

## IS LEGISLATION THE BEST WAY TO PROTECT MĀTAURANGA MĀORI?

Caren Fox\*

### *I The Evolution of Māori Culture and Identity*

Most Māori come from the ancestors of Hawaiiki who brought with them a culture that was equally at home on land and sea. According to the Waitangi Tribunal in the Wai 262 report, the defining principle of this culture was kinship. Kinship or whakapapa was:<sup>1</sup>

... the value through which the Hawaiikians expressed their relationships with the elements of the physical world, the spiritual world and each other. These people had their own ways of producing and distributing wealth, and of maintaining social order. They emphasised individual responsibility to the collective at the expense of individual rights, yet they greatly valued individual reputation and standing ...

As the Tribunal noted, the Hawaiikian culture evolved. Old traditions, scientific knowledge, technologies, values and laws were adapted to local conditions or new ones were invented. Names were found for all that was new about this land, its waters and skies. Modern technologies and art forms emerged, the names of gods changed, the values and laws changed and slowly as the generations passed, the Māori people, their way of life, their knowledge and culture took shape.<sup>2</sup>

Māori people with this history would meet the people who arrived from Europe bringing their own technologies, science, values, notions of law and property rights.<sup>3</sup>

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\* Deputy Chief Judge of the Māori Land Court, Alternate Judge of the Environment Court, and Presiding Officer for the Waitangi Tribunal. Deputy Chief Judge Fox delivered this speech at the Ngā Taonga Tuku Iho Conference on Māori Cultural and Intellectual Property Rights at Wakatū Marae, Nelson on 16 September 2018.

1 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 5.

2 At 5–7.

3 At 10.

During this meeting of peoples, alliances were forged, ideas and technologies were exchanged and innovations that drew on both cultures evolved — values changed.<sup>4</sup> Just as there was at the beginning of time — there was nothing but potential for this new society of peoples.

The Waitangi Tribunal then went on to describe how, once British colonial rule was established, Māori people and their language and culture were marginalised from settler society.<sup>5</sup> Their unique way of viewing themselves and their world, their traditional knowledge and culture continued to evolve but only in the recesses of their communities, marae and schools of learning. Conversely, British language and culture — which transitioned into New Zealand culture with its forms of government and law — flourished in the public life of the country. That dominance continued up to and including the time the initial Wai 262 claim was filed in 1991.

## *II Intellectual Property Law*

The laws introduced by the British included the common law and legislation that recognised certain rights to protect knowledge and ideas. These rights, now known as intellectual property (IP) rights, were designed to reward creativity and innovation in science, technology and the arts. They were also designed to encourage the owner to share the tangible results of their ideas and knowledge with the community. The first IP statute adopted in New Zealand was the 18th ordinance enacted after the signing of the Treaty of Waitangi. That was the Copyright Ordinance 1842.<sup>6</sup> The main impetus for the Ordinance ironically seems to have been to protect a dictionary of Māori grammar written by the Reverend Maunsell — who, by the way, was one of the missionaries who persuaded chiefs to sign the English sheet of the Treaty of Waitangi at Waikato Heads-Manukau.<sup>7</sup> The next statute was the Patents Act 1860 followed by the Trade Marks Act 1866.

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4 At 12–14.

5 At 14.

6 Copyright Ordinance 1842 4 Vict 18.

7 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (pre-publication version, Wai 898, 2018) pts I and II at 29.

International developments followed leading to the codification of IP rights in instruments such as the Paris Convention for the Protection of Industrial Property of 1883,<sup>8</sup> and the Berne Convention for the Protection of Literary and Artistic Works of 1886.<sup>9</sup> In 1891, the Madrid System for the international registration of marks was established.<sup>10</sup> In 1893, the two secretariats set up to administer the Paris and Berne Conventions combined to form the United International Bureaux for the Protection of Intellectual Property (BIRPI). In 1970, BIRPI became the World Intellectual Property Organisation (WIPO).

Alongside these developments, and following World War II and its horrors, the human rights of individuals and their rights to property captured the attention of the post-war allies. The protection of IP was included in these developments and enshrined in art 27 of the United Nations *Universal Declaration of Human Rights* in 1948.<sup>11</sup> States must have a property regime that provides some degree of protection for IP holders. However, the owners' rights are to be balanced against the right of others to participate freely in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. This dual balancing of IP rights with those of the community to access (the rights of the individual versus the rights of collectives) would have a major influence on the work of the Waitangi Tribunal in the Wai 262 Report.

Other developments include the nine treaties, conventions or instruments administered by the WIPO. They include the 47 IP-related multilateral agreements entered into by New Zealand. They include the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Comprehensive and Progressive

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8 Paris Convention for the Protection of Industrial Property (adopted 20 March 1883, entered into force 7 July 1884).

9 Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, entered into force 5 December 1887).

10 See Madrid Agreement Concerning the International Registration of Marks (adopted 14 April 1891, entered into force 15 July 1892).

11 *Universal Declaration of Human Rights* GA Res 217A (1948), art 27. See also International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976), art 27; and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (adopted 16 December 1966, entered into force 3 January 1976), art 15.

Agreement for Trans-Pacific Partnership (CPTPP).<sup>12</sup> They include several regional agreements and six IP-related bilateral treaties.

All these streams of development in international law, regional agreements and treaties, along with national developments, have influenced New Zealand IP legislation. The primary IP statutes, and related legislation, in New Zealand are:

- the Patents Act 2013;
- the Trade Marks Act 2002;
- the Designs Act 1953;
- the Plant Variety Rights Act 1987;
- the Geographical Indications (Wines and Spirits) Registration Act 2006;
- the Copyright Act 1994;
- the Conservation Act 1987;
- the Resource Management Act 1991 (RMA);
- Te Ture mō Te Reo Māori — the Māori Language Act 2016; and
- the Education Act 1989.

New Zealand's legislation in the IP field is administered by the Intellectual Property Office of New Zealand (IPONZ) and the Ministry of Business, Innovation and Employment (MBIE). The IPONZ states on its website that it helps "New Zealand and international businesses protect their intellectual property rights in New Zealand".<sup>13</sup> The Ministry for the Environment administers the RMA, the Department of Conservation administers the Conservation Act, Te Puni Kōkiri administers Te Ture mō Te Reo Māori and the Ministry of Education administers the Education Act.

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12 Agreement on Trade-Related Aspects of Intellectual Property Rights 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 1 January 1995); and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018).

13 "About us" IPONZ <[www.iponz.govt.nz](http://www.iponz.govt.nz)>.

It is against this enormous number of international, regional and national legal instruments and legislation that the Wai 262 claim was considered. Inherent in this framework is a bias in favour of the rights of the individual, and companies or businesses, at least for a defined term.

### ***III Returning to the Wai 262 Claim***

The Waitangi Tribunal articulated how the claims before it were essentially about Māori culture and identity. As such, that required the Tribunal to consider who owns and controls:<sup>14</sup>

- mātauranga Māori;
- the tangible products of mātauranga Māori — traditional artistic and cultural expressions that the Tribunal called *taonga works*; and
- things that are important contributors to mātauranga Māori, such as the unique characteristics of flora and fauna — what the Tribunal called *taonga species* — and the natural environment more generally.

### ***IV Mātauranga Māori***

The Tribunal defined mātauranga Māori as the unique Māori way of viewing themselves and the world, which encompasses (among other things) Māori traditional knowledge and culture.<sup>15</sup> It is, therefore, all-encompassing.

The Tribunal noted that the claim concerned taonga that were integral to Māori culture and identity. It reviewed how the Wai 262 claimants were concerned that many of these taonga were subject to outsider rights and interests, and too few Māori rights. These taonga included the Māori language, symbols, stories, songs and dances. The claimants were also concerned that their native flora and fauna, upon which their culture and identity were built, “have been controlled, modified, and privatised by

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14 Waitangi Tribunal, above n 1, at 17.

15 At 17.

people, companies, or government agencies who have no affinity with those [taonga]”.<sup>16</sup> In addition to other matters, including impacts on traditional healing practices, which the Tribunal noted, the claimants also argued that the Crown had taken direct ownership and control of mātauranga Māori through its various agencies.

The Tribunal then considered the claims by subject heading, namely:<sup>17</sup>

- the Māori interest in taonga works and IP law;
- the Māori interest in genetic and biological resources — flora and fauna;
- the Māori interest in the environment and the RMA;
- taonga and the conservation estate;
- the state of te reo Māori;
- the performance of a range of Crown agencies dealing with mātauranga Māori;
- government support for rongoa Māori; and
- the processes for engagement with Māori over entering into international instruments that may impact on mātauranga Māori.

