

Know your rights to your Aboriginal plant knowledge

A guide for Aboriginal knowledge holders on recording and commercialising Aboriginal plant knowledge





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This report covers many complex areas of law in a simplified format, and is not intended as legal advice.

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Important legal notice

This paper provides general advice on the relevant laws and policies as at May 2010. It is not intended to be legal advice. For your particular legal issue, we recommend that you seek independent legal advice from a suitably qualified legal practitioner. We would be happy to provide you with this advice, on instruction.

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SECTION I - ABOUT THIS BOOKLET

The purpose of this booklet is to guide Aboriginal people in the Northern Territory on the legal aspects of commercialising their knowledge of plants, and the plant materials the knowledge relates to. As the holder(s) and custodian(s) of plant knowledge that has been built up and used over thousands, you have information about plants that could be used to generate wealth and opportunities for yourself and your community. Alternatively, you may just want somebody to document your knowledge for safe keeping and for future generations.

Knowing how best to use this knowledge in a way that will benefit you and your community can be a tricky business. In certain cases, you will need support and assistance from non-Aboriginal people and/or institutions to record the knowledge and/or develop the knowledge and the plant into a commercially viable product. However, in doing so, there is the danger that you will lose control of the knowledge, how it is used and who it benefits. By looking at the various options and stages involved in recording and commercialising plant knowledge, and the various laws that control the trade of both knowledge and plants, this booklet will help you make informed decisions at each stage of the process.

The process of recording and/or commercialising your plant knowledge can be complex and lengthy. Once you start the process, there will be various steps along the way, possibly many different people, organisations and institutions that you will need to deal with and many decisions to make. There are also a variety of laws that will affect how you (and others) can deal with your knowledge and the plants to which the knowledge relates. Some of the laws will work in your favour, whereas some may work against you if you are not careful. In any case, it is important to consider all of the potential issues you might come up against as early as possible. This information booklet is designed to help you get an idea of what issues you might face at the various stages of the process, and what you should do (or avoid doing) to make sure your knowledge is used in ways that you feel comfortable with and that are most likely to benefit you and your community.

Although this booklet divides the process into several stages, this doesn't mean that each stage will definitely follow the previous stage. You may never reach one of the later stages, or may have to return to the first stage of the process at a later date. The important thing is to be aware of all the issues at the earliest possible time. A decision you make now could affect the project many years down the track.



SECTION II - THE FIVE STAGES

STAGE 1- IDENTIFY THE KNOWLEDGE/PLANT

What is the knowledge?

The first stage of the process is to work out what the knowledge is, and which plant or plant(s) the knowledge relates to. Before beginning the process by talking to other people, it might be worth investigating whether the knowledge you have (or the plant) has already been documented and whether it might have any commercial value. For example, if somebody else has already researched the plant, or if somebody else is already producing the plant in a commercial context, this will affect how you should proceed. Of course, it may be that you have knowledge of many different plants, each of which has a number of uses. It would be worth making a list of the different plants, and their uses and then finding out whether the plant is already documented. It may be that there are certain uses of a plant that you are willing to share, but other information you would like to keep secret. Also, there may be different names for the same plant and different uses for the same plant. If you are unaware or unable to find out all of the details about whether the plant has already been researched or documented, you may be at a stage where you need to contact a researcher. Before you proceed to Stage 3 (FINDING A RESEARCHER), you should follow the steps outlined in Stage 2.

- Australian Medicinal Plants by E.V Lassak and T McCarthy
- Bush Food Aboriginal Food and Herbal Medicine by Jennifer Isaacs
- Wild Medicine in Australia by A.B. & J.W.Cribb Collins
- Feasibility of Small Scale Commercial Native Plant Harvests by Indigenous Communities- A report for the RIRDC/Land & Water Australia/FWPRDC/MDBC Joint Venture Agroforestry Program by P. J. Whitehead, J. Gorman, A. D. Griffiths, G. Wightman, H. Massarella and J. Altman

Legal issues

At this early stage of the process, you should be thinking about the risks of releasing the knowledge. If you write anything down at this stage, or record it on film or tape recorder be sure to keep it safe. While copyright law can be used to stop people from copying the words you have written or a film you have made, there is nothing stopping others from using the contained knowledge. At this stage, if you think you might have knowledge that only you and your community know about, it is important to keep it secret. If you can't help telling somebody about a particular plant and how it can be used therapeutically or medicinally, let them know that what you are telling them is 'confidential', and if possible have them sign a confidentiality agreement. For more on the law of confidentiality see Confidentiality and Trade Secrets in Section III.



