

PATENTS, PVRs AND PRAGMATISM: GIVING EFFECT TO WAI 262

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I. INTRODUCTION

In July 2011, the Waitangi Tribunal released its highly anticipated response to the Wai 262 claim in a report entitled *Ko Aotearoa Tēnei*.¹ Despite humble beginnings, the claim came to encompass a wide range of issues relating to the interaction between Māori and the Crown in New Zealand, including the areas of intellectual property (“IP”), resource management, the conservation estate, te reo Māori (language) and Māori health.

This paper focusses on the IP aspects of Wai 262. Specifically, it concentrates on the recommendations proposed in relation to patents and plant variety rights (“PVRs”); while issues of course remain in the areas of copyright and trademarks,² the divide between Māori concerns and Western IP rights is most acutely felt in the former fields.

The claimants’ objections to the current regime were twofold, relating to the inappropriate exploitation of Māori IP by non-Māori and to the inability of Māori to exploit their IP themselves.³ Indigenous IP is an area that has received significant attention internationally in the context of protecting the so-called traditional knowledge (“TK”) of indigenous peoples, where the focus tends to be on the conflicting worldviews governing such knowledge and Western IP. This issue squarely presented itself for consideration in Wai 262. There, much is made of the fact that to talk of “Māori IP” oversimplifies the complex spiritual connections between Māori TK (“mātauranga Māori”) and the Māori way of life.

With that in mind, this dissertation evaluates the recommendations made in Wai 262 through a pragmatic lens, asking whether, to what extent and how effectively New Zealand could implement the Waitangi Tribunal’s suggestions in light of its international obligations and existing IP system. It leaves behind the well-trodden debate over *whether* mātauranga Māori is

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1 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuarua* (Wai 262, 2011) [Wai 262].

2 See for example *Te Rūnanga o Toa Rangatira Inc v Prokiwi Ltd* [2012] NZIPOTM 14.

3 Wai 262, above n 1, at 191; see also at 65 and 178-180; *Information Sheet: Treaty of Waitangi Claim Wai 262* (Ministry of Economic Development, February 2007).

deserving of unique protection by assuming merit in the claims of TK-holders and that a political will to enact change exists. Instead, this paper measures the specific recommendations against the hurdles they are likely to face.

Part II of the paper describes the issues raised in the Wai 262 claim and the recommendations made by the Waitangi Tribunal in response. Subsequently, Part III considers the compatibility of the recommendations with New Zealand's international obligations, with reference to the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), the International Convention of the Union for the Protection of New Varieties of Plants ("UPOV") and New Zealand's trade agreements. This part concludes that there is in fact a good degree of latitude available to legislators.

The principal part of the thesis, Part IV, triages the recommendations along a scale of difficulty of implementation. It tracks up this scale by starting with the changes that would be the least problematic to introduce and moving towards those that would pose significant challenges. This novel approach allows valuable insights to be made into what forces are driving the scale of difficulty in the first place. The investigation finds that many of the recommendations have been crafted with the IP system in mind, and therefore do less violence to the system as some perhaps suspect.

Following this, and in keeping with the hierarchy of difficulty, Part V addresses the notable absence in Wai 262 of what literature on this topic calls "positive protections" like compulsory benefit-sharing arrangements or perpetual rights that might enable Māori to commercially benefit from their TK themselves.

Lastly, Part VI extracts the conceptual thread running through the difficulty scale, observing that the more alien the measures are to IP law (and the harder they are to implement), the more effective they appear to be at achieving the interests of Māori. This paper concludes that, if the protection of mātauranga Māori is to be taken seriously, some fundamental changes to IP law must be made, and that the Tribunal's recommendations are a good place to start.

II. WAI 262: ISSUES RAISED AND RECOMMENDATIONS MADE

The worldwide plight of indigenous groups in the IP/TK arena has been well documented, and is commonly illustrated by reference to the case of the San people of Southern Africa.⁴ Since their nomadic days, the San have known of the appetite-suppressing qualities of the native Hoodia cactus, something that caught the eye of researchers for its potential as an anti-obesity drug. Unfortunately, the development and subsequent commercialisation of the drug by pharmaceutical company Pfizer, under the auspices of IP protection,

⁴ See for example Janewa OseiTutu "A Sui Generis Regime for Traditional Knowledge: the Cultural Divide in Intellectual Property Law" (2011) 15 Marq Intell Prop L Rev 147 at 166-167; Victoria Tauli-Corpuz *Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples* PFII/2005/WS.TK/5 (2005) at 21.

failed to provide any benefits to the San people until they eventually managed to secure royalty payments after years of protest.⁵ While this story enjoys something of a happy ending, it is emblematic of the plunder of indigenous TK, usually at the hands of Western corporations, without a backflow of benefits, a phenomenon commonly referred to as “biopiracy”.⁶ Other popular examples of this include the turmeric and neem plants of India.⁷ Closer to home, too, the Waitangi Tribunal recounts an example of a patent application that sought to protect the manufacture of insect repellent using oil extracted from kiwi. Having had their initial application rejected by the Intellectual Property Office of New Zealand (“IPONZ”) on morality grounds, the applicants re-submitted their bid for a patent without any reference to the native bird.⁸ Again, although each of these examples resulted in varying degrees of success from an indigenous perspective, they illustrate that the exploitation of TK is a live problem and, crucially, that New Zealand is not immune to the issue. Indeed, the United Nations has estimated that over 70 per cent of the world’s clinically useful plant-derived drugs “came to the attention of pharmaceutical companies because of their use in traditional systems of medicine”.⁹

It should come as no surprise, then, that Wai 262 included a claim that New Zealand’s IP laws are currently failing to protect mātauranga Māori as a taonga (cultural “treasure”), as was guaranteed to Māori under art 2 of the Treaty of Waitangi 1840 (“Treaty”). Principally, the Māori claimants asserted that New Zealand’s IP regime neither actively prevents third parties from exploiting mātauranga Māori for their own ends, nor permits Māori to benefit from their TK should they wish to do so.¹⁰ Claimants also railed against their inability to control certain “taonga species” of particular significance to various iwi, such as the manuka tree and the tuatara.¹¹

5 Stephen Munzer “Territory, Plants, and Land-Use Rights Among the San of Southern Africa: A Case Study in Regional Biodiversity, Traditional Knowledge, and Intellectual Property” (2009) 17 *Wm & Mary Bill Rts J* 831 at 848-851.

6 See generally Pollyanna Folkins “Has the Lab Coat Become the Modern Day Eye Patch? Thwarting Biopiracy of Indigenous Resources by Modifying International Patenting Systems” (2003) 13 *Transnat’l L & Contemp Probs* 339; Javier Garcia “Fighting Biopiracy: The Legislative Protection of Traditional Knowledge” (2007) 18 *Berkeley La Raza LJ* 5.

7 See for example Shubha Ghosh “Traditional Knowledge, Patents and the New Mercantilism (Part II)” (2003) 85 *J Pat & Trademark Off Soc’y* 885 at 898 and 910.

8 Wai 262, above n 1, at 229 (endnote 467).

9 United Nations Department of Economic and Social Affairs *State of the World’s Indigenous Peoples* ST/ESA/328 (2009) at 69.

10 Wai 262, above n 1, at 191; see also at 65 and 178-180; and Ministry of Economic Development, above n 3.

11 Wai 262, above n 1, at 128-131 and 134-136 respectively.

Once more, these problems have been widely enumerated, and thus they require only summary attention here.¹² Chief among the concerns is the fact that IPONZ and IP offices worldwide are failing to prevent activities like biopiracy because they are not detecting mātauranga Māori components in the novelty stages of patent and PVR assessments.¹³ Obviously, this enables third parties to reap commercial benefits from impure “inventions” without necessarily sharing those benefits with Māori. Oppositely, the long-standing and communally-held (if not widely known) nature of TK often means that Māori are barred from obtaining patents or PVRs because the knowledge forms part of the “prior art” available in the “public domain”, and therefore is not novel or inventive.¹⁴ In a similar vein, many Māori may be put off pursuing IP rights for particularly sacred mātauranga due to the exacting requirements of, say, patent law to provide specifications of protected material for general release.¹⁵

The blame for the incompatibility of Western IP and Māori interests is usually laid at the feet of the “conflicting worldviews” that govern the two societies.¹⁶ It is said that Western society emphasises commodification and individual ownership, and that IP rights foster innovation by endowing inventors and breeders with the ability to benefit exclusively from the commercial exploitation of their labours for a defined period of time.¹⁷ By contrast, indigenous peoples live with a “holistic” view of the world, seeing themselves as intractably bound to nature both physically and metaphysically, “perceiving each to be interdependent on, and therefore inseparable from, one another”.¹⁸ Indigenous communities – and Māori are no exception – view their role as one of kaitiakitanga, or “guardianship”, over tangible natural resources, as well as intangible spiritual taonga relating to those resources

12 For an excellent summary, albeit in the realm of copyright, see Mariaan de Beer “Protecting Echoes of the Past: Intellectual Property and Expressions Of Culture” (2006) 12 *Canta LR* 94 at 95-98. In this part, the issues have been framed in a specifically Māori context, although they are ubiquitous to indigenous groups worldwide.

13 Elizabeth Longacre “Advancing Science While Protecting Developing Countries from Exploitation of Their Resources and Knowledge” (2003) 13 *Fordham Intell Prop Media & Ent LJ* 963 at 992.

14 Paul Kuruk “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States” (1999) 48 *Am U L Rev* 769 at 797.

15 See Terri Janke *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (Aboriginal and Torres Strait Islander Commission, 1998) at 137-138; and Deepa Varadarajan “A Trade Secret Approach to Protecting Traditional Knowledge” (2011) 36 *Yale J Int'l L* 371 at 378.

16 de Beer, above n 12, at 95.

17 Brian Garrity “Conflict Between Māori and Western Concepts of Intellectual Property” (1999) 8 *AULR* 1193 at 1201-1202; and see for example *Patents Act 2013*, s 3.

