Intellectual Property Law and the Protection of Indigenous Australian Traditional Knowledge in Natural Resources

GARY D MEYERS* AND OLASUPO A OWOEYE**

Introduction

This essay is not about native title (though it will get a brief mention). Rather, its subject is the potential means for protecting Indigenous traditional knowledge rights in natural resources, which arguably, at its core, is about the nature of the socio-political and, perhaps more importantly, the economic relationship between Indigenous peoples and non-Indigenous society in Australia. It is these relationships which form the two fundamental pillars of the study and understanding of Indigenous/non-Indigenous relations, particularly in all common law jurisdictions in North America, New Zealand, Australia and elsewhere, and probably wherever Indigenous lands have been conquered or otherwise settled by Europeans and others.¹

* Gary D Meyers, BA (cum laude), JD, LLM is Professor of Law at the University of Tasmania Faculty of Law.

** Olasupo A Owoeye, LLB (Hons) is a PhD Candidate and Law Tutor at the University of Tasmania Faculty of Law.

¹ See generally: K McNeil, Common Law Native Title (Clarendon Press, 1989); and second, R A Williams Jr, The American Indian in Western Legal Thought: The Discourses of Conquest (Oxford University Press, 1990). In Common Law Native Title, McNeil traces the jurisprudential development of the Native Title Doctrine and outlines its general parameters as recognised in the US, Canada, New Zealand, Australia, and elsewhere, including Papua New Guinea and more recently, Malaysia. Briefly, these parameters, as we would generally understand them, are that where Indigenous people occupy lands in their traditional manner, they continue to hold the rights to occupy and use those lands and resources when those lands are conquered by, ceded to, or settled by the Crown, until the Crown affirmatively extinguishes those rights, which generally requires some form of compensation to those Indigenous legal rights holders. Professor Williams, on the other hand, traces the historical development of the doctrine to the middle ages and describes how a legal doctrine originally articulated in the context of the crusades and later applied within Europe, is applied in European acquired lands in the “new world” and how that application to others was (and is still) justified. He argues that a cultural racism, which assumed the inherent superiority of Christian/White Europeans to other races acts to ‘morally’ support the socio-political, economic, and cultural dispossession of Indigenous peoples in the Americas, Austral-Asia, Africa, and elsewhere. In effect, McNeil describes the jurisprudential development of the native title doctrine; Williams tells us why it developed: because Europeans wanted the land and resources held by Indigenous peoples for settlement, development, and exploitation and needed to justify legally, if not morally, the dispossession of Indigenous peoples’ socio-political structures, cultural beliefs, and economic resources. That continuing conflict — the
In today’s increasingly global economy, intellectual property (IP) rights in biological resources are becoming ever more important in all our lives. Professor Michael Blakeney, identifies five types of cultural exploitation:

1. Infringement of copyright of individual artists;
2. the copying of works not authorised by Aboriginal groups;
3. the appropriation of indigenous themes and images;
4. the inappropriate use of indigenous images; and
5. the uncompensated expropriation of traditional knowledge.\(^2\)

To a large extent, the first four can, and have been protected by the current IP legal regime. And this is true even when there is no individual, identifiable artist, writer, composer, etc or where the individual artist declines to protect his or her work as long as the product or image is traceable to a recognisable group.\(^3\)

These general issues are outside the scope of this article. Instead, the focus of this essay is on the expropriation of traditional knowledge in natural or biological resources. The essay first, briefly discusses the value of bio-resources; second, outlines the potential conflict between Indigenous approaches to ownership of traditional resources and the existing IP legal regime; third, comments briefly on whether Native Title provides any source for the assertion of Indigenous IP rights in Australia; and fourth, suggests how, using a combination of International Law and Domestic Law, the current IP regime might expand to provide protection for traditional knowledge in genetic resources. The essay concludes that a sui generis regime protecting these rights provides a useful starting point for reform.

### 1 Biodiversity and Bio-resources

Australia has one of the largest and most unique stores of bio/genetic resources in the world. It is classified by the United Nations (UN) as one of

---


3 John Bulun Bulun v R&T Textiles (1998) 86 FCR 244 (Held: the existence of a fiduciary duty between an Indigenous artist and his clan authorises a communal claim for infringement of the artist’s copyright where the artist is unwilling or unable to assert such a claim. For a useful discussion of this case, see: T Janke, ‘Guarding Ground: A Vision for a National Indigenous Cultural Authority’ (Speech delivered at the Wentworth Lecture 2008, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, Australia 22 August 2008) 10-13.
the 17 most mega diverse regions\(^4\) — all of which are in the Southern Hemisphere and with the exception of Australia, all those regions lie within developing countries.\(^5\) Australia’s uniqueness lies in the fact that it has a higher percentage of endemic animal and plant species than any other country.\(^6\) Thus the potential economic reward for the development of these resources into valuable consumer goods is enormous. One oft quoted statistic is that 25 per cent of our medicines are derived from bio-resources\(^7\) and that is certainly one reason that the biotechnology industry is among the fastest growing industries in the world with product sales exceeding US$50 billion in 2000.\(^8\) In the US alone, successful patent applications for products and processes using genetically modified organisms (GMOs) increased by 15 per cent annually from 1990 to 2000.\(^9\) In the period 2004-2007, the sales of US-produced bio-based products increased by over 30 per cent.\(^10\) The latest Organization for Economic Cooperation and Development (OECD) statistics on biotechnology also reveal that the US had 41.5 per cent of all biotechnology Patent Cooperation Treaty (PCT) patent applications in 2006 with Japan and Germany following with respective shares of 12 and 7 per cent.\(^11\) The global prescription sales of biotech drugs increased by 12.5 per cent in 2007 to more

\(^4\) Australian Bureau of Statistics (ABS), *Year Book Australia* 2009-10, chapter 1301.0, 4, (‘ABS Yearbook’).


\(^6\) ABS Yearbook, above n 4, 5. This high level of endemism also extends to the marine environment, with roughly 85 per cent of its inshore fish species found only in Australian waters, at 5. Moreover, approximately 88 per cent of Australia’s 44,000 plant species are found only in Australia: M Blakeney, ‘Ethnobiological Knowledge and the Intellectual Property Rights of Indigenous People in Australia’ in M Blakeney (ed), *Perspectives on Intellectual Property: Intellectual Property Aspects of Ethnobiology* (Sweet & Maxwell, 1999) vol 6, 83, 85.


than $US75 billion\textsuperscript{12} and the estimates of the sales of industrial biotechnology products worldwide between 2001 and 2010 vary from $US50 billion to $US140 billion.\textsuperscript{13}

Outside uses in medical science and pharmaceutical manufacture, the bio-tech industry’s growing use of genetic resources has potential application in the development of agricultural products and processes, the cosmetics industry, chemical construction industries,\textsuperscript{14} and in other areas such as environmental management, eg, the bio-remediation of domestic, industrial, and hazardous wastes. In sum, the bio-tech-industry ‘promises’ us: increased harvests of food stuffs, more and better drugs, advances in medical science, and a cleaner, greener environment.\textsuperscript{15} This paper does not assess these promises; rather it accepts them as given and moves on to other issues.

\section{Indigenous Knowledge and the IP Legal Regime – Potential Conflicts}

\subsection{Intellectual Property Law}

IP law is a mixture of international law, affected by agreements such as the World Intellectual Property Organization Agreement,\textsuperscript{16} the Agreement Establishing the World Trade Organization,\textsuperscript{17} and the Agreement on Trade Related Aspects of Intellectual Property Rights\textsuperscript{18} which is administered by the World Trade Organization (WTO) and domestic law which must generally be consistent with obligations created


\textsuperscript{14} See, W Cornish and D Llewelyn, \emph{Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights} (London Sweet & Maxwell, 6\textsuperscript{th} ed, 2007) 871.


\textsuperscript{17} \emph{Marrakesh Agreement Establishing the World Trade Organization}, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) (‘WTO Agreement’).

\textsuperscript{18} \emph{Marrakesh Agreement Establishing the World Trade Organization}, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C (‘Agreement on Trade Related Aspects of Intellectual Property Rights’) (‘TRIPS’). The TRIPS Agreement was formally annexed to the WTO Agreement thereby requiring accession to TRIPS in order to become a member of the WTO. See, F Macmillan, \emph{WTO and the Environment} (Sweet & Maxwell, 2001) 7.
by TRIPS.\textsuperscript{19} Other international agreements, such as the \textit{Biodiversity Convention} (CBD)\textsuperscript{20} and the \textit{United Nations Declaration on the Rights of Indigenous Peoples}\textsuperscript{21} may also impose related obligations on member states.

In general terms, to hold property is to hold the right to exert control over a valuable asset, whether it be land, prudential shares, personal artwork, or a patent right to an invention. IP is a generic term describing a variety of property rights associated with the outcomes or products of creative intellectual activity.\textsuperscript{22} The 1970 Convention establishing the World Intellectual Property Organization defines IP as including the rights related to: literary, artistic, and scientific works; performances or performing artists; phonograms and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs, trademarks, service marks, and commercial names and designations; and protection against unfair competition and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.\textsuperscript{23} The IP legal regime is designed to provide monopoly rights to creators and inventors and to encourage economic growth and commercial activity, and as articulated, this legal regimen is necessarily founded in Western constructs of property.\textsuperscript{24} In Australia, this regime incorporates Commonwealth statutes giving effect to copyrights, patents, trademarks, designs, plant breeder’s rights, and circuit layouts, among others.\textsuperscript{25}

The focus of our IP laws is on the individual and his or her ability to create a new product or process. Thus, for example, this paper is protectable because copyrights are available for books, articles, songs, etc. A fundamental rule of IP law is that it rewards ‘creation’ not knowledge, eg, the words on the paper not the thoughts in one’s head. This presents one potential hurdle for Indigenous claims to IP protection for their knowledge, particularly in the case of patents, the most likely avenue for IP protection of bio-resources. Typically, a patent issues only when product or process is new or novel, is non-obvious, ie, the end product requires a creative step, and is capable of

\begin{footnotes}
\item[19] TRIPS, art 1.
\item[23] WIPO Convention, art 2(viii).
\end{footnotes}
industrial application or utilisation. Thus knowledge is not enough — there must be something more.

2.2 Indigenous Cultural Heritage

For Indigenous peoples, culture refers to holistic ways of living that are practiced, refined, and communicated orally from generation to generation. Indigenous peoples’ knowledge, art, and culture are inextricably linked with their land. Thus, Indigenous IP rights are rights to protect cultural heritage in both a historical and a present sense. This heritage consists of both tangible property such as religious sites, structural works and features or relics as well as intangible aspects of their ways of living including socio-cultural practices and the particular knowledge systems which are part of each people’s individual culture. In that sense, the knowledge of the uses or locations of bio-resources form an integrated component of culture.

Pharmaceutical companies are becoming increasingly aware of the benefits of using traditional knowledge as a basis for modern pharmaceutical research as following leads from traditional cultures has been shown to increase the chances of finding a commercially valuable drug. Ethnopharmacology is a form of bio-prospecting that entails using indigenous knowledge as a guide in the search for new drugs. Indigenous knowledge has been the source of a number of commercially viable drugs derived from plants. For instance, the rosy periwinkle (Catharanthus roseus), used for childhood leukaemia drugs vincristine and vinblastine, was originally used in traditional medicine for the treatment of diabetes. Similarly, traditional knowledge of the San people of southern Africa about the potency of the hoodia cactus plant as an appetite suppressant was used in getting a patent for an extract from the plant for its ability to stave off hunger and a license to exploit it was subsequently granted.

---

26 See Cornish and Llewelyn, above n 14, 179.
31 Xynas, above n 28, 25.
34 Ibid 8.
to Pfizer. This makes it possible for Pfizer to make huge profits from the weight lose drug while the San people continue to remain impoverished.

A pharmaceutical research firm once reported investigating plants recommended by indigenous groups for their medicinal significance. The firm noted that although the plants were screened for only a few characteristics, over 50 per cent of the plants showed some pharmacological relevance, or ‘activity’ and no less than 74 per cent of the pharmacologically active plants correlated with the activity reported by the indigenous groups; on the other hand, random plant screening only had about an 8-15 per cent chance of revealing a sample which showed some activity. The potential relevance of traditional knowledge of herbal or other medicines to pharmaceutical patents is therefore undeniable.

In one very fundamental sense, potential Indigenous IP rights are quite different to presently legally recognised IP rights because they consist, in many instances, solely of ‘knowledge.’ This knowledge may refer to identification of sites and areas, the rituals involved in preserving those sites and areas, the medicinal value of plants and animals, methods of preparation, the location of those species, and land management customs in relation to those areas or species. Moreover, given that this knowledge is cultural, ie, that it belongs to a particular, identifiable group, the potential ‘ownership’ rights are socially based, collectively owned and inherited. The fact that knowledge is held collectively and transmitted orally provides a second potentially fundamental departure from the traditional IP legal regime. However, while there is a collective aspect to ownership, often, the collective is identifiable. Moreover, an individual or particular class of individuals is often the custodian of knowledge. This power of custodianship empowers caretakers to

---


37 Ibid.


39 Ibid.


42 As Green notes, one argument that traditional knowledge is incompatible with western IP paradigms is based on grounds such as it having been under protected from time immemorial and therefore a matter for the public domain as well as the fact that it is created by diffused groups and largely unascertainable authors. K J Greene, ‘Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues’ (2007) 16 American Journal of Gender, Social Policy and Law 365, 384.
act in the best interests of the community as a whole, a point acknowledged in the Bulun Bulun case and in Milpurrurru v Indofurn. Therefore, identifying a potential holder of the rights poses far less difficulty in the application of the traditional IP legal regime than the requirement that more than ‘mere knowledge’ is needed for a right to accrue.

3 The Native Title Question

Asked prior to the High Court’s Mirriwung Gagerong decision (Ward v Western Australia) whether IP rights were potentially within the ambit of native title rights, the authors would have answered unequivocally, yes. Up to that point in time, it was accepted that the Native Title Act 1993 (Cth) (‘NTA’) was a codification of the common law of native title as articulated in the Mabo case. All the subsequent cases between 1992 and 2002 supported this interpretation. Thus the Mabo Court’s determination that native title was defined according to the customs and uses of the land; that it was a right pre-existing the assertion of British sovereignty in Australia; and that native title rights were unique, or sui generis rights that did not need to correspond to common law property rights all potentially supported the proposition that protection of cultural rights, including rights to protect traditional knowledge of the uses of the land and its resources could amount to Indigenous IP rights encompassed in a group’s native title.

And to some extent, this view was supported by the High Court’s acceptance (albeit with no comment) of the proposition in the Croker Island sea rights case that native title included the right to protect culture. Similarly, the High Court’s determination in Yanner that state laws regulating the use of wildlife did not amount to ‘ownership’ of that wildlife also added support to the proposition that the rights to hunt, fish, forage, and gather, ie, effectively live from the uses of the land, might give rise to commercial rights to exploit

43 John Bulun Bulun v R&T Textiles (1998) 86 FCR 244.
44 Milpurrurru v Indofurn Pty Ltd (1994) 54 FCR 240.
45 Western Australia v Ward (2002) 213 CLR 1.
46 Mabo v Queensland (No 2) (1992) 175 CLR 1.
48 Commonwealth v Yamirr (2001) 208 CLR 1. The Court notes that in the original determination, the Federal Court found that native title includes access to the sea and seabed to safeguard the cultural and spiritual knowledge of native title holders. However, as there was no argument on the issue before the High Court, the Court let stand that determination without comment: (Gleeson CJ, Gaudron, Gummow, and Hayne JJ) at 33.
49 In Yanner v Eaton (1999) 201 CLR 351, 373 the Court (Gleeson CJ, Gaudron, Kirby, and Hayne JJ) holds that, ‘[n]ative title rights and interests must be understood as what has been called “a perception of socially constituted fact” as well as “comprising various assortments of artificially defined jural right.” And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social
those resources, including potentially, the assertion of Indigenous IP rights. The Canadian, US, and New Zealand jurisprudence all supported, and for that matter, still do support, these interpretations of the ambit of native title.\(^5\)

Following the Court’s judgment in *Mirriwung Gajerong* in 2002, it is still possible to say that native title rights may include a right to protect cultural resources, but the scope for the application of those rights has been severely narrowed.\(^{51}\) This narrowing of the scope of native title rights is due largely to two determinations of the Court: first, that native title, as defined in the *NTA*, effectively replaces the common law concept as articulated in *Mabo*, and therefore, native title property rights must be recognisable under Australian law,\(^{52}\) which may very well mean that they must conform to existing property rights rather than be sui generis; and second, the Court’s determination that native title rights must be directly related ‘to an interest in land’,\(^{53}\) suggests that only those native title holders with exclusive rights to land will ever be able to assert ‘ownership’ rights, including potential rights to protect cultural knowledge of the uses of bio-resources.

The aim here is not to critique the *Ward* decision; that is an article of a far different nature and far longer duration.\(^{54}\) However, while the Court did not clearly rule out rights to protect traditional knowledge or culture, it did clearly link that right to an interest in land, and arguably, exclusive ownership interest in land. Moreover, in its summary of its determination, despite indicating that it ought not be read as a statute, the Court notes that, ‘[i]n so far as claims to protection of cultural knowledge go beyond denial or control of access to land or waters, they are not protected by the *NTA*.’\(^{55}\) While access may be a critical and economically valuable right, the Court’s decision effectively leaves protection of potential IP rights arising from the commercialisation of resources to other laws of the Commonwealth.

---


\(^{52}\) See P Lane, ‘Native Title – The End of Property As We Know It?’ (1999) 8 *Australian Property Law Journal* 1, 5.


\(^{55}\) *WA v Ward* (2002) 213 CLR 1, 209.
Even if in the future the Court was to expand its concept of potential commercial rights to include IP rights, the potential native title ‘knowledge and cultural protection’ rights, are effectively limited to those instances where the bio-resource occurs only where Aboriginal and Torres Strait Islanders control lands and waters held exclusively under the native title statutory regime.\textsuperscript{56} Given the limited number of claims likely to succeed as exclusive possession claims, compounded by the further limited number of instances where a bio-resource occurs only in the recognised claim area, and the additional limitation that knowledge does not count, the likelihood of native title being of any help is significantly diminished, if not entirely eliminated until such time as Parliament amends the NTA to protect such rights or the Court reconsiders the ambit of native title to more broadly include commercial rights in land and water resources held by native title holders.\textsuperscript{57} Thus, the question that remains is how can these IP rights to cultural knowledge be acknowledged and protected.

4 Reform – The Interaction of International and Domestic Law

As observed, IP law is a mix of international and domestic law, with international law playing not only a historical role, but an increasingly prominent role in the development and articulation of the IP legal regime. Australia is a signatory to the \textit{WIPO Convention} and the WTO/TRIPS regime, as well as other international treaties such as the CBD which all may affect the resolution of the issues outlined in this essay.

