Resolution 3/91)*; Food and Agriculture Organisation of the United Nations, *Report of the Conference of FAO, Twenty-fifth Session (1989) C 1989, [108] (Resolution 5/89 and Resolution 4/89)*.

<sup>10</sup> Food and Agriculture Organisation of the United Nations, *Report of the Conference of FAO, Twenty-fifth Session (1989) C 1989, [108] (Resolution 5/89 and Resolution 4/89) [105]*.

<sup>11</sup> Food and Agriculture Organisation of the United Nations, *Report of the Conference of FAO, Twenty-fifth Session (1989) C 1989, [108] (Resolution 4/89) [3]*.

<sup>12</sup> The mechanism was to be 'an international fund on plant genetic resources which will support plant genetic conservation and utilisation programmes, particularly, but not exclusively, in the developing countries': C 1991, above n 9, [104] (Resolution 3/91).

<sup>13</sup> C 1989, above n 9, [108] (Resolution 5/89).

<sup>14</sup> See Commission of Plant Genetic Resources, *Report of the Fourth Session of the Commission of Plant Genetic Resources (1991) CPGR/91/REP, [9(ii)]*; Commission of Plant Genetic Resources, *Report of the Third Session of the Commission of Plant Genetic Resources (1989) CPGR/89/REP, [10]*; Commission of Plant Genetic Resources, *Report of the Second Session of the Commission of Plant Genetic Resources (1987) CPGR/87/REP, [78]*.

<sup>15</sup> See Secretariat of the Convention on Biological Diversity, *Handbook of the Convention on Biological Diversity Including its Cartagena Protocol on Biosafety* (3<sup>rd</sup> edition, 2005) 408 (setting out the *Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity*, Resolution 3); United Nations, *Earth Summit: Agenda 21 – The United Nations Programme of Action from Rio* (United Nations, 1992) [14.60.a].

farmers' rights' and the re-negotiating of the *International Undertaking*.<sup>16</sup> The content of farmers' rights remained hotly contested through 1994 — 98.<sup>17</sup> A compromise text was agreed in 1999 that limited responsibility for farmers' rights to national governments:

farmers' rights ... would have to be recognized internationally, *it being clearly understood* however that responsibility for realising these rights would be the responsibility of individual governments, which would be required to protect and promote them, to the extent they considered appropriate and in accordance with national legislation (emphasis added).<sup>18</sup>

The text for farmers' rights was eventually settled and adopted in the final *Plant Treaty* in 2001.<sup>19</sup> The main body of the *Plant Treaty* sets out the substantive farmers' rights provisions:

9.1 The Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.

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<sup>16</sup> Food and Agriculture Organisation of the United Nations, *Report of the Conference of FAO, Twenty-seventh Session* (1993) C 1993, [105] (Resolution 7/93, [1]). See also Fourth International Technical Conference on Plant Genetic Resources, *Global Plan of Action for the Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture* (FAO, 1996) [32].

<sup>17</sup> See Commission on Plant Genetic Resources for Food and Agriculture, *Report of the Commission on Plant Genetic Resources, Fifth Extraordinary Session* (1998) CPRG-Ex5/98/REP, [5]-[7] and Appendix C (pp 9-11); Commission on Plant Genetic Resources for Food and Agriculture, *Report of the Commission on Plant Genetic Resources, Fourth Extraordinary Session* (1997) CPRG-Ex4/97/REP, [5]-[6] and Appendix C (pp C11-C15); Commission on Plant Genetic Resources for Food and Agriculture, *Report of the Commission on Plant Genetic Resources, Seventh Session* (1997) CPRG-7/97/REP, [34]-[35] and Appendix I (p 15); Commission on Plant Genetic Resources for Food and Agriculture, *Report of the Commission on Plant Genetic Resources, Third Extraordinary Session* (1996) CPRG-Ex3/96/REP, [5], [10], Appendix D, [17]-[19]; Commission on Plant Genetic Resources for Food and Agriculture, *Report of the Commission on Plant Genetic Resources, Second Extraordinary Session* (1996) CPRG-Ex2/96/REP, [32]-[39]; Commission on Plant Genetic Resources, *Report of the Commission on Plant Genetic Resources, Sixth Session* (1995) CPRG-6/95/REP, [73] and Appendix K; Commission on Plant Genetic Resources, *Report of the Commission on Plant Genetic Resources, First Extraordinary Session* (1994) CPRG-Ex1/94/REP, Appendix D [12].

<sup>18</sup> Commission on Plant Genetic Resources for Food and Agriculture, *Report of the Chairman of the Commission on Genetic Resources for Food and Agriculture on the status of the negotiations for the revision of the International Undertaking on Plant Genetic Resources, in harmony with the Convention on Biological Diversity* (1999) CGRFA-8/99/13, [9].

<sup>19</sup> See C 2001, above n 4, [58] (Resolution 3/2001) and Appendix D; Food and Agriculture Organization of the United Nations, *Report of the Council of FAO, Hundred and Twenty-first Session* (2001) CL 121/REP, [60]-[66]; Commission on Plant Genetic Resources for Food and Agriculture, *Report of the Commission on Plant Genetic Resources for Food and Agriculture, Sixth Extraordinary Session* (2001) CGRFA-Ex-6/01/REP, [6] and Appendix B; Commission on Plant Genetic Resources for Food and Agriculture, *Report of the Commission on Plant Genetic Resources for Food and Agriculture, Eighth Session* (1999) CGRFA-8/99/REP, [7]-[9] and Appendix E (p E2).



9.2 The Contracting Parties agree that the responsibility for realizing farmers' rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote farmers' rights, including:

- (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
- (b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and
- (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

9.3 Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.

Put simply, the obligation on Contracting Parties is that they 'should' take measures 'to protect and promote farmers' rights' according to the national government's 'needs and priorities'.<sup>20</sup> Since the adoption of the *Plant Treaty* in 2001,<sup>21</sup> the Treaty's Governing Body has addressed the implementation of farmers' rights.<sup>22</sup> Australia has reported its commitments to farmers' rights as:

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<sup>20</sup> *International Treaty on Plant Genetic Resources for Food and Agriculture*, Art 9(2). See also Gerald Moore and Witold Tymowski, *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture*, IUCN Environmental Policy and Law Paper No 57 (IUCN, 2005) 72-75; Gregory Rose, 'International Law in the 21<sup>st</sup> Century: The International Treaty on Plant Genetic Resources for Food and Agriculture' (2003) 15 *Georgetown International Environmental Law Review* 583, 603-604; David Cooper, 'The International Treaty on Plant Genetic Resources for Food and Agriculture' (2002) 11 *Review of European Community and International Environmental Law* 1, 3-4; Kerry ten Kate and Carolina Lasén Diaz, 'The Undertaking Revisited: A Commentary on the Revision of the International Undertaking on Plant Genetic Resources for Food and Agriculture' (1997) 6 *Review of European Community and International Environmental Law* 284, 287-288.

<sup>21</sup> C 2001, above n 4, [58] (Resolution 3/2001) and Appendix D.

<sup>22</sup> See Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, *Compilation of Submissions by Contracting Parties and other Relevant Organizations, and the Reports of Regional Workshops on the Implementation of Article 9* (2013) IT/GB-5/13/Inf.8; Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, *Fourth Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture* (2011) IT/GB-4/11/Report, [29] and Appendix A.6 (Resolution 6/2011, [2] (p 46)); Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, *Third Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture* (2009) IT/GB-3/09/Report, [49] and Appendix A.6 (Resolution 6/2009, [3] and [4] (p 34)); Governing Body of the International Treaty on

The rights of Australian farmers, in the context of the objectives of Article 9 [Farmer' Rights], are established under a broad legislative framework that provides a comprehensive set of intellectual, property and legal rights, including common law rights.<sup>23</sup>

The following part describes how community gardens contain agro-biodiversity and their gardening practices promote agro-diversity including at the level of different types of plants and in terms of the germplasm in the different types of food plants in use. It then goes on to assess the legislative framework applying to community gardens. The subsequent analysis then links this legislative framework to a conception of farmers' rights that is consistent with Australia's stated Treaty commitments.

### III PRACTICES AND PLANT MATERIALS USED IN COMMUNITY GARDENS

To assess what is grown in community gardens, how it is grown, and why, a pilot study was conducted of 50 community gardens around Brisbane and the Gold Coast cities. The study identified community gardens through a snowballing search, where council officers and administrators of identified gardens were asked to confirm and identify further gardens. Of the 53 gardens identified, 50 were willing to participate in the research (see Table 1 and 2). Garden administrators were provided with a questionnaire about gardening philosophy and practice, the plants grown in the gardens, the source of plants/seeds, the motivation of the gardeners to establish the community gardens, garden facilities, and the management of the gardens. The garden manager or community representative provided a response for the community garden so that there was only one questionnaire completed from each community garden. In terms of farmers' rights, the pilot study is significant in that it addressed the diversity of plants grown in the gardens, the types of gardening practices used to grow the plants, and the sourcing of the plants grown. Having assessed that the gardens are an import source of agro-biodiversity and that the gardening practices foster this, the study also demonstrated the important place of governments in enabling community gardens.

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Plant Genetic Resources for Food and Agriculture, *Second Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture* (2007) IT/GB-2/07/Report, [75] (Resolution 2/2007, [vii] and [viii] (p 13)); Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, *First Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture* (2006) IT/GB-1/06/Report, [54] and Appendix N (p 3).

<sup>23</sup> Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, *Collection of Views and Experiences Submitted by Contracting Parties and Other Relevant Organizations on the Implementation of Article 9* (2009) IT/GB-3/09/Inf.6 Add.1, 3.

Across the 50 community gardens surveyed, 294 different types of food plants were grown. These include representatives of temperate, subtropical and even some tropical foods and plants that contain a diversity of phytochemicals including representatives of major 'food colour' groups. Many plants came from three main families with 28 types of Asteraceae (such as tarragon, endive, dandelion, artichoke, and so on), 26 types of Fabaceae (such as peas, beans, and so on), and 21 types of Brassicaceae (such as rocket, broccoli, radish, cabbage, brussels sprouts, and so on). On average, 72 different types of plants were grown in each garden consisting of 27 types of vegetable, 14 fruits, 18 herbs, five legumes, and one nut.

The study found that there were two main types of gardening philosophies used in these community gardens (organic/chemical free and permaculture) and that gardening philosophies were closely aligned with actual practices. Of the 50 gardens examined, 21 adhered to permaculture gardening practices. Permaculture is essentially a gardening technique developed by the international permaculture movement as sustainable agriculture through the conscious design and maintenance of agriculturally productive systems without the use of synthetic chemicals.<sup>24</sup> The gardening practices used in the permaculture community gardens, and many of those used in the other 29 gardens, differ from those used in modern industrial agriculture. For example, community gardens often avoid using synthetic fertilisers, herbicides, fungicides and pesticides and instead rely on companion planting, composting, recycling, and non-chemical weeding. They also often participate in the dynamic conservation of plants through selection factors such as favouring germplasm better adapted to permaculture practices and sourcing non-industrial agriculture germplasm.

Plants sourced for the community gardens were predominantly seeds and seedlings (seeds 36 per cent, seedlings 38 per cent, and cuttings 26 per cent) (Table 3). Cuttings were predominantly sourced from personal associations (friends/families' gardens 60 per cent). Seedlings were predominantly from profit making 'mainstream' sources (garden outlets 41 per cent, online purchases 19 per cent) but also included seedlings obtained from farmers markets 16 per cent) and from non-profit sources (grower meetings 10 per cent and swapping 14 per cent). Seeds were predominantly from profit making 'mainstream' sources (garden outlets 27 per cent, online purchases 21 per cent)

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<sup>24</sup> See generally Bill Mollison, *Introduction to Permaculture* (Tagari Publications, 2<sup>nd</sup> edition, 1994).

but again included farmers markets 16 per cent and an important contribution from seed saving and swapping (grower meetings 5 per cent, seed saving 30 per cent, and swapping 13 per cent). These results show that a significant proportion of seeds and seedlings were sourced outside the profit making firms (seedlings 24 per cent and seeds 49 per cent), cuttings were predominantly sourced outside the profit making firms (cuttings 85 per cent), and that community gardens are a reservoir for some heirloom varieties (17 per cent).

In summary, the pilot study demonstrated that community gardens contain a high diversity of food plants, including germplasm favoured by 'alternative' style gardening practices as opposed to those used in more traditional gardening and industrial agricultural practices. Some of these germplasm are also shared among and within the gardens fostering adaptations to these different farming practices. In short, community gardens represent important dynamic reserves of agro-biodiversity and farming practices that are likely to foster the conservation of germplasm.

#### IV LEGISLATIVE PLACE OF COMMUNITY GARDENS

Community gardens in Australia are administered by local government authorities, also called local councils. Local councils are empowered under State laws. In the pilot study all the community gardens were within the State of Queensland, albeit the cities of Brisbane and the Gold Coast are subject to slightly different legal regimes. The local councils in Queensland are constituted under the *Local Government Act 2009* (Qld) (all councils except the Brisbane City Council) and the *City of Brisbane Act 2010* (Qld) (only the Brisbane City Council).<sup>25</sup> Each council is a separate legal entity,<sup>26</sup> which is comprised of councilors elected under the *Queensland Local Government Electoral Act 2011* (Qld)<sup>27</sup> and council staff, who are engaged under the authority of the *Local Government Act 2009* (Qld)<sup>28</sup> or the *City of Brisbane Act 2010* (Qld).<sup>29</sup> The statutory schemes applying to community gardens are:

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<sup>25</sup> See *Constitution of Queensland 2001* (Qld) s 71.

