Te Hunga Rōia Māori o Aotearoa, the Māori Law Society

Submissions on the Disclosure of origin of genetic resources and traditional knowledge in the patents regime

21 December 2018

Introduction

This submission is made for and on behalf of Te Hunga Rōia Māori o Aotearoa, the Māori Law Society (THRMOA) and addresses Māori interests regarding the introduction of a disclosure of origin of genetic resources and traditional knowledge requirement in the patents regime for Aotearoa/New Zealand.

THRMOA was formally established in 1988. Since then, the Society has grown to include a significant membership of legal practitioners, judges, parliamentarians, legal academics, policy analysts, researchers and Māori law students. Our vision is *Ma te Ture, Mo te Iwi – By the Law, for the People.*

THRMOA encourages the effective networking of members, makes submissions on a range of proposed legislation, facilitates representation of its membership on selected committees, and organises regular national hui which provide opportunities for Māori to discuss and debate legal issues relevant to Māori.

When making submissions on law reform, THRMOA does not attempt to provide a unified voice for its members, or to usurp the authorities and responsibilities of whānau, hapū, and iwi, but rather, seeks to highlight areas of concern, and suggest further reform options where appropriate.

This submission is made on the Discussion Paper around the proposal to introduce a Disclosure of origin of genetic resources and traditional knowledge in the patent regime.

The structure of this submission follows the structure of the Discussion Document.

Question 1 -Do you have any comments on the problem definition?

We agree with the problem definition as stated. However, we also acknowledge the intellectual property system does not fully recognise or protect traditional knowledge and Mātauranga Māori. Without this, small incremental changes to the patent system, such as the changes proposed by the introduction of a disclosure of origin requirement in our patents system, will not deal with this fundamental underlying problem for Māori. We encourage the government to continue the work in this area towards a fully inclusive intellectual property system, that recognises and protects traditional knowledge, Mātauranga Māori, and Te Ao Māori within the Western Science paradigm and our traditional research programmes, and is based on the principle of ongoing partnership with Māori. We discuss this issue more fully in our answer to question 2.

Question 2 - Do you agree with the objectives that we have identified? Do you agree with the weighting we have given the objectives?

We agree with the objectives identified. However, we consider there are key aspects of the objectives or standalone objectives that are missing.

First, the objectives do not acknowledge the broader objective of greater recognition and acknowledgement to be given to traditional knowledge, Mātauranga Māori, and Te Ao Māori within the intellectual property system. Given the increasing exposure and involvement of science and research, and therefore, the patent regime, with traditional

knowledge, Mātauranga Māori, and Te Ao Māori, the need for, and opportunities for, increasing understanding of traditional knowledge, Mātauranga Māori, and Te Ao Māori are considerable. A disclosure of origin requirement in our patent regime for genetic resources and traditional knowledge can aid in this greater recognition and understanding.

Second, the objectives do not identify giving effect to the mandatory disclosure of origin requirement recommendation from the Waitangi Tribunal's Report: Ko Aotearoa Tēnei (Wai 262)[1] as a key objective.[2] The discussion document refers to the WAI 262 claim throughout. The government has recently issued its s8I report under the Treaty of Waitangi Act 1975, which reports on the progress made in the implementation of recommendations made to the Crown by the Waitangi Tribunal.

This report includes a feature section on Wai 262. However, it states that the section does not directly address the Wai 262's findings. As the Wai 262 claimants' whānau are still waiting for any formal response from the government to the WAI 262 report, it is important the government formally acknowledge and recognise the report, more than 7 years after the report issued. The government should acknowledge the recommendation from the WAI 262 report as one of the reasons this amendment is being proposed to the patent legislation.

Third, and relating to the two points stated above, the objectives make no reference to Te Tiriti o Waitangi/the Treaty of Waitangi or giving effect to the Treaty principle of partnership. A disclosure of origin requirement in part responds to recommendations in Wai 262, as well as creates a potential space for greater inclusion of Mātauranga Māori in the intellectual property system, in our science and research industries. We think it is important to recognise that with this proposal one of the objectives is to give effect to the treaty principle of partnership, by recognising the importance of traditional knowledge in these industries.