18 S Te Marino Lenihan “A Time for Change: Intellectual Property Law and Māori” (1996) 8 *AULR* 211 at 212; Garrity, above n 17, at 1198-1199; Surinder Kaur Verma “Protecting Traditional Knowledge: Is a *Sui Generis* System an Answer?” (2004) 7 *JWIP* 765 at 770.

such as mātauranga Māori.¹⁹ The role of kaitiakitanga emphasises a spiritual “oneness” with nature that endures “from the furthest past into the distant future”.²⁰

This exposes the balance of the problems experienced by Māori. That is, a perpetual kaitiakitanga relationship with mātauranga Māori is poorly served by finite IP rights.²¹ Similarly, the individual ownership called for by patents and PVRs fails to match the whānau (family)-hapū (subtribe)-iwi (tribe) structure of communal guardianship under Māori custom.²² Finally, and perhaps most fundamentally, the ideas of “owning” and “commercialising” mātauranga, whether by Māori themselves or by third parties, is clearly at odds with a guardianship ethos; indeed, in many instances, affording such treatment to Māori TK will be deeply offensive to Māori culture.²³

Faced with these problems, and with a weight of expectation,²⁴ the Waitangi Tribunal released its recommendations in response to the Wai 262 claim in *Ko Aotearoa Tēnei* on 2 July 2011. The Government, which is not bound by the Tribunal’s proposals,²⁵ reacted by giving assurances that it will consider the recommendations over time, but that it was in “no rush” to respond;²⁶ at the time of writing, no response has yet been forthcoming.

The remainder of this part details the Tribunal’s suggested reforms to the patent and PVR systems. It presents these in the order in which they are discussed below in Part IV.

The Tribunal recommends the establishment of a proactive Māori Advisory Committee (“MAC”) within IPONZ to advise examiners on Māori issues relating to patents and PVRs. It suggests the MAC should, of its own volition, be able to advise the Commissioner of Patents when a patent

19 Garrity, above n 17, at 1198-1199; Wai 262, above n 1 at 115-118; Janke, above n 15, at 8.

20 Coppins *Pakeha Citation of Māori Motifs, Symbols and Imagery* (1997) at 18 as cited in Brian Garrity “Conflict Between Māori and Western Concepts of Intellectual Property” (1999) 8 AULR 1193 at 1205; see also Maui Solomon “Intellectual Property Rights and Indigenous Peoples Rights and Obligations” (paper presented to Global Biodiversity Forum, Nairobi, May 2000).

21 Verma, above n 18, at 770; Paul Kuruk “The Role of Customary Law Under *Sui Generis* Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge” (2007) 17 *Ind Int’l & Comp L Rev* 67 at 72.

22 Garrity, above n 17, at 1198; Varadarajan, above n 15, at 373-374; Paul Sumpter *Intellectual Property Law: Principles in Practice* (CCH New Zealand, Auckland, 2006) at 259.

23 Varadarajan, above n 15, at 373; de Beer, above n 12, at 98; Garrity, above n 17, at 1208; Michael Blakeney “Bioprospecting and the Protection of Traditional Medical Knowledge of Indigenous Peoples: an Australian Perspective” (1997) 19 *EIPR* 298 at 299-300.

24 For example, the Bill that became the Patents Act explicitly deferred full consideration of Māori interests until the release of Wai 262: Patents Bill 2008 (235-2) (select committee report) at 3.

25 Treaty of Waitangi Act 1975.

26 Kate Chapman and Belinda McCammon “Govt to take time considering Wai 262 report” Stuff <www.stuff.co.nz> (4 July 2011); Belinda McCammon “Govt considers Wai 262 claims report”, Stuff <www.stuff.co.nz> (2 July 2011); Colin James “Wai 262: The Treaty after grievances are settled” *Otago Daily Times* (Dunedin, 5 July 2011).

application contains such a degree of mātauranga Māori that it should be denied for want of novelty or inventive step.²⁷ Additionally, it states, the MAC should give effect to a recommendation in the Draft PVR Amendment Bill 2005 that the Commissioner of PVRs should refuse to grant applications with a denomination (name) that would be offensive to Māori.²⁸ The Tribunal expresses that it is “comfortable with the idea that the [MAC] should have an advisory rather than directive role”.²⁹

In order to assist the MAC in the performance of its duties, the Tribunal moots the creation of a voluntary public register of kaitiaki interests in taonga species and mātauranga Māori,³⁰ with any competing claims to be settled by the MAC.³¹ Notably, a desire not to register any interests would not preclude Māori groups from objecting to applications they believed infringed their mātauranga.³² In the plant varieties sphere, this measure would be of assistance when it came to enforcing another recommendation from the Draft PVR Bill endorsed by the Tribunal. This proposes the removal of protection for “discovered” plant varieties, which would exclude those species already known to Māori.³³

Perhaps the most contentious proposal is the idea to empower the Commissioner to exclude otherwise patentable inventions where granting a patent would unduly interfere with a kaitiaki relationship with a taonga species on the grounds that this would be contrary to *ordre public* or morality.³⁴ Such a power, the Tribunal recommends, should be explicitly added to the *ordre public* section in the Patents Act 2013.³⁵ The Commissioner’s determinations would be made according to a statutory balancing test by first ascertaining the nature and effect on the kaitiaki relationship in question, and then weighing that against other interests such as those of existing property rights-holders and of the community in research and development.³⁶ Matters relevant to the inquiry might include an applicant’s failure to obtain the prior informed consent of relevant Māori groups to use their mātauranga or to enter into benefit-sharing arrangements with those groups, although the report stops

27 Wai 262, above n 1, at 200-201.

28 At 206; see *Plant Variety Rights Amendment Bill: Draft for Consultation* (Ministry of Economic Development, July 2005) [Draft PVR Bill] at 1.

29 At 201.

30 At 202-203.

31 At 207.

32 At 203.

33 At 206 with reference to 175.

34 At 202.

35 At 202; Patents Act, s 15. The recommendation actually related to what was then cl 14 of the Patents Bill, which was enacted without change from how it stood when Wai 262 was released. It should be noted that s 15(3) provides that the Commissioner may seek the advice of a MAC when making decisions under that section; however, the Tribunal seems to be of the view that more details about the operation of the provision would be desirable.

36 At 202 with reference to 195-197.

short of recommending these be made mandatory requirements.³⁷ What would be mandatory is a requirement to disclose any mātauranga Māori involved in the patenting process, failure to comply with which would also be assessed through this mechanism.³⁸ Depending on the severity of the effect on the kaitiaki relationship, sanctions could range from no penalty to an outright denial or revocation of the patent. Lastly, the Tribunal recommends that this balancing process should also apply to a suggested power of the Commissioner of PVRs “to refuse a PVR on the ground that it would affect kaitiaki relationships with taonga species”.³⁹

Before evaluating these recommendations, the analysis explores the potential effects of international IP regulation on New Zealand’s ability, in general terms, to implement them.

III. THE IMPACT OF INTERNATIONAL REGULATION

IP is subject to extensive regulation at the international level, most notably by the TRIPS Agreement administered by the World Trade Organisation (“WTO”). This sets out the minimum standards of IP protection that must subsist in each Member state, including New Zealand.⁴⁰ Compliance with TRIPS will be a necessary precursor to implementing any of the recommendations suggested by the Tribunal.⁴¹ PVRs are not directly governed by the Agreement in New Zealand, which, under art 27(3)(b), opted to introduce *sui generis* legislation in the Plant Variety Rights Act 1987. This was modelled on the 1978 Act of the UPOV Convention, of which New Zealand is a member.⁴² Compliance of the Tribunal’s PVR proposals within that regime is also discussed below. Lastly, New Zealand’s trade agreements are considered.

37 At 194-195 and 204-205.

38 At 202 with reference to 203-206.

39 At 206.

40 Agreement on Trade-Related Aspects of Intellectual Property Rights (entered into force 1 January 1996) [TRIPS], art 1(1); JH Reichman “Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement” (1995) 29 Int’l L 345 at 351; Guido Westkamp “Convergence of Intellectual Property Rights and the Establishment of ‘Hybrid’ Protection under TRIPS” in Fiona Macmillan (ed) *New Directions in Copyright Law: Vol 1* (Edward Elgar, Cheltenham, 2005) at 112.

41 It is recognised that another claim addressed in Wai 262 is that the Crown has excluded Māori from “meaningful participation in the development of New Zealand’s positions on international instruments affecting Māori interests”, including TRIPS: Wai 262, above n 1, at chapter 8. However, the resolution to this argument lies beyond the scope of this paper, which focusses on the impacts of TRIPS given that it does currently bind New Zealand at international law.

42 Sumpter, above n 22, at 259-261; International Convention for the Protection of New Varieties of Plants (adopted 2 December 1961, revised 10 November 1972, 23 October 1978 and 19 March 1991).

A. TRIPS

The first point of note is that art 1(1) of TRIPS preserves to Members the ability to enact “more extensive protection” should they choose to do so. This, Gervais suggests, means that what are generally known as “*sui generis*” or novel protections for TK, over and above conventional IP rights, are permitted by the Agreement.⁴³ This is the certainly the view taken by the Tribunal, which effectively dismisses TRIPS by describing it as “a floor, not a ceiling” with which *sui generis* protections do not conflict.⁴⁴ It is submitted, though, that a more nuanced understanding of the meaning of “minimum standards” is required.

A “minimum standards” obligation does not give Members *carte blanche* to impose any other regulations that they please. Rather, it refers to the idea that, as a bare minimum, any applicant who fulfils the TRIPS requirements for a given IP right must be granted protection. Any obstacles to this would amount to falling short of TRIPS obligations, exposing the offending Member to considerable trade sanctions at the hands of the WTO.⁴⁵ It is for this reason that art 1(1) goes on to emphasise that additional protections “must not contravene the provisions of this Agreement”, a point apparently under-acknowledged by many commentators and the Tribunal. Importantly, this will operate in any case where a *sui generis* right, even if not explicitly, presents any limitations to TRIPS rights that “constitute a disguised barrier to trade”.⁴⁶ It is suggested that it is a serious abdication of responsibility on the Tribunal’s part to represent that their recommendations are TRIPS-compliant without fuller justification.

This does not make the Tribunal wrong, however. Indeed, the introduction of a MAC and kaitiaki register would, if anything, increase the efficacy of the TRIPS patentability criteria in New Zealand; those measures pose no foreseeable threat of frustrating worthy applicants from attaining patents. The same would also be true when it came to detecting false “discoveries” of plant species already known to Māori when making novelty assessments for PVRs.

The Tribunal’s *ordre public* recommendation in regards to patents draws upon art 27(2) of TRIPS itself. This permits Members to exclude inventions from patentability where preventing commercial exploitation of the subject matter is “necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment”. Although this particular incarnation of “*ordre public*” does not appear especially supportive of Wai 262’s expansive suggestions, the Tribunal

43 Daniel Gervais “Traditional Knowledge and Intellectual Property: A TRIPS-Compatible Approach” [2005] Mich St L Rev 137 at 156.

44 Wai 262, above n 1, at 175; see also at 50-51.

45 JH Reichman “Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate” (1996) 29 Vand J Transnat’l L 363 at 367.

46 Westkamp, above n 40, at 112.

cites scholarship to support the fact that *ordre public* is a term of art used in multiple international instruments referring to “the fundamentals from which one cannot derogate without endangering the institution of a given society”.⁴⁷ The Tribunal says that the protection of kaitiaki relationships with taonga species and mātauranga Māori ascends to this level given the place of the Treaty as New Zealand’s founding document and the central value of Māori culture within New Zealand society.⁴⁸

Whether or not this is actually the case deserves deeper examination, considering that many of the Tribunal’s arguments hinge on the accuracy of this assertion. The first thing to note is that a precise definition of *ordre public* has never been pinpointed; rather, it has long been a subject of conjecture among scholars and judges alike.⁴⁹ One school of thought pitches the term at the level of preventing threats to “public security ... or social order”,⁵⁰ a decidedly high threshold that the safeguarding of Māori TK would struggle to attain. Making matters worse is the fact that the TRIPS definition’s emphasis on “life or health” perceptibly steers the Agreement down this path, and further, the Tribunal’s own definition arguably conjures up anarchic images that a lack of TK protection, on its own, is unlikely to generate.

Conversely, broader approaches to *ordre public* refer to it as preserving the “fundamental laws, morals and ideologies of each respective country”.⁵¹ Westkamp, for instance, describes *ordre public* as a mechanism to allow deviations from agreements “if substantial national interests are concerned”.⁵² Similarly, in the *Onco-Mouse* case, ethical deliberations were made within the ambit of an *ordre public* clause.⁵³ Indeed, although they are couched in varying terms, it is suggested that such approaches embody the prevalent view

47 Daniel Gervais “Patents: *Ordre Public* and Morality” in United Nations Conference on Trade and Development – International Centre for Trade and Sustainable Development *Resource Book on TRIPS and Development* (Cambridge University Press, Cambridge, 2005) at 375-383 as cited in Wai 262, above n 1, at 176 (see note 387).

48 Wai 262, above n 1, at 202, with reference to 176-177; see also at 197.

49 Kong Qingjiang “The Doctrine of *Ordre Public* and the Sino-US Copyright Dispute” [2008] LAWASIA Journal 34 at 35.

50 *Plant Genetic Systems and Greenpeace* T356/93 [1995] EPOR 357 (European Patent Office, Board of Appeal) at 5 as cited in Vivienne Green “The Ethics of Patenting Inventions Derived from Human Embryonic Stem Cells in the European Union” (2006) 64 *Journal of the Intellectual Property Society of Australia and New Zealand* 10 at 14.

51 Qingjiang, above n 49, at 35.

52 Westkamp, above n 40, at 126; see also Qingjiang, above n 49, at 35-37; Vivienne Green “The Ethics of Patenting Inventions Derived from Human Embryonic Stem Cells in the European Union” (2006) 64 *Journal of the Intellectual Property Society of Australia and New Zealand* 10 at 14-15.

53 *Harvard/Onco-Mouse* T19/90 [1992] EPOR 3; [1991] EPOR 525 (European Patent Office, Board of Appeal).

of how *ordre public* clauses should operate.⁵⁴ At the very least, their existence stands testament to the fact that a broad interpretation has never been positively disproved. This is bolstered by the view that, in the end, it is down to each state “to define ... *ordre public* in accordance with its own national conditions”.⁵⁵ Furthermore, TRIPS’s *ordre public* clause is not expressed in exhaustive terms and, strictly, does not preclude an expanded definition.

Obviously, these arguments support Wai 262’s compliance with TRIPS. The Tribunal’s appeal to the need to protect Māori culture as a cornerstone of New Zealand society certainly presents a compelling argument to both national and international observers. For a start, it accords with judicial pronouncements that the Treaty – a proxy for Māori values – “occupies a fundamental place of some constitutional significance in ... New Zealand”;⁵⁶ indeed, this is probably the sense in which the Tribunal referred to the “institution of a given society”. Such an understanding has also prevailed in contemporary New Zealand governance and society in general.⁵⁷ It would be difficult to deny that fostering Māori culture and honouring the Treaty were matters of “national interest” in modern New Zealand. It is submitted that this established domestic viewpoint, coupled with the growing international impetus for the protection of indigenous TK,⁵⁸ makes it improbable that New Zealand would face international resistance to the protection of mātauranga Māori under the *ordre public* clause. Notwithstanding the political volatility of such a move, the uncertain scope of *ordre public* would render any opposition difficult to justify.

Despite this, it is worth specifically assessing the fact that *Ko Aotearoa Tēnei* would see informed consent and/or disclosure factored into the *ordre public* calculus where the Commissioner deems it appropriate. The concept of informed consent in particular has already been the subject of significant debate in the context of the Convention on Biological Diversity (“CBD”) and

54 *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden) (Judgment)* [1958] ICJ Rep 55 at 90 and 106 per Judges Sir Hersch Lauterpacht and Quintana respectively; see Qingjiang, above n 49, at 35-37; and Green, above n 52, at 15.

55 Qingjiang, above n 49, at 35.

56 *Huakina Development Trust v Waikato Valley Authority & Bowater* [1987] 2 NZLR 188 (HC) at 196; see generally *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands Case*].

57 For example, reference is made to the “principles of the Treaty of Waitangi” in each of the State Owned Enterprises Act 1986 (s 9), the Education Act 1989 (s 181(b)) and the Resource Management Act 1991 (s 8) to name a few.

58 See for example the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/L.67 (2007) [DRIPs], art 31.

its recent augmentation in the Nagoya Protocol.⁵⁹ The latter instrument deals with mechanisms to ensure that informed consent and “fair and equitable” benefit-sharing take place “upon mutually agreed terms” in line with art 15 of the CBD, and specifically calls for such measures to protect TK under CBD art 8(j), which urges Parties to “respect, preserve and maintain” indigenous knowledge.⁶⁰

Speculation has emerged, however, that an inherent conflict may exist between TRIPS and the CBD in that the privileges awarded to those meeting the minimum standards under the former are not subject to the provisions of the latter.⁶¹ Moreover, art 8(j) is “subject to ... national legislation”, which undoubtedly includes TRIPS-governed IP legislation such as the Patents Act.

However, any suggestion that informed consent and benefit-sharing requirements are entirely prohibited by TRIPS can be readily discredited. As noted, “more extensive protections” that do not interfere with TRIPS rights will be permissible. Moreover, international dialogue in the TK area has recently begun seriously considering the shape of informed consent and benefit-sharing requirements.⁶² The best example of this is the WTO TRIPS Council itself which, having adopted informed consent and benefit-sharing as unanimous policy objectives,⁶³ found no objection to an approach requiring informed consent and benefit-sharing contracts as a corollary of accessing patent legislation, but enforced outside of IP law (aside from the regular objection and re-examination mechanisms).⁶⁴ Further, in 2011 the World Intellectual Property Organisation (“WIPO”) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, tasked with addressing this very issue, released a set of Draft Articles for the Protection of TK, included in which were informed consent

59 Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993); 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 (opened for signature on 2 February 2011). New Zealand is a Contracting Party to the CBD but is yet to sign the Nagoya Protocol.

60 See Nagoya Protocol, arts 7, 12 and 16.

61 Charles Lawson “Biodiversity, Conservation, Access and Benefit-sharing Contracts and the Role and Place of Patents” (2011) 33 EIPR 135 at 135.

62 Tania Bubela, E Richard Gold and Jean-Frédéric Morin “Wicked Issues for Canada at the Intersection of Intellectual Property and Public Health: Mechanisms for Policy Coherence” (2011) 4 McGill J L & Health 3 at 21.

63 *The Relationship Between the TRIPS Agreement and The Convention On Biological Diversity: Summary of Issues Raised and Points Made* IP/C/W/368/Rev.1, 8 February 2006 (Note by the Secretariat) [TRIPS Council: *TRIPS/CBD*] at 5; see also DRIPs, above n 58, art 31(1).

64 TRIPS Council: *TRIPS/CBD*, above n 63, at 16; see for another variation of this Folkins, above n 6.

and benefit-sharing requirements.⁶⁵ Finally, several WTO Members have already introduced informed consent and benefit-sharing obligations without facing any sanctions under TRIPS,⁶⁶ and still more, including Australia, are seriously discussing doing so.⁶⁷ Thus, the Waitangi Tribunal seems to be on reasonably good grounds to suggest that failing to engage in informed consent and benefit-sharing arrangements with Māori groups might properly be relevant to an *ordre public* inquiry.

The Tribunal's disclosure requirement takes more consideration. Encouragingly, it too sits alongside an abundance of calls for disclosure measures internationally,⁶⁸ and, as noted, it can actually assist in the fulfilment of TRIPS criteria. The trouble arises in cases where inventions would otherwise qualify for patentability but the applicants have failed to disclose mātauranga Māori components. Denying patentability effectively amounts to imposing an additional substantive criterion⁶⁹ that would, *prima facie*, offend against TRIPS's minimum standards, correctly understood. However, this concern can be largely dispelled by unpicking the likely effects of the disclosure requirement as recommended. The Tribunal's proposal is for patents to be refused or revoked where an applicant's failure to disclose the use of mātauranga Māori and taonga species incurs a damaging effect on the kaitiaki relationship.⁷⁰ In reality, this is only likely to arise in cases where the mātauranga in question is of such a sacred nature that the applicant should have obtained informed consent and even entered into a benefit-sharing contract. After all, the balancing process to be applied by the Commissioner

65 *The Protection of Traditional Knowledge: Draft Articles* (WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO/GRTKF/IC/21/4, 2011) at 4-5 and 13; see also *Revised Draft Provisions for the Protection of Traditional Knowledge* (WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO/GRTKS/IC/9/5, 2008).

66 Examples include Brazil, Peru, Panama and the Philippines: see generally Kanchana Kariyawasam and Scott Guy "Intellectual Property Protection of Indigenous Knowledge: Implementing Initiatives at National and Regional Levels" (2007) 12 *Deakin L Rev* 105.

67 Janke, above n 15, at 139-141.

68 Wend Wendland "Intellectual Property, Traditional Knowledge and Kolklore: WIPO's Exploratory Program" (2002) 33(4) *IIC* 485 at 499-500; Interview with Wend Wendland, Director, Traditional Knowledge Division, World Intellectual Property Organisation (Shlomit Yanisky-Ravid, Ono Academic College International Conference: Intellectual Property Law and Development – the Road Ahead; Traditional Knowledge and Access to Knowledge, 24 October 2011); Vincent Smolczynski "'Willful Patent Filing': A Criminal Procedure Protecting Traditional Knowledge" (2010) 85 *Chi-Kent L Rev* 1171 at 1186-1187; Verma, above n 18, at 786; Christopher Heath & Sabine Weidlich "Intellectual Property: Suitable for Protecting Traditional Medicine?" [2003] 1 *IPQ* 69 at 81.

69 TRIPS Council: *TRIPS/CBD*, above n 63, at 32; see also *Wai* 262, above n 1, at 205.

70 *Wai* 262, above n 1, at 203-206.

begins by sizing up the kaitiaki interest and then weighing it against the interests of others.⁷¹ Further, in its own words, the Waitangi Tribunal envisages the disclosure requirement as being:⁷²

... a vehicle for kaitiaki involvement in New Zealand's patent regime. Disclosure allows kaitiaki to monitor and, to a certain extent, control the use of mātauranga Māori and taonga species in the research process. In appropriate cases, this might even trigger [benefit-sharing] arrangements between the parties.

Even Longacre, one of the staunchest sceptics of disclosure requirements, concedes that patents obtained under fraudulent circumstances should be revoked.⁷³ This, she says, is due to the operation of art 8 of TRIPS, which allows Members to “adopt measures necessary ... to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement”.⁷⁴ Clearly, this grants nations a fair deal of latitude to repudiate patent applications that could cause detriment to socio-economic imperatives. In New Zealand circumstances, the socio-economic development of Māori once again presents a compelling argument in favour of revoking patents for undisclosed mātauranga in the worst of cases. This is certainly the line taken by the Waitangi Tribunal, which identifies art 8 in the lead-in to its *ordre public* proposition,⁷⁵ through which the disclosure mechanism is to operate. Indeed, it is presumably for this reason that the Tribunal opted to channel disclosure through *ordre public* in the first place, although, of course, art 8 applies equally to matters such as informed consent as well.⁷⁶

Any residual unease with the whole *ordre public* regime no doubt lies in the way matters such as disclosure and informed consent are shoehorned into a wide discretionary clause that gives researchers and other nations few clues as to how it might operate. While that may lead to problems on a practical front,⁷⁷ it is suggested that this poses no obstacle in terms of general compliance within the international context. It must be remembered that

71 At 203.

72 At 204.

73 Longacre, above n 13, at 1001.

74 In fact, several WTO Members have submitted that art 8 of TRIPS would support an outright disclosure requirement in the patent regime: TRIPS Council: *TRIPS/CBD*, above n 63, at 55.

75 Wai 262, above n 1, at 175-176.

76 For additional arguments to this effect, see Ghosh, above n 7, at 915.

77 See for discussion Part IV.6 below.

the international TK debate is characterised by uncertainty and indecision.⁷⁸ At the same time, the development of concrete measures to protect TK has gained momentum.⁷⁹ In light of this, it seems reasonable to suppose that New Zealand would encounter no major difficulties on the international stage were it to implement the Tribunal's wide-reaching *ordre public* mechanism.

Of course, there can be no guarantee that New Zealand would not face political fallout from enacting this measure, and it must be acknowledged that reliance on an indeterminate international regime is an unprincipled way to approach legislative reform. Indeed, it is conceivable that some developed countries may view this use of *ordre public* as setting a dangerous precedent and oppose it on that basis. Still, the gravitational shift of international law in the opposite direction and the domestic focus of *ordre public* at least mean that the recommendation has strong potential to be TRIPS-compliant.

B. UPOV Convention

When it comes to PVRs, compliance with international regulation is a simpler affair. Indeed, the two reforms drawn from the Draft PVR Bill were developed with a view to achieving harmony between New Zealand's PVR laws and the 1991 revisions to the UPOV Convention.⁸⁰ For example, the 1991 Act defines a breeder as "the person who ... discovered *and developed* a variety",⁸¹ justifying the recommendation to remove protection for persons who have simply "discovered" varieties, including those known to Māori. Similarly, the ability of Māori to object to a denomination would simply be a codification of an existing objection right under s 6(1) of the PVR Act,⁸² which is already UPOV-compliant.

The Tribunal's other recommendation, to deny PVR protection where it would affect kaitiaki-taonga relationships, requires closer attention, but is still, it is submitted, ultimately permissible. Superficially, arming the Commissioner of PVRs with the capability to deny otherwise compatible plant varieties IP protection would appear to run counter to the UPOV Convention. However, the Convention does permit restrictions on PVRs

78 For instance, despite years of rumination, no clear consensus has emerged over the interface between TRIPS and the CBD: see generally TRIPS Council: *TRIPS/CBD*, above n 63; see also *The Protection of Traditional Knowledge and Folklore: Summary of Issues Raised and Points Made* IP/C/W/370/Rev.1, 9 March 2006 (Note by the Secretariat), where debate even persists over which is the appropriate forum to address the international protection of TK: at 6-9; and Secretariat of the Convention on Biological Diversity *Handbook of the Convention on Biological Diversity Including its Cartagena Protocol on Biosafety* (3rd ed, Montreal, 2005) at 208.

79 See for example WIPO Draft Articles, above n 65.

80 New Zealand has signed but not ratified this instrument: Sumpter, above n 22, at 260; *Review of the Plant Variety Rights Act 1987: A Discussion Paper* (Ministry of Economic Development, March 2002).

81 1991 Act of the UPOV Convention, art 1 (emphasis added).

82 PVR Discussion Paper, above n 80, at 31.

“for reasons of public interest”.⁸³ Thus, the foregoing arguments about the importance of fostering Māori culture in New Zealand society are just as applicable here. A slight recalibration of these contentions is required to account for the fact that, unlike mātauranga-based inventions, taonga plants already do, and would continue to, exist regardless of PVRs being granted; in fact, as the Tribunal points out, commercially encouraging the revegetation of taonga species could be a beneficial policy.⁸⁴ Notwithstanding this, the Tribunal’s core focus is not on prohibiting commercial exploitation outright, but ensuring that Māori culture is respected and, where necessary, included if it does occur. This, it avers, aligns with the public interest of honouring the Treaty. In this sense, the arguments from above are valid here.

If anything, it is submitted that “public interest” provides greater conceptual latitude in this regard than does “*ordre public*”. The UPOV Convention is arguably friendlier to TK preservation, including as it does a specific exception in the 1991 Act for Parties to provide what are known as “farmer’s rights” protection.⁸⁵ “Farmer’s rights” sustain the ability of indigenous groups to persist with traditional uses of plant species without fear of IP sanctions,⁸⁶ and, as the example of India shows, they can be neatly tied into the UPOV model.⁸⁷

C. Trade Agreements

The final area within which one might expect to encounter challenges is within New Zealand’s arrangements with its key trading partners like Australia, the United States and China. However, in the IP sections of New Zealand’s core free trade agreements (“FTAs”), express savings are made for the parties to be able to protect TK, subject to international obligations. This is true of the FTA between Australia, the ASEAN nations and New Zealand;⁸⁸ the original “P-4” Trans-Pacific Strategic Economic Partnership Agreement;⁸⁹ New Zealand’s proposed text of the developing Trans-Pacific

83 1978 Act of the UPOV Convention, art 9; 1991 Act of the UPOV Convention, art 17.

84 Wai 262, above n 1, at 206.

85 1991 Act of the UPOV Convention, art 15(2).

86 Dan Leskian and Michael Flitner *Intellectual Property Rights and Plant Genetic Resources: Options for a Sui Generis System* (International Plant Genetic Resources Institute, Issues in Genetic Resources No 6, June 1997) at 43-45.

87 Christoph Antons “*Sui Generis* Protection for Plant Varieties and Traditional Agricultural Knowledge: The Example of India” (2007) 29 EIPR 480 at 485. India is not actually a signatory to the UPOV Convention, but its plant variety protection is modelled on it and it is seeking to become a Party.

88 Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (signed 27 February 2009, entered into force 10 January 2012), ch 13, art 8.

89 Trans-Pacific Strategic Economic Partnership Agreement, Brunei-Chile-New Zealand-Singapore (signed 3 June 2005, entered into force 28 May 2006), art 10.3(3)(d); see also Susy Frankel “Intellectual Property in New Zealand and the TPPA” in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books, New Zealand, 2010) at 165.

Partnership with *inter alia* the United States;⁹⁰ and New Zealand's FTA with China, the last of which enables the Parties to "establish appropriate measures to protect genetic resources, traditional knowledge and folklore".⁹¹ Quite simply, then, these arrangements leave TK protection in the hands of the individual parties and rely on the international obligations already discussed to set the parameters. As such, they themselves present no obstacles to the enactment of Wai 262's reforms.

D. Summary

This section has concluded that a combination of relatively permissive provisions within international instruments and the fact that the most troubling reforms would only really operate in extreme cases means that Wai 262's recommendations are unlikely to be prohibited at international law. Having checked the recommendations for global compliance, it is now apt to evaluate each of them for feasibility at the domestic level. This is the subject of the following section.

IV. EVALUATING THE RECOMMENDATIONS

This part of the paper evaluates each of the Waitangi Tribunal's proposed reforms in turn. It is reiterated that this assessment examines Wai 262's suggestions along pragmatic lines, questioning whether, to what extent and how effectively they fit within New Zealand's IP system. Of course, while the merits of the proposals may be relevant at several points, the focus is to investigate *how* New Zealand's existing laws would cope with the various changes and not whether they should: after all, the virtues of the Māori claims have been assumed. The recommendations are presented along a scale of the difficulty that would be generated by their implementation, starting with the easiest to introduce and incrementally tracking through to the most difficult.

A. Māori Advisory Committee

In general terms, the instalment of a MAC within IPONZ is unlikely to pose any problems for New Zealand's existing IP regime given that such a thing already exists in the realm of trademarks.⁹² Further, one has already been enacted in the Patents Act with largely the same functions as those

90 *TPP Text Submitted by New Zealand: Intellectual Property* (Ministry of Foreign Affairs and Trade, February 2011) at 5. Recent United States' proposed texts simply incorporate the TRIPS *ordre public* clause as to what may be excluded from patentability: see Clive Elliott "IP for Traditional Knowledge" [2011] NZLJ 252 at 256.

91 New Zealand-China Free Trade Agreement, New Zealand-China (signed 7 April 2008, entered into force 1 October 2008), art 165.

92 Trade Marks Act 2002, s 177.

proposed by the Tribunal.⁹³ Put simply, a MAC represents an administrative and not a substantive addition to IP regulation which, as a consequence, would fit neatly within the IP rubric.

