

BRIEFING PAPER TO UNITED NATIONS SPECIAL RAPPORTEUR ON THE WAI 262 CLAIMS TO INDIGENOUS FLORA AND FAUNA ME O O RATOU TAONGA KATOA.

Introduction

The Wai 262 claim to indigenous flora and fauna and associated cultural and intellectual property rights filed with the Waitangi Tribunal in 1991 has been described by an international expert on indigenous peoples rights as one of the most important claims of its kind anywhere in the world¹. In 2001 the Royal Commission on Genetic Modification recommended to the New Zealand government that due to the national significance of the Wai 262 claim to Maori, all parties should work together to ensure it is resolved as soon as possible².

Despite its widely recognised significance both in Aotearoa/New Zealand and internationally, the claim has suffered many setbacks including a serious lack of funding, significant opposition from the government and ongoing unreasonable delays. Almost 15 years after the claim was filed, and notwithstanding that urgency was granted to it being heard in 1995, the claim still languishes uncompleted in the Waitangi Tribunal. Tragically, three of the original elders who filed the claim in 1991 have since passed away.

The Wai 262 claimants respectfully call upon the United Nations Special Rapporteur to recommend to the New Zealand government that the Wai 262 claim be properly resourced and that the government support the completion of the hearing of the claim as a priority.

¹ Evidence given by the late Dr Darrell Posey to the Waitangi Tribunal considering the Wai 262 claim, Rotorua, 1998.

² Report of The Royal Commission on Genetic Modification, 2001, pages 291-293

Background to the Wai 262 Claim

The Wai 262 claim was filed in 1991 on behalf of six claimant Iwi. The claim began as a vision of Maori elders including, Hemanui-a-Tawhaki (Dell) Wihongi (Te Rarawa), Saana Murray (Ngati Kuri), Witi McMath (Ngati Wai), John Hippolite (Ngati Koata) and Tama Poata (Te Whanau a Rua of Ngati Porou) and Christine Rimene (Ngati Kahungunu). These kaumatua were becoming concerned at the apparent loss of native flora and fauna to overseas interests and the lack of Maori involvement and participation regarding decision making concerning the granting of intellectual property rights over this flora and fauna.

Professor Sir Hugh Kawharu, of Ngati Whatua, an anthropologist, linguist, and tribal elder, had this to say to the Waitangi Tribunal hearing the Wai 262 claim in May 2002:

In my opinion the present claim has had no equal in terms of significance to Maori since the Te Reo Maori claim in 1985. Such a statement is not made lightly....

The Wai 262 claim takes another step forward from that auspicious claim in 1985. It focuses on that simple phrase in the second article of the Maori version of Te Tiriti o Waitangi – Te tino rangatiratanga o o ratou taonga katoa. It talks of a way of life, a world view, a culture, an identity. Denial by the Crown partner of these matters is the cause of historical and contemporary Treaty breaches.¹

What is the Claim About?³

The claim is founded upon the rights guaranteed in Article 2 of the Treaty of Waitangi which guaranteed to Maori the "*...full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess. ..*" (English version of the Treaty). In the Maori version of the

³ **Important Note:** This report does not purport to represent all the issues or views relevant to the various claims brought by the Wai 262 claimants or their counsel. It is intended as a summary only for the purpose of briefing the UN Special Rapporteur on the current status of the claim.

Treaty, the guarantee was in relation to their *tino rangatiratanga* over all of their *taonga* (treasures).

Essentially the claim is about ensuring that appropriate recognition, protection, and provision is made for Maori rights in relation to indigenous flora and fauna, their special relationship with that indigenous flora and fauna, and all knowledge and intellectual property rights that flow from that relationship. The claimants assert that these are rights that were guaranteed and protected under Article 2 of both the English and Maori versions of Te Tiriti o Waitangi/Treaty of Waitangi.

Claims over Indigenous Flora and Fauna

Maori have an ancient association and relationship with the native flora and fauna of Aotearoa/New Zealand. In today's modern world where everything is up for sale and the genes of plants and animals are subjected to manipulation for scientific and commercial gain, Maori are concerned that their unique relationship with these taonga may be endangered or eroded. In this respect, the claimants seek recognition of their rights and relationship with indigenous flora and fauna as tangata whenua. Rights the claimants state are guaranteed and protected under the Treaty of Waitangi.

Matauranga Maori – Maori Traditional Knowledge

The Wai 262 claim seeks the protection of matauranga Maori (Maori traditional knowledge) from inappropriate use and its control by Maori. Included in the protection of knowledge is the knowledge system itself, and its internal mechanism for transmission, dissemination, tuition, and development. The evidence presented to the Tribunal has asserted that such systems existed at the time of the Treaty, but have been seriously eroded and disrespected to the point where the systems and the knowledge itself are at risk. This has been a consistent theme as the Tribunal has traveled from hapu (sub-tribe) to hapu to hear the testimony of elders.

In more recent times, there has been a growing recognition of the importance of

matauranga Maori and its relationship and relevance to western science. As noted by Dr. Murray Parsons:

“If science is the study of the world around us using a hypothetico- deductive process (the scientific method) then this is not exclusive to western or European-derived cultural traditions but is also found in the cultures of all indigenous peoples. All indigenous peoples have science according to their needs and cultural understandings of their surroundings, the environment. The same thought processes that allowed Polynesians to voyage between the islands of the Pacific and to settle them, also has sent people into space. The term Maori Science has been used to emphasise Maori people too used the scientific method and that it is not the prerogative of western countries only”

Rongoa Maori - Traditional Knowledge of Plants and Medicines

The Wai 262 claim also seeks to preserve and revive the practices of rongoa Maori or traditional Maori knowledge of native plants and their healing powers and the preparation of medicinal remedies based on those plants. Maori traditionally had an extensive knowledge of plants and their medicinal uses. The term ‘rongoa Maori’ refers to traditional Maori medicine, to the practice of traditional Maori medicine, and the body of knowledge behind that practice. Tohunga or traditional healers had special knowledge of herbal plants and their uses. Many if not most of the practitioners of rongoa were elderly women. As one elderly expert on rongoa Maori explained in her evidence to the Waitangi Tribunal hearing the Wai 262 claim in 1997 ‘I know the plants and they know me’. She described her power to heal as a gift from the Creator and that she was just a conduit between the gods and the plants in order to aid the healing process. She never sought payment for her services as to do so would diminish the healing powers of the remedies she provided to Maori and non-Maori alike.

Genetic Engineering

The Wai 262 claimants have been concerned about issues of genetic engineering since prior to the lodgement of their claim in 1991. In particular the likely prejudicial effects

the release of genetically modified organisms (GMOs) into the environment will have on whakapapa (genealogy) of humans, plants and animals and on the mauri (life force) and tapu (sacredness) of those organisms and the claimants responsibilities as kaitiaki (traditional guardians). The claimants believe that there needs to be a great deal more research carried out under tightly controlled conditions to determine with more accuracy the long term and cumulative impacts that the wholesale release of GMOs will have on the natural environment.

It needs to be noted here that the Royal Commission on Genetic Modification further recommended that the legislation dealing with applications for genetically modifying living organisms (the Hazardous Substances and New Organisms Act 1996) should be amended to ensure that the “effect is to be given to the principles of the Treaty of Waitangi” because, they said, the current reference in the legislation to “take into account” the principles was “tokenistic” and “half hearted”.⁴

This recommendation has been ignored by the government and the legislation remains unchanged.

Misappropriation of Maori Cultural Property Rights

This past decade has witnessed a marked growth in international interest in ‘cultural heritage tourism’ and the use of Maori imagery, symbols and designs to promote commercial products to gain an ‘edge’ over their competitors by associating their products with the ‘trendy’ indigenous brand. Tourists are attracted to the cultures of the indigenous peoples, and their artwork, music and indigenous designs are becoming highly prized commodities, and powerful marketing and branding tools.

In recent years, a plethora of international companies including, LEGO (use of Maori names on Bionicle toys), Sony (Play Station game ‘Mark of Kri’ using Maori names and

⁴ Report of The Royal Commission on Genetic Modification, 2001, page 308

designs), TechnoMarine (watches and models with Maori names and imagery), Microsoft (use of Maori names and imagery in a computer game called Asheron's Call), a Danish Restaurant (using Maori moko to promote food) and Ford Motor Company (Maori inspired moko on a Hot Rod Pick-Up Truck), Fischer Skis (Maori names on skis) have used Maori designs, names and imagery to promote their products.

Maori are not opposed to the use and development of their culture and intellectual property rights but insist that they have control over how their taonga (including in this context language, designs, symbols and traditional knowledge) are used, for what purposes they are used and by whom they are used. It is offensive to many Maori (and certainly the Wai 262 claimants) that names such as 'tohunga' are used on plastic toys and moko (facial markings) are used to promote food products, watches and Hot Rod trucks.

Another example of misappropriation of traditional knowledge involves a German company registering a trademark over the Maori and Polynesian name "Moana". Moana Maniapoto, a top Maori performing artist and musician was threatened in 2002 by a German based company with a court injunction and damages of 100,000 deutsche marks, for daring to use her own name 'Moana' on a CD of the same name which was for sale in Europe.

These cases provide examples of the inadequacies of the current system of IPR to protect Maori traditional knowledge in the public domain and how Maori names can be claimed and registered by others without the knowledge or consent of the guardians or 'owners' of that knowledge.

The International Context

The New Zealand government is engaged in negotiations at the international level regarding development of processes and principles governing traditional knowledge, access to genetic resources and intellectual property rights. The New Zealand governments' stance regarding recognizing and protecting the rights of indigenous peoples in fora such as the Convention on Biological Diversity, the World Intellectual

Property Organisation and Draft Declaration on the Rights of Indigenous Peoples, has become increasingly hostile in recent years. This can be attributed to the negative ‘backlash’ experienced over the foreshore and seabed issue and the increasing politicization of racial and Treaty issues in New Zealand.

As Treaty partners with the Crown, the Maori assert that they need to be fully involved in any international dialogue or negotiations that have the potential to impact upon their rights as guaranteed under the Treaty of Waitangi.

Need For a Process and Framework to Protect Maori Rights

One of the difficulties for both Maori and non-Maori interests is the lack of any formal process for identifying where to go and who to speak to in the rare instances where commercial operators make efforts to obtain approval to use of traditional material and resources. This is one of the key practical steps that the Wai 262 claimants seeks to remedy by developing a framework and process within which these issues can be handled efficiently and effectively.

Conclusion

The Wai 262 claimants have been waiting for 15 years for a resolution to what is widely regarded as one of the most important claims to come before the Waitangi Tribunal. While they have patiently waited, some of the elders who brought the claim have passed away. Legislation and government policy has continued to be developed and implemented that has serious implications for the issues raised by the claim. Many of these issues are now being debated in international fora such as the CBD and WIPO, but Maori are only on the very fringes of those processes and have little or no influence.

The Wai 262 claimants continue to look to their Treaty with the Crown in New Zealand for recognition and protection of their guaranteed rights. In the case of the Wai 262 claim, it is certainly the case that ‘justice delayed is justice denied’.