Some other things that you should think about at this stage include:

- Is the knowledge secret or sacred, and do you need to consult with other community members before releasing the knowledge?
- If the knowledge is specific to a communal or family group (even though it isn't secret or sacred), how would the other people in the group feel about you approaching a researcher?
- Who else holds the knowledge? If it's other people in your group, you will probably want to talk to them about your idea to commercialise the knowledge/plant.
- If the knowledge is held over a large area by many different groups, you may want to think about consulting with and including those groups in the process (see Stage Two).

STAGE 2 - IDENTIFY KNOWLEDGE HOLDERS & OTHER STAKE HOLDERS

When you have worked out what the knowledge or plant is that you want to record or commercialise, you should identify other members of your group or community who also know about the plants uses(s), and will want to be involved in the process.

At this stage you should consult with any other people who you hold the same knowledge about the plant. It could be that this is only a couple of people close to you, but it could also be that there are people in several different communities who hold the same knowledge. If this is the case, you could hold a meeting with those people and talk about approaching a researcher with a view to recording or commercialising the knowledge/plant together as a group.

If you decide that there are a number of people who want to be involved in the process, and you can all agree to move forward, you may want to consider approaching a local land council, Aboriginal corporation or association, or forming your own corporation or association. There are a number of reasons why this is a good idea;

- You will have a united front with which to approach any researchers and/or business partners.
- The corporation/association can enter legal agreements, whereas an unincorporated group can only enter agreements as individuals.
- The corporation/association can continue to operate if you decide you don't want to be involved anymore.
- The corporation/association may have access to resources including money, lawyers and experts in other areas that could be helpful.
- They may already have ties to a researcher or have their own research facilities. (This will probably only be true for the larger land councils.)

Of course, once you begin involving other people and/or organisations, you may lose a certain amount of control over the process (and the knowledge). This is because decisions will need to be made on a group basis. If you want to retain control (and a final say) over the project, this will need to be worked out at the beginning of the project. This should all be discussed at an early stage, before sharing the knowledge with anybody.



At this stage of the process you might also begin thinking about who you would like to benefit should the project result in generating any profits. There may also be alternative ways of directing benefits to your community, such as work opportunities, skill training and infrastructure development (see Benefit Sharing). One option is to establish a Community Trust, as has been done by the San people in South Africa. There, royalties returning to the San from Hoodia plant are delivered to Trust. The Trust has certain rules that say exactly how the money should be spent, and who it should benefit.

This might also be a good time for the community (or communities) to develop 'Prior Informed Consent' procedures for future negotiations. (See Prior Informed Consent).

STAGE 3 - FIELD RESEARCH

What is your reason for approaching a researcher?

The type of researcher or research institution you approach will depend on your reasons for approaching them. At this point you will need to think about (and discuss with other knowledge holders or stake holders) what kind of uses you would like to make of your knowledge, or those uses that you will allow others to make.

There are a lot of issues to consider, and there are likely to be some big decisions to be made. However, it should be clearly spelt out to the researcher that this is just a fact finding exercise. At this stage, you will be prepared to share some knowledge of the plant with the researcher in confidence. Your aim at this stage of the process is to have the researcher help you determine whether your knowledge and the plant it relates to might be of interest to them or another institution. It should be clearly stated that this stage of the process is 'field research', and that you do not consent to the researcher taking samples of any plants away for more in depth research, or using your knowledge in such an activity. (If the researcher wishes to do this, you will need to undertake the procedures set out in Stage 4- Research & Development).

You should make sure that the researcher and the research institution understand that all discussions are commercial in confidence.

Commercial or non-commercial uses

Firstly, you should consider whether the research is for commercial or non-commercial purposes. Non-commercial purposes include any purpose that isn't intended to make money. Commercial purposes are those that will or might make money. You may decide that you don't want the knowledge to be commercialised.

Non-commercial uses

Sometimes it may be that you just want knowledge recorded as a means of ensuring the knowledge isn't lost. If this is the case, the purpose of engaging the researcher will be purely to record the information.

If the knowledge is going to be recorded purely for non-commercial purposes, you will still need to decide:



- How the knowledge should be recorded and stored (ie on film, in written form, or on a database).
- Whether the knowledge is going to be published, or whether it will be held privately for a specific group or community.

Another reason for recording knowledge on a database would be as a protective measure to ensure that other people cannot obtain a patent based on the knowledge. This is known as defensive publication. For this type of database to be successful, it needs to be made available to patent examiners. An example of a database of this type is the Traditional Knowledge Digital Library which has been established in India, and which has been successfully used to prevent the misappropriation of traditional knowledge. One of the arguments against putting your knowledge in a public database is that it means the knowledge is no longer secret and will lose its ‘novel’ status. This will mean that as well as stopping other people from getting patents based on your knowledge, you will not be able to obtain a patent. (For more on patents see Section III).

