

MODEL LAW FOR THE PROTECTION OF TRADITIONAL ECOLOGICAL KNOWLEDGE, INNOVATIONS AND PRACTICES

ANALYSIS

1 Short title	10 Commercial use
2 Interpretation	11 Non-commercial uses
3 Application	12 Remedies and jurisdiction
4 Act to bind government	13 Offence by a company
5 All traditional ecological knowledge, innovations and practices owned	14 Amendment to patent law
6 Proof of ownership	15 Amendment to copyright law
7 Co-ownership	16 Amendments to geographical indications, appellations of origin and trade marks laws
8 Nature of ownership right	17 Amendment to designs law
9 Register of traditional ecological knowledge, innovations and practices	18 Regulations

TRADITIONAL ECOLOGICAL KNOWLEDGE, INNOVATIONS AND PRACTICES ACT 200X

An Act to prevent unauthorised use of traditional ecological knowledge, innovations, and practices and to ensure equitable sharing of benefits derived from the use of such knowledge, innovations and practices.

1. Article 8(j) of the Convention on Biological Diversity (CBD) uses the phrase “knowledge, innovations and practices” which is adopted by this Act.
2. A distinction is made between “commercial” and “non-commercial” use; see sections 10 and 11.
3. The Act encompasses not only knowledge, but also products (ie, innovations) and practices based on that knowledge. In this regard it differs from the proposed Peruvian regime which focuses only on knowledge.

1 Short title

This Act may be cited as the Traditional Ecological Knowledge, Innovations and Practices Act 200X.

2 Interpretation

In this Act unless the context otherwise requires:

“**commercial use**” occurs when traditional ecological knowledge, or an innovation or practice, becomes the subject of a commercial transaction;

“**Commercial transaction**” is a deliberately wide term and covers transactions such as sales, leases, licenses, mortgages, conditional sales, etc.

“**entity**” means a national government or the Regional Coordinator in their capacity as trustees;

“**group**” means a number of people belonging to a Pacific island having a long standing social organisation that binds them together whether in a defined area or in any other manner and includes a village, community or family;

“innovation” means biological material - defined as any part, including the genes, of a plant, animal or microorganism - rendered of any or of enhanced use or value through the application of traditional ecological knowledge;

The focus of the Act is not only plants (eg, kava, nonu, etc) but includes animals and microorganisms. The Act, though modelled along the lines of the Third World Network “Community Intellectual Rights Act” 1994, is therefore broader inasmuch as the focus of the latter is solely plant varieties.

The term “rendered” refers to the transformation of raw material by human intervention.

“own” means to belong - as this word is understood according to the culture or rules of the relevant individual, entity or group - to that individual, entity or group and “owner” “owned” and “ownership” have corresponding meanings;

The term “own”, depending on the cultural context, can signify not only total control, but different forms of control such as trusteeship, custodianship, stewardship etc.

“practice” means a generations-old process, method or way of doing things, gained over generations of living in close contact with nature;

“Regional Coordinator” means a regional body or an individual position to be designated or established by the governments of the South Pacific;

“traditional ecological knowledge” means generations-old knowledge whether embodied in tangible form or not, gained over generations of living in close contact with nature regarding:

- living things, their constituent parts, their life cycles, behaviour and functions, their effects on and interactions with other living things (including humans) and with their physical environment;
- the physical environment including water, soils, corals, weather, solar and lunar effects, processes and cycles;
- the obtaining and utilising of living or non-living things for the purpose of maintaining, facilitating or improving human life.

3 Application

- (1) This Act applies to traditional ecological knowledge whether in the public domain or not.
- (2) The extent to which the Act should be applied to the public domain will depend upon an assessment of the following factors:
 - (a) whether there was an intention by the owner to share the knowledge, and if so the purpose for sharing;
 - (b) whether permission was given to publicise or disseminate the knowledge;
 - (c) whether the owner knew that the knowledge might be used for commercial ends;
 - (d) whether the owner understood that sharing the knowledge with outsiders would result in a loss of control over its subsequent use;
 - (e) the extent to which unauthorised use of the knowledge may undermine the spiritual and cultural integrity of the owners.

