Te Hunga Roia Maori o Aotearoa
(Maori Law Society Inc.)

SUBMISSION

BIOPROSPECTING DISCUSSION DOCUMENT

OCTOBER 2007

Introduction

This submission is made for and on behalf of Te Hunga Roia Maori o Aotearoa (THRMOA) and addresses Maori interests regarding the development of bioprospecting policy.

THRMOA has a membership totalling more than 350 members of Maori lawyers. In addition to these members, THRMOA also incorporates students who are studying towards a Bachelor of Laws (LLB).

THRMOA holds a mandate to make submissions on a range of policies and proposed legislation, ensures representation of its membership on selected committees and organises regular national hui which provide an annual opportunity for Maori lawyers to discuss issues relevant to Maori.

General comments

We note that a range of views were expressed on various issues during the consultation hui. This submission is not intended to undermine or override any of these. Our submission focuses on generic issues affecting Maori as well as matters of a technical nature.

Further, as has been widely noted, Maori are not one homogenous group with a single set of ideas. This should not, however, be taken advantage of by the Crown by 'zoning in' on the more conservative views put forth. Government policy must be compliant with the Treaty of Waitangi and Treaty principles. It must meet the Treaty standard. There is no question that the Tribunal's findings and recommendations in the Wai 262 Inquiry will be instructive as to the meaning and effect of the Treaty in the present context.

A number of submissions have also been made in respect of the process going forward. This submission will not provide detailed comment in that regard. However, we do note that whatever process is agreed upon, it must be based on the principle of ongoing partnership.

Before addressing the substance of the discussion document, there are some broader contextual issues which we consider it imperative to comment on:

- *Integration of Wai 262 evidence*: Policy development must be informed by the Wai 262 context. In the period leading up to the release of the Tribunal's report, there is a wealth of evidence which can be, and should be, referred to. The substance of that inquiry must be fully integrated into and considered in the policy development process. While the Tribunal's report is likely to be several years away, the Crown can commence its analysis phase immediately to clarify the nature of the problem. That said, the policy development process should not go so far as to jeopardise the outcomes of that inquiry;

- *Whole of government approach:* The discussion document correctly identifies that "traditional knowledge extends beyond the use of biological resources". This is quite correct and highlights the need for the government's work in this area to be co-ordinated. For example, we are aware that the Ministry of Economic Development (MED) has the Traditional Knowledge Work Programme. This policy work must be coordinated with the bioprospecting work so one stream does not get out ahead of another. Also, knowing the limitations in what work MED can carry out given its mandate, it is imperative that other agencies are involved as well, each in its respective area of expertise. A whole of government approach is essential;

- *New Zealand participation in international fora*: There is considerable activity underway at the international level in respect of traditional knowledge. Evidence presented in the Wai 262 Inquiry showed that officials from the Ministry of Foreign Affairs and Trade consider that New Zealand should take a low profile in meetings under the Convention on Biological Diversity (CBD) given that New Zealand does not have policy in this area. While we are of the view that New Zealand should not do anything internationally to jeopardise or negatively affect Maori interests, to do nothing is equally as unacceptable. By not supporting positive steps to address issues affecting indigenous and local communities, New Zealand could be considered to be indirectly opposing those proposals. We support the approach taken by New Zealand in the World Intellectual Property Organisation Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC) which has been to actively engage in analysis and research etc. A significant amount of analytical work needs to be carried out and New Zealand, and Maori, must contribute to this. There is ample material on record in the Wai 262 Inquiry to provide guidance to officials on the Maori interest. We would expect that the Crown is therefore sufficiently aware of the problem and can actively engage in discussions in this regard.

  Furthermore, we note that the 'low profile' approach is not consistent with the Treaty principle of active protection nor is it consistent with the Cabinet decision in 2001 that "New Zealand be proactive in pursuing cultural and intellectual rights for indigenous peoples internationally" [CAB Min (01) 34/15 refers]. We also note that there has not been adequate consultation with Maori on any shift in position from that Cabinet decision which raises considerable concerns regarding transparency and accountability. Further discussion with Maori on matters in this area is needed.

- *Indigenous participation*: Closely related to the previous point is the need for New Zealand to be far more active in supporting indigenous participation in international fora. Evidence presented in the Wai 262 Inquiry showed that New Zealand has taken a low profile on this issue as well within the CBD (but has been supportive within the WIPO IGC which is to be commended). This is of considerable concern and does not, in our view, reflect the spirit of partnership.