That said, it is worth noting a striking feature of the Tribunal's report in that it is content for the MAC to "have an advisory rather than directive role",⁹⁴ meaning that, like in the Patents Act, its advice would not be binding.⁹⁵ No doubt this falls short of more stringent powers sought by a number of Māori lobbyists,⁹⁶ and, on its own, would perceptibly expose the MAC to Sumpter's criticism that, as a purely internal mechanism to IPONZ, it would make "the bureaucracy the critical watchdog" for the misappropriation of mātauranga Māori.⁹⁷ However, that comment referred to an earlier version of the Patents Bill in which the opportunity for third parties, such as Māori groups, to lodge pre-grant opposition applications had been removed; this was later restored.⁹⁸

In addition, the Tribunal accepts an advisory role for the MAC as a trade-off for its mandate to proactively investigate and advise the Commissioners about the tikanga Māori ("traditional cultural") aspects of any patent or PVR application it sees fit, including those that have already been granted; and, although not bound by it, the Commissioners would be formally compelled to take that advice.⁹⁹ Here, the Tribunal seems to repeat the need to balance all competing interests on a case-by-case basis.¹⁰⁰ In that vein, the imposition of non-binding advice ensures that other interests, such as research and development, would not be held to ransom by a Committee specifically tasked with promoting the interests of one group of stakeholders. Equally, though, much like the Waitangi Tribunal itself, it will probably be controversial for the Commissioner to decline to follow the MAC's advice without good reason.¹⁰¹ If anything, then, this conception of the MAC enhances its fit within the regulatory regime.

B. PVR Denominations Offensive to Māori

Another of the simplest recommendations is the proposal to empower the Commissioner of PVRs to deny applications with denominations that may be offensive to a significant section of the community, including Māori. For a start, having been drawn from the Draft PVR Bill, the idea has obviously been vetted for compatibility with the PVR scheme already. In any event, it

93 Section 225. In terms of functions, compare s 226 and Wai 262, above n 1, at 201.

94 Wai 262, above n 1, at 201.

95 Compare Patents Act, s 227.

96 Solomon, above n 20; Wai 262, above n 1, at 13-14; Lynell Tuffery Huria "Wai 262 – the Intellectual Property Claim" (2012) 6 NZIPJ 852 at 852; de Beer, above n 12, at 117; Lenihan, above n 18, at 213-214.

97 Paul Sumpter "Intellectual Law and the New Morality" (2005) 11 NZBLQ 216 at 225.

98 Patents Bill, above n 24, cl 87A; see also at 9-10; Patents Act, s 92.

99 Wai 262, above n 1, at 201.

100 At 195-197 and 201.

101 Justin Graham "The Future of Patent Law" [2008] NZLJ 363.

represents a minor adjustment to a criterion that is not a truly substantive requirement of PVR protection in the same sense as newness, distinctness, homogeneity and stability, and thus any interference with the PVR system would be comparatively minor. Even then, such interference seems unlikely given that the term “offensive” is already employed in trademark law,¹⁰² the jurisprudence from which could be informative in the PVR context. This must be tempered by the fact that few decisions have actually arisen in this area, and further, that there is a far greater scope for trademarks to touch upon fundamental matters.¹⁰³ Nonetheless, there will be useful commonality with tests relating to word marks, including issues like the meaning of “offensiveness” and whether “a significant section” of Māori must cross tribal lines, or whether the views of individual iwi would suffice.¹⁰⁴

Even without a proactive MAC, the equivalent practical difficulty of detecting mātauranga Māori in patent applications¹⁰⁵ is unlikely to be present here given that, when working with names alone, those applications deserving further investigation (that is, those containing a te reo Māori component) will be self-evident in almost all cases. Of course, this could be circumvented by applicants who only use the botanical and English names for taonga-derived PVRs; however, while such cases might alert the MAC to applications that “affect kaitiaki relationships with taonga species”,¹⁰⁶ it would be rare for *the name itself* to be offensive.¹⁰⁷

C. Novelty and Inventiveness

The Tribunal’s proposition that the MAC be mandated to advise the Commissioner of Patents on the requirements of patentability falls primarily within the “easy to implement” camp because, as noted, it would largely enhance the enforcement of those criteria. Where an alleged invention contains such a degree of mātauranga Māori as to warrant failure of the patentability criteria, commonly novelty or inventive step, the MAC would be able to advise the Commissioner to reject the application where the TK contribution might otherwise go unnoticed. This both tightens up the efficacy

102 Trade Marks Act, s 17(1)(c); see also Owen Morgan *Protecting Indigenous Signs and Trade Marks Under the New Zealand Trade Marks Act 2002* (Intellectual Property Research Institute of Australia, Working Paper No 02/04, February 2004) at 14-19; Sumpter, above n 22, at 143-144.

103 For example the use of the human head or ta moko on food products: Elliott, above n 90, at 254-256.

104 As to this see Morgan, above n 102, at 24-25; *HALLELUJAH Trade Mark* [1976] RPC 605.

105 Sumpter, above n 97, at 226.

106 See Part IV.H.

107 One possible instance might be where an omission to use the Māori name is itself considered offensive. It is submitted, though, that this would be uncommon, and would need to be considered on a case-by-case basis.

of the patentability benchmarks, ensuring that only worthy inventions receive protection, and provides a clearer path to protecting mātauranga Māori third party exploitation.

There is one issue that pulls this recommendation towards the more difficult end of the spectrum. That is its lack of definitions, an issue the Tribunal fails to confront to the extent probably called for. TK is a notoriously nebulous concept because of its holistic status as an “integral part of ... cultural heritage” and its constantly evolving nature.¹⁰⁸ As Cross identifies, one of the most widely-accepted definitions, from WIPO itself, is “extremely broad”, characterising TK as including:¹⁰⁹

... tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.

This goes on to describe TK systems as those that “have generally been transmitted from generation to generation ... and are constantly evolving in response to a changing environment”.¹¹⁰ Immediately these definitions reveal the link to novelty and inventiveness; for, where mātauranga Māori has existed for a number of generations and is not attributable to a single inventor, “a section of the wider community” knows about it and it is, by definition, not “new”.¹¹¹ Instead, it forms part of what is known as the “prior art base” available in the public domain.¹¹² Interestingly, the definitions also expose a juxtaposition in the idea of evolutionary TK. Presumably, some TK advancements could actually amount to novel and non-obvious inventive steps and thereby qualify for patent protection.

The problem arises from the fact that the Tribunal makes no attempt to delineate the levels of TK that will be sufficient to defeat mātauranga-derived patent applications. This, Garcia adds, is only made more complicated by the fact that no universal definition of “novelty” is prescribed in TRIPS or elsewhere.¹¹³ What *Ko Aotearoa Tēnei* does refer to, though, is an explanation of the way in which, under current conceptions of IP law, comparatively little

108 Verma, above n 18, at 800; see also *Convention on Biological Diversity: Detailed Thematic Report on Access and Benefit-Sharing – New Zealand* (June 2001) (obtained from Convention on Biological Diversity <<http://www.cbd.int>>) at 1; de Beer, above n 12, at 100-101.

109 *Intellectual Property Needs and Expectations of Traditional Knowledge Holders* (WIPO, 2001) at 25 as cited in John Cross “Justifying Property Rights in Native American Traditional Knowledge” (2009) 15 *Tex Wesleyan L Rev* 257 at 262; see also *The Protection of Traditional Knowledge: Revised Objectives and Principles* (WIPO, WIPO/GRTKF/IC/18/5, 10 January 2011), annex 18 as cited in Susy Frankel “Branding Indigenous Peoples’ Traditional Knowledge” in Andrew T Kenyon, Megan Richardson and Wee Loon Ng-Loy (eds) *The Law of Reputation and Brands in the Asia Pacific* (Cambridge University Press, 2012) at 2.

110 WIPO as cited in Cross, above n 109, at 263.

111 Wai 262, above n 1, at 171.

112 Sumpter, above n 22, at 236.

113 Garcia, above n 6, at 13.

movement away from the mātauranga Māori in question is actually needed for an invention to qualify for a patent. It gives the example of patenting a method to isolate the active substance from a plant traditionally used by Māori, stating that “[t]hrough mātauranga Māori might have been the trigger to [carry out] research ... , its existence will not have destroyed the novelty of this isolation process”.¹¹⁴ This provides a strong clue that the Tribunal intends mātauranga Māori to be treated similarly to any other form of prior art, with emphasis being placed on its tangible characteristics. Thus, where an invention is more than merely an embodiment of TK, it will be “novel” in the strict sense of the word. A corollary of this is that all questions pertaining to matters like how appropriate it is for inventions to be based on certain mātauranga Māori or whether informed consent should have been obtained are relegated to the *ordre public* considerations of the Commissioner. This whole approach is deeply problematic for many Māori when it comes to the matter of “positive” protection enabling them to commercially benefit from their own mātauranga,¹¹⁵ an issue that shall be returned to later.¹¹⁶ Overall though, it presents minimal difficulties for a “fit” analysis such as this, given that it poses no changes to the patentability criteria.

The difficulty that remains is the uncertainty generated for patent applicants whose inventions are based in some way upon mātauranga Māori as to how integral to their invention the Commissioner will view the TK component. Absent a prescribed definition, it will be over to the MAC to quantify the parameters of mātauranga Māori in a given application. This goes some way to meeting the demands of Māori that only those experienced in tikanga should be permitted to pronounce what constitutes TK,¹¹⁷ but could ring alarm bells for commercial developers who are not so experienced. However, it is submitted that this concern can be allayed on the basis that it is no different to the intrinsic uncertainty in any patent application, especially for inventions derived from existing materials. All inventions are subject to an examination of their novelty and inventiveness compared to the prior art base, none of which is any more predictable without a mātauranga Māori component.

D. Kaitiaki Register

The first of the “moderately difficult” recommendations is the idea of establishing a voluntary register of kaitiaki interests in taonga species or mātauranga Māori. This publicly available compendium would serve both to bolster IPONZ’s detection of mātauranga Māori and taonga plant species in patent and PVR applications respectively, and alert potential researchers

114 Wai 262, above n 1, at 170.

115 See de Beer, above n 12, at 112-113; see also in the context of trademarks Daphne Zografos “New Perspectives for the Protection of Traditional Cultural Expressions in New Zealand” (2005) 36(8) IIC 928 at 952.

116 See Part V.

117 See for example Garrity, above n 17, at 1202; Lenihan, above n 18, at 211.

to “the kaitiaki interest and of the need to engage” with the relevant Māori group(s).¹¹⁸ This suggestion echoes numerous calls across the globe to create TK databases, with the predominant purpose of thwarting undeserving IP applications and biopiracy.¹¹⁹

The internationally-recognised drawback of any TK registration system is that it precipitates clashes between indigenous communities over which group or individual has the best claim to certain TK.¹²⁰ As a preliminary point it might be said that, because a kaitiaki register would sit outside New Zealand’s traditional IP structures, this is not actually a problem with any real impact on the IP system. However, to the extent that a kaitiaki register would be administered by IPONZ and have a direct bearing on the assessment of patent and PVR criteria, it becomes a problem for the IP system that must be properly addressed.

