



NINTI ONE REMOTE ECONOMIC PARTICIPATION

STRATEGIES TO SUPPORT ABORIGINAL AND TORRES STRAIT ISLANDER INTERESTS IN THE DEVELOPMENT OF NEW NATIVE PLANT VARIETIES

POLICY BRIEFING KEY HIGHLIGHTS

- ▶ Aboriginal and Torres Strait Islander peoples are key stakeholders in the development of new native plant varieties.
- ▶ Few laws support the diverse interests of Aboriginal and Torres Strait Islander peoples in this commercial context.
- ▶ The wider implementation of access and benefit-sharing laws related to genetic research on wild plants may improve support for some interests some of the time.
- ▶ The Plant Business project uses a novel approach to identify an integrated set of possibilities that may support more Aboriginal and Torres Strait Islander interests in more situations.

Background

One aim of the Plant Business project is to identify how laws and institutions (public and private) can support the interests of Aboriginal and Torres Strait Islander peoples in the development of their traditional plant foods ('bush foods'). Bush food products include gourmet sauces, jams and pies and new varieties of bush food plants.

This brief provides an overview of research findings in relation to the capacity of laws and institutions to support Aboriginal and Torres Strait Islander interests in the development of new bush food varieties.

The aim of the brief is to further discussion and investigation of options to strengthen the position of Aboriginal and Torres Strait Islander peoples in the development of their traditional foods.

Aboriginal and Torres Strait Islander interests in new plant variety development

The development of new native plant varieties for horticultural production can help conserve wild populations by lessening the demand on wild plants. Australian and international breeders have developed new varieties of native wildflowers, bush foods and landscape plants.

Aboriginal and Torres Strait Islander peoples have diverse interests in their local species from which new varieties derive. These may include, but are not limited to:

- control of species and species knowledge
- fair share of benefits from species and knowledge use
- development of native plant enterprises and partnerships
- transfer and maintenance of species knowledge in cultural practices.

This brief proposes some possible ways for governments to improve support for Aboriginal and Torres Strait Islander interests at key stages in the development of new plant varieties.



Project planning and financing

This stage involves planning research and development and securing investment and commercial partners.

Current support

- Aboriginal and Torres Strait Islander people can enter into plant breeding partnerships.
- Public sector researchers (e.g. those working at universities) who research Aboriginal and Torres Strait Islander peoples must generally comply with ethical guidelines, which may require negotiating with Aboriginal and Torres Strait Islander peoples (e.g. *Guidelines for Ethical Research in Australian Indigenous Studies 2012*).

Issues

- Most public sector breeder's research native plants, not Aboriginal and Torres Strait Islander peoples, and so are not generally expected to follow ethical guidelines which may require negotiations with Aboriginal and Torres Strait Islander peoples.
- Most plant breeders are private enterprises not subject to ethics approval conditions.
- An Aboriginal and Torres Strait Islander person may not have the capacity or desire to be involved in further developing wild native plant varieties.

Possible ways for government to improve the situation

- Extend the application of the *Guidelines for ethical research in Australian Indigenous studies 2012* to publicly funded researchers investigating native plants.
- Implement a collaborative native plant breeding program to benefit and in partnership with Aboriginal and Torres Strait Islander peoples, providing support to:
 - create confidentiality agreements to protect knowledge
 - develop cultural branding strategies
 - make Plant Breeder's Rights applications
 - license Plant Breeder's Rights and trademarks
 - manage licensing agreements and royalties.

Research and development

This may involve collecting plant specimens and knowledge, selecting varieties with desirable traits, crossbreeding selected varieties and propagating new varieties.

Current support

- Aboriginal and Torres Strait Islander peoples who control access to land can negotiate agreements with people wanting to access wild specimens from their land.

- The holders of Aboriginal and Torres Strait Islander knowledge can negotiate support for their interests with people wanting to use their knowledge.
- The law allows a limited ability for people to sue others for unfair use of their commercial secrets and breach of agreement.
- Aboriginal and Torres Strait Islander people might develop, legally protect and exploit plant varieties.

Issues

- Access to many plant specimens does not require negotiations with traditional land custodians, for example, specimens accessed from herbariums, nurseries and private collections.
- Many collection agencies (e.g. herbariums, arboreta or germplasm collections) freely provide native plant specimens to researchers in other countries, limiting Aboriginal and Torres Strait Islander people's control of traditional resources.
- It is difficult for breeders to know what knowledge Aboriginal and Torres Strait Islander peoples have, and much native plant knowledge is publicly available from non-Aboriginal and Torres Strait Islander sources.
- Court proceedings to enforce agreements to not disclose Aboriginal and Torres Strait Islander knowledge are expensive, risky and limited jurisdictionally, for example, a Queensland court can only prevent use in Queensland.
- Aboriginal and Torres Strait Islander peoples cannot control the use of their knowledge once it is published.
- Aboriginal and Torres Strait Islander peoples may not have the funds to transform wild varieties into stable varieties for commercialisation.

Possible ways for government to improve the situation

- Create a national register of the contact details for legally recognised traditional custodians of bush foods, using as a starting point Aboriginal and Torres Strait Islander groups with freehold title over land, native title holders, registered native title claimants and Aboriginal and Torres Strait Islander peoples party to land use agreements.
- Amend the laws regulating the taking of native plants from public lands to require non-Aboriginal and Torres Strait Islander researchers and developers to obtain consent from relevant traditional custodians to take native plants from these lands (similar to existing legal requirements to obtain landowner consent to access private land).
- Amend funding agreements with public botanical collections (e.g. herbariums, arboreta or germplasm collections) to require the collection to ensure people negotiate specimen access with the traditional custodians of land from where the specimen was collected.
- Amend export laws to require the exporters of native plant specimens to have a benefit-sharing agreement with the traditional custodians of the land from where the specimen was originally collected (where known).



