

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



**SUBMISSION ON THE PATENTS BILL
BEFORE THE COMMERCE SELECT COMMITTEE**

2 July 2009

TE HUNGA ROIA MAORI O AOