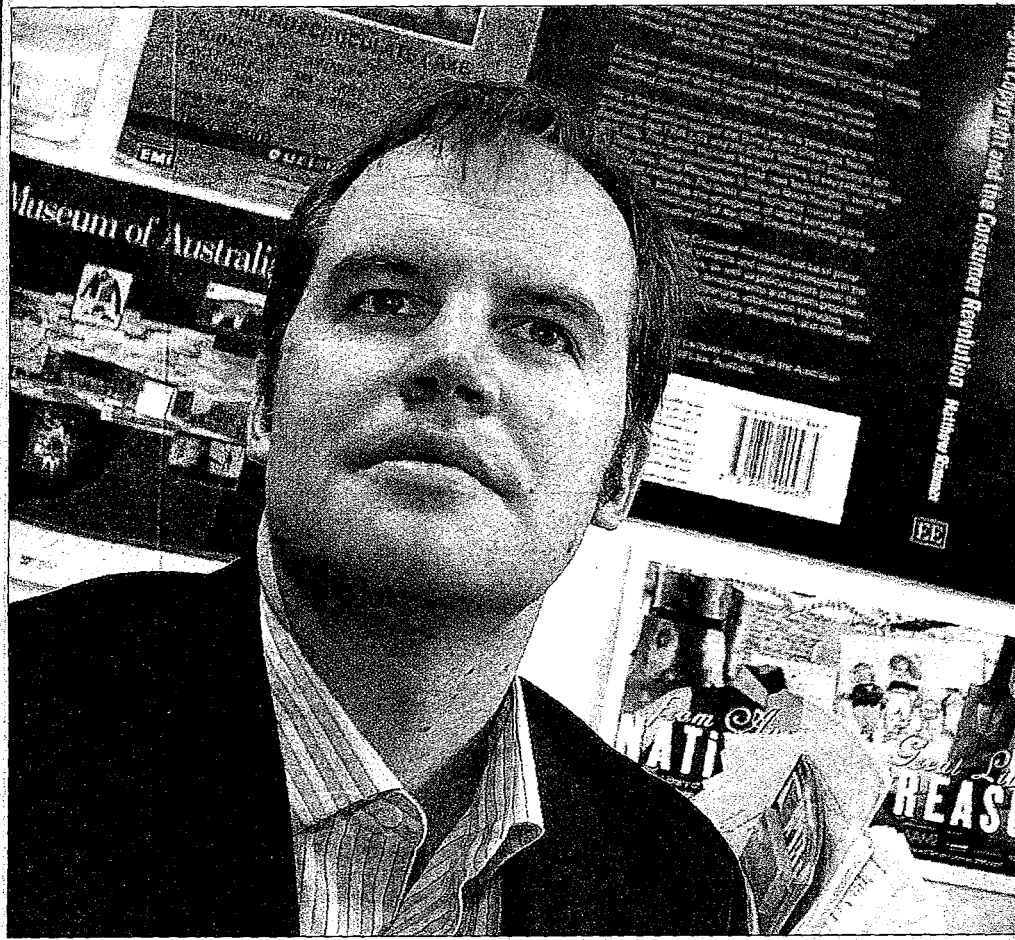
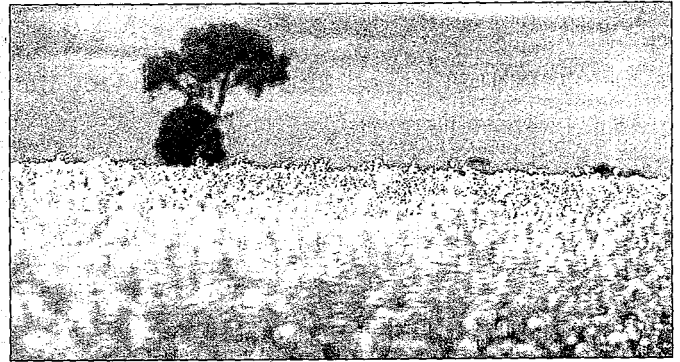


Sunday Focus



Australian National University intellectual property law expert Matthew Rimmer.

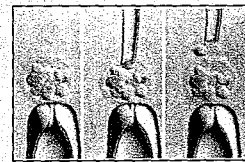
Photo: MARTIN JONES



Parliament has, for some time, left the interpretation of what is and is not patentable subject matter to the patent office and courts.



Dolly the cloned sheep, above; a cell is removed from an embryo, left; genetically modified canola crops, top.