Commercial uses

When you have determined what the plant resource and associated knowledge is that you would like to have someone else investigate for possible commercial uses, you will probably need to approach a researcher. This is likely to be a university or some other established institution such as DK-CRC or CSIRO, or even a pharmaceutical or natural therapy research company. When approaching a researcher/ research institution with a view to entering a commercial venture, there are lots of things to think about.

To start, you will need to decide early on what type of commercial uses are suitable for the plant. This could include:

- food and beverage products
- nutritional supplement products
- therapeutic goods
- cosmetics and personal care
- horticulture,
- fragrance and flavoring
- botanicals
- biotechnology.

The type of use you want to make of the product might affect the type of researcher or institution you approach at this stage. If you want your community to be involved in manufacturing a product such as a food or juice, you will probably be looking towards developing a product that is based purely on the raw materials of the plant, rather than on extracted compounds or genetic resources contained within the plant. In this situation, it may not even be necessary to engage a researcher or research institution to help you.



Raw material products

If you are considering making a product using just the raw materials of the plant (without any refinement or extraction), it will be easier to keep control of the process. For example, if you only wanted to harvest fruit from the bush (or cultivate it) and produce a juice or a food, there may be no need to engage a research institution to undergo scientific testing of the plant. Likewise, there will be no need to abide by the environment laws (the Environment Protection and Biodiversity Conservation Act/Regulations and the Biological Resources Act). For more on these laws, see Biodiversity Conservation Laws below.

Stage 3 Legal issues- Confidentiality agreement or Research Agreement

When you have decided upon a research partner, you will need to enter into a formal arrangement by negotiating with the researcher and then signing an agreement. While this could be a confidentiality agreement, it could include other things, such as:

- how the knowledge should be shared and recorded
- what will happen if the researcher decides to take the research to the next stage, and
- who will own intellectual property rights in the immediate results of the research.

Because the only results of this research will be recorded information, such as written notes, sound recordings, photographs and films, a main area of IP applicable will be copyright. You should discuss with the researcher who will own copyright in all of those things, and include this in the agreement.

However it is very important to use a confidentiality agreement (or confidentiality clause within a larger agreement) to make sure that the researcher doesn't take the knowledge and use it in ways that you or your community have not agreed to. The purpose of a confidentiality agreement is to assert that the knowledge you are sharing is secret and should remain secret. It may be that there are different levels of knowledge, some being open and some being secret. This should be discussed at a community and group level. It might be that some of this knowledge should not be disclosed at all because of cultural protocols and sensitivities. For more information on Confidentiality and Trade Secrets see Section III.

Any agreement entered into at this stage should also include provisions to ensure that the products (i.e any reports or databases) of the research are returned or made available to the community.



STAGE 4 - RESEARCH & DEVELOPMENT

This stage will occur if the research institution decides to take the research further and conduct more in depth scientific testing on a specific plant. Before this stage can commence you will need to undertake some serious negotiations. Also at this stage a number of legal issues will need to be considered.

Permit to take plants

It is at this stage of the process that a research institution will need to take samples of plant materials back to their laboratories for more detailed scientific analysis and testing. In most cases, anyone taking plants from the wild in the Northern Territory must apply for a permit from the Northern Territory Parks and Wildlife Service.

It should be noted that Aboriginal people are allowed to collect plant resources in accordance with their traditional customs. However, if the plants are being collected and delivered to an outside researcher for scientific analysis, this would not be considered to be 'in accordance with Aboriginal customs'. In this case, the researcher will need to apply to Parks and Wildlife for a permit to collect the plant.

Parks and Wildlife will then examine the application, and if it seems that the researcher is accessing the plant for 'biodiscovery', one of the biodiversity conservation laws (see below) will apply. In particular, the researcher may then be obliged to enter a benefit sharing agreement with the resource access provider (the land owner), and making a declaration about any traditional knowledge upon which the research will be based. Unless the researcher can show Parks and Wildlife a benefit sharing agreement, the permit will be refused.

Biological diversity laws

A relatively new addition to the Australian legal framework is the legislation that has emerged as a result of Australia signing the Convention on Biological Diversity (CBD). The CBD is an international legal instrument that aims to conserve biological diversity and ensure the fair and equitable sharing of benefits arising out of the utilisation of genetic resources (also known as biological resources). The CBD has been given force in all areas of the Northern Territory. For areas controlled by the Commonwealth government (such as Uluru Kata-Tjuta and Kakadu), this is through the Environment Protection & Biodiversity Conservation Act 1999. For areas controlled by the Northern Territory government, the CBD is given voice through the Biological Resources Act 2006.