1. The public domain refers to literary, music and artistic works on which copyright has expired or never existed. Accordingly it represents a valuable pool of knowledge which can be used by anyone without restriction or the need to compensate. Despite this there are instances where European, Japanese and US legislators have each found occasion to extend intellectual property protection to information in the public domain in order to secure protection over databases, architectural designs and publications, respectively (B. Tobin, 2000). In addition, the French concept of *domaine public payant* requires payment of royalties for the use of literary and musical works in the public domain (K. Puri, 2000). There are therefore precedents upon which rights may be attached to knowledge in the public domain.

2. The Act treats knowledge in the public domain (eg, recipes, cures, place names, methods of fishing navigation, boat building, house building, etc) as capable of being subject to ownership rights. While the Act establishes this new principle, in practice it would not be desirable or practical to enforce owners' rights over this material at one time. It is suggested that a selective approach should be used, focusing on the most glaring examples of misappropriation and commercial abuse. The five factors listed are meant to guide this selection.

3. Section 10 makes it an offence to use knowledge (including knowledge in the public domain) unless prior informed consent has been given and an access and benefit-sharing agreement has been concluded.

(2) This Act applies to traditional ecological knowledge, innovations and practices existing before or after the commencement of this Act.

1. Retrospectivity is considered objectionable because existing rights and arrangements will be affected which may go back many years possibly involving substantial sums of money. It may provoke retaliatory legislation - every country has traditional ecological knowledge, innovations or practices obtained from another country - resulting in a myriad of claims and counter claims involving time-consuming tracing as to the origin of knowledge, innovations and practices as well as the circumstances of their subsequent transfer.

2. Nonetheless the Act will have retrospective effect regarding civil actions but not criminal offences.

3. Criminal offences, viz, sections 6 (bringing a false claim); 8 (contravention of moral rights); 10 (unauthorised use of knowledge, innovation or practice); and 11 (unauthorised use of knowledge, innovation or practice by a traditional individual, entity, or group), cannot result in criminally culpable conduct in jurisdictions such as Samoa whose Constitution provides at Article 10(2) that

"No person shall be held guilty of any offence on account of any act or omission which did not constitute an offence at the time when it was committed...".

The same wording is also found in Article 37(7) of the Constitution of Papua New Guinea and is probably repeated in any Pacific island country that has a written Constitution with basic freedoms provisions.

3. Could subsection (2) be challenged as unconstitutional? For those countries with the constitutional provision discussed above, a challenge should be brought where subsection (2) has been mistakenly used to commence a criminal prosecution.

4. Some concession may however be made for acts or negotiations that are in progress and legal at the time the law is about to come into force but become an offence once the Act enters into force. A period of grace may be granted allowing those that have been caught out to take steps to comply with the law.

5. No constitutional bar on retrospectivity exists as regards civil proceedings hence civil claims can be brought against pre-Act infringements including, it is submitted, for infringements against new rights created under the Act such as the "moral rights" in section 8(1)(c)-(f).

(3) This Act shall come into force on the day it is assented to by the relevant body.

4 Act to bind government

This Act binds the government.

This means that the government must comply with the Act and agrees to waive any immunity it may have from prosecution (particularly relevant for countries where the Queen of England is the Head of State). Government civil liability will normally be governed by a Government Proceedings Act or similarly named law.

5 All traditional ecological knowledge, innovations and practices owned

(1) All traditional ecological knowledge, innovations and practices are owned in perpetuity by:

The fundamental principle is that all traditional ecological knowledge, innovations and practices are owned, so foreclosing any argument that these things may be ownerless.

(a) a group or an individual; or

The literature on traditional knowledge acknowledges that an individual can own knowledge, not merely as trustee on behalf of others, but outright. By extension this would apply to innovations and practices. The Model Law mirrors this.

In contrast, “The Protection of Traditional Knowledge and Expressions of Culture Act 2001” by Kamal Puri is based on the group as being the owner and not the individual, except insofar as the individual represents the group. That Act would therefore not apply to an individual that owned knowledge.

(b) where competing claims exist as to ownership or where a claim is challenged, until such time as the claims are resolved, either the national government as trustee on behalf of the claimants where the claimants are from a single country, or the Regional Coordinator as trustee on behalf of the claimants where they are from different countries; or

(c) where it is not known who the owner is but the knowledge, innovation or practice originates from a single country, by the national government as trustee on behalf of that country; or where the knowledge, innovation or practice is shown to originate from more than one country, by the Regional Coordinator as trustee on behalf of those countries.

A trust instrument will set out the terms of the trust: its purpose, holding and distribution of funds, beneficiaries, duties of trustees etc. Trustee duties will include safeguarding the knowledge, innovations or practices by legal action where necessary, and to exercise the rights as well as to discharge the responsibilities associated with such knowledge, innovations or practices.

(2) Claims occurring within a single country are to be resolved according to a procedure to be specified by the national government concerned and where more than one country is involved, according to a procedure to be specified by the Regional Coordinator.

1. From the national perspective, either the regular court system can be used, or a special purpose tribunal established to attempt conciliation or failing this, arbitration.

2. The task of the Regional Coordinator may simply be to establish rules as to which country will be selected to as having jurisdiction to hear the dispute.

6 Proof of ownership

(1) Upon a claimant declaring or acknowledging in a form or manner valid by its customs or practices that it has been using and is the owner of traditional ecological knowledge, an innovation or a practice, and providing proof of such usage, the claimant shall be considered to be the owner of such knowledge, innovation or practice.

(2) Any claimant who brings a wrongful, speculative, frivolous or vexatious claim commits an offence and is liable upon conviction to a fine not exceeding \$5,000.00.

The offence provision is needed to deter individuals from bringing spurious or false claims.

Who will bring the prosecution? A prosecution is almost always commenced by the Police through the laying of an information or charge. Citizens can also lay an information but this is rare. Government departments may prosecute an offence in a subordinate court under an Act it administers, eg, the Labour Department under an infringement of the Labour Act in

the Magistrates Court. If however the offence falls within the jurisdiction of the principal court, the Department will need to seek assistance from qualified lawyers from the Government Legal Office. In terms of resources and consistency of practice it would be preferable that the Department administering this Act brings the prosecution.

7 Co-ownership

- (1) Nothing in this Act shall prevent any other claimant, wherever situated, from claiming ownership of traditional ecological knowledge, an innovation or a practice, and where such claim satisfies section 6, the claimant shall be deemed to be a co-owner.

A co-owner may be from the same community albeit located on the other side of a common border or from a totally different community which has independently developed that knowledge, innovation or practice.

Trustees (ie, national governments or the Regional Coordinator) may become co-owners, for example, in the situation of multiple co-owners, where one owner is known but the others are not.

- (2) All benefits that accrue to one co-owner from the knowledge, innovation or practice shall be held in trust for the benefit of the other co-owner or co-owners.
- (3) All rights and responsibilities attaching to the knowledge, innovation or practice are equally those of all co-owners.
- (4) The relationship between co-owners is to be governed by rules to be prepared by the Regional Coordinator.

The rules should extend to a section 11 use, where one co-owner wants to share the knowledge, innovation or practice with an individual or group but the other co-owners refuse.

8 Nature of ownership right

- (1) The ownership right over knowledge, an innovation or a practice:
- (a) is inalienable and non-transferable and is in addition to any other rights available under existing intellectual property laws but where there is an inconsistency with intellectual property laws, the intellectual property laws shall, to the extent of the inconsistency, be void;

Any attempt to alienate or transfer such right by contract will be void but does not amount to an offence.