This lack of reference to Te Tiriti o Waitangi, in contrast to the Copyright Act Review, which states that one of its proposed objectives is to ensure the copyright regime is consistent with the Crown's obligations under Te Tiriti o Waitangi.

Finally, we agree in principal with the weighting of the objectives. However, we consider these weightings are not practically being applied throughout the discussion document. For example, the weighting of objective C is stated as being lower, but it appears that more weight has been given to this objective given the government's emphasis and preference given to Option 2. The Castalia Report makes it clear that despite the high cost associated with Option 3 it only amounts to a small cost per patent ($19.85), yet Option 2 is preferred given the lower cost of that regime.

Question 3: Do you have any comments on our preliminary assessment of the options?

We consider that Option 1 does little more than maintain the status quo and consider that its potential impact has been overstated. We understand Option 1 is not the preferred option, and we agree with this assessment. Option 1 will not assist with achieving any of the objectives identified in the discussion document or any of the wider objectives identified above. We do not support Option 1.

---

[1] The Wai 262 report can be accessed here: https://www.waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/

[2] 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) vol 1 at 204.

We consider Option 2 is the minimum standard. This option goes some way to recognising and protecting traditional knowledge, Mātauranga Māori, and Te Ao Māori. Research is a key part of any invention and it underpins the discipline of science. Therefore, we consider that a requirement to disclose all the information that forms part of the research of that invention (irrespective of whether it forms part of the overall invention) should be mandatory. This places the onus on researchers and applicants to ensure they are carrying out comprehensive research and appropriately acknowledging the source of information (genetic, traditional or otherwise).

We consider the analysis of Option 3 does not adequately address or consider the Castalia Report, and therefore, the negative impacts may be overstated. For example at [83], the Discussion Document states the substantive requirements may deter applicants from lodging patent applications. However, the Castalia Report identified this is likely to only be an initial deterrent and would not have a significant impact overall. Further, the Report also acknowledges these are preliminary predictions. Preliminary predictions are conservative in nature and further research would be required to understand the real impact or more realistic impact Option 3 may have. Other countries have adopted disclosure of origin requirements, and actual impact of a disclosure of origin requirement on the number of patents filed could be gleaned from these countries.

Question 4: What is your preferred option? Why?

We prefer Option 3 because we consider this option goes to the heart of Wai 262, acknowledges the Treaty principle of partnership, and begins to address the lack of recognition and understanding of traditional knowledge, Mātauranga Māori, and Te Ao Māori within the intellectual property system.

We also consider Option 3 promotes New Zealand's status as a good global citizen by acknowledging the importance of genetic resources and traditional knowledge to indigenous peoples internationally.

Further, Option 3 is more in line with tikanga. Ehara taku toa, he taki tahi, he toa take tini. This whakataukī or Māori proverb means that "my success should not be bestowed onto me alone, as it was not individual success but success of a collective". In Te Ao Māori, a product is not only a product of the elements that form it but include everything that has contributed in some way to its creation.

Option 3 acknowledges that all knowledge that has been considered or used, whether contained in a final product has influenced that final product and therefore require recognition as much as those that are contained within the final product.

We also consider that Option 3 should be the goal. Therefore, if Option 2 is the option adopted as part of the patent regime review, then this should only be an interim step on the journey to full disclosure and compliance with international bioprospecting and ABS policies (Option 3). Suggestions for interim measures and considerations will be discussed at question 7.

Question 5: Do you have any comments on how New Zealand should approach international discussions relating to disclosure of origin requirements?

New Zealand should support the introduction of disclosure of origin requirements globally. Aspects of traditional knowledge, Mātauranga Māori, and Te Ao Māori are being misappropriated around the world. The government needs to be seeking recognition and protection of traditional knowledge, Mātauranga Māori, and Te Ao Māori internationally as well as domestically. To do this, it is important the government also supports and recognises the traditional knowledge of other indigenous peoples.

Question 6: What are your views on the design features of a potential disclosure of origin requirement?

Subject matter:
We consider the subject matter should be defined broadly for both genetic resources and traditional knowledge. A broad definition will encompass genetic sequence data and derivatives, and include appropriate acknowledgement of all the resources that have influenced the invention regardless of whether it is contained within the final product.