<sup>26</sup> *Local Government Act 2009* (Qld) s 11; *City of Brisbane Act 2010* (Qld) s 10.

<sup>27</sup> See *Queensland Local Government Electoral Act 2011* (Qld) s 22.

<sup>28</sup> *Local Government Act 2009* (Qld) s 9(1).

<sup>29</sup> *City of Brisbane Act 2010* (Qld) s 11(1).

- (a) *Gold Coast City Council* (Table 1) — The Gold Coast City Council is constituted under the *Local Government Act 2009* (Qld) for an area of the South East region of Queensland.<sup>30</sup> Within this area the Gold Coast City Council has a broad power, albeit within the scope of what a State can validly do,<sup>31</sup> 'to do anything that is necessary or convenient for the good rule and local government of its local government area'.<sup>32</sup> According to these powers the Gold Coast City Council has set aside land and provided financial support for community gardens.<sup>33</sup> This land is primarily located on existing recreation reserves.
- (b) *Brisbane City Council* (Table 2) — The Brisbane City Council is constituted under the *City of Brisbane Act 2010* (Qld) for 'the boundaries of Brisbane'.<sup>34</sup> Within this area the Brisbane City Council has a broad power, albeit within the scope of what a State can validly do,<sup>35</sup> 'to do anything that is necessary or convenient for the good rule and local government of Brisbane'.<sup>36</sup> According to these powers the Brisbane City Council has set aside land and provided financial support for community gardens, also primarily on recreation reserves.<sup>37</sup>

While land for the community garden is the major governmental support (see Table 1 and 2), there is also some financial and other support through governmental grant schemes and administration assistance such as maintaining a website.<sup>38</sup> Within these arrangements there is an ongoing dialogue between each community garden (through steering committees and annual general meetings) and each council about the operations and management of the community gardens, including reporting and reviewing

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<sup>30</sup> *Local Government Act 2009* (Qld) ss 8(1) and (4); *Local Government Regulation 2012* (Qld) r 4(1) and sch 1 ('Gold Coast').

<sup>31</sup> *Local Government Act 2009* (Qld) s 9(2).

<sup>32</sup> *Local Government Act 2009* (Qld) ss 9(1) and 28(1).

<sup>33</sup> See Gold Coast City Council, *2011-2012 Annual Report* (Gold Coast City Council, 2012) 43, 146, 148, 150 and 151; Gold Coast City Council, *Operational Plan 2011-2012* (Gold Coast City Council, 2011) 16; Gold Coast City Council, *Corporate Plan 2009-2017* (Gold Coast City Council, 2009) 27.

<sup>34</sup> *City of Brisbane Act 2010* (Qld) s 7(4); *City of Brisbane Regulation 2012* (Qld) r 3(1).

<sup>35</sup> *City of Brisbane Act 2010* (Qld) s 11(2).

<sup>36</sup> *City of Brisbane Act 2010* (Qld) ss 11(1) and 29(1).

<sup>37</sup> See Brisbane City Council, *Cultivating Community Gardens 2012/2013: Grants Guidelines* (Brisbane City Council, 2012); Brisbane City Council, *Our Shared Vision: Living in Brisbane 2026* (Brisbane City Council, 2005) 34.

<sup>38</sup> For example, on the Gold Coast the Gold Coast City Council lists community gardens as a part of its Corporate Plan, a process for joining and forming community gardens and finance through grants to set up and maintain community gardens: see Gold Coast City Council, *Community Gardens Start-up Kit* (Gold Coast City Council, 2013) 5; Gold Coast City Council, *2011-2012 Annual Report*, above n 33, 43.

obligations.<sup>39</sup> The arrangement is probably best described as a partnership between government and individuals with the government making available land and some other limited resources to enable community gardens.