The Tribunal made a number of recommendations sourced in the principle of partnership of the Treaty of Waitangi. Thus, the Tribunal clearly believed that through a mixture of policy and legislative change, mātauranga Māori could be protected — and it did not hold back on identifying ways in which this could be done. As I am a presiding officer in the Waitangi Tribunal, it is not for me to substitute a different view at this time.

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16 At 17.

17 At 19–23.

## ***V So What Has Happened since 2011?***

Well, if you read the legal articles and literature on the subject, the general perception is that successive governments since 2011 have not formally responded to the Waitangi Tribunal's recommendations.

There is one article I wish to acknowledge in particular, and it was written by an IP lawyer at Henry Hughes, Mr David Nowak, and published in the *New Zealand Intellectual Property Journal* in 2017.<sup>18</sup> In this article, Nowak lays out what the Wai 262 Tribunal recommended and what governments have completed in terms of legislative change. In each division of the article, under each recommendation, he demonstrates that very little of what the Tribunal recommended has been done. In summary, there are two Māori Advisory Committees, one on patents and the other on trade marks. The Māori Advisory Committee on Trade Marks has been busy, but the Patents Committee has not. There is also provision for refusing to register a geographical indication for wine or spirits, if its registration would offend a significant section of the community.

## ***VI The Labour-led Government Report 2017***

As all lawyers know, legislation is informed by policy, and I note that the Minister for Māori Development has attempted to report on what has happened since 2011. In her first report to the New Zealand Parliament pursuant to s 8I of the Treaty of Waitangi Act 1975 for the period June 2016–June 2017, the Hon Nanaia Mahuta MP has stated:<sup>19</sup>

The government has progressed a number of initiatives that align with various recommendations in the WAI 262 report. However, generally this has been as part of ongoing agency work or via Treaty settlements rather than a specific response to WAI 262 recommendations.

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18 David Nowak "Wai 262, Patents and Plant Variety Rights Revisited" (2017) 8 NZIPJ 35.

19 Nanaia Mahuta *Annual Report on The Crown's Implementation of Waitangi Tribunal Recommendations for the Period July 2016 – June 2017* (E74, 20 December 2017).

### Intellectual Property

In 2017, the Ministry of Business, Innovation and Employment (MBIE) began reviewing the Plant Variety Rights Act 1987 which has included technical workshops with Māori. This identified issues for the review, including a decision to coordinate consultation with engagement on certain international agreements which refer to traditional knowledge. A public issues paper, which will include Māori-focused material, is proposed for release in the coming months. The review will consider the recommendations and issues raised by Wai 262.

The review of the Copyright Act 1994, also led by MBIE, began in June 2017 with the release of the Terms of Reference for the review. An 'issues paper' for public consultation is proposed for early 2018. The review will provide an opportunity to consider Wai 262 which recommended overall that mechanisms be put in place to provide greater protection for the kaitiaki interest in mātauranga Māori, taonga works and taonga derived works.

### Natural Resources

The Wai 262 report recommends reform of the resource management system. Some progress has been made to address these recommendations via reforms to the Resource Management Act 1991, developments in Treaty settlements, and the development of the National Policy Statement for Freshwater Management.

### Te Reo Māori

The Wai 262 report contains recommendations for how the Crown can protect and promote Te Reo Māori. The Crown has undertaken a number of initiatives in relation to Te Reo Māori, the most significant of which is the enactment of Te Ture mō Te Reo Māori 2016. The Act provides for the establishment of Te Mātāwai as an independent statutory entity to provide leadership on behalf of iwi and Māori in their roles as kaitiaki of the Māori language. Te Matawai Board held its inaugural meeting in October 2017 and will develop strategies and provide funding for the ongoing support for Te Reo Māori.



### Rongoā

The Ministry of Health maintains service contracts with 17 rongoā providers for the provision of traditional rongoā services. The recently updated Māori Health Strategy He Korowai Oranga articulates a focus on Māori models of care and the Tikanga ā-Rongoā standards document sets out standards for the Ministry funded delivery of quality rongoā services. The development of these standards, which are voluntary for other providers of rongoā services, was informed by rongoā providers nationally and published in 2014.

### International Instruments

The Wai 262 report recommends a process of engagement with Māori in the making of international instruments. The Ministry for Foreign Affairs and Trade (MFAT) is working on better systematising how Māori interests are identified and engagement is planned and conducted by MFAT.

Progress has also been made to address issues of Māori relationships to the environment including acknowledging kaitiaki, or guardianship, interests and the implementation of co-management, co-governance and partnership models within the natural resource sector.