4.1 World Intellectual Property Organization (WIPO)

Some of the organisations created by these treaties, eg, WIPO, have attempted to rectify the lack of protection for Indigenous IP and the inadequacies of the current legal regime by adopting model standards for the protection of Indigenous cultural expression.\textsuperscript{58} In particular, the WIPO Intergovernmental Committee (IGC) has been involved in addressing issues relating to the interface between IP and genetic resources.\textsuperscript{59} The work of the IGC has benefitted from the Conference of Parties of the CBD as well as the United States.

\textsuperscript{56} \textit{WA v Ward} (2002) 213 CLR 1, 66, 84-85.


\textsuperscript{58} WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has developed two sets of draft provisions for protecting 1) traditional cultural expression and 2) traditional knowledge which are each intended to lead to or shape future treaty provisions related to the protection and promotion of benefit sharing from the exploitation of traditional cultural knowledge and expression. See WIPO Program Activities, \textit{Traditional Knowledge, Genetic Resources and Traditional Cultural Expression/Folklore} (2012) <http://www.wipo.int/tk/en>; and Janke, above n 41, 83.

The work of the IGC has covered three main areas: the defensive protection of genetic resources; IP aspects of genetic resources and equitable benefit sharing arrangements; and disclosure requirements in patent applications involving genetic resources or Traditional Knowledge (TK).

The IGC is currently working on developing an appropriate sui generis system for the protection of Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions. Thus, the Draft Articles on Traditional Knowledge prepared at the WIPO IGC 19 in July, 2011 define TK as including knowledge that is ‘associated with biodiversity, traditional lifestyles and natural resources.’ The IGC draft articles on Traditional Knowledge cover all the main areas of their work on the IP aspects of genetic resources insofar as it relates to genetic resources. The IGC has also prepared draft objectives and principles relating to IP and Genetic Resources. The objective of the IGC Draft Objectives and Principles Relating to Intellectual Property and Genetic Resources as prepared in July, 2011 is to ensure that those accessing and or using genetic resources, their derivatives and associated traditional knowledge, in particular applicants for intellectual property rights, comply with national law and requirements of the country providing for prior informed consent, mutually agreed terms, fair and equitable benefit-sharing and disclosure of origin.

4.2 Convention on Biodiversity

Similarly, the CBD also attempts to protect Indigenous cultural knowledge, specifically in relation to the exploitation of Indigenous bio-resources and practices in relation to those resources. The most important provision of the CBD is art 8 which,

---


61 WIPO, *Genetic Resources*, above n 59.

62 See WIPO, *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)* (Doc No WO/GA/40/7) 5.


64 Ibid Annex C.

65 Ibid.

encourages member states, subject to national legislation ... to ... respect, preserve, and maintain [the] knowledge ... and practices of Indigenous and local communities... promote their wider application with the involvement of the holders of such knowledge ... and encourage the equitable sharing of the benefits arising from the utilization of such knowledge.\(^\text{67}\)

Article 15(7) in particular, provides that countries should take legislative, administrative or policy measures to ensure a fair and equitable sharing of the results of research and development as well as the benefits accruing from the exploitation of genetic resources. The key here though is that all these mandates are subject to the enactment of national legislation and are therefore, discretionary.\(^\text{68}\) The Conference of the Parties (COP) attempted to redress the problem of the CBD’s lack of specificity at its sixth meeting in Bonn in 2002 with the adoption of the \textit{Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising from their Utilization}.\(^\text{69}\) However, while the guidelines are more specific, the substance of their application is still made subject to the development of national legislation, thus the discretionary aspect of the provision remains unchanged and unenforceable.\(^\text{70}\) More recently, at its tenth meeting (COP 10) the Conference of the Parties has attempted to formalise these requirements with adoption of the \textit{Nagoya Protocol} signed in Japan in October 2010.\(^\text{71}\) The \textit{Nagoya Protocol} seeks to ensure the fair and equitable sharing of genetic resources with a view to contributing to the conservation of biological diversity and the sustainable use of its components.\(^\text{72}\) The \textit{Protocol} will enter into force on the ninetieth day after the deposit of the fiftieth instrument of ratification by the Parties to the Convention on Biological Diversity.\(^\text{73}\) To date, however, only Gabon, Jordan, Mexico, Rwanda and the Seychelles have ratified the \textit{Protocol},\(^\text{74}\) thus there is a long way to go before the \textit{Protocol}’s provisions become mandatory.

\(^{67}\) Ibid art 8(j) (emphasis added).

\(^{68}\) Meyers, above n 66, 142.


