

**National Group:** Australia

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## **Questionnaire February 2010**

**Special Committees Q 94 – WTO/TRIPS and Q166 – Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

**on the**

**Requirement of indicating the source and/or country of origin of genetic resources and traditional knowledge in patent applications**

### **Questions**

**1)** Is there a legal requirement in your country that the source and/or country of origin of biological/genetic resources and traditional knowledge must be indicated in patent applications for inventions based on such biological/genetic resources or traditional knowledge? **NO**

**2)** Please indicate your *experience* with the application of the legal requirement as listed under 1) when filing and prosecuting patent applications in your country. **NOT APPLICABLE**

**3)** Please give *statistical data* on the number of applications mentioning source and/or country of origin of genetic resources and/or traditional knowledge, following the legal requirement as listed under 1) in your country. If such data are not available, please give an estimate of the number of such applications. **NOT APPLICABLE**

4) Please indicate whether *administrative or judicial decisions* on the application of the legal requirement as listed under 1) are available. If yes, please provide the text of such decisions.

**NOT APPLICABLE**

5) If there is no legal requirement of indicating the source and/or country of origin of genetic resources and/or traditional knowledge in patent applications for inventions based on such genetic resources or traditional knowledge in your country: Do you know of any *project of law* in your country dealing with the topic? If yes please provide the corresponding text and review it for the questions a) to i) as under 1). Please include also links to websites which would allow us to follow the progress on these projects of law.

**We are not aware of any specific *project of law* in Australia dealing with this topic. However, there is legislation which may link into certain provisions of the current Patents Act 1990 with respect to inventions the use of which would be “contrary to law” (specifically section 51(1)(a): “*The Commissioner may refuse to accept a patent request and specification, or grant a patent for an invention the use of which would be contrary to law*”).**

**For example, the following legislative instruments may have impact on patentability of inventions based on biological/genetic resources or traditional knowledge, even though there is no specific requirement under the Patents Act 1990 to disclose relevant source details in the patent specification:**

**Australia has ratified the Convention on Biological Diversity, and now has legislation in the form of the Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act). The EPBC Act has among its objectives, recognition of the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity, and promotion of use of indigenous people’s knowledge of biodiversity with the involvement of and in co-operation with, the owners of that knowledge.**

**The EPBC Act and The Environment Protection and Biodiversity Conservation Amendment Regulations 2001 include provisions dealing with control of access to biological resources, agreement with traditional owners regarding the equitable sharing of benefits arising from exploitation of biological resources, the facilitation of access to such resources, the right to deny access to such resources, and the granting of access to such resources, and the terms and conditions of such access.**

**Changes to Environment Protection and Biodiversity Conservation Regulations, which came into force in December 2005, give further effect to Australia’s obligations under the Convention for Biodiversity (CBD) and deal with access to and**

the taking of biological resources of native species for research and development on any genetic resources, or biochemical compounds, comprising or contained in the biological resource.

For constitutional reasons the Commonwealth is unable to legislate in relation to State and Territory areas, hence the regulations only apply in Commonwealth areas. At present, existing State and Territory law prohibits without permit, harvesting of some native species, and in particular endangered species. Whereas the legislative instruments differ between the states and territories of Australia, they are all working towards establishing generally consistent provisions throughout the country in publicly owned lands and waters, such as national parks, reserves etc. (eg. Queensland's Biodiscovery Act 2004).

<http://www.environment.gov.au/biodiversity/publications/access/regs/pubs/regs.pdf>

Details for access arrangements and contact details for each state and territory are available at:

[www.deh.gov.au/biodiversity/science/access/index.html](http://www.deh.gov.au/biodiversity/science/access/index.html)

For further information, the Commonwealth Department of Environment and Heritage provides the website <http://www.deh.gov.au/biodiversity/publications/>

In April 2008, IP Australia, the Australian government agency responsible for administering patents, trade marks, designs and plant breeder's rights, announced its reconciliation plan. Among the aims of the plan is the further development of Australian government's policy positions on IP issues as they relate to the needs and interests of indigenous Australians; and to better engage and consult with the indigenous community on IP issues to ensure that the concerns and interests of indigenous Australians on IP issues are fully considered.

<http://www.ipaustralia.gov.au/pdfs/general/IP%20Australia's%20Reconciliation%20Action%20Plan.pdf>

There have been no cases as yet where such non-IP legislative provisions in this area of technology have been used to challenge patents or prevent their grant. The "contrary to law" provisions of the Patents Act 1990 have been used recently in a different area of technology (embryology/stem cells) to refuse the grant of a patent. Whether or not a similar approach is likely to be adopted by IP Australia with respect to inventions that contravene provisions of the above-discussed legislation is unclear at present.

## Procedure

It would be most helpful if the National Groups would fill out the Questionnaire and send in their answers to the General Secretariat of AIPPI by **12 March 2010** to:

[f.martin@aippi.org](mailto:f.martin@aippi.org)

Please use a separate sheet for indicating your answers or include the answer in the present text at the end of each question.

For inquiries, please contact any of the chairs of Q94 and Q166:

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