Further opportunities exist to progress the recommendations within the WAI 262 report. Government agencies will continue to develop these opportunities as part of their broader engagements in the Treaty of Waitangi sector.

## ***VII The Nature of Government***

That brings me to the nature of governments. As we all know, legislation and policy are developed by governments. In New Zealand, a government's longevity no longer depends on the majority vote. It now depends on acquiring the majority of seats in Parliament, whether as a party able to govern alone or (and what is more likely these days) with a coalition partner. That is what the Mixed Member Proportional environment has done for New Zealand.

The ability of legislation to protect mātauranga Māori, therefore, does not depend on the views of the Waitangi Tribunal but rather on what any particular government with its coalition partners are prepared to do during their short time in office, 3–9 years being the norm in this country.

What they are prepared to do depends on what they have inherited in terms of a legislative framework, and what international, regional and national pressures they face. As I have described above, the historical development of the IP framework is imbued with western and human rights values, which are hard to overcome.

### ***VIII Māori Resistance***

Equal to the task, and presenting their own challenges, are the continued acts of Māori resistance to the IP framework. That resistance has taken the form of pursuing international solutions through human rights instruments and environmental fora. These are actions that have resulted in forcing a top-down approach to legislative change. These actions include, for example, the work of Aroha Mead, Moana Jackson and Maui Solomon, and many others, on the *United Nations Declaration on the Rights of Indigenous Peoples*,<sup>20</sup> on the Earth Summit, on the Agenda 21 programme and on the Convention on Biodiversity.<sup>21</sup> Aroha Mead was the first to bring that discussion thread back to New Zealand when she organised the hui in Whakatane that resulted in

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20 See *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

21 See *Cultural and Intellectual Property Rights – Economics, Politics & Colonisation: A Series of Readers Examining Critical Issues in Contemporary Māori Society* (International Research Institute for Māori and indigenous Education, Auckland, 1997) vol 2; Moana Jackson “The Face Behind the Law: the United Nations and the Rights of Indigenous Peoples” (2005) 8(2) *Yearbook of New Zealand Jurisprudence* 10; and Aroha Te Pareake Mead “Sacred Balance” (1998) 3(2) *He Pukenga Korero* 22. See also “Agenda 21” in *Report of the United Nations Conference on Environment and Development: Rio de Janeiro, 3–14 June 1992* UN Doc A/CONF151/26/Rev1(Vol1) (1993) 9.

the Mataatua Declaration of 1993.<sup>22</sup> I also note the work of Maui Solomon, Aroha and others with the WIPO.<sup>23</sup>

Māori resistance seems to be relentless as they continue to appear before other international and regional bodies to express their concerns on why the New Zealand government has not fully addressed the Wai 262 report recommendations. I note that the Human Rights Committee, as a result, has expressed the same concern, and requested a list of policies and a timetable for implementation of the Waitangi Tribunal's recommendations.<sup>24</sup> Likewise, the Committee on the Elimination of All Forms of Racial Discrimination wanted targets and a timetable.<sup>25</sup> At the local level, Māori continue to return to the Waitangi Tribunal on issues such as the CPTPP.<sup>26</sup> They continue to seek law and policy reform, including through the Treaty settlement process.<sup>27</sup>

## ***IX Conclusion***

In conclusion, the Waitangi Tribunal has finished its work on the Wai 262 claim, and it is up to Māori and the Crown to debate what further measures are needed to protect mātauranga Māori.

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22 See "The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples" in Other Matters Including Meetings and Seminars and the Voluntary Fund for Indigenous Populations: Information received from indigenous peoples' and non-governmental organisations UN Doc E/CN4/Sub2/AC4/1994/12 (1994) 12.

23 See Maui Solomon "An indigenous perspective on the WIPO IGC" in Daniel F Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds) *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge, New York, 2017) 219.

24 Human Rights Committee *Concluding observations on the sixth periodic report of New Zealand* UN Doc CCPR/C/NZL/CO/6 (28 April 2016) at [45]–[46].

25 Committee on the Elimination of Racial Discrimination *Concluding observations on the combined twenty-first and twenty-second periodic reports of New Zealand* UN Doc CERD/C/NZL/CO/21-22 (22 September 2017) at [12]–[17].

26 See Waitangi Tribunal *The Report on the Crown's Review of the Plant Variety Rights Regime: Pre-publication Version - Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020).

27 In this latter respect, see the Haka Ka Mate Attribution Act 2014, Te Urewera Act 2014 and Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.