- (b) requires that as far as practicable an owner has its name associated with the traditional ecological knowledge, innovation or practice;
- (c) requires that there is no false attribution of ownership to an item of knowledge, an innovation or a practice;
- (d) includes a right of integrity of ownership requiring that the knowledge, innovation or practice is not subjected to any distortion, mutilation or other modification, or other derogatory action in relation to the work which would prejudice the honour or reputation of the owner.

The above features are drawn from “The Protection of Traditional Knowledge and Expressions of Culture Act 2001”. Paragraphs (b) - (d) of subsection (1) are the so-called moral rights now found in Pacific copyright laws based on the WIPO Secretariat “Draft law on Copyright and neighbouring rights”. To be effective, recognition of these rights should be included under an Access and Benefit Sharing agreement - see section 10(1)(b).

- (2) Any person who without the prior informed consent of the owner uses knowledge, an innovation or a practice in a manner inconsistent with paragraphs (c) - (f) of subsection (1) commits an offence and is liable upon conviction to a term of imprisonment not exceeding 3 months.

(1) How effective is this provision against an offender that resides or has fled overseas?

Although this provision is in the nature of a criminal sanction, extradition of the offender will not be possible unless:

- there exists an extradition treaty between the two countries involved;
- within the treaty the offence needs to be referred to either explicitly or by reference to length of imprisonment (eg, not less than 12 months) - usually only the more serious offences are covered;
- the offence needs to be recognised as such in both countries.

In some jurisdictions however, judgment can be given in the accused's absence (eg, Vanuatu: Criminal Procedure Code, sections 34-36, 44; and Samoa: Criminal Procedure Act 1972, section 42) if the punishment is **a fine only, or a period of imprisonment of not more than 3 months**. Although this may seem small, the Act suggests "three months imprisonment" as the penalty (with the exception of section 5, where the offenders are more likely to be local and a fine alone is stipulated) because,

- (a) although short, any term of imprisonment is serious;
- (b) all companies or individuals want to project a good personal or corporate reputation and the bad publicity that a prosecution would generate would ruin this image;
- (c) convictions can be brought against offenders even when they are overseas, thus tarnishing the offenders reputation, and when followed by a warrant of arrest, the damage to reputation is considerable;

On the other hand, a fine only has the advantage of being able to be adjusted to the circumstances of the offence and is more easily imposed than a term of imprisonment. A fine against an overseas offender still represents a moral victory and has the added advantage that an offender that has repented can still return to the country, pay the fine and begin things anew. This would not be the case where imprisonment awaits an offender.

9 Register of traditional ecological knowledge, innovations and practices

- (1) An individual, entity or group may register its traditional ecological knowledge, innovations and practices in a national register, or where the knowledge, innovations or practices are or may be owned by 2 or more countries or by the Pacific region as a whole, in a regional register.
- (2) Each national government in respect of a national register, and the Regional Coordinator in respect of a regional register, must put in place rules to establish and maintain a register and to provide for confidentiality.
- (3) The fact of non-registration does not affect an individual's, entity's or group's ownership of its knowledge, innovations and practices.

A register has 3 principal roles:

- to serve as prima facie evidence of ownership of the thing registered;
- to serve as evidence of prior art, which might be used to challenge patent applications;
- to protect traditional knowledge, innovations or practices against continuing erosion and promote their revitalisation. (B.Tobin, 2000).

10 Commercial use

- (1) Any person using or proposing to use traditional ecological knowledge, or an innovation or any part of such innovation, or a practice for commercial use must:
 - (a) seek the prior informed consent of the owner, where there is one, or co-owners where there are several, of the knowledge, innovation or practice; and
 - (b) enter into an access and benefit sharing agreement with the owner or co-owners.

1. Reference should be made to the work of SPREP, WWF (South Pacific) and FIELD in initiating ABS (access and benefit-sharing) policies and laws in several Pacific island countries.