Both the Gold Coast City Council and the Brisbane City Council limit agriculture activities within their areas. There is generally a ban on keeping farm animals (except some cats and some dogs and some poultry on lots greater than 800m<sup>2</sup> in area);<sup>40</sup> limits on certain forms of vegetation;<sup>41</sup> and a requirement for permits or permission to undertake farm-like activities in public places.<sup>42</sup> The effect of these local laws is that community gardens in public places require permission and/or a permit from the local council. The regulation of community gardens also requires the community group to maintain public liability insurance.<sup>43</sup>

## V DISCUSSION AND CONCLUSIONS

The analysis so far demonstrates that farmers' rights are only an obligation in the *Plant Treaty* that Contracting Parties 'should ... take measures to protect and promote farmers' rights' according to the national government's 'needs and priorities'.<sup>44</sup> Australia's commitment to these obligations has not been through a comprehensive regime of farmers' rights.<sup>45</sup> Instead, Australia relies on its existing regime of a 'broad legislative framework that provides a comprehensive set of intellectual, property, and legal rights'.<sup>46</sup> Within this broad legislative framework, the analysis in this article shows that community gardens are within the regulatory ambit of local government — specifically the Gold Coast City Council and the Brisbane City Council in the pilot study. In this sense, community gardens are farms of a sort, and community gardeners are farmers promoting particular farming practices. These practices include making and continuing to make, a

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<sup>39</sup> See, for example, Gold Coast City Council, *The Process* (Gold Coast City Council, 2012) 28-29.

<sup>40</sup> See, for examples, *Local Law No. 12 (Animal Management) 2013* (GCCC) ll 6(1); *Subordinate Local Law No. 12 (Animal Management) 2013* (GCCC) slls 4-77.

<sup>41</sup> See, for example, *Local Law No. 6 (Vegetation Management) 1998* (GCCC).

<sup>42</sup> See, for example, *Local Law No. 9 (Parks and Reserves) 2008* (GCCC) lls 12, 13 and 21.

<sup>43</sup> See Gold Coast City Council, *The Process*, above n 39, 29.

<sup>44</sup> *International Treaty on Plant Genetic Resources for Food and Agriculture*, Art 9(2).

<sup>45</sup> For an example of such a scheme see *Protection of Plant Varieties and Farmers' Rights Act 2001* (In). For overviews of the scheme see, for examples, Chanchal Chaturvedi, 'Analysis of Farmers' Rights: In the Light of Protection of Plant Varieties and Farmers' Rights Act of India' (2011) 33 *European Intellectual Property Review* 708; Anitha Ramanna and Melinda Smale, 'Rights and Access to Plant Genetic Resources under India's New Law' (2004) 22 *Development Policy Review* 423; and so on.

<sup>46</sup> IT/GB-3/09/Inf.6 Add.1, above n 23, 3.

contribution to conserving and developing plant genetic resources of value to food and agriculture within the ambit of farmers' rights as set out in the *Plant Treaty*. As such, community gardens are a manifestation of Australia's commitments to farmers' rights in the *Plant Treaty* and an illustration of realising these rights in a developed country.

There is no consensus yet about how farmers' rights should be realised. Perhaps the leading proponent of farmers' rights has been the government of India under the *Protection of Plant Varieties and Farmers' Rights Act 2001* (In).<sup>47</sup> The entitlements of farmers' rights flow to 'farmers' that are defined to mean:

... any person who:

- (i) cultivates crops by cultivating the land himself; or
- (ii) cultivates crops by directly supervising the cultivation or land through any other person; or
- (iii) conserves and preserves, severally or jointly, with any other person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties.<sup>48</sup>

For 'farmers' under this scheme there is an entitlement to register a new plant variety,<sup>49</sup> compensation from the 'Gene Fund'<sup>50</sup> for 'conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation',<sup>51</sup> and a right 'to save, use, sow, re-sow, exchange, share or sell his farm produce' that is not packed and labelled as a protected variety.<sup>52</sup> In addition to these entitlements, there is also a statutory right for 'tribal or rural families' to be consulted about using genetic materials they have conserved in plant variety claims,<sup>53</sup> and an expanded standing to bring actions on behalf of farmers (including to non-governmental organisations).<sup>54</sup> Central to this conception of farmers' rights is the broad ambit of the 'Gene Fund', including making payments for:

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<sup>47</sup> For overviews of the scheme and its dealing with Farmers' Rights see, for examples, Chaturvedi, above n 45; Ramanna and Smale, above n 45; and so on.

<sup>48</sup> *Protection of Plant Varieties and Farmers' Rights Act 2001* (In) s 2(k).

<sup>49</sup> *Protection of Plant Varieties and Farmers' Rights Act 2001* (In) s 39(1)(i).

<sup>50</sup> *Protection of Plant Varieties and Farmers' Rights Act 2001* (In) s 45.

<sup>51</sup> *Protection of Plant Varieties and Farmers' Rights Act 2001* (In) s 39(1)(iii).

<sup>52</sup> *Protection of Plant Varieties and Farmers' Rights Act 2001* (In) s 39(1)(iv).