The Waitangi Tribunal effectively dismisses this issue by giving an assurance that the problem “has been regularly dealt with” in New Zealand and, as such, that “[t]he Crown, Māori, the private sector and the courts have learnt to live with a level of ambiguity rather than let mandate disagreements halt progress”.¹²¹ Undoubtedly, New Zealand’s unique experiences at tackling Māori issues mean that there is truth to this sentiment, but it glosses over some distinctive discomforts when it comes to the IP sector. In particular, the Tribunal’s suggestion that any entitlement disputes need not be addressed “unless a patent or PVR application makes that necessary” is an unacceptable encroachment on a process that should be as efficient as possible.¹²² Rather, competing claims must be dealt with as they arise on the register.

As to how disputes would be settled, the Tribunal is light on details. Importantly, this issue pertains not only to disputes but also to ensuring that the kaitiaki relationships claimed are valid; for, if they are to be factored into patent and PVR eligibility, they must be legitimate interests (a point upon which the Tribunal is totally silent). The Tribunal would see the MAC charged with the decision-making role,¹²³ which makes considerable sense. However, short of proposing the development of ethical guidelines for researchers engaging with Māori,¹²⁴ the Tribunal offers no advice on

118 Wai 262, above n 1, at 202-203.

119 These calls have culminated most notably in India’s inauguration of a TK Digital Library to assist (*inter alia*) its Patent Office: Chidi Oguamanam “Patents and Traditional Medicine: Digital Capture, Creative Legal Interventions, and the Dialectics of Knowledge Transformation” (2008) 15 *Ind J Global Legal Stud* 489 at 499; see also Longacre, above n 13, at 1003.

120 Kariyawasam, above n 66, at 114; Angela Riley “Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities” (2000) 18 *Cardozo Arts & Ent LJ* 175 at 217 (in the context of copyright); Wai 262, above n 1, at 207; see also OseiTutu, above n 4, at 193-198.

121 Wai 262, above n 1, at 207.

122 At 207.

123 At 207.

124 At 207-208.

what should steer the Committee. It is submitted that there is merit in the opinion of several commentators that indigenous customary laws (here, *tikanga* Māori) should govern TK to the greatest extent possible.¹²⁵ Indeed, as Frankel and Drahos point out, it is often readily discernible at customary law which group is most affiliated with certain *mātauranga* Māori or *taonga* species, and who is primarily responsible for their welfare.¹²⁶ As such, the MAC would be well serviced by the use of *tikanga* Māori principles to solve this distinctly Māori problem, which, crucially, would not conflict with IP laws when used in this manner. The utility of this would only be enhanced by another of New Zealand's distinctive advantages in that Māoridom is already well-organised into *iwi*, *hapū* and *whānau* groups, each with distinctive roles under *tikanga*.¹²⁷ Of course, it would be unrealistic to expect *tikanga* to provide a quick-fix for every dispute; after all, *iwi* have frequently resorted to the courts over boundary and other disputes. Nonetheless, it would still afford a valuable starting point for even contentious deliberations.

In addition to this, significant value might also lie in making use of pre-existing institutions that routinely deal with Māori disputes, for example by extending the jurisdiction of the Māori Appellate Court to hear appeals from the MAC. Although that Court currently exists to resolve Māori land matters,¹²⁸ there is nothing in principle to prevent it from hearing cases relating to *mātauranga* Māori as well. Beneficially, this would open an appeal channel to New Zealand's regular appellate courts that could be employed by Māori groups and, where relevant, interested parties to IP rights applications.

125 See generally Kuruk, above n 21; Solomon, above n 20, at 13-14; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986) at [202] as cited in Erin MacKay "Regulating Rights: the Case of Indigenous Traditional Knowledge" (2010) 7(21) *ILB* 12 at 14; Patricia Adjei "What Place for Customary Law in Protecting Indigenous Knowledge" [2010] August *WIPO Magazine* 18 at 19. In fairness, this could well have been the Tribunal's presumed intention, but, if so, it is suggested that this would have been better stated explicitly.

126 Susy Frankel and Peter Drahos "Indigenous Peoples' Innovation and Intellectual Property: The Issues" (2012) 2 *VUWLRP* 36/2012 at 17-18; see also Riley, above n 120, at 217-218; García, above n 6, at 21.

127 One wrinkle to this might be the discernible socio-political shift within the Māori community away from traditional *iwi* structures towards urban-centred collectives like Māori trust boards: Manuhuia Barcham "The Challenge of Urban Māori: Reconciling Conceptions of Indigeneity and Social Change" (1998) 39 *Asia Pacific Viewpoint* 303 at 308. However, for something like long-standing *traditional* knowledge, this is unlikely to have much of an effect as most *mātauranga* Māori will be rightly affiliated to the more conventional constructs. In any event, the potential impacts of this lie well beyond the scope of a paper concentrated upon legal analysis.

128 *Te Ture Whenua Māori Act* 1993, pt 2.

Another difficulty with a kaitiaki register that is acknowledged in Wai 262 is the fact that some Māori will be reluctant to make especially sacred kaitiaki relationships publicly available.¹²⁹ Worse still, concerns have been voiced that a public encyclopaedia of TK could actually facilitate biopiracy, especially overseas.¹³⁰ Evidently, this in no way impacts on the patent or PVR systems themselves, but it could severely limit the effectiveness of the recommendation. In light of this, the Tribunal is right to say that the register “will best address the needs of kaitiaki whose mātauranga is already ... accessible in the public domain”;¹³¹ for them, the choice is obvious. However, it leaves many Māori in the awkward position of having to decide whether to sit on their secrets or rely on alternative IP mechanisms such as the tenuous shield of trade secrets should they wish to engage with the Western sphere.¹³² All this feeds into the lack of “positive” protections contained within *Ko Aotearoa Tēnei*, addressed below.¹³³

E. Discovered Plant Varieties

The removal of “discovered”, naturally occurring plant varieties from PVR protection, including those previously known to Māori, seems innocuous enough. After all, it is another of the suggestions uplifted from the Draft PVR Bill and, in fact, it aligns the PVR regime with its underlying philosophy by ensuring that exclusive rights are only granted to those whose intellectual labour has fashioned a new breed of plant.¹³⁴ However, it has the potential to become problematic in a subtle but significant way, especially when coupled with the idea of establishing a kaitiaki register.

The problem arises from the fact that Māori interests in native plant varieties, such as the pōhutukawa tree, will invariably relate to the plant species in general terms, and not to any of its specific scientific characteristics.¹³⁵ On the other hand, comparatively minor adjustments to plant species, like increased disease resistance and flower colour, will amount to sufficiently distinctive changes for the grant of a PVR to the breeder.¹³⁶ The frustration for Māori becomes obvious in scenarios such as that where PVRs have been granted for pōhutukawa varieties bred specifically for their commercially

129 Wai 262, above n 1, at 203; see also John Cross “Justifying Property Rights in Native American Traditional Knowledge” (2009) 15 Tex Wesleyan L Rev 257 at 271; Djims Milius “Justifying Intellectual Property in Traditional Knowledge” [2009] 2 IPQ 185 at 201.

130 Oguamanam, above n 119, at 500-501; Eric Kansa “Protecting Traditional Knowledge and Expanding Access to Scientific Data: Juxtaposing Intellectual Property Agendas via a ‘Some Rights Reserved’ Model” (2005) 12(3) IJCP 285 at 305.

131 Wai 262, above n 1, at 203.

132 See generally Varadarajan, above n 15.

133 See Part V.

134 See Draft PVR Bill, above n 28, at 1.

135 See Wai 262, above n 1, at 121-123.

136 At 175; Leskian and Flitner, above n 86, at 50-51.

favourable low-growing stature;¹³⁷ here, a strict application of the PVR criteria conflicts with the Māori view that the pōhutukawa variety is still subject to a kaitiaki relationship.

The Tribunal neglects to explicitly deal with this issue. Undeniably, the removal of protection for “discovered” plant species poses no actual “fit” complications with IP law, once again enhancing the efficacy of the “novelty” criterion. If anything, though, the renewed emphasis on protecting varieties with “a degree of human input into [their] development”¹³⁸ seems to favour granting PVRs to altered native plant species. After all, it must be remembered that the Tribunal endorses a reform to *remove* “discovered” varieties from PVR protection and not a prohibition on, say, “discovered varieties or their derivatives”. This matches the Tribunal’s treatment of patentability criteria in relation to the minor alterations to mātauranga needed to qualify for novelty and inventiveness. Presumably, the Tribunal also intends any other PVR matters be dealt with under its suggested power to refuse PVRs if they would affect kaitiaki relationships with taonga species. Thus, although this recommendation does not introduce any “poor fits” with the IP system, it does nothing to directly assuage a serious concern of Māori.

The true difficulty then comes from the possible existence of a kaitiaki register. Unlike in the patent regime, where mātauranga Māori claimed on the register would need to be relatively technical, this recommendation might incentivise Māori groups to describe taonga plant species as broadly as possible. Admittedly, in clear-cut cases where there is a high degree of novelty in a plant variety, this will not be a problem. However, danger (at least for the classic conception of IP law) lurks where distinctness is alleged in relatively minor adjustments. These could easily be defeated by generically-worded Māori claims, which would be difficult to disprove without the safety-net of technical comparisons available in patent examinations.

The real heart of this whole problem, alluded to in the previous section, lies in the way that the Tribunal offers no means of assessing the legitimacy of Māori claims; essentially, one is left to rely on the MAC and IPONZ. However, as is explained in the next section, concerning *ordre public*, this may be something of a cold comfort.

F. *Ordre Public*

The Tribunal’s wide-ranging *ordre public* clause would see the need to protect kaitiaki relationships with mātauranga Māori defeat otherwise eligible patents where, on balance with other interests like research and development, the Commissioner deems it necessary to do so. As has been evident throughout Part IV, the positive feature of this recommendation from a “fit” point of view is the way it leaves existing patentability criteria wholly intact, effectively by acting as a catch-all category for any of the truly confronting issues, including

137 Wai 262, above n 1, at 123 and 175.

138 Draft PVR Bill, above 28, at 1.

informed consent, benefit-sharing and disclosure. However, its wide ambit is its own biggest flaw, essentially because it creates considerable uncertainty for researchers and Māori alike.

It is worth dispensing first with one of the major concerns experienced in Belgium, where a similar reform was considered in 2000, namely whether this use of “*ordre public*” would be permitted under its standing domestic definition of the term.¹³⁹ In New Zealand, by contrast, no authoritative judicial or legislative pronouncement on the meaning of “*ordre public*” exists.¹⁴⁰ Besides, as has already been discussed in the context of TRIPS-compliance, the indubitable centrality of Māori culture in New Zealand society puts the country on strong footing to claim that protecting Māori TK is a matter of national importance.

