



IP Food for Thought: Intellectual Property and Protecting Indigenous Bush Foods

***Merinj Kaartdijin: Aboriginal Food
Knowledge Forum***

Conference Paper

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About Terri Janke and Company

Terri Janke and Company was established in April 2000 in Sydney as an independent commercial law firm advising on matters related to Indigenous business and intellectual property. For more than 19 years, our firm has been finding simple solutions to complex legal matters. We have worked on more than 3000 matters for a broad range of clients, including; businesses, organisations, associations and government agencies.

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Opening

We acknowledge the Menang Noongar of the beautiful Great Southern Region of Western Australia (**WA**), on which this paper was presented. Desiree Leha and Charisma Cubillo, Indigenous Graduate Lawyers from Terri Janke and Company, Lawyers and Consultants (**TJC**) are pleased to attend the Merinj Kaartdijin: Aboriginal Food Knowledge Forum. We have been asked to talk about the Australian Intellectual Property framework and provide some tips for protecting your bush food products and services. This is an introduction only and provides general advice. If you need specific legal advice, we recommend that you contact our firm.

Introduction

Australia is home to unique natural resources and rich with biodiversity which presents great potential for growth in bush foods and cultural tourism for Indigenous people. Aboriginal people have used Indigenous plants from their country as a food source for tens of thousands of years. Our connection to animals and plants are deeply rooted into our knowledge systems and ways of being on country. For some, bush foods are a part of our song lines and are our totems. There are cultural protocols and customary laws that Indigenous peoples follow when they are caring for species and passing on the associated knowledge.

Indigenous knowledge has been used in the commercial development of bush foods, and in the past this has resulted in exploitation. Indigenous people were not historically given decision making roles about this commercial development. Our aim is to provide information about intellectual property laws that can assist you make better choices about the commercialisation of your bushfoods; and to also plan strategies for guarding your Indigenous Cultural and Intellectual Property (**ICIP**) and developing Intellectual Property (**IP**) protection.

IP is a category of laws that grant protection over products of the mind. IP is built on the premise that exclusive rights should be actively granted to people or corporations for expressions of original thoughts as an incentive for innovation of information. However, IP is fundamentally flawed when it comes to protecting Aboriginal plant knowledge.

There is no single law which can protect ICIP by giving rights to Aboriginal people to control their knowledge and genetic resources. Aboriginal people must be strategic. It is important to know these laws and make them work for you when you are planning a bushfoods project.

1. Keeping Ideas Secret: Confidential Information

A common mistake people make when they come up with bushfoods ideas is to publish or talk about the idea to other people without letting them know that the idea is confidential. Many a good idea, recipe or plant preparation technique are disclosed in publications by local Aboriginal organizations, or when approaching potential partners.

Confidential information law can be used to stop other people from disclosing trade secrets, and confidential knowledge like recipes or a proposed business model for a project for instance. The information cannot be generic or publicly known, the information must be confidential. The person receiving the knowledge must also know that the information is confidential, and the disclosure of the information must be harmful to the discloser. If there is any breach of confidence, the confidential information must be identifiable; have some form of originality; and should not be public knowledge.

Confidential information laws have been used to stop the unauthorised book publication of sacred men's ceremony.¹ However, if we are talking about traditional plant knowledge, a lot of information may be published in books or available on the internet. But you might have knowledge of seeds, or plants that have never been published. Information like how to grow or find the seeds may be confidential.

Before sharing your confidential or secret information, it is recommended that non-disclosure agreements (NDA) are used and signed by all people receiving the information. NDA's (also known as confidentiality agreements) are legal contracts, which should be used when sensitive information needs to be shared between two parties. NDA's ensure that the person or organisation who gain access to sensitive information does not disclose it to a third party without your consent.²

Our tips for using confidential information law to your advantage are:

¹ *Foster and Others v Mountford and Rigby Ltd* 14 ALR 71 (1976) was the first Australian case to consider Aboriginal customary rights to cultural protocols surrounding secrecy. Please see case studies for more details.

² For more information see IP Australia's website: Non-Disclosure agreements - <https://www.ipaustralia.gov.au/ip-for-digital-business/idea/non-disclosure-agreements>.