<sup>53</sup> *Protection of Plant Varieties and Farmers' Rights Act 2001* (In) s 40(1).

<sup>54</sup> *Protection of Plant Varieties and Farmers' Rights Act 2001* (In) s 41(1).

the expenditure for supporting the conservation and sustainable use of genetic resources including *in-situ* and *ex-situ* collections and for strengthening the capability of the Panchayat [a village council] in carrying out such conservation and sustainable use.<sup>55</sup>

The key elements of the *Protection of Plant Varieties and Farmers' Rights Act 2001* (In) model for farmers' rights is an entitlement for 'farmers' to access funds and be consulted about the plant materials they are dealing with.

The *African Model Legislation for the Protection of Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources* has a slightly different conception of farmers' rights.<sup>56</sup> The African model legislation provides distinct farmers' rights to the 'traditional knowledge relevant to plant and animal genetic resources', an 'equitable share of benefits arising from the use of plant and animal genetic resources', to 'participate in making decisions, including at the national level, on matters related to the conservation and sustainable use of plant and animal genetic resources', and some protections for farm saved seeds.<sup>57</sup> The African model law also provides for a fund to share financial resources with eligible farmers.<sup>58</sup>

A number of other countries have identified elements of their laws that support farmers' rights,<sup>59</sup> and others have signalled an intention to adopt such laws.<sup>60</sup> There has been

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<sup>55</sup> *Protection of Plant Varieties and Farmers' Rights Act 2001* (In) s 45(2)(c).

<sup>56</sup> See also African Union Commission, *A Gap Analysis Report on the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* (African Union Commission, 2012) 9-12; J Ekpere, 'African Model Legislation for the Protection of Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources' in Kent Nnadozie, Robert Lettington, Carl Bruch, Susan Bass and Sarah King (eds), *African Perspectives on Genetic Resources: A Handbook on Laws, Policies, and Institutions Governing Access and Benefit-Sharing* (African Union, 2003) 275-286.

<sup>57</sup> *African Model Legislation for the Protection of Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources*, Art 26.

<sup>58</sup> *African Model Legislation for the Protection of Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources*, Art 66(2).

<sup>59</sup> See IT/GB-3/09/Inf.6 Add.1, above n 23, 3-4; Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, *Collection of Views and Experiences Submitted by Contracting Parties and other Relevant Organizations on the Implementation of Article 9* (2009) IT/GB-3/09/Inf.6 Add.4; Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, *Collection of Views and Experiences Submitted by Contracting Parties and other Relevant Organizations on the Implementation of Article 9* (2009) IT/GB-3/09/Inf.6 Add.5. See also Manuel Ruiz and Ronnie Vernooy, 'Race to the Bottom Versus Slow Walk to the Top' in Manuel Ruiz and Ronnie Vernooy (eds), *The Custodians of Biodiversity: Sharing Access to and Benefits of Genetic Resources* (Earthscan, 2012) 174-175 (and the cases referred to therein).

<sup>60</sup> See IT/GB-3/09/Inf.6 Add.1, above n 23, 4; Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, *Collection of Views and Experiences Submitted by Contracting Parties and other Relevant Organizations on the Implementation of Article 9* (2009) IT/GB-3/09/Inf.6, [9] and



considerable work done to try and identify the likely scope of farmers' rights.<sup>61</sup> Despite all this activity, the scope and content of farmers' rights remains uncertain and contested and has expanded to address a very wide range of socio-political,<sup>62</sup> economic, and cultural rights within a broader conception of farmers having a bundle of rights to 'land, water, energy, culture, social fabric, household, and individual well-being'.<sup>63</sup> Within this milieu, the present analysis illustrates a particular realisation of farmers' rights — community gardens as a partnership between government and individuals, with the government making available land and some limited financial and intellectual resources to enable community gardens. A measure of the obligation in the *Plant Treaty* to protect and promote farmers' rights is that without this governmental support, community gardens and community gardeners would not be as prominent, with a consequential loss of the gardening practices in community gardens and the diversity of plants that these

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Annex I; . See also Commission on Genetic Resources for Food and Agriculture, *The Second Report on The State of the World's Plant Genetic Resources for Food and Agriculture* (FAO, 2010) 133-134.