Turning to the recommendation’s hurdles, a significant question mark about any *ordre public* clause lies over whether the complete nullification of a patent, effectively as a punitive sanction, is proportional to the shortcoming.¹⁴¹ The obvious counter, in the most serious of cases of misappropriation, is “yes”. However, when it comes to defining what “serious cases” means, the answer is much less obvious. In *Ko Aotearoa Tēnei*, this is where the Tribunal’s balancing process comes in. By its own admission, “this approach comes with an element of uncertainty”; still, it goes on, that is no different to the ongoing threat of objection or revocation faced by any other patent.¹⁴² It is submitted, though, that where objection and revocation typically rely on comparatively predictable grounds such as the patentability criteria, kaitiaki challenges are unfamiliar to the patent system and, as such, are deeply uncertain quantities both for applicants and those bringing the challenges. Nonetheless, the Tribunal must be commended for expounding a set of guidelines in the first place, in particular for including a range of interests such as research and development in the framework. Unfortunately, while they will work in simple cases, they ultimately suffer for their failure to consider more complicated examples.

One such scenario is where mātauranga Māori puts researchers on the scent of a particular innovation, yet patent protection is sought not for mere isolation processes or extracts but for downstream products that have been the result of significant additional research. Here, there would seem to be merit in the TRIPS Council’s citation of a pharmaceutical regime where the rights that must be accorded to the indigenous group who provided the TK will

139 Geertrui van Overwalle “Belgium Goes Its Own Way on Biodiversity and Patents” (2002) 24 EIPR 233 at 234-235.

140 The term has only been considered in the context of “freedom of expression” cases, and even then only in passing: see for example *Police v Beggs* [1999] 3 NZLR 615 (HC) at 630-631; *Hopkinson v Police* [2004] 3 NZLR 704 (HC) at 715-716; *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [39].

141 Van Overwalle, above n 139, at 235.

142 Wai 262, above n 1, at 205. These comments are made specifically in relation to the disclosure requirement, which, in the Tribunal’s model, operates via the proposed *ordre public* clause.

“depend upon the relationship of the marketed drug to the original lead”.¹⁴³ Thus, when the invention is vastly more developed than the mātauranga that led to it, it might be reasonable for a patent to be granted without informed consent or benefit-sharing arrangements in place. Add to this, though, that the mātauranga in question is of special significance to a particular Māori group – a key factor in the proposed balancing process – and the outcome is a lot more difficult to predict.

And what of remedies? If, in borderline cases such as this, the Commissioner did come down in favour of the kaitiaki interest, refusing the patent outright would seem unduly harsh. The more sensible option, it is suggested, would be for the Commissioner to impose conditions for how the situation could be corrected sufficiently for patentability to become appropriate. In many cases, this will require the applicant to obtain at least the informed consent of the relevant Māori group for commercial exploitation to proceed, which appears reasonable enough; but what if that consent is not forthcoming, or is withheld for improper reasons?¹⁴⁴ In the end, the strict dichotomy of granting or refusing a patent available to the Commissioner means that the patent must ultimately be denied.

This would effectively see the introduction of a substantive informed consent and/or benefit-sharing criterion through the back door of *ordre public*, which, as illustrated, would lead to unfair results for researchers in some cases.¹⁴⁵ On the other hand, permitting the Commissioner to revise his or her conditions upon their rejection by Māori would hardly be fair to those Māori, and would in fact defeat the purpose of imposing them in the first place. One suggestion that may ease the tension is for the Commissioner to be able to tailor conditions for the given situation;¹⁴⁶ for example, in the case above, a lump sum payment to acknowledge the mātauranga tip-off might be enough. Still, where these are rebuffed, the fact remains that the applicants are left with nothing. Herein lies the enormous degree of uncertainty generated by this recommendation.

Compounding this uncertainty is the noted inability within the Tribunal’s procedures to authenticate Māori claims. This issue is of greatest moment here because, unlike earlier matters, this inquiry would account for imprecise things like the “depth” of the kaitiaki relationship,¹⁴⁷ which would not be tested by more robust filters such as “novelty” and “inventiveness”. The obvious hazard is that there is a perceptible incentive for Māori groups to overstate the importance of taonga species or mātauranga in order to trigger the compulsion of greater benefits by the Commissioner. There is also the potential for heightened disagreements between Māori groups as to who has

143 TRIPS Council: *TRIPS/CBD*, above n 63, at 19.

144 A conceivable example of the latter might include where a rival drug company to an applicant pays the relevant Māori group to withhold their consent.

145 See also Heath and Weidlich, above n 68, at 77-78.

146 See Longacre, above n 13, at 1017; Ghosh, above n 7, at 921.

147 *Wai 262*, above n 1, at 202; see also at 193-194.

the greatest entitlement to particularly lucrative TK.¹⁴⁸ Of course, this is not to imply that Māori groups would necessarily be motivated by dishonesty or malice; rather that the temptation to exaggerate kaitiaki relationships might be too hard for some to resist and, more significantly, that past conflicts could be reawakened in this new context.

To counter this, one would need to rely on the MAC to ensure that an accurate picture of the relationships is painted to the Commissioner. However, the Waitangi Tribunal experience itself shows us that this may be no simple task, especially when, as stated above,¹⁴⁹ the MAC will be under pressure to resolve disputes quickly in this context. Applicants are also likely to insist on rigorous scrutiny of the MAC's advice by the Commissioner.¹⁵⁰ But the Tribunal's view is that kaitiaki relationships be presumed paramount unless other interests are shown to deserve priority.¹⁵¹ In any event, the Commissioner and higher appellate courts will probably be reluctant to second-guess the MAC's conclusions without compelling evidence to contradict it.

Plainly, the uncertainty of being caught out by the *ordre public* section would be exacerbated in cases where no engagement with Māori had taken place prior to the development of the invention. While such engagement could never totally immunise applicants from uncertainty in the MAC's deliberations, it could mitigate the associated risks, particularly where a benefit-sharing arrangement is struck with the relevant kaitiaki or their informed consent is obtained. To that end, the Tribunal's recommended mandatory disclosure requirement¹⁵² could go some lengths to reducing the casualties, given that the purpose of disclosure requirements is to encourage early interaction.¹⁵³ Again, because the disclosure requirement is set to operate through the *ordre public* clause, this will by no means eliminate uncertainty; nonetheless, it could decidedly reduce it.

G. Disclosure

Besides the uncertainty generated by enforcing disclosure of contributing mātauranga Māori through the *ordre public* clause, it is worth remarking on the potential effectiveness of the suggested requirement.

148 The problem of competing claims between Māori groups has already been discussed in the context of a kaitiaki register in Part IV.4. The same processes, whereby the MAC resolves disputes by reference to tikanga Māori, would be equally valid here.

149 Part IV.4.

150 This would accord with Taylor's thesis that it exhibits "breathtaking condescension" to simply take indigenous claims at face-value when, in the same position, other assertions would be the subject of "thoughtful deliberation": Charles Taylor "The Politics of Recognition" in Amy Gutmann *Multiculturalism: Explaining the Politics of Recognition* (Princeton University Press, Princeton, 1994) as cited in Michael Brown "Can Culture Be Copyrighted?" (1998) 39 *Current Anthropology* 193 at 205.

151 See Wai 262, above n 1, at 202.

152 See Part IV.7 below.

153 Wai 262, above n 1, at 203-204; Oguamanam, above n 119, at 518; Smolczynski, above n 68, at 1187.

The success of mandatory disclosure could be restricted if sanctions are not imposed in every case of non-compliance. The simple point is that, where there is a possibility that non-disclosure could go unpunished, the opportunity for abuse is ample.¹⁵⁴ Common examples are likely to involve applications where the mātauranga used is also common knowledge and/or can be easily disguised in the specification,¹⁵⁵ but this will not be exhaustive; and, even with a proactive mandate, the MAC will be hard-pressed to detect every incidence. Put simply, there is no point insisting on mandatory disclosure if sanctions are optional. Importantly, a weak disclosure regime will do little to properly facilitate early engagement.

The Tribunal's suggestion of a discretionary scheme via *ordre public* is based on the need to certify that any sanctions are proportionate to the shortcoming, which is laudable. A better regime, though, would see sanctions imposed in every case of non-disclosure, with a creative range of sanctions used in place of the revocation/no sanction dichotomy. In fact, at the "serious" end of non-disclosure, there is little to be gained from a purely punitive rejection or revocation if indeed the purpose is to facilitate informed consent or benefit-sharing. Instead, an application or a patent should be suspended until a relationship with Māori has been established. By contrast, where disclosure would not have actually affected patentability, it would still be appropriate to impose a penal measure to deter non-compliance, even at low levels; one possibility is the imposition of criminal sanctions like substantial fines,¹⁵⁶ which could be worth investigating here.

H. PVRs Affecting Kaitiaki Relationships with Taonga Species

The power to refuse PVRs where they would affect kaitiaki relationship with taonga species would be subject to the same test that governs *ordre public* in patents,¹⁵⁷ and would therefore suffer the same drawbacks. No specific discussion about it is required.

I. Summary

This draws to a close the analysis of the Tribunal's recommendations. In general, these are actually relatively inoffensive to patent and PVR law, deliberately being sculpted as they were to operate within existing IP frameworks.¹⁵⁸ That said, they also have the potential to generate considerable uncertainty, particularly at the *ordre public* end of the spectrum. Before concluding, this paper considers the notion of positive protection.

154 Heath and Weidlich, above n 68, at 81-82; see also Verma, above n 18, at 789-790.

155 For the latter point see Smolczynski, above n 68, at 1187.

156 See generally Smolczynski, above n 68. That author would employ a *mens rea* of knowledge in a criminal provision: at 1195.

157 Wai 262, above n 1, at 206.

158 At 210; see also at 198.

V. OF POSITIVE PROTECTION

Anyone well-versed in the vast literature about the protection of indigenous TK will be struck by the fact that *Ko Aotearoa Tēnei* prescribes nothing by way of what the literature terms “positive” protections, namely some form of positive rights that would enable kaitiaki to commercially develop mātauranga off their own bat. This is not to overlook the Māori-driven, “whole-of-government” approach to protecting kaitiaki relationships called for by the Tribunal,¹⁵⁹ itself a radical idea involving the taking of positive steps. But here, the term is to be contrasted with “negative” protections. These provide indigenous groups specific means to prevent exploitation of TK by third parties, often within existing IP systems. The recommendations already discussed fall within this category.

The Tribunal expressly disavows the idea of exclusive Māori property rights over mātauranga or taonga species, saying that the concept of “ownership” is irreconcilable with a guardianship philosophy and that control over use by third parties is therefore preferable.¹⁶⁰ Notably, though, this runs counter to scholarship advocating a recalibration of “property” rights (and indeed a shift away from the concept of “property”) to accommodate positive protection in a suitable format.¹⁶¹ This recognises that the realities of “property” depend not on what it is called but the rights it entails.