\(^{70}\) For a history of negotiations leading to, and review of the substance of the Guidelines, see generally, S Tully, ‘The Bonn Guidelines on Access to Genetic Resources and Benefit sharing’ (2003) 12 (1) RECIEL 84-98.

\(^{71}\) \textit{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}, opened for signature 2 February 2011, UNEP/CBD/COP/DEC/X/1 of 29 October 2010 (not yet in force) (‘\textit{Nagoya Protocol}\!’).

\(^{72}\) Ibid art 1.

\(^{73}\) Ibid art 33.

4.3 WTO/TRIPS

TRIPS was concluded in 1994 as part of the Uruguay round of the General Agreement on Tariffs and Trade which created the WTO.\(^\text{75}\) Its principal purpose is to create a globally uniform IP protection regime. All members of the WTO automatically become bound to TRIPS;\(^\text{76}\) however, developing countries were permitted a five-year grace period to comply with the provisions relating to bio-resources and processes,\(^\text{77}\) while the poorest member states were granted an additional five-year grace period.\(^\text{78}\) With the adoption of the Doha Declaration in 2001, least developed countries are further exempted from complying with these provisions until 1 January 2016.\(^\text{79}\)

The key provisions in TRIPS related to the protection of indigenous cultural knowledge are found in art 27. First, art 27(2) allows member states to exclude bio-resources/processes from patent protection where the prevention of commercial exploitation of those resources is necessary to protect the public order, human, animal or plant life or health, or the environment. Additionally, and most importantly, art 27(3) allows members to develop sui generis regimes for these resources/processes where such regimes will serve their interests better than standard patent regimes.

It is therefore possible for WTO/TRIPS members to develop their own comparable measures for protecting IP rights in bio-resources, which theoretically allows member states, like Australia, to acknowledge the collective rights of Indigenous peoples in these resources/processes without falling afoul of TRIPS. These provisions are, however, subject to the general principles of TRIPS, including the national treatment principle requiring members to grant non-nationals the same access and advantage as its own nationals. Thus, these particular regimes need to be drawn carefully to avoid discriminating between nationals and non-nationals who seek to exploit bio-resources.

Conclusion

As noted at the outset of this essay, the ‘legal’ issues associated with the protection of Indigenous rights in traditional knowledge arise in a social, political and economic context reflecting the relationship between Indigenous peoples and non-Indigenous societies. This context has both historical and contemporary dimensions. Historically in Australia, as in other countries colonised by European nations, the property rights of Indigenous peoples

\(^{75}\) The TRIPS Agreement constitutes Annex 1C of the WTO Agreement.

\(^{76}\) WTO Agreement, art II.2.

\(^{77}\) TRIPS, art 65(4).

\(^{78}\) Ibid art 66.

were rejected or largely ignored by colonising nations. As Bowrey notes, historically, ‘[c]ommon presumptions included that Indigenous people were too primitive to have legal rights or that Indigenous culture was archetypically “collectively” owned and therefore automatically outside the Western protections afforded to private property.’ This failure to recognise Indigenous forms of property ownership carries over into our present legal regimes. As Bowrey goes on to note,

[in relation to associated scientific knowledge, the modern notion of invention focused on the distinction between discovery and invention, with emphasis on the role of individual agency and legal-scientific forms of documentation ... has left Indigenous science as largely uncredited, with Indigenous knowledge undifferentiated from Nature, to be discovered, translated and credited to expert biologists, botanists, anthropologists and ethnographers who have studied Indigenous communities. Western notions of science civilization and law have led to significant Indigenous IP being owned by agents, universities and museums who ‘authenticated’ Indigenous culture through recording in into forms of expression that corresponded to Western categories of IP and associated legal requirements for subsistence and registration of rights.]

In relation to Indigenous traditional knowledge of their biological resources, there are three related steps Australia should take to address the issues raised in this essay. First and fundamentally, Australia needs to confront its ethical responsibilities to its Indigenous peoples. Australia must acknowledge the significant contribution of Indigenous knowledge to the economic development of products and services dependent on this knowledge and that this knowledge of the use, location and properties of bio-resources has been largely ignored due to its uncompensated existence in the public domain. As the Chair of the Commonwealth Public Inquiry (CPI 2000) into access to biological resources in Commonwealth areas notes:

There is considerable commercial interest in Indigenous knowledge of plant and animal species for food, medicine and other purposes. Much of this knowledge has already been published and is readily available to the public. This knowledge helps to locate species that could be used, for example, by:

a. the pharmaceuticals industry for developing new drugs;
b. herbalists and the medical profession in developing natural therapies and neutriceuticals;

---


81 Ibid.
c. the bush food industry, for new herbs, spices, flavours and food staples;

d. agricultural, aquaculture and floriculture industries;

e. industries based on developing personal care products, ie cosmetics, soaps, shampoos, fragrances, sun-screens, aromatic oils, etc.; and

f. biotechnology industries, in which biotechnology can be used to develop products associated with any of the above industries, as well as in the development of industrial products and processes.\footnote{82}

