Patents and Plant Breeder’s Rights in Australian law

Briefing Paper No. 4

Plain English material

The Patents Act 1990 and the Plant Breeder’s Rights Act 1994 are two laws that are used to protect intellectual property (IP) in Australia (see also Briefing Paper Nos. 1, 2 and 3).

Like all the other IP laws, they give the registered owner exclusive or monopoly rights over the product or work that they have produced. For a patent this is an invention – that is, something that is new and original; and for a plant breeder’s right, it is for a new variety of plant that they have bred by genetic crossing of ‘natural’ plant varieties.

What is a patent?

A patent is a right granted under the Patents Act to protect inventions made by people or companies. Inventions are products that are ‘novel’ and different from other things that have already been made or that are known about. As with copyright, under patent law an invention must be in some physical form; an idea in itself cannot be protected. The cost of patenting an invention is about $14,000 (not including the time taken to invent it).

The knowledge Aboriginal and Torres Strait Islander people have about plants is usually not able to be patented, because researchers, such as ethno-botanists, ethno-pharmacologists, anthropologists and linguists, have already published information about the properties and/or uses of these plants. It is therefore not considered new knowledge under the Patent Act, since it is already known about by the public. This knowledge is said to be ‘in the public domain’.

If a patent is granted to a company to develop a process or product that is based on Aboriginal or Torres Strait Islander plant- or animal-related knowledge, this does not prevent Aboriginal and Torres Strait Islander people from continuing to use the plant or animal for medicinal or customary purposes in the same way that they always have. However, the patent owner gains all royalties from the use of the patented product or process, as they have exclusive rights to use their patent for commercial advantage.
What are plant breeder’s rights?

Under the *Plant Breeder’s Rights Act 1994* people, companies or organisations can be granted certain exclusive rights in a new variety of plant that they have produced. These rights allow them to sell the new plant variety or its reproductive material, and to further develop it for commercial purposes. The exclusive rights in plant varieties can last for up to 25 years. Like the rights to a patent, these rights have to be applied for, and cost considerable money. The costs involved, and high level of scientific expertise and equipment needed to meet the criteria for acquiring rights under plant breeder’s rights laws mean that this type of intellectual property law is usually very difficult for Aboriginal and Torres Strait Islander people to use or access.

As with other intellectual property laws, the rights given under these two laws (patents and plant breeder’s rights) are only granted for a limited period of time. This means that these laws are generally not able to be used by Aboriginal and Torres Strait Islander people to protect their rights in their plant- and animal-related knowledge, or in other kinds of knowledge, because Aboriginal and Torres Strait Islander knowledge is ancient and is passed down from the ancestors and the Dreaming. Thus, because some Aboriginal and Torres Strait Islander people see their knowledge as continuous, applying for rights for fixed time periods may not be considered.

Another problem with patents and plant breeder’s rights laws for Aboriginal and Torres Strait Islander people is that the rights granted under these laws are exclusive to individuals or companies, and do not allow for recognition or protection of collective or community rights. These collective rights may be held by many individual custodians who ‘hold’ specific plants along the Dreaming tracks that ‘travel’ across long distances.

An additional problem with plant breeder’s rights is that they do not recognise the deliberate manipulation and domiculture of plant species *in situ*, that is, within ecosystem contexts that was done by Aboriginal and Torres Strait Islander people over thousands of years.

**When these IP laws might be useful for Aboriginal and Torres Strait Islander people**

As with all the intellectual property laws, Aboriginal and Torres Strait Islander people need to be aware of patent and plant breeder’s rights laws so they can make use of them if relevant to their needs. Notably, there are some Aboriginal and Torres Strait Islander people who have chosen to place their knowledge in the public domain because they put a high priority on educating younger
Aboriginal and Torres Strait Islander people and the wider Australian public, not because they anticipate economic returns.

There may also be instances where Aboriginal and Torres Strait Islander people will need to oppose or challenge a patent or plant breeder’s right that has been wrongly given to an individual, company or organisation over a plant or animal product or property, or related knowledge that is used by the Aboriginal and Torres Strait Islander people. It is also important for Aboriginal and Torres Strait Islander people to be able to state their rights in regard to patents or plant breeder’s rights if they are involved in discussions or negotiations for a contract or agreement with a company, researcher or government department that is interested in using their knowledge, and/or plants or animals that are important to them.

One of the ways in which Aboriginal and Torres Strait Islander people can make sure they protect their knowledge from being taken away from them by bad patents is to record and document it in community-owned registers or databases. In these cases, they may wish to be joint owners in a patent application. It is vital, if Aboriginal and Torres Strait Islander people are negotiating contracts or agreements involving plants and animals and associated knowledge, that they seek to maximise the benefits they will receive when external parties use their plants and animals and associated knowledge and practices.

If Aboriginal and Torres Strait Islander people are involved in negotiating contracts and agreements for projects involving their knowledge that may be subject to patents (and to a lesser extent plant breeder’s rights), it is also vital that they are aware of, and take measures to protect their ethics and cultural protocols, and that the right permissions are obtained by the researchers by means of free prior informed consent processes.

**References**


Note: We would like to thank Fiona Walsh for contributions and comments on a draft of this briefing paper.