This paper seeks to complement its analysis of Wai 262 by briefly investigating whether and how positive protection might be added to the recommendations.

A. *The Theorist’s Dilemma*

The first obstacle for any form of positive protection to overcome would be the delicate question of whether Māori culture should in fact be afforded what is effectively favourable treatment when it comes to commercialisation.¹⁶² Western detractors might balk at the perception of Māori appealing to vague notions of an ideological rift to exclude mātauranga-derived inventions and taonga-derived plant breeds from Western IP protection, while at the same time obtaining exclusive entitlements to commodify that material in Western markets. The rejoinder to this is that the integral, spiritual importance of taonga species and mātauranga in holistic Māori culture renders many brands of commercial exploitation wholly inappropriate; and, even where such exploitation is deemed proper, having an expiry date on control is utterly incongruous with the infinite kaitiakitanga responsibility.

159 For example at 700.

160 At 78-80 and 192-193.

161 For example Kristen A Carpenter, Sonia K Katyal and Angela R Riley “In Defense of Property” (2009) 118 YLJ 1022; Milius, above n 129; Antony Taubman “Is There A Right of Collective Personality” (2006) 28 EIPR 485.

162 Gervais, above n 43, at 158-159. Obviously, addressing this question requires momentarily stepping beyond this paper’s assumption of merit in all Māori claims for TK protection.

In simple terms, the dilemma boils down to an issue of whether one can reap the benefits of one culture while playing by the rules of another. It is submitted that, in the context of indigenous TK, this can be answered in the affirmative, owing to the overwhelming dominance of Western culture in this sphere. Western society has essentially been thrust on indigenous communities worldwide, including in New Zealand, and its values of globalisation and commercialisation have inescapably engulfed those cultures.¹⁶³ According to Taubman, this presents a “homogenising” threat to indigenous values, in the face of which protective measures must be taken to ensure their survival;¹⁶⁴ indeed, such preservation is an international imperative from which it is difficult to deviate.¹⁶⁵ Simultaneously, Māori culture cannot exist in isolation from the Western world, and must therefore engage with Western structures if it is to have the means to flourish in modern society.¹⁶⁶ To say that such engagement will only be permitted if it takes place on Western terms (such as IP rights) is, at best, to be ignorant of this reality and, at worst, to assert a repugnant arrogance. Quite simply, introducing positive protections for Māori TK is unlikely to pose any serious threats to the foundations of Western culture, while failing to do so could hasten a decline of tikanga Māori.¹⁶⁷ In that context, it must be incumbent upon the dominant culture to incorporate a mode of protecting the more vulnerable.

B. The Pragmatist’s Dilemma

The pragmatist might also query whether providing positive protection for Māori TK is sensible on a practical level. Campaigners for such protection tend to frame their suggestions in terms that would permit Māori groups to develop their TK into a marketable form on their own.¹⁶⁸ However, when it comes to inventions and plant breeds, the examples almost exclusively refer to indigenous partnerships with corporate bodies, with the development of pharmaceuticals from traditional medicine the best illustration.¹⁶⁹ Thus, while it would be wrong to suggest that Māori organisations could never possess the capacity to generate tradable products themselves, the reality is that Western corporates will probably be involved in the majority of cases.

163 Taubman, above n 161, at 487.

164 At 487. For a New Zealand example, see the Waitangi Tribunal’s chapter on te reo Māori: Wai 262, above n 1, at ch 5.

165 As evidence of this, see for example DRIPs, above n 58; notably, after having originally opposed it, New Zealand signed this Declaration in April 2010 after significant pressure from Māori groups. Undoubtedly, there will be those who disagree that cultural preservation should be a societal goal: see for example Carpenter, above n 161, at 1038-1046. However, this is an anthropological debate that lies beyond the borders of this paper.

166 Jennifer Amcott “Investigating the Convention on Biological Diversity’s Protections for Traditional Knowledge” (2003) 11 *Mo Env’tl L & Pol’y Rev* 3 at 15-16.

167 Cross, above n 129, at 274-275.

168 See for example Garrity, above n 17; Verma, above n 18, at 791 and 799.

169 See generally Folkins, above n 6; Oguamanam, above n 119.

As a consequence, positive protection models must confer rights upon Māori without choking the operation of patents and PVRs; for, without familiar IP protection, the involvement of Western bodies would most likely stagnate.

C. *The Shape of Positive Protection*

This section presents only a brief sketch of the most suitable features of positive protection. First, in light of the conclusion of the previous section,¹⁷⁰ the Tribunal's recommendations in Wai 262 may in fact provide a solid component of TK infrastructure, given the way in which they preserve patents and PVRs but (if they work) restrict these to applicants who have engaged with Māori kaitiaki where appropriate. Because these would also foreclose mātauranga and taonga plants from direct patent and PVR protection – which are unsuited to the task anyway – something of a “rights-package” could be crafted to fill the gaps for Māori groups.

Tentatively, one might observe that the Tribunal's recommendations may actually be sufficient to quell the misappropriation of TK themselves, leaving a clear path for Māori-Western partnerships and Māori alone. However, it is not enough to rely on an inability of third parties to obtain IP rights to prevent the misuse of mātauranga Māori or taonga species that are taken to the market; rather, the positive ability to pursue third parties for remedies must exist. Here, Gervais' suggestion of a statutory tort of TK misappropriation with a similar balancing threshold to *ordre public* could be favoured,¹⁷¹ if not even a criminal provision,¹⁷² over and above the ability to revoke patents or PVRs under *ordre public*. This rights-package should endure in perpetuity and subsist in the mātauranga Māori itself, howsoever that evolves, and not to its physical expressions, the latter of which would be the subject of temporary patents or PVRs and their contingent benefit-sharing partnerships.¹⁷³ Finally, like copyright, these rights should accrue regardless of any registration of the subject-matter and be held by the most appropriate iwi, hapū, whānau or individual, as determined by the MAC constituted as above in the case of any disputes.¹⁷⁴

A rights-package along these lines would afford Māori the bargaining power so desperately needed to protect TK,¹⁷⁵ while at the same time not stifling the research and development essential to both Māori and Western societies.

170 Part V.2.

171 Gervais, above n 43, at 156.

172 See generally Smolczynski, above n 68.

173 This accords with a commendable suggestion along similar lines from Gupta, as cited in Gervais, above n 43, at 159.

174 See Parts IV.4 and IV.6.

175 The call for Māori bargaining power is drawn from Frankel and Drahos, above n 126, at 26, and echoes the demands for Māori control of de Beer, above n 12, at 103 and Lenihan, above n 18, at 214.

VI. THE CONCEPTUAL THREAD

The final part of this paper reflects on Wai 262's recommendations by extracting the conceptual thread running through the "scale of difficulty" as presented.

Given that the genesis for the progression was a "fit" analysis with existing patent and PVR laws, it is axiomatic to observe that the more challenging the recommendations would be to implement, the less familiar they are to prevailing IP mechanisms. What is not so obvious, though, is the observation that the less familiar the reforms are to the current system, the greater the potential they have to provide meaningful protection of Māori traditional resources.

For example, the measures appearing earlier in the scale, such as those relating to non-novel mātauranga-based "inventions", "discovered" plant varieties and the kaitiaki register, are each geared towards inhibiting third parties from obtaining what the *present* IP criteria consider to be undeserving patents and PVRs. It is only at the "hard" end of the chain that *ordre public* and taonga-relationship clauses in patents and PVRs respectively would introduce considerations such as disclosure and informed consent, which share the twin characteristics of being entirely foreign to IP law and having genuine promise to facilitate Māori partnerships with Western researchers. Further, going beyond both *Ko Aotearoa Tēnei* and IP law altogether, "positive" protections would complete a full arsenal of Māori TK protections. Finally, it is also worth appending that the last step towards total TK security – global enforcement – would only be possible via international agreement; unquestionably, this lies at the hardest end of the line.

The lesson in all this may have also already been obvious to some: that if one really does value the protection of TK, one must render elemental change to (and beyond) IP law. It is hoped, though, that by presenting examples of reform in the order that it has, this paper laid this conclusion bare and put its truth beyond doubt. It is also hoped that, in various sections, it has been shown that effective reforms can be accommodated without doing nearly as much violence to the IP system as some perhaps fear.

VII. CONCLUSION

This paper has evaluated Wai 262's recommended reforms to patent and PVR law for achieving greater protection of Māori TK in New Zealand. By assuming merit in the claimants' assertions, it has evaluated the recommendations from a pragmatic standpoint, analysing the extent to which the reforms actually fit within existing IP frameworks.

First, this paper vetted the recommendations for compliance with New Zealand's international obligations, considering TRIPS, UPOV and trade compliance. It concluded that the recommendations passed the test, both

because the central importance of Māori culture would probably justify the invocation of “*ordre public*” and because, in reality, New Zealand is unlikely to be challenged on that position.

This essay then analysed each of the recommendations in turn, presenting these along a spectrum of their difficulty to implement. It began with “easy” fits within the IP regime and incrementally moved to those that would be hardest to introduce. In general, despite the claimants’ emphasis on the differing worldviews behind Western commercialisation and Māori kaitiakitanga of the natural world, the Tribunal persisted with solutions that could largely operate within existing IP frameworks. These recommendations do not greatly offend against the current IP system, although their reach to assuaging Māori concerns is concordantly limited. That said, some proposals at the “hard” end of the spectrum, such as the *ordre public* suggestion, introduce a number of concepts unknown to IP law, which could cause considerable discomfort and uncertainty.

In keeping with the difficulty scale, this paper then moved beyond the Tribunal’s suggestions, considering “positive” bundles of rights to supplement the predominantly anti-misappropriation measures recommended.

Finally, the paper reflected that the scale of difficulty used in the analysis made plain a crucial observation: the most effective methods for protecting indigenous TK are also those that require the biggest steps outside of IP law. Undoubtedly, that is, the higher up the scale a reform was considered, the greater potential it had to make a difference to mātauranga Māori. However, the analysis itself also showed that major damage need not be inflicted upon the IP system. While there may be discomfort and uncertainty for the current regime, protections against third party exploitation of TK can be accommodated without alienating Western researchers or Māori groups. Further, *sui generis* “positive” protections distinguishable from IP rights could be developed for Māori in ways that would complement the IP system, allowing partnerships between researchers and Māori to develop.

The protection of mātauranga Māori and taonga species is undoubtedly imperative. As a result, the author suggests that implementation of the Tribunal’s recommendations be seriously considered, and soon. It is hoped this paper has provided a helpful evaluation of the Tribunal’s (and other) proposals for the purposes of moving forward. And, most importantly, that it has shown that the “clash” with IP law is not as intractable as it may seem.