<sup>61</sup> See Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, *Collection of Views and Experiences Submitted by Contracting Parties and other Relevant Organizations on the Implementation of Article 9* (2009) IT/GB-3/09/Inf.6 Add.2 (Centre for Genetic Resources, The Netherlands and the Community Technology Development Trust, Zimbabwe); Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, *Collection of Views and Experiences Submitted by Contracting Parties and other Relevant Organizations on the Implementation of Article 9* (2009) IT/GB-3/09/Inf.6 Add.3 (Fridtjof Nansen Institute, Norway). See also Juanita Chaves Posada, *Mechanisms by which Centers of the CGIAR Consortium can Support the Development of Appropriate Policies and Procedures for the Recognition and Promotion of Farmers' Rights* (Global Forum on Agricultural Research, 2013).

<sup>62</sup> Literature has also addressed Farmers' Rights in the context of intellectual property: see, for examples, Lauren Winter, 'Cultivating Farmers' Rights: Reconciling Food Security, Indigenous Agriculture, and TRIPS' (2010) 43 *Vanderbilt Journal of Transnational Law* 223; Chidi Oguamanam, 'Regime Tension in the Intellectual Property Rights Arena: Farmers' Rights and Post-TRIPS Counter Regime Trends' (2006) 29 *Dalhousie Law Journal* 413; Craig Borowiak, 'Farmers' Rights: Intellectual Property Regimes and the Struggle over Seeds' (2004) *Politics and Society* 511; CS Srinivasan, 'Exploring the Feasibility of Farmers' Rights' (2003) 21 *Development Policy Review* 419; Michael Blakeney, 'Protection of Plant Varieties and Farmers' Rights' (2002) 24 *European Intellectual Property Review* 9; A Ravishankar and Sunil Archak, 'Searching for Policy Options: Is CoFaB a Suitable Alternative to UPOV?' (1999) 34 *Economic and Political Weekly* 3661; Vandana Shiva, 'Agricultural Biodiversity, Intellectual Property Rights and Farmers' Rights' (1996) 31 *Economic and Political Weekly* 1621; Sidney Williams, 'There is Not a Conflict Between Intellectual Property and the Rights of Farmers in Developing Countries' (1991) 4 *Journal of Agricultural and Environmental Ethics* 143; Hope Shand, 'There is a Conflict Between Intellectual Property and the Rights of Farmers in Developing Countries' (1991) 4 *Journal of Agricultural and Environmental Ethics* 131.

<sup>63</sup> Wilhelmina Pelegrina and Renato Salazar, 'Farmers' Communities: A Reflection on the Treaty from Small Farmers' Perspectives' in Christine Frison, Francisco López, and José T. Esquinas-Alcázar (eds), *Plant Genetic Resources and Food Security: Stakeholder Perspectives on the International Treaty on Plant Genetic Resources for Food and Agriculture* (Earthscan, 2011) 176. For examples of the breadth of potential socio-political, economic and cultural rights see, for example, Shiva, *ibid*; MS Swaminathan (ed), *Agrobiodiversity and Farmers' Rights* (Konark Publishers, 1996) and the contributions therein. See also Oguamanam, *ibid* 292 describing Farmers' Rights as 'a conceptual morass', 'navigating a slippery terrain littered with banana skins', and 'the conceptual quagmire'. And see Fadya Orozco, Donald Cole, Greg Forbes, Jürgen Kroschel, Susitha Wanigaratne, and Denis Arica, 'Monitoring Adherence to the International Code of Conduct: Highly Hazardous Pesticides in Central Andean Agriculture and Farmers' Rights to Health' (2009) 15 *International Journal of Occupational and Environmental Health* 255 for a discussion of the emerging connections between the environmental justice movement and Farmers' Rights.

practices engender. Most importantly, however, this analysis demonstrates that community gardens do represent important dynamic reserves of agro-biodiversity and farming practices that foster the conservation of germplasm. This realises farmers' rights in a developed country and, as such, demonstrates another conception of farmers' rights and the empirical basis of the commitments in the *Plant Treaty*.

**Table 1: Gold Coast City Council partnered community gardens constituted under the authority of the *Local Government Act 2009 (Qld)*.**

<b>Name of community garden</b>	<b>Address</b>
Ashmore Community Garden	Ashmore State School, Currumburra Road, Ashmore
Broadbeach Community Garden	c/o 1/9 Amrick Avenue, Broadbeach
Coombah Community Garden	164-172 Oxley Drive Coombah
Joan Park Community Garden	Joan Street, Southport
Labrador Community Garden	Olsen Avenue and Jacob Drive, Labrador
Loders Creek Community Garden	Beale Street, Southport
Nerang Community Garden	Lawrence Drive, Nerang
Peachey Community Garden	Corner McReadie and Tillyroen Roads, Ormeau
Southern Beaches Community Garden	Tugun Community Hall, Tugun Street, Tugun
Varsity Vegies Community Garden	Jim Harris Park, Mattocks Road, Varsity Lakes

**Table 2: Brisbane City Council partnered community gardens constituted under the authority of the *City of Brisbane Act 2010 (Qld)*.**

<b>Name of community garden</b>	<b>Address</b>
Acacia Ridge Community Garden	21 Hanify Street, Acacia Ridge
Aspley Special School Garden	751 Zillmere Rd, Zillmere
Balaangala Indigenous Food Garden	98 Yoorala Street, The Gap
Banyo Community Garden	37 Hilltop Place, Banyo
Beelarong Community Farm	Corner York and Beverley Streets, Morningside
Bulimba Creek Catchment Co-ordinating Committee	1358-1368 Old Cleveland Road, Carindale
Bulimba State School Garden	261 Oxford Street, Bulimba
Burnie Brae Park	Kuran Street, Chermside
Carindale PCYC	27 Narracott Street, Carina
Centacare North East Community Care	20 Cabbage Road, Northgate
Coorparoo Community Garden	15 York Street, Coorparoo
Crossroads Community Garden	91 Maundrell Terrace, Chermside West
Delaware Street Community Garden	46 Delaware Street, Geebung
Golden Years Seniors Centre	15 Jenner Street, Nundah
Graceville/Sherwood Community Garden	79 Waratah Ave, Graceville, Qld
Green Corner Community Garden	Corner Waterworks Rd & Jubilee Terrace, Ashgrove
Green P Community Garden	106 Kempster Street, Deagon
Abbeville Street Community Garden	41 Abbeville Street, Upper Mt Gravatt
Inala Community Garden	105 Poinsettia Street, Inala
Inspiration Garden	118 Blackwood Ave, Morningside
Jane Street Community Garden	124 Jane Street, West End
Jeay's Street Community Garden	8 Jeays Street, Bowen Hills
Kelvin Grove Community Garden	48 Blamey Street, Kelvin Grove
Koala Park Community Garden	108 Vendale Avenue, Moorooka
Kyabra Street Community Garden	Kyabra Street, Runcorn
Lyons Playground	Sankey Street, Highgate Hill
Northey Street City Farm	Northey Street, Windsor
Nyanda State High School Garden	19 Fairlie Terrace, Salisbury
Paradise Street Community Garden	29 Paradise Street, Highgate Hill
Rocks Riverside Park	Counihan Road, Seventeen Mile Rocks
Sandbag Community Garden	153 Rainbow Street, Sandgate
St Clements Church Garden	14 Eudunda Street, Stafford
The Pocket Community Garden	97 Preston Street, East Brisbane
Vera Street Community Garden	78 Bywong Street, Toowong
Wynnum Manly Community Garden	38 Bethania Street, Lota
Yoorala Street Community Garden	98 Yoorala Street, The Gap

**Table 3: Questions and results of community garden study.**

Of the 53 identified community gardens in the region, 50 responded to the questions.

Question	Answers	Results
Where are the majority of the plants sourced from? (Check all that apply)	Cuttings	33
	Seedlings	47
	Seeds	45
	Other	-
If <b>cuttings</b> , where are the majority of them sourced from? (Check all that apply)	We swap in between members from the garden	13
	From friends/family's gardens	32
	From gardening workshops	2
	Local farmers markets	6
	Other	-
If <b>seedlings</b> , where are the majority of them sourced from? (Check all that apply)	Supermarket	-
	Gardening outlet (e.g. Bunning's, Garden World, etc.)	34
	Online Organic Seedlings Store (e.g. Heirloom Seedlings)	16
	Local farmers markets	13
	Gold Coast/Brisbane Organic Growers Club Meetings	8
	We swap in between members from the garden	12
	Other	-
If <b>seeds</b> , where are the majority of them sourced from? (Check all that apply)	Supermarket	3
	Gardening outlet (e.g. Bunning's, Garden World, etc.)	27
	Online Organic Seed Store (e.g. Eden Seeds)	21
	Gold Coast/Brisbane Organic Growers Club Meetings	5
	We don't buy seeds anymore, only save	30
	We swap in between members from the garden	13
	Other	-
Is there any policy/emphasis for sourcing seeds? (Check only one)*	We only use certified organic seeds	2
	We only use heirloom varieties	1
	We try to use as much organic but it's not always possible	13
	We try to use as much heirloom varieties but it's not always possible	9
	No, anyone is free to use any seeds	28
	Other	-
Is the garden a member of Seed Savers Network? (Check only one)	Yes	7
	No	43

\* Notably some questionnaires checked more than one response.

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