1. Keep your ideas confidential – do not publish or speak widely about them until you have your IP registered and your product or services business model worked out;
2. Mark all written information as commercial in confidence; and
3. When telling potential partners about the information, explain to them that it's confidential, and if possible, get them to sign a non-disclosure agreement.

2. Intellectual Property laws: use with care when protecting bushfoods

Intellectual property laws require you to meet the criteria of the laws in order to protect your bushfoods. This section we identify ways the laws may be of use, and also where there are gaps in the law, that you need to be careful about.

2.1 Copyright

The *Copyright Act 1968 (Cth)* grants automatic rights to the creators of works such as literature, art, films, recordings, music. There is no need for registration.

To get copyright protection, works must be original, have an identifiable author and be expressed in material form. Generally, the author, artist or maker is the owner of copyright. Copyright protection for works lasts for the life of the author, plus 70 years. Once this period is over, the work is in the public domain, where other people can use it without asking.

Copyright protects the expressions and not the underlying ideas or concepts. So, this is why publishing books about the properties of plants doesn't stop people from finding out about the information and using it. It only stops people from copying a substantial part of the expression of the idea or concept. Some of the problems to watch out for them are:

- (i) Indigenous Knowledge is often communally owned, therefore appropriate authority to use traditional plant knowledge and cultural knowledge should be sought;
- (ii) once traditional knowledge is published and copyright protection expires, that cultural knowledge becomes part of the public domain;
- (iii) People who write down the information might become the copyright owners of the text or book;
- (iv) If you are filmed speaking about the knowledge, the maker of the recording will own copyright in the film. However, you do have performer's rights which allow you refuse to be filmed, or to set the terms of how the film is to be used. Look

closely at any release forms that you are given, to make sure you are happy with the ways the film will be used.

Copyright in the work of employees belong to the employer but copyright in the work of contractors is owned by the contractor. You can assign copyright in writing, and this is where agreements are key for ensuring that any content belongs to you when you are dealing with contractors.

Licensing of copyright is the way that copyright authorise others to use their works. Licensing should be done using written licence agreements. Licence agreements are an effective model for businesses seeking to engage with Indigenous artists or use their artistic works, providing terms and conditions that, when respected, facilitate respectful and ethical engagement.³

Moral rights are also granted to authors in the Copyright Act 1968 (Cth), but are personal rights which cannot be licensed to others. Moral rights include the right of (a) attribution, (b) against false attribution and (c) the right of integrity. So, if you are dealing with content made by other people in your project, you will have to negotiate moral rights clearances with the authors, performances and filmmakers.

Our tips for using copyright law to your advantage are:

1. Make sure that you own the copyright in written materials;
2. Licensing should be done using written agreements;
3. Check IP clauses in funding agreements to ensure that rights vest in you, and further, that any licenses granted to the funding agency are not too wide that they interfere with your business model; and
4. If using artistic work for packaging or logos or website, make sure that you have an agreement with the artist that covers the rights to reproduce the work, includes a fair payment; has terms for attributing the artist, and making sure you have moral rights consent to adapt the work if you want to alter it for the website.

³ Terri Janke and Company, 'Promoting ethical manufacture of Indigenous art products with Art Licensing Agreements', <http://www.terrijanke.com.au/single-post/2019/10/29/Promoting-ethical-manufacture-of-Indigenous-art-products-with-Art-Licensing-Agreements>

2.2 Plant Breeder's Rights

The *Plant Breeder's Rights Act 1994 (Cth)* gives plant breeders exclusive commercial rights to market a new plant variety or its reproductive material. To be eligible for protection under this law, plant breeders must show that the new variety is distinct, uniform and stable. Protection lasts up to 25 years for trees or vines, and 20 years for other species.

Plant Breeder's Rights (**PBR's**) are personal rights which allow plant breeders:

- produce, reproduce, sell and distribute the new plant variety;
- receive royalties from the sale of plants, or sell the rights to do so; and
- prevent others from selling seeds of that variety.

There are specific exceptions to infringing PBR's, these include breeding conducted for private, experimental or for the purpose of breeding other varieties.