Second, the Commonwealth needs go beyond mere ratification of the CBD. Parliament needs to fully implement in domestic legislation the provisions contained in arts 8, 10, 15, 17, and 18 of the Convention. To date, however, Commonwealth and state action has largely been rhetorical. Queensland has released a discussion paper which acknowledges that Indigenous peoples may have some interest in bio-resources, but the state government has not suggested it will recognise IP/ownership rights or how it might compensate Indigenous peoples for their knowledge of the use or location of these resources.\footnote{83} The Western Australian Law Reform Commission (LRCWA) has also recently completed a major project on the potential incorporation of Indigenous customary law in the state’s legal system;\footnote{84} and, one important area identified for consideration by government is the relationship of Indigenous IP recognition to the Western Australian statutory regime governing rights in natural resources.\footnote{85} Without dismissing the efforts of state governments to potentially recognise Indigenous rights in bio-resources, given the nature of intellectual property law as a largely federal matter, influenced by international law, the real effort at reform needs to be undertaken at the Commonwealth level.

The federal government has been more proactive which may influence state government efforts. In October 2002, in response to the CPI 2000 report, which recommended consultation between the Commonwealth and States/Territories on a nationally consistent scheme to take into account Indigenous interests in the access, use, and commercialisation of bio-resources,\footnote{86} the 14 Commonwealth, State and Territory Ministers of Australia

---


\footnote{83}{See: Queensland Government, Queensland Biodiscovery Policy Discussion Paper, (May 2002).}

\footnote{84}{LRCWA, The Interaction of WA Law with Aboriginal Law and Culture, Final Report, Project 94 (September 2006).}

\footnote{85}{T Janke and R Quiggin, Indigenous Cultural and Intellectual Property and Customary Law Background Paper No 12, Law Reform Commission of Western Australia (March 2005).}

\footnote{86}{Ibid 488-90.}
comprising the Natural Resources Management Ministerial Council endorsed the ‘Nationally Consistent Approach for Access to and the Utilisation of Australia’s Native Genetic and Biochemical Resources’ (NCA) which affirms the recognition of Indigenous biodiversity knowledge and its holders.\(^{87}\) It has, however, been argued that this ‘national’ approach has not necessarily been consistently followed in all Australian arrangements on this issue.\(^{88}\)

The Commonwealth Environmental Protection and Biodiversity Conservation Act (Cth) 1999 (EPBCA) ‘implements’ Australia’s obligations under the CBD. But neither the Act nor its regulations adequately address the IP ‘ownership rights’ issues as articulated in arts 8, 10, 15, 17 and 18 of the CBD. The Environment Protection and Biodiversity Conservation Amendment Regulations (No 2) 2005 (Cth) require applicants seeking access to biological resources for commercial purposes to enter into a benefit sharing agreement with the ‘access provider’ which covers Indigenous land owners and native title holders.\(^{89}\) There is, however, an increasing concern that these benefit-sharing arrangements do not adequately take cognisance of the significant detriment suffered by Indigenous people from the loss of intellectual property rights in their traditional ecological knowledge.\(^{90}\) Although s 505A of the EPBCA establishes the Indigenous Advisory Committee to advise the Minister on the operation of the Act taking into account the significance of Indigenous peoples’ knowledge of land management and use of biodiversity, the Minister is under no obligation to act on such advice.\(^{91}\)

Third, Australia should adopt a sui generis IP regime that acknowledges Indigenous property ownership interests in their traditional knowledge of their natural resources. Commonwealth guidelines, recommendations to the states and territories, consultation, access permits to Indigenous lands and waters, and some form of ‘benefit sharing arrangements’ are steps forward, but they are small steps which largely dance around the main issue. And as observed, given the nature of intellectual property law as a largely federal matter, influenced by international law, the real effort at reform needs to be undertaken and mandated at the Commonwealth level.

---


\(^{89}\) Environment Protection and Biodiversity Conservation Regulation 2000 (Cth), reg 8A.04.


\(^{91}\) Chapman, above n 88, 211-12.
To some extent, the case has in fact been made for the development of a sui generis regime that would take cognisance of the peculiar characteristics of Indigenous knowledge.\textsuperscript{92} The development of a sui generis regime however poses challenges such as what is protectable, the extent of rights to be conferred, the identity of the rights holders, the modes of acquisition, as well as the duration and enforcement strategies.\textsuperscript{93} Osei Tutu suggests that certain difficulties would make the adoption of a sui generis IP style traditional knowledge right questionable.\textsuperscript{94} The first is that there is no clear consensus on the meaning of Indigenous or local people and second, that the proposed traditional knowledge right does not ameliorate the inequities of the current system but seeks to expand the IP system without correcting its existing flaws.\textsuperscript{95} She therefore argues that rather than taking an expansionist view of the IP system, the international community should be mindful of the need to balance rights and obligations in the development of international IP law and policy.\textsuperscript{96} Such an approach could, however, merely perpetuate the injustices of the past where, at worst, Indigenous rights were simply ignored, or at best, proved too difficult to ‘quantify’.