Patent law: a clash of interests

SHOULD we be able to patent a life? What about an animal or a plant? Or what about a medical procedure or even software? Patent law unmasks the clash between public versus private interests. It also stokes fears about the expansion and possibilities of new technologies.

A patent is a right granted to commercially exploit a device, substance, method or process for a given period of time. The Advisory Council on Intellectual Property, an independent government-appointed body, has opened the debate on what should and shouldn't be patented in a review of patentable subject matter.

Australian National University intellectual property law expert Matthew Rimmer says the review is "rather belated" since parliament has, for some time, left the interpretation of what is and is not patentable subject matter to the patent office and courts.

"It's really been the courts and the patent office that have recognised patents in relation to microorganisms, plants, animals, human genes, human stem cells and computer software, computer hardware and business methods," Rimmer says. "This might be an opportunity for the Government to confirm that broad approach to what can be patented."

Patentable subject matter must be new, inventive and useful.

An Advisory Council on Intellectual Property review has opened the debate on what should and shouldn't be patented, as **NYSSA SKILTON** reports

Artistic creations, mathematical models, plans, schemes or other purely mental processes cannot be patented.

Australia has a broad test for patentability, but it excludes some things such as biological processes for generating human beings and inventions that are contrary to law.

General manager of the business development and strategy group at Intellectual Property Australia, Ian Goss, says ACIP is conducting the review to clear up aspects of patent law that are vague or confusing.

"In recent years a variety of concerns have been raised about the sort of things that can be patented," Goss says. "The main area of concern has been that patents are being granted which hinder innovation, investment and public access to new technologies, rather than promote such activities."

Rimmer says the dominant tendency in Australia has been "anything under the sun", with some human intervention potentially patentable following a landmark US Supreme Court case allowing the first patent of a genetically modified microorganism.

The Diamond and Chakrabarty case in 1980 opened the floodgates for including living organisms in patentable subject matter.

Gene Ethics, a group opposed to the genetic modification of crops, regards living organisms as a discovery, not an invention, and therefore not patentable subject matter.

Executive director Bob Phelps says, "We don't consider that cutting and pasting genes between organisms is an inventive step, so it doesn't qualify for being patentable. The Chakrabarty case has never been challenged and we feel that it should be".

Phelps says people have been modifying organisms, using techniques such as traditional breeding, for some time.

"It was always done in the public domain without anybody owning or controlling particular varieties," he says. "It's only during the 20th century that other, not only patents but also plant breeders' rights, have been developed in order to essentially take what existed in the public domain and privatise it. That is not in the public interest."

Phelps says he can see a case for patents being developed as a way of encouraging or rewarding some developments such as mouse traps and ball point pens. But Gene Ethics does not consider that the work of genetic manipulations are novel in that sense.

Science Industry Australia executive director Duncan Jones welcomes the review, saying he doesn't believe patents encourage scientific research. "They protect the results, but they don't of themselves encourage," he says.

In Australia, the main legal test for patentable subject matter is that the invention must be a "manner of manufacture". This test dates back to the Statute of Monopolies, an Act of Parliament made in England in 1623.

"A lot of our law in this area is outdated," Jones says. "I'd like to see patent laws become more flexible. At the moment, patents can stifle conversations between academia and industry. All too often, industry wants to talk to researchers, just about what they're doing, the areas they're working in, but if a patent is involved, we can't talk to research unless we do it through lawyers. And that is a huge barrier to conversation."

A further concern about patents relates to methods of human treatment. Medical treatments were once considered non-economic and therefore not patentable subject matter, but Australian courts have, in a number of cases, extended patents to methods of human treatment.

Australian Medical Association vice president Gary Speck says the profession considers the skills and training of doctors as part of their professional responsibility.

"So we'd expect treatments and skills to transfer from one generation of doctors to the next without restriction," Speck says. "I would think we'd like to see the ability to be able to transfer skills and knowledge freely without any restrictions by a patent."

ACIP will publish an issues paper in July, inviting people to put in written submissions by September 2008. The council hopes to report to the Innovation, Industry, Science and Research Minister in about 18 months.

Rimmer says patent law is the locus for broad social, economic and ethical concerns about new technology.

"Patent law doesn't just involve questions about innovation, but it also raises questions about access to healthcare, access to knowledge, access to medicines," Rimmer says. "It really pits certain private interests in relation to new technology against the larger public interests in scientific progress and access to knowledge and scientific information. It's a classic clash between public and private interests."