Specific comments

Prior to turning to the specific questions set out in the discussion document, it is important that we firstly address the characterisation of the Maori dimension in section 3.2 (and also section 6.32). While it is important and helpful to clarify and understand the Maori dimension, the discussion document has very narrowly (and arguably, prematurely) defined the Maori interest. The Maori dimension regarding bioprospecting is not limited to matauranga Maori. It is much broader. It will come as no surprise to officials that the Maori 'dimension' includes the relationship Maori have with their natural environment, including indigenous flora and fauna (there was extensive evidence presented in the Wai 262 Inquiry which illustrated this relationship).

It is critical for officials to understand that the Maori dimension also extends to the policy framework regarding access to and utilisation of genetic resources. While the government may be cautious about pre-determining the outcomes of the Wai 262 Inquiry, it is both inaccurate and misleading to suggest that the Maori interest lays only in matauranga Maori issues. At a minimum, the discussion document should have noted the Maori dimension as Maori consider it to be.

1 New Zealand's Biological Resources

1.1 Do you think we need to have good information about bioprospecting activities in New Zealand, including the type and nature of such activities? Please give reasons for your answer.

Yes. Policy development should always be informed by an accurate and well-researched understanding of the nature of the problem. Evidence presented in the Wai 262 Inquiry can provide guidance to officials in this regard, but should not be a substitute for ongoing discussions with Maori.

1.2 As a traditional knowledge holder, bioprospector and/or access provider, what are your experiences of bioprospecting in New Zealand? Can you provide any information that would be useful to develop a bioprospecting framework in New Zealand, for example, provide information about bioprospecting costs, benefits, outcomes and current benefit sharing agreements? If so, please describe them.

It is important to note that many tribal groups have had experiences regarding bioprospecting in their traditional rohe and can provide guidance on the nature of such activities. The 'Maori experience' is not limited to activities relating to matauranga Maori. That said, a degree of capacity building work is needed to lay an adequate foundation for these discussions. Not all bioprospectors approach Maori individuals and groups under the banner of 'bioprospecting'. It is a relatively new term to many groups and this needs to be borne in mind when carrying out consultation.

Moreover, some research is non-commercial in nature and therefore does not technically fit the definition of bioprospecting. However, the experience may have many instructive parallels.

2 New Zealand's Current Frameworks to Access Biological Resources

2.1 Do you think the existing access frameworks would benefit from operating within a more co-ordinated and comprehensive bioprospecting framework? If so, why? If not, why not?

Yes, for many reasons. In terms of Maori interests, it is important that all access providers are consistent and co-ordinated.

3 A Comprehensive Bioprospecting Framework for New Zealand

3.1 Do you think that New Zealand should have a comprehensive policy framework to manage bioprospecting activity in this country? Please give reasons for your answer.

Yes. We also note that a comprehensive bioprospecting framework could include both 'hard' and 'soft' law measures. There are soft-law approaches, such as codes of ethics, that the Crown could be doing right now. For example, the discussion document refers to a code of best practice for bioprospectors. There was evidence presented in the Wai 262 Inquiry by Crown Research Institutes (CRI's) that was very supportive of working with Maori and showed a strong willingness by industry groups to do so (section 2.3 notes that the main bioprospecting activity is occurring within CRI's).

3.2 What are your views on the proposed vision and policy principles to guide New Zealand's bioprospecting policy?

As a general comment, there is very strong commercial focus, to the extent that it is inappropriate. The discussion document refers to the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation* on page 18 and notes that the guidelines have conservation and sustainable use of biodiversity as core objectives. The Bonn Guidelines, whilst not binding, are intended to provide guidance for national systems.

Moreover, the conservation and sustainable use of biodiversity comprise two of the three objectives of the Convention on Biological Diversity (CBD) as noted on page 17. The development of domestic bioprospecting policy has stemmed primarily from New Zealand having to meet its obligations under Article 15(2) of the CBD. That provision states that Parties should "endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses…". The objective of this work, when framed as an international obligation, is clearly to advance environmental outcomes.

Of note is that New Zealand is one of the few countries in the world to be leading its policy work from an industry-related department. The comments in the discussion document's foreword focus heavily on opportunities for our economy, but what about the environment?

Understandably, this stems from the fact that this work is being led by MED. This is not a criticism of MED itself, but when a project is led by a department with an economic development mandate, it is not surprising that the proposed vision and policy principles are commercially oriented. In addition, it is unclear how this issue falls within the portfolio of the Minister of Energy. This raises further questions of whether the appropriate policy frameworks are being utilised in this process.

The failure to have environmental outcomes as the primary drivers in bioprospecting policy has permeated into other areas. For example, the benefits identified in section 3.5.1 are almost all commercially oriented. Environmental outcomes have become secondary in nature.