As stated above, these laws govern the access to and use of biological resources (among other things). They focus on 'bioprospecting', which involves researching the genetic makeup of living organisms or compounds contained within them. This does **not** include the following activities:

- fishing for commerce or recreational purposes;
- taking wild plants and animals for food;
- collecting firewood;
- taking wild flowers or essential oils from plants;
- Aboriginal people hunting, fishing, collecting resources in accordance with their traditional customs.

(There are a few other circumstances in which the biodiversity laws won't apply, but are unlikely to arise



in relation to your situation. In any case, the territory Parks and Wildlife Service will decide this when considering the application for a permit to take the plant.)

In other words, the law only applies where somebody is taking samples of living organisms (including plants) and doing scientific research on them. Usually it will be quite clear whether a project involves bioprospecting. Whenever somebody wants to harvest plant resources from the wild in non-Commonwealth areas, they will need to apply for a permit from Northern Territory Parks and Wildlife. (More on these permits can be found here: <http://www.nt.gov.au/nreta/wildlife/permits/index.html>). When reviewing the permit application, the permit issuer will decide whether the project involves bioprospecting. If it does, the permit issuer will send the permit on to the Department of Business, Industry and Resource Development, and the requirements of the Biological Resources Act will need to be met, as explained below.

If the researcher wishes to take biological resources from a Commonwealth area (or certain endangered species that are controlled by the Commonwealth), they will need to apply to the relevant Park Manager (for Uluru Kata-Tjuta or Kakadu National Parks) or the Protected Area Policy and Biodiversity Section of DEHWA.

Some species are restricted under CITES (covered by International legislation and restrictions) and may require special permits

Further information on this is available through www.nailsma.org.au – “Indigenous Wildlife Enterprise Development, The Regulation and Policy Context and Challenges” document.

Requirements under the Biological Resources Act (NT)

As most areas in the NT are controlled by the Northern Territory government rather than the Commonwealth government, this section focuses on the Biological Resources Act NT, although the Commonwealth Act has very similar requirements.

When taking plant resources from the wild for bioprospecting, the Biological Resources Act NT requires a person or institution accessing the plant to enter a benefit sharing agreement with the resource access provider. The resource access provider is the person who holds the land. This will either be:

- an Aboriginal Land Trust or Association for Aboriginal land;
- the native title corporate body for native title land;
- the landowner for freehold (privately owned) land; or
- the Territory government for most other land (including land leased by the Territory to someone else, such as a pastoral lease).

A benefit sharing agreement is an agreement that details how benefits will be shared with the resource access provider. A benefit does not have to be monetary (in the form of money), but might include employment opportunities, training opportunities, recognition or the ownership of intellectual property rights. For a detailed list of benefits, monetary and non-monetary, see Appendix II of the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (<http://cdn.www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>). There are other requirements of what a benefit sharing agreement should include under the Biological Resources Act. Among other things, a benefit sharing agreement must:



- provide for reasonable benefit-sharing arrangements, including protection for, recognition of and valuing of any indigenous people's knowledge to be used; and
- include a statement regarding any use of indigenous people's knowledge, including details of the source of the knowledge, such as, for example, whether the knowledge was obtained from the resource access provider or from other indigenous persons;
- a statement regarding benefits to be provided or any agreed commitments given in return for the use of the indigenous people's knowledge.

In other words, if a bioprospector has used Indigenous people's knowledge, this must be stated in the benefit sharing agreement, even if the person who provided the knowledge is not the landholder (resource access provider).

Bear in mind, the requirements of the biological diversity legislation do not apply until the person or institution actually takes samples of plants from the field for research. Another point to remember is that these laws only requires bioprospectors to make a statement regarding use of Indigenous people's knowledge if the knowledge was obtained directly from an Indigenous person. If the knowledge was obtained from a published book, scientific journal or other publically available source, the bioprospector will not have to make a statement regarding Indigenous people's knowledge or provide benefits to the knowledge holder.

Prior Informed Consent

Another requirement of benefit sharing agreements under the Biological Resources Act relates to the 'prior informed consent'. This is a concept that is used often by Indigenous in relation to projects that affect them. The basic idea is that Indigenous people should be fully informed about projects that affect them before they begin, and that based on this they should have the right to decide whether the project should go ahead. Under the Biological Resources Act, the bioprospector must obtain the prior informed consent of the resource access provider for a benefit sharing agreement to be considered valid. This may not always be the group providing the knowledge of plants. However, in a more general sense, the concept of prior informed consent should be applied in all situations. When entering any kind of agreement, you should make it clear that you expect to be fully informed about a project **before** it begins, and you should be able to withdraw your consent for the project at a later stage. When approaching researchers with knowledge, you should make an effort to find out as much as you can before signing on to any deals. In relation to bioprospecting, there is a detailed list of the information that should be requested from the bioprospector in the Provision 36 of the *Bonn Guidelines*.