The ability of PBR's to protect Indigenous interests is limited as they offer protection for a set term and usually vests in individuals, while Indigenous knowledge is communal and lasts in perpetuity. PBR applications require a considerable degree of legal and scientific expertise and may be expensive.

PBR's are about commercialisation. This could be useful where Indigenous people wish to take part in industry, but it does not give Indigenous people the right to be recognised as plant breeders where they have intergenerationally developed and nurtured plants.

Our tips for using PBR law to your advantage are:

1. Be conscious of who you share information with;
2. Before entering a research collaboration, make sure you seek consent from appropriate cultural authority or elders; and
3. If you decide to collaborate with other companies or individuals wanting to commercialise on your plant knowledge, make sure the IP clause in the research agreement recognise Indigenous interests.

2.3 Patents

Under the *Patents Act 1990 (Cth)*, a plant existing in nature or a mere discovery is not patentable. To have a patent application approved, an inventor or organisation needs to demonstrate that the invention is new and involves an inventive step. Patents aims to protect the IP of an inventor by allowing them to control the use of their invention for a limited time frame. A standard patent offers protection for up to 20 years.

There have been circumstances where medicinal plant knowledge has been sourced directly from Indigenous people; and instances where traditional knowledge has been taken from published accounts in textbooks, guides, or databases, and later patented by researchers, scientists and corporations.

It is problematic for traditional custodians to obtain patents over methods of bush food harvesting, cooking and production due to the 'inventive step' requirement of patents. Another barrier to Aboriginal ownership of patents is the cost associated with applying for patent protection or applying to oppose a patent application.

Our tips for using patent law to your advantage are:

1. Always have written agreements;
2. Use research clauses which ensure you are apart of the decision making in the research;
3. Do not disclose secret until granted patent protection; and
4. Be strategic, you will need to register in Australia and apply for an international patent if you want to commercialise on global scale.

2.4 Trade Marks

The *Trade Marks Act 1995* (Cth) provides protection for distinguishable signs, designs and expressions used in the trade of products and services. Trade marks (**TM**'s) can be used by companies or enterprises that incorporate traditional plant knowledge and bush foods to distinguish themselves from competitors.

TM protection lasts 10 years from registration. However, TM protection can be renewed indefinitely so long as the distinctive mark is continually used to identify the registered goods and/ or service. TM's can be filled and protected in different countries.

A 'geographical indication', or 'GI' identifies a good as originating in a specific region where a particular quality, reputation or other characteristic of the good is attributable to that geographic origin. The attributes of the goods may derive from either:

- the method of production and the ingredients used;
- the environmental or agricultural features of the region which give the product its distinctive qualities;
- a strong reputation that may have developed in the region for producing a particular good of a certain quality over time.

Trade marks can be registered using collective or certification trade marks if there is a link between the special characteristics of the good and the geography or reputation of the region. GI's are a form of certification mark which indicates that a good originates from a specific region, and attributes a good with a particular quality, content or production methods.⁴ TM's and GI's may be used together to protect the quality and commercial value of products, however the cost of applying for registration TM's and/ or IG's may be a barrier for Aboriginal bush food entrepreneurs.

Our tips for using TM law to your advantage are:

1. Use TM for unregistered TM's, and ® for registered TM's (i.e. logo, slogan or other distinctive mark);
2. Use unique names which are descriptive and distinctive to your service or product; and
3. Apply for both patent and TM protection for your product if possible.

⁴ For example, wine can only be labelled Champagne if it derives from Champagne, France or Australian Wild Abalone GI for wild catch abalone from Australian waters.

3. Access and Benefit Sharing Agreement Laws: looking after genetic resource and traditional knowledge

Australia has been a signatory of the *Convention on Biological Diversity (CBD)* since 1992 and committed to the three goals of conservation of biodiversity; sustainable use of biodiversity; and fair and equitable sharing of the benefits arising from the use of genetic resources.

Article 8 states that signatories must:

*Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*⁵

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation (Nagoya Protocol)* complements the CBD and provides protection for traditional knowledge associated with genetic or natural resources.⁶ The Nagoya Protocol implements the CBD core objective of fair and equitable sharing of benefits arising from utilising genetic resources.

Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC) aims to control access to resources on Commonwealth areas and applicants for access must enter benefit-sharing arrangements with all access providers. Unfortunately, the EPBC Act limits these requirements only to access where genetic resources are used commercially. This means if plant knowledge was used for non-commercial purposes, there are no limitations in place to stop traditional practices and use of Indigenous native foods by non-Indigenous people.

The CBD and Nagoya Protocol is currently being ratified in Australia. WA is the first state to do so with the development of the *Biodiscovery Bill* being led by the WA Department of Jobs,

⁵ *UN Convention on Biological Diversity*, Art. 8(j). Available: <https://www.cbd.int/convention/text/>.

⁶ *Un 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 at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

Tourism, Science and Innovation.⁷ The *Biodiscovery Bill* will outline an authorised process for biodiscovery activities of genetic resources, and promote compliance with the Nagoya Convention and Protocol in WA. The *Biodiscovery Bill* will align with the principles of:

- Authorised access – prior informed consent from traditional custodians;
- Mutually agreed terms – negotiations of access and use of knowledge;
- Benefit sharing – fair and equitable sharing of monetary and non-monetary benefits; and
- Recognition and protection of traditional knowledge – attribution to be given to traditional custodians of knowledge.

Access and benefit sharing agreements will therefore be the future to ensuring Aboriginal custodians of traditional plant knowledge are acknowledged, and Aboriginal communities have access to and can benefit from the commercialisation of this knowledge in pharmaceuticals, cosmetics, horticulture, pesticides, biotechnology and bush foods.

⁷ Legislation and policy. <https://www.jtsi.wa.gov.au/what-we-do/industry-development/industry-development-legislation>

4. ICIP Protocols: how ethical practices and protocols can be useful for Indigenous protection of bushfoods

ICIP rights are Indigenous peoples' rights to their cultural heritage, both the tangible and intangible aspects including traditional knowledge and cultural expressions.⁸ ICIP is connected to the cultural, social and historical contexts of the Indigenous communities it belongs to, including belief and ecological systems.

Ownership of ICIP is communal and involves certain roles, obligations and responsibilities to look after the knowledge and pass it on. In some instances, ICIP may be undocumented and transmitted through dance, song, performance and oral traditions; and in other cases, ICIP may be documented in artworks, historical records and books. This cultural heritage is a living tradition that is not static but constantly evolving and nurtured over time as part of intergenerational cultural expressions.

Indigenous plant knowledge and bush foods is ICIP, and Aboriginal people have the right to:

- own and control the use of ICIP in accordance with customary laws;
- benefit commercially from the authorised use of ICIP;
- be given full and proper attribution and recognition; and
- prevent the derogatory and offensive uses of ICIP.⁹

An ICIP protocols should be following or developed to promote cultural renewal opportunities for expanding the national bush food market.

Our tips for protecting ICIP are:

1. Consult community from the initial planning phase and throughout projects which use ICIP;
2. Ensure the Interests of traditional custodians of plant knowledge are put first and they are involved in decision making regarding the use of their ICIP; and
3. To fill the gaps in IP protections, check all written agreements integrate clauses surrounding appropriate cultural lore and protocols to be followed in the project.

⁸ ICIP rights are discussed in detail in the landmark report, Terri Janke, *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (Michael Frankel and Company, 1998) which is available: <http://www.terrijanke.com.au/our-culture-our-future>.

⁹ Terri Janke, *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (Michael Frankel and Company, 1998) 43-44.

Conclusion

Bush foods and Aboriginal plant knowledge can not be protected by just one area of law. As shown above it is necessary to adopt an approach which uses confidential information, copyright, trade marks, patents, plant breeders rights and access and benefit sharing laws.

Aboriginal bush foods producers must be proactive and strategic. It is important to go into any commercial or research opportunity understanding your rights and considering the potential impact of the project.

We recommend that any bush food project should firstly consider how they will apply the True Tracks ICIP principles.

You should also use written contracts that deal with rights and obligations as well as benefit sharing. When partnering with universities or companies, it is important to have access and benefit sharing agreements or research agreements so that you can understand the terms of the deal and set solid foundations.