Regarding our specific comments on the proposed vision:

- While it is agreed that social, cultural and environmental values should be respected, it is submitted that positive outcomes and developments in these areas should also be promoted. In the context of the environment, it is about promoting environmental objectives, moving forward. The focus is not defensive in nature (avoiding, remedying or mitigating impacts). It should be about advancing environmental improvement;
- The inclusion of Maori traditional knowledge generally within the vision is to be commended. However, the proposal that the vision be that it is 'recognised' is very weak. Key aspects of Article 8(j) such as respect, preserve and maintain' are considerably more appropriate and also consistent with New Zealand's obligations;
- The vision also refers to Maori traditional knowledge being protected 'where appropriate'. It is unclear why such a caveat is necessary. It is certainly not common for protection to be qualified in such a manner. Moreover, it presumes that a policy decision has been made that certain parts of matauranga Maori should be protected whilst other parts would not be. Further explanation would be helpful in this regard.

Turning to our specific comments on the proposed policy principles:

- What does take 'appropriate account' of the Treaty of Waitangi mean? This appears to be an even lower standard that the already weak statutory references to 'take account of' or 'have regard to' etc;
- How are Treaty settlements relevant? While this is not disputed in principle, it is noted that the present Treaty settlement framework does little to accommodate Maori interests in respect of bioprospecting;
- Maori interests are not only Treaty-based. The New Zealand government has international obligations as well under Article 8(j) and related provisions of the CBD;

- How can a policy ensure that Maori traditional knowledge is 'acknowledged' and 'respected'?

- We strongly support "the need to seek permission from holders of the traditional knowledge for its use in bioprospecting" but consider it more beneficial and consistent with international developments to refer to 'prior informed consent' (PIC). There is considerable scholarship on this principle which has provided clarity and guidance to prospective users. By not making explicit reference to PIC, it could be implied that the standard to be met is not as high. It is also likely to create confusion for users who have become accustomed to operating within a PIC framework in many overseas jurisdictions;

- The broad and general reference to 'ensures the equitable sharing of benefits' is not, arguably, consistent with the recent developments regarding Article 8(j) of the CBD. Numerous meetings of the Conference of the Parties to the CBD have clarified matters relating to the implementation of Article 8(j) and the phrase 'fair and equitable' has become the norm. In addition, the reference to 'equitable benefit sharing' is not connected with traditional knowledge. Article 8(j) states "encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices'. While it is understood that the CBD also provides for benefit-sharing arising from access to and utilisation of genetic resources, it is unclear whether it is intended that the principle apply to both scenarios. We do consider there is a risk that traditional knowledge may 'slip through the cracks' if explicit reference is not made.

We also wish to comment on the discussion set out on page 32 which lists four points that NZ's bioprospecting policy framework would need to ensure:

- While it could be interpreted that the first bullet point might capture Article 8(j) and related provision obligations, the latter part of that sentence then narrows the scope to the substance of Article 15 only. It is submitted that it would be both more encompassing and more appropriate to state the first bullet point as "gives effect to New Zealand's obligations under the CBD" and delete the latter portion;

- We support the bioprospecting policy framework being consistent with the Bonn Guidelines but note that there was very limited indigenous involvement in the development of these guidelines. This is evident in the guidelines which have a number of notable omissions. We comment further on this under question 5.1.

We do not consider it appropriate or timely to respond to the other questions set out under section 3 given our position that further analytical work is required before possible policy options are discussed.

4 Matauranga Maori

We have already outlined our submissions regarding how the discussion document very narrowly characterises the Maori dimension in referring only to traditional knowledge considerations. While it is very encouraging that that the coverage given to traditional knowledge has increased considerably since the 2002 discussion document (and wish to commend the Ministry in this regard), by no means does this represent the totality of the Maori interest regarding bioprospecting.

Turning to the discussion document's section entitled 'Traditional knowledge considerations', we note the following:

- While we agree with the suggestion that "the protection and use of traditional knowledge, in particular matauranga Maori, is an issue much broader than bioprospecting policy", we are concerned that such arguments are typically used to place an issue in the 'too hard basket'. We refer to our earlier points regarding the importance of a co-ordinated government approach to traditional knowledge issues;

- The discussion document refers to protection and use but does not refer to the preservation and maintenance of traditional knowledge. The latter are a fundamental aspect of Article 8(j). There are a number of important linkages between bioprospecting and preservation. For example, if exclusive property rights are granted to a private party which prevents Maori groups from being able to access and customarily use a particular resource, or the collection of a sample irrevocably damages the surrounding environment, this significantly hampers their ability to transmit the associated matauranga. It is well documented that the loss of traditional knowledge often has a direct impact on the environment and biodiversity through changes in land and resource use. Another example is how benefit-sharing can be channelled towards achieving preservation outcomes. Both in-situ and ex-situ measures can be used. It should not be assumed that because preservation does not have an obvious commercial component, that it will not form part of bioprospecting policy development.