- Support traditional custodians to develop engagement protocols, and require parties to comply with the engagement protocols of traditional custodians.
- Implement a central database support service to help Aboriginal and Torres Strait Islander groups develop knowledge databases that serve their interests. Support might include:
 - searching and collating publicly available knowledge
 - identifying what knowledge is available without disclosing the details of that knowledge
 - developing policies and model agreements to facilitate commercial partnership
 - negotiating database access arrangements with international intellectual property offices to prevent Plant Breeder's Rights or patents being granted for products derived from database knowledge.
- Implement a collaborative native plant breeding program to benefit and in partnership with Aboriginal and Torres Strait Islander peoples (see above).

Acquisition of rights and marketing

This may involve naming a new variety and securing a Plant Breeder's Right or patent over the variety. Plant Breeder's Rights and patents grant the rights-holder the exclusive right to grow and sell the variety for up to 25 years. An alternative commercialisation strategy is to market the new variety using a distinctive trademark.

Current support

- Aboriginal and Torres Strait Islander peoples may petition IP Australia to reject a trademark application associated with a new plant variety, where the mark contains cultural words (e.g. words from an Aboriginal or Torres Strait Islander language).
- Aboriginal and Torres Strait Islander peoples may lodge a complaint with consumer authorities regarding commercial practices that misrepresent Aboriginal and Torres Strait Islander support for, or involvement in, product development.
- Any person whose commercial interests would be affected by the grant of Plant Breeder's Rights can object to its registration on the basis the variety is commonly known.
- Any person can oppose the grant of a patent on the basis that the variety is not original.
- Aboriginal and Torres Strait Islander breeders can obtain Plant Breeder's Rights or patents over otherwise secret varieties, and/or distinguish those varieties in the marketplace using distinctive trademarks (e.g. geographical or cultural indicators of provenance).

Issues



- In order to exercise many of their potential rights, Aboriginal and Torres Strait Islander peoples need to be aware of unauthorised uses of cultural words and symbols.
- Objecting to Plant Breeder's Rights and patent applications requires awareness of the application and technical skills to prove the variety is a known variety.
- Plant Breeder's Rights and patents only allow the rights holder to exploit the variety in the jurisdictions in which the rights are granted.
- Aboriginal and Torres Strait Islander peoples cannot obtain Plant Breeder's Rights or patents over already known varieties, and collection agencies (e.g. herbariums, etc.) have identified and continue to identify many native varieties.
- Aboriginal and Torres Strait Islander peoples may not have resources to develop wild varieties into commercially viable plants that others can regrow, or to secure and enforce a Plant Breeder's Right or patent.

Possible ways for government to improve the situation

- Implement a collaborative native plant breeding program to benefit and in partnership with Aboriginal and Torres Strait Islander peoples (see above).
- Waive fees for Aboriginal and Torres Strait Islander peoples to apply for Plant Breeder's Rights over their genetically stable varieties.
- Implement an alternative dispute resolution service to mediate disagreements over the commercial use of native plant varieties.
- Amend Plant Breeder's Rights, patent, trademark and copyright laws to require that any attempted registration of a native plant variety or any attempted use of Aboriginal or Torres Strait Islander art or expressions shall be notified to an agreed list of Aboriginal and Torres Strait Islander organisations, to facilitate protection of cultural interests.

Licensing, production and sale

This stage may involve licensing rights to reproduce, grow and sell varietal material (e.g. seeds, seedlings, clones and tissue culture), licensing rights to sell new varieties under distinctive marks, growing plants to sell, selling plants through nurseries and online stores, securing interstate trade or export permits and paying government levies on potted plant containers.

Current support

- Aboriginal and Torres Strait Islander peoples who hold a Plant Breeder's Right or patent can negotiate licensing agreements.
- Aboriginal and Torres Strait Islander peoples with access to land can develop and sell genetically stable varieties.
- Aboriginal and Torres Strait Islander breeders can join Supply Nation to connect with people interested in buying Aboriginal and Torres Strait Islander products.

Issues

- Aboriginal and Torres Strait Islander peoples may not have the funds to transform wild varieties into stable varieties for commercialisation or to secure Plant Breeder's Rights or patents.
- Aboriginal and Torres Strait Islander peoples may not have access to land on which to grow genetically stable varieties.
- There is no legal requirement for exporters to consider the interests of Aboriginal and Torres Strait Islander peoples when exporting native plant materials.

Possible ways for government to improve the situation

- Implement a collaborative native plant breeding program to benefit and in partnership with Aboriginal and Torres Strait Islander peoples (see above).
- Support traditional land custodians to negotiate land use agreements that allow them to grow new varieties on that land.
- Exercise existing legal authority to require people transporting plant materials to overseas producers to disclose benefit-sharing arrangements with Aboriginal and Torres Strait Islander peoples.
- Encourage peak plant-breeding bodies (e.g. Nursery and Garden Industry Australia) and their members to implement Reconciliation Action Plans that target commercial partnerships with Aboriginal and Torres Strait Islander peoples.

Further information

Lingard K. 2015. Legal support for the interests of Aboriginal and Torres Strait Islander peoples in the commercial development of new native plant varieties, *Australian Intellectual Property Journal*, vol. 26 no. 1 (in press).

Kylie Lingard: Telephone: (+61) 02 6773 3585 or (+61) 08 7905 5510
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Research Partners of the CRC-REP Plant Business Project