Triggers:
We consider the trigger should be in line with the recommendation in the WAI 262 report. The trigger should be wide enough to encompass any traditional knowledge or Mātauranga Māori. The benefit of using this trigger is that the patent regime will ensure any traditional knowledge or Mātauranga Māori that was considered is acknowledged (irrespective of whether it influences the final product in a material way).

Sanctions and remedies:
We consider the sanctions and remedies to be appropriate. As filing dates carry huge implications for applicants, the possibility of missing this due to incomplete or incorrect information regarding genetic resources and traditional knowledge is significantly serious to influence behaviour.

Question 7: Are there other design considerations that we should consider?

We consider that the review's consideration of the options does not acknowledge broader policy considerations relating to research and development. We acknowledge this review is part of a broader review of the intellectual property system in New Zealand. However, we consider that a broader focus on recognising and protecting traditional knowledge, Mātauranga Māori, and Te Ao Māori more substantively across the entire system still needs to be considered (some of which are beyond the scope of the work being undertaken by Ministry of Business, Innovation and Employment (MBIE), but which highlights that a whole of government approach across all sectors of the government is needed). For example, a consideration of:

- the funding of research and development with a focus on Māori research and development;

- incorporation of Mātauranga Māori within the discipline of science and research, and the promotion of its understanding and use by science students (particularly post-graduate students) and in research;

- the promotion of and assistance with, collaboration between scientists, researchers, and iwi organisations;
-
- the consideration of having a Māori advisor on ethics committees for science projects and research projects (or a standalone committee that can address issues of tikanga that could arise in various projects); and

- the creation of a New Zealand bioprospecting and ABS policy.

We also note the discussion document only provides 3 options for implementation of a disclosure of origin requirement.

There are many more options that could be considering including interim measures or alternative options that fall between Options 2 and 3.

For example, if Option 3 was chosen, the regime could be implemented in stages to assist patent applicants with the transition to full disclosure, and at the same time, provide time for the government to develop its bioprospecting and Access and benefit-sharing (ABS) policies and regimes.

Question 8: Are there any additional comments you wish to make about the Disclosure of Origin Discussion Paper?

We support the introduction of a disclosure of origin of genetic resources and traditional knowledge in the patent regime, because this step implements one of the recommendations in the WAI 262 report, goes some way towards recognising and protecting traditional knowledge, Mātauranga Māori, and Te Ao Māori within the Western Science paradigm and our traditional research programmes, and is in line with the principle of partnership under the Treaty of Waitangi.

We encourage the government to continue the work in this area towards a fully inclusive intellectual property system, that recognises and protects traditional knowledge and Mātauranga Māori, and is based on the principle of ongoing partnership with Māori.

We also encourage the government to continue its work on enhancing the science and research industries that will supplement this work, and help deliver on the proposed objectives, including considering:

- the funding of research and development with a focus on Māori research and development

- incorporation of Mātauranga Māori within the discipline of science and research, and the promotion of its understanding and use by science students (particularly post-graduate students) and in research

- the promotion of and assistance with, collaboration between scientists, researchers, and iwi organisations

- the consideration of having a Māori advisor on ethics committees for science projects and research projects (or a standalone committee that can address issues of tikanga that could arise in various projects)

- the creation of a New Zealand bioprospecting and ABS policy.

More information can be found in our previous submissions on the Bioprospecting Discussion Document in October 2007 and on the Patents Bill in 2 July 2009, which can be found on our website at http://www.maorilawsociety.co.nz/law-reform-submissions/.

In Closing

Te Hunga Rōia Māori o Aoteora are grateful for the opportunity to comment on this kaupapa and we hope our submissions assist with the important mahi MBIE is tasked with undertaking. Should you have any pātai or wish to discuss any aspect of our submissions, please feel free to contact Toni Love at Toni.Love@chapmantripp.com or Lynell Tuffery Huria at Lynell.TufferyHuria@ajpark.com.

Ngā mihi nui ki a koutou

……..

Lynell Tuffery Huria and Toni Love
On behalf of THRMOA