Workshops have already been held in Samoa, the Cook Islands and Vanuatu and a model ABS law exists which details the procedures and requirements that need to be met by a potential user. Although the model ABS law focuses on access to “genetic resources” this focus can be broadened to include access to “knowledge, innovations and practices” as they relate to genetic resources.

One of the terms of an ABS agreement should be recognition of moral rights as provided for in section 8(1)(b)-(d).

2. A register, once fully developed will help determine who all co-owners are. If they live in different countries the obligation on a prospective user may become somewhat onerous. For the time being, if an agreement is entered into with an owner, a clause can be included which covers the possibility of subsequent co-owners emerging and how to deal with the issues of their consent and sharing of benefits. This clause needs to be acceptable to all parties so that there is predictability and certainty for an owner or prospective user entering into a contract.

(2) Any person who uses any knowledge, innovation or practice in contravention of subsection (1) commits an offence and is liable upon conviction to a term of imprisonment not exceeding 3 months.

Civil proceedings are always available in addition to criminal prosecutions - see section 11. Some national laws make this explicit, eg, section 172 of [Samoa's Criminal Procedure Act 1972](#) provides “No civil remedy for any act or omission shall be suspended by reason that such act or omission amounts to an offence”.

The aim of civil proceedings might be to prevent continued non-compliance, to seek damages for wrongful use (conversion) of the knowledge, innovation or practice or alternatively to request that the monetary gain by the offender be surrendered to the owner (account of profits).

The owner (which in certain circumstances - see section 5 - may be the national government or the Regional Coordinator) of the traditional ecological knowledge, innovation or practice would bring a civil action. This is contrasted with the Department administering the Act, which would be expected to initiate criminal proceedings (see earlier discussion).

(3) Nothing in this section shall prevent more than one person from using any knowledge, innovation or practice for commercial use at the same or later time.

Exclusive use of knowledge, an innovation or a practice is nonetheless something that can be negotiated between the parties.

11 Non-commercial uses

(1) An owner or a co-owner, may in accordance with their customs and practices and such other conditions as they consider appropriate, allow use of their traditional ecological knowledge, innovations and practices by a group or an individual belonging to a group so long as such knowledge, innovations and practices are not acquired for or do not subsequently become the subject of commercial use.

1. If this section is breached, the owner should be prepared to take legal action and to that end might at the outset consider entering into a written contract with the recipient.

2. The possibility of the knowledge, innovation or practice being improved or serving as an inspiration for new knowledge or a new innovation to the recipient should be addressed so that appropriate recognition including for example a right of co-ownership can be accorded to the original owner.

3. It is possible for an owner who is an individual to pass on knowledge, etc. to his own group (ie, family, village, community) and so the word “a” group is used rather than “another” group.

- (2) The recipient of the knowledge, innovation or practice must not make it available to any other person without having first obtained the prior informed consent of the owner of such knowledge, innovation or practice.
- (3) Any person who uses any knowledge, innovation or practice in contravention of this section commits an offence and is liable upon conviction to a term of imprisonment not exceeding 3 months.

As to rules as between co-owners, see comment on section 7(4).

12 Remedies and jurisdiction

- (1) This Act does not affect any rights of action or other remedies, civil or criminal, whether brought under this Act or any other enactment or any rule of law.
- (2) The Court shall have competence under its civil and criminal jurisdictions to determine matters whether brought under this Act or any other enactment or any rule of law, and may grant in addition to any other relief any one or more of the following:
- (a) an account of profits;
 - (b) an order for a public apology;
 - (c) forfeiture of any tangible items of knowledge, innovation or practice or alternatively compensation for loss of any tangible item of knowledge, innovation or practice.

1. Damages (eg, for conversion and detinue) or an injunction (to restrain the infringement) are standard civil remedies.

2. The “Court” should be the principal rather than a subordinate court given that the range of civil remedies is widest in the principal court.