4.1 How do you think use of matauranga Maori for bioprospecting can be most appropriately managed and protected?

This is a fundamentally important question. However, an adequate and comprehensive response is simply not practicable within a submission of this nature. Nonetheless, in order to provide guidance on key principles, we note the following:

- The kaitiaki of matauranga Maori are the decision-makers regarding its use, not a Competent National Authority or an Access Provider. A bioprospecting policy framework should affirm and clarify this;

- Any access to and use of matauranga Maori must only occur with the prior informed consent of the relevant kaitiaki. This would include the right of veto and the right to exclude from publication and/or have kept confidential particular information;

- Customary laws and practices have a key role in management and protection. These laws and practices should be used as the starting point;

- Given limitations in the present protection regime (including IPR's), new forms of protection such as *sui generis* measures are needed. To achieve 'appropriate' protection, such measures will need to integrate customary laws and practices.

These types of key policy principles need to be analysed and developed further before progressing to policy options (as outlined in the discussion document). That said, some 'soft law' measures will be able to be advanced more rapidly and in the short term (for example, codes of ethics etc).

4.2 What do you think of the suggestions made in this document as options to protect matauranga Maori (a voluntary register, ensuring legally and fully mandated governance entities, a code of best practice for bioprospectors, or an advisory council to a Competent National Authority)?

As noted above, key principles need to be clarified. Furthermore, we note that the discussion document does not define the nature of the problem in respect of matauranga Maori. In the absence of these matters, it is premature to comment in detail on the options set out in the discussion document. This should not be taken to mean that the options themselves are inappropriate or inadequate etc.

5 International Bioprospecting Frameworks

5.1 What aspects of the Bonn Guidelines of the Convention on Biological Diversity (CBD) do you believe should be considered in developing a domestic bioprospecting framework?

It is helpful to prefix our submissions on this point with some broader contextual comments in respect of the Bonn Guidelines. Firstly, these guidelines were developed over a very short period of time. Secondly, few indigenous peoples were able to participate in their development nor were the Bonn Guidelines considered by the Ad Hoc Open-Ended Working Group on Article 8(j) and Related Provisions. This limited consideration of indigenous people's interests and perspectives is evident within the guidelines. For example:

- there is no reference to the possible use of *sui generis* regimes;
- the term 'indigenous peoples' has been inappropriately included in the term 'stakeholders';
- there is no acknowledgement of the importance of promoting prior informed consent in respect of traditional knowledge.

This is not to suggest that the Bonn Guidelines are not helpful. There are some positive 'stepping stones'. For example, the Bonn Guidelines make several references to effective indigenous peoples participation which is constructive. Capacity building elements are also particularly useful. However, given the limitations identified above, the Bonn Guidelines should not be taken as conclusive guidance regarding Maori interests.

5.2 Are there aspects of international bioprospecting frameworks as outlined in section 5 (or any others you know about) that could be useful to consider during the development of a bioprospecting framework in New Zealand?

Firstly, there is a distinction between national frameworks that form part of the international context and international frameworks. The majority of examples outlined in section 5 are essentially national regimes from foreign jurisdictions, others have regional application. While collectively, these make a substantial contribution to the operation of an international regime, it is arguably incorrect to refer to these as international bioprospecting frameworks.

In response to the question, the following aspects of the regimes cited would be useful to explore further:

- the provisions in the Norwegian draft Bill on the Protection of the Natural Environment, Landscape and Biological Diversity on access to genetic material which call for respect for traditional use by indigenous people and local communites;
- the Australian approach for Commonwealth areas which includes references to: "informed consent of any indigenous owners of biological resources (when applicable)" and "protection for and valuing of "indigenous knowledge". Further, the Northern Territory approach makes reference to "the interests of indigenous people in the use and ownership of traditional knowledge, innovations and practices" and in the context of benefit-sharing agreements, "indigenous landholders". While these should be explored further, it is important to note that the Australian approach is land-defined as opposed to resource-defined. There would be considerable difficulties in transferring this model across to New Zealand in respect of Maori/Treaty interests as the relationship between Maori and biological diversity is not defined or limited by the nature of land tenure.

There are also a number of other national and regional regimes that were not referred to in the discussion document. We would expect that comparative analysis would extend beyond the cited regimes.

It is also noted that this section of the discussion document does not make reference to the negotiation of an international regime that is being discussed within the Convention on Biological Diversity (although it is referred to in other parts of the document). The Introduction notes that "it has the potential to influence domestic bioprospecting policy settings". This is very true and reinforces the importance of New Zealand both taking a more active role to ensure that Maori interests are not jeopardised, and ensuring there is adequate Maori participation in the development of New Zealand positions on matters that affect Maori interests.

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