Before entering agreements at any stage, ask for (or discuss) the following information to ensure you are fully informed about the project:

- The purpose of the research;
- The identity of the researchers, the institution and any other sponsors of the research;
- The benefits that will flow to the people assisting with the research and their associated community or group;
- The costs and disadvantages of consenting and/or participating in the research;
- The budget for the research project;



- The expected outcomes of the research project.

You should also use this opportunity to negotiate at this stage, and outline any restrictions, limitations, requirements or benefits you would like to put in place.

Other legal issues

Do you think it would be useful to have a brief description of different agreements?

Confidentiality Agreement

Service Agreement

The research and development stage may go on for many years and could lead to any number of possible outcomes. For this reason it is important to enter a written agreement with the research institution as early as possible. However, it may not be possible to do this until the terms of the project have been negotiated. The type of agreement you enter might be called a service agreement. If you are also the resource access provider for the purposes of biological conservation laws, this might also satisfy the requirements of a benefit sharing agreement.

You would be best advised to get the help of a lawyer when negotiating and drafting a service agreement. Some of the things a service contract might cover would include:

- The purposes of the project;
- Who all the stake holders are;
- The duration of the project;
- The territory (geographic area) of the project;
- Intellectual property rights;
- Details regarding access to the plant resources (harvesting etc.);
- Monetary and non-monetary benefits to be shared with stakeholders (including resource access providers and knowledge holders).

Ethical and moral issues

While it is difficult to know what potential uses might be made of the plant resource based on your knowledge, there may be certain uses that you will not approve for moral or ethical reasons. For example, would you be happy if the genetic information from a plant was used to genetically modify another strain of plant? If you do not believe in genetic engineering, you may need to clearly state that plant knowledge you are imparting must not be used in research and development for these purposes. The possibility of the knowledge leading to a patent is also an issues that should be considered in ethical terms. For more on Patents see Section III.)



STAGE 5 - PRODUCT DEVELOPMENT, MARKETING & BRANDING

In the final stage of the process you will hopefully be developing a product along with strategies that will help you sell it to the public or retail suppliers. There will be a variety of products that might result from the previous stages. If you have decided to develop a product using the raw materials of the plant only, you may have bypassed the research and development stages, and will need to think about the production process, as well as branding and marketing. If the eventual product is based on research carried out on the plant, the chances are this stage will be undertaken by another well established organisation, for example a pharmaceutical or medicinal product company. It is important to protect your design, name, product so that other people cannot pinch or copy this as easily.

Providing the raw materials

The opportunity to provide the raw plant materials may offer economic, employment and development opportunities for your community. If large quantities of a plant need to be harvested to produce a particular product, the plant will either need to be harvested from the wild or cultivated on privately owned land. You should consider early on in the process how this would work. Questions that may arise and should be discussed include:

- Would harvesting the plant from the wild be sustainable?
- Is the plant easy to cultivate?
- Is the plant widely available, and if so could you retain any control of how the plant is sourced?
- Is there a danger that other people would grow the plant in commercial quantities should a product succeed?

It might be necessary to establish a system through which you can keep some control over the harvest or cultivation of a particular plant. There may even be opportunities to develop a new strain of plant and apply for Plant Breeders Rights (see Section III). However, if the plant is widely spread and/or easy to grow, it may be difficult to maintain control of the supply. Using branding tools, protocols and forming a growers association are some of the ways in which Aboriginal people could ensure they benefit if the plant is in high demand. Another option would be include a clause in a legal agreement that researcher partners (and their partners) must only source the plant from your community. This should be done at the research and development stage.

Branding strategies

Whether you or another company is developing the product, there may be opportunity for you to create a brand image for the product that makes it more attractive to consumers. For example, people may be enticed to buy a product based on the fact that it is a traditional remedy that has been developed by or in partnership with Aboriginal people. Developing logos, brand names, marketing material and packaging that show this is the first step in this process. The important laws to think about at this stage are the intellectual property laws of copyright and trade marks. These laws are useful for protecting the packaging and branding material used to sell the product, rather than any knowledge regarding the properties of the plant, or the end product itself.