3. In a criminal matter, paragraphs (a) and (b) would not normally be applicable.

13 Offence by a company

Where a company commits an offence under this Act, any officer, director, employee or agent of the company who directed, authorised, assented to, or acquiesced in the commission of the offence is a party to and guilty of the offence, and is personally liable to the punishment provided for the offence, whether or not the company has been prosecuted or convicted.

Individuals can no longer hide behind the “corporate veil”.

14 Amendment to patent law

Patent law is to be amended by making changes to the following effect:

- (a) An applicant for a patent, or a holder of an overseas patent seeking registration of that patent in this country, must provide clear evidence to the Patent Office that if the invention for which a patent is being sought had used or was based upon traditional ecological knowledge, a traditional innovation or a traditional practice that the prior informed written consent of the owner was obtained, an arrangement had been made as to access and benefit-sharing, and the owner’s permission was obtained to seek a patent. Lack of such evidence will result in rejection of the application.
- (b) An existing patent is revocable if it is found to have used or been based upon traditional ecological knowledge, a traditional innovation or a traditional practice but had not satisfied the requirements of paragraph (a).

The real value of this section lies in its being made a requirement of overseas patent laws, as almost all inventors would file their patent applications overseas. Indeed there is currently a lobby for overseas patent laws to be so amended in order to assist source countries enforce their access and benefit-sharing laws.

Sections 14-17 are drawn and adapted from “The Protection of Traditional Knowledge and Expressions of Culture Act 2001” and is meant to provide consistency with that regime.

No time limit is set for these amendments.

15 Amendment to copyright law

Copyright law is to be amended by:

- (a) modifying the law to ensure the continuing freedom of owners to exercise their customary rights in the use of traditional ecological knowledge, innovations and practices;
- (b) providing for the economic right known as *domaine public payant*, as adapted to traditional ecological knowledge, innovations and practices in the public domain.

Domaine public payant requires payment of royalties for the use of literary and musical works in the public domain.

16 Amendments to geographical indications, appellations of origin and trade marks laws

(1) Geographical indications, appellations of origin and trade marks laws are to be amended by disallowing an application for registration of a geographical indication, appellation of origin or trade mark for products of an individual, entity or group which manifests goodwill or a reputation created or built up over a long period of time unless there has been prior informed written consent from the owner and a benefit sharing arrangement has been entered into.

(2) Trade marks law is to be amended by:

- (a) prohibiting registration of traditional words, names, designs, sounds, scents and symbols as trade marks unless the owner has given prior informed written consent and a benefit sharing arrangement has been entered into.
- (b) empowering the Trade Marks Office to refuse registration of trade marks that may be culturally offensive;
- (c) allowing individuals, entities or groups who are culturally aggrieved to oppose a trade mark application and to have standing to petition for removal of an existing trade mark from the trade mark register.

17 Amendment to designs law

Designs law is to be amended by empowering the Designs Office to refuse registration of cultural designs unless the owner has given prior informed written consent and a benefit sharing arrangement has been entered into.

18 Regulations

(1) The national government may from time to time make such regulations as shall be necessary or expedient for giving full effect to the provisions of this Act and for its due administration.

(2) Without limiting the generality of subsection (1), regulations may be made:

- (a) prescribing procedures and requirements for the establishment and maintenance of a register and rules of confidentiality;
- (b) prescribing a procedure for the resolution of disputes.

The Regional Coordinator also has power to make rules for the due administration of this Act, see for example s5(2).and s7(4).

This Act is administered in the Department of...

Which office should administer this Act?

- a Department of Culture has expertise in traditional knowledge and may provide expert and impartial advice in ownership disputes;
- a Department of Environment has expertise on biological materials, Access and Benefit Sharing laws and the Convention on Biological Diversity;
- a Department of Justice looks after intellectual property matters, has experience with registers, and may facilitate dispute resolution through the Court system.