A more effective solution to the problem may lie in the recognition of customary law as being very germane to the protection of traditional knowledge as customary practices actually define what constitutes traditional knowledge.\textsuperscript{97} A prominent Australian case in which a judge consulted Aboriginal customary law is \textit{John Bulun Bulun & George Milpurrurrru v R & T Textiles Pty Ltd.}\textsuperscript{98} The case involved an artist’s painting based on the heritage of his people, the Ganalbingu, which was replicated without permission on rolls of fabric made overseas and re-imported into Australia. As the Court notes:

\begin{quote}
[t]he law and customs of the Ganalbingu people require that the use of the ritual knowledge and the artistic work be in accordance with the requirements of law and custom, and that the author of the artistic work do whatever is necessary to prevent any misuse. The artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge.\textsuperscript{99}
\end{quote}

\begin{thebibliography}{99}
\bibitem{93}Ibid, 73.
\bibitem{95}Ibid.
\bibitem{96}Ibid 214.
\bibitem{97}Kuruk, above n 92, 116.
\bibitem{98}(1998) 86 FCR 244.
\bibitem{99}Ibid 262.
\end{thebibliography}
Critically, sui generis regimes to protect traditional knowledge rights are beginning to emerge. A good example of a regional sui generis instrument on traditional knowledge is the African Model Law for the Protection of the Rights of Local Communities, Farmers, Breeders and Regulation of Access to Biological Resources (‘African Model Law’). The African Model Law recognises Community Intellectual Rights which are defined to include rights held by traditional professional groups and traditional IP practitioners. It equally guarantees communities a right to at least fifty per cent of the access permit fees. Another sui generis regional instrument is the Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture (‘Pacific Model Law’). Under the Pacific Model Law, if traditional knowledge is to be used for a commercial purpose, there must be a benefit-sharing arrangement providing for equitable compensation to the right owners. The Andean Community also adopted Decision 486 on a Common Intellectual Property Regime in September 2000. Under the decision, member states undertook to safeguard and respect the ‘biological and genetic heritage, together with the traditional knowledge of their indigenous, African American, or local communities.’ At the national level, countries such as Panama, Ecuador, the Philippines have developed some form of sui generis regime for the protection of traditional knowledge.

The unique right proposed in this essay would be based on the ‘but for...’ test: Where a bio-resource is identified or certain of its properties targeted for investigation based on Indigenous knowledge of location and/or prior


101 Ibid art 23.

102 Ibid art 22.


104 Ibid art 12.


106 Ibid art 3.

Indigenous use, then a certain percentage of the profits from the successful commercialisation of a product or process based on the use of that resource would be allocated to the group whose knowledge of that resource’s use, location, preparation, etc led to the investigation of that resource. Where no particular group of Indigenous ‘knowledge holders’ can be identified, then the percentage of the profits should be allocated to a special fund administered for the benefit of Aboriginal and Torres Strait Islander Peoples.

In sum, where but for prior Indigenous knowledge of the location, properties, preparation, or use of a resource, the resource would likely remain untapped or unidentified for potential commercialisation, then compensation for that knowledge which leads to commercialisation is due and Indigenous people share in the IP right for the ultimate product or process. This new right requires that the legal regime make a place for Indigenous difference. The IP legal regime would need to accommodate a collective, rather than individual interest and acknowledge that in some instances ‘knowledge’ is as valuable as invention or product. While this proposal is tentative and incomplete, and surely not without pitfalls, it is very much in consonance with the principle of equity which is the underlying foundation of the existing IP rights acknowledged in TRIPS and it does seem to overcome the knowledge vs product dichotomy in IP legal regimes while at least providing for some recognition of Indigenous IP rights in natural resources, without violating the non-discrimination principle in TRIPS.

---

108 See Oddie, above n 33, 9; and Voumard, above n 82, 95-96.

109 In her 2008 Wentworth Lecture, Terri Janke suggests creating an analogous arrangement to protect, prevent exploitation of, and promote Indigenous artists and other forms of cultural expression. See Janke, above n 3. Similarly, the CPI 2000 report notes that both national Indigenous organisations and local organisations, such as Aboriginal Land Councils have canvassed the possibility of trusts to identify and administer benefits arising from Indigenous rights in bio-resources. The report recommends consideration of and consultation on such trust arrangements. See Voumard, above n 82, Chapt 6.47-51 and Recommendations 35 and 36, 92-93.

110 Bowrey, above n 80, 63-64.