Using Aboriginal words/names

If you want to use an Aboriginal word or name, this should be discussed with the community/language group from where the word or name originates. Branding and naming of products can be trade marked for greater commercial potential. Trade Marks to be registrable must be distinctive, and not descriptive. Using an Aboriginal word for the plant contained in the product may not be able to be registered as a trade mark.

To avoid any issues, it might be best to use a made up word, and to include on packaging details of how the Aboriginal community has been involved in the project and how it benefits Aboriginal people (for example, it might be that royalties are going to be returned to the community, or the community is going to be involved in the harvest or cultivation of the plant in order to produce the product). Often, when people hear that a product has been used traditionally by Aboriginal people and/or it has been developed in an ethical way that respects and benefits Aboriginal people, they will be more happy to buy the product.

Use distinctive words/logos

If words and logos are created to help sell a product, you might be able to register these as trade marks. This will stop anyone else using a similar trade mark to sell a similar product (see Trade Marks, Certification marks and Geographical Indicators in Section III). On a wider scale, there may be an opportunity to develop a logo or trade mark that can be used on a number of different products. This is known as a ‘collective mark’ or a ‘certification mark’, and anybody who wanted to use the mark would have to show the product fulfilled certain requirements.



SECTION III - INTELLECTUAL PROPERTY LAWS

The booklet has referred to a number of intellectual property laws that will be relevant at various stages of the process outlined. Below is a brief summary of those laws and an explanation of how they are relevant to recording and commercializing your plant knowledge.

1. Copyright

Copyright protects the expression of ideas in material form, such as written works, artistic works, musical works, films, sound recordings, databases and so on. Copyright does not protect ideas or knowledge, only the form in which the ideas and knowledge are expressed. For example, if you write and publish a book about the medicinal properties of a plant, copyright can be used to stop someone else from copying the book. However, it will not stop someone from reading the book and then using the knowledge to develop a medicine using the information contained in the book.

Usually copyright is owned by the person who writes the words down, records the film or paints a painting. So if you are talking to a researcher and she later writes down what you have told her in her own words, the researcher will own copyright in the work she has written.

An important point to remember is that copyright ownership can be changed by written agreement. For example, if you engaged a researcher to record plant knowledge in a book, you could ask the researcher to sign a written agreement saying you are the copyright owner of the resulting book. It is advisable to get a lawyer to help you draft such an agreement.

For a more detailed look at copyright, refer to the *NRMB Report on the Current Status of Indigenous Intellectual Property* (p. 15), available at <http://www.nrmbnt.org.au/iek.shtml>.

2. Patents

Under the *Patents Act 1990*, an individual or company can apply for a patent. To qualify for protection, a patent must be a novel process or product and involve an 'inventive step'. A patent gives its holder the exclusive right to use an invention for a limited time (usually twenty years). For example, a pharmaceutical company might develop a novel way of extracting a chemical from a naturally occurring plant. They can then apply for a patent over the process or the resulting product. Once a patent is granted, the person holding the patent can stop others from commercially exploiting their invention for the life of the patent. Once the patent expires, it is in the public domain and free for anybody to use without license.

Patents and plant knowledge

From a plant knowledge holder's perspective, patents may offer a means of protecting certain knowledge relating to a plant's uses. For example, knowledge of how to extract part of a plant for medicinal purposes may be a patentable invention. Because patent applications are complex and expensive, there are very few examples of Indigenous people successfully using the patent process to protect knowledge of plants on their own. However, if you enter a partnership with a research institution such as a university, there is a better chance of the university developing a patentable invention, which you could then be made the joint owner of, in return for providing the plant knowledge in the first place. It is important to address this when you first enter a partnership with a research institution. Again, it would be wise for you to have a lawyer draft such an agreement.



For a more detailed look at patents refer to the *NRMB Report on the Current Status of Indigenous Intellectual Property* (p. 39), available at <http://www.nrmbnt.org.au/iek.shtml>.

Defensive protection using databases

Many commentators argue that knowledge relating to plants should not be patentable at all. This is partly in response to the many cases in which large pharmaceutical companies have registered patents over inventions based on uses of plants that had been known to people for thousands of years. They can do this by claiming that a ‘method of extraction’ or ‘novel compound isolated in the plant’ is a discovery, and therefore a novel invention.

For an interesting paper on this topic see Daniel F. Robinson’s article- *Traditional Knowledge and Biological Product Derivative Patents: Benefit-Sharing and Patent Issues Relating to Camu Camu, Kakadu Plum and Açai Plant Extracts* available at http://www.unutki.org/news.php?doc_id=174.

It is really an ethical or moral decision that each person group has to make as to whether they agree that this type of patent is fair. It should be remembered that even when a patent is granted, this doesn’t stop people from using the plant itself as they have done. It is the particular method of extraction or novel compound that is protected by the patent.

As discussed earlier, in India there is a Traditional Knowledge Digital Library which has been set up to stop anyone from registering patents based on traditional knowledge. Patent examiners are given access to the database, which they can check against patent applications. If the process or plant use in a patent application is already documented on the database, the patent will probably be refused. You may decide that recording your knowledge on a publically accessible database would be a suitable way of stopping others from getting patents based on your knowledge. Of course, if you choose this path, you may be foregoing the opportunity to use the knowledge as the basis of a patent application in partnership with a research institution. Also, such a database would need to be endorsed by the Australian Patent Office to be sure of success.

For a more detailed look at patents refer to the *NRMB Report on the Current Status of Indigenous Intellectual Property* (p. 39), available at <http://www.nrmbnt.org.au/iek.shtml>.

For more information on database see the *UNU-IAS Report The Role of Registers & Databases in the Protection of Traditional Knowledge A Comparative Analysis* by Evans L. 2009. It is available at http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf.

3. Plant Breeder’s Rights

The Plant Breeder’s Rights Act gives plant breeders the exclusive commercial rights to market a new plant variety or its reproductive material. Such rights allow a plant breeder to produce, reproduce, sell and distribute the new plant variety; receive royalties from the sale of plants or sell the rights to do so. Plant breeder rights holders can prevent others from selling seeds of that variety. Exceptions are that other breeders can use the protected seeds to develop new seed varieties; and growers do not have to pay royalties on the crop produced and may save the seeds for replanting.

Like other intellectual property laws, the ability of plant breeder’s rights laws to protect Indigenous plant knowledge is limited in that protection it limited to a set period and usually vests in individuals and companies, while responsibilities for Aboriginal knowledge lasts is handed down indefinitely and is collective.



4. Confidential Information & Trade Secrets

The law of confidential information and trade secrets protects knowledge that is deemed confidential in nature, where the publication of it would cause detriment to the owner of the knowledge.

Although yet to be tested, there is an argument that Aboriginal plant knowledge holders may be able to control access to their knowledge of plant materials and other biological resources if the knowledge is secret and confidential (however any material that has been previously published will not qualify for protection).

If the knowledge you hold has not previously been published, you should use the law of confidential information when you approach researchers regarding the use of your knowledge for commercial purposes. Treating your plant knowledge as secret and using confidentiality agreements (non-disclosure forms) will assist and enhance the application of this law. The point of using a confidentiality agreement is to ensure the researcher you are providing your knowledge to will not use that knowledge for purposes other than contained in the agreement without your permission and/or further negotiations.

In the 1976 the case of *Foster v Mountford* traditional knowledge was treated as ‘confidential information’. A non-Indigenous anthropologist tried to publish a book he had written containing information of religious and sacred significance to the Pitjantjatjara . The court issued an injunction stopping the book from being published in the Northern Territory, because the anthropologist was found to have breached his duty to keep that information secret.

5. Trade marks, Certification marks & Geographical Indications

Trade marks

Trade mark law offers protection for words and logos used in relation to goods or services. Trade marks should be registered with the Trade Marks Office to be sure of protection. Trade marks are an effective way of increasing and protecting the value in a product by claiming ownership of the word or logo that you use to sell it. However, to be accepted as a trade mark, the particular word or image has to be distinctive, and cannot be a commonly used word (in relation to the product) or too descriptive of the product. For example, if you called a new product you had developed ‘Pandanus Skin Cream’ and it was made from the Pandanus plant, you would be unlikely to succeed in an application to register the trade mark. If on the other hand you called it ‘Panda Sun’s Supercream’, you would be more likely to successfully register the name of the cream as a trade mark, as it is made up and distinctive, and isn’t too descriptive of the product it relates to.

Certification Marks

There are also certification marks which can endorse some quality or characteristic about the product or service. The process is more complex as it involves the development of rules for use of the mark, which require endorsement of the Australian Consumer and Competition Commission. The Label of Authenticity was a certification mark designed to denote products made from start to finish by Aboriginal and Torres Strait Islander people. Although no longer in use, it is a good model to consider for marketing of Indigenous plant products.



Geographic indications

A geographical indication (GI) is a name or sign used on certain products originating from a specific geographical location, such as a town, region, or country. The use of a GI certifies that the product possesses certain qualities, or enjoys a certain reputation, due to its geographic origin. For example, 'champagne' is a GI.

Given that Indigenous peoples' cultural expression reflects their belonging to land and territories, geographic indications may allow some scope for Indigenous people to use GI labels for their cultural products and services including products based on plant knowledge. In Australia, the use of geographic indications has been largely by the wine industry.

To benefit from GIs however, an Indigenous regional association would need to develop its own GI trade mark (either a word and/or a logo) and establish certification-issuing processes.

For a more detailed look at trade marks, certification marks and GIs refer to the *NRMB Report on the Current Status of Indigenous Intellectual Property* (p. 54 & 56), available at <http://www.nrmbnt.org.au/iek.shtml>.



SECTION IV - PROTOCOLS

Protocols, Guidelines and Codes of Ethics are standard setting documents that are developed to set standards and implement best practice procedures for particular industries or activities. Although protocols are not legally binding in the same way that laws are, they can play an important role where the law is unclear or insufficient. For example, they can be used as a guide for people wanting to do the ‘right thing’, when they are unsure as to what the right thing is, or where the law is insufficient. Also, in some cases, people and organisations can choose to ‘sign on’ to Protocol documents, either as a requirement of being part of an association, through a legally binding contract, or through international treaty law.

The following is a list of documents that may be useful or applicable in relation to Aboriginal plant knowledge.

AIATSIS’s Guidelines for Ethical Research in Indigenous Studies 2000 (revised 2010) (available on-line at <http://www.aiatsis.gov.au/research/docs/ethics.pdf>) sets standards for research involving Indigenous people and subject matter in Australia.

Desert Knowledge CRC’s Aboriginal Knowledge and Intellectual Property Protocol Community Guide (available on-line at <http://www.desertknowledgecrc.com.au/resource/DKCRC-Aboriginal-Knowledge-and-IP-Protocol-Community-Guide.pdf>) is a plain English guide that explains how researchers and Aboriginal people can work together and how Aboriginal knowledge should be used in a respectful way by researchers.

The International Society of Ethnobiology’s Code of Ethics (available on-line at http://ise.arts.ubc.ca/global_coalition/ethics.php) provides a best practice framework for decision-making and conduct in ethnobiological research, emphasising the rights of Indigenous people to their resources and knowledge.

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, (available on-line at <http://www.cbd.int/abs/>) is an international agreement that encourages countries to enact laws for the fair use of genetic resources and traditional knowledge related to genetic resources.

In addition, Natural Justice, a non-profit organisation based in South Africa, encourages in the development of ‘Bio-Cultural Community Protocols’. See their website for more information and resources: www.naturaljustice.org.



SUMMARY

There is no specific law that protects Indigenous ecological knowledge. Intellectual property laws have some useful tools that you can use to protect Indigenous plant knowledge. For example, although oral knowledge is not protected, copyright can be used to protect written and recorded forms of traditional knowledge, however, to ensure that copyright belongs with the knowledge holders or an Aboriginal organisation, written agreements to assign copyright should be used. Publishing plant knowledge should be considered carefully. Once knowledge is published, it is available to any person to use, interpret and apply. Putting traditional knowledge notices is one way to stake a claim to the knowledge once it is published. Protocols are also a means of setting standards for your organisation, or industry on how Indigenous knowledge should be protected. See for example how the Australia Council for the Arts has developed five protocol guides for the production of Indigenous art, which advocate for prior informed consent for use of Indigenous cultural and intellectual property.

Patents and plant breeder's rights require registration for protection and they focus on commercial application of the invention or plant breed. The rights are costly to secure, and limited in time. Indigenous people have not made use of patents or plant breeders rights to protect their knowledge, but they could oppose applications of their TK used by others, by arguing it was part of the prior art base.

Trade marks promote the authenticity and source of Indigenous arts products. A geographic indication could promote the region, or locality where traditional knowledge is based.

There is also a developing body of international laws relating to bioprospecting and use of the use of Indigenous knowledge. The *Convention on Biological Diversity* promotes the principles of free, prior informed consent, and access and benefit sharing. The Biological Resources Act NT requires a person or institution accessing the plant to enter a benefit sharing agreement with the resource access provider.

Written agreements for access and benefit sharing agreements are promoted as the means to establish rights for Indigenous knowledge holders, and to set out the licensed terms for bioprospectors. This could include the sharing of monetary benefits, but also transfer of technological skills and employment.

Since 1999, Indigenous people have called for a new law for Indigenous cultural and intellectual property rights. There has been no draft models proposed for Australia. World Intellectual Property Organisation is the international agency responsible for intellectual property treaties and conventions. WIPO has been examining traditional knowledge since 2000, and is current drafting an international text for protection of TK. The track to law will be a long one. For this reason, should Indigenous Australians use protocols, written agreements, copyright, trade marks, geographic indications and databases, and their customary laws and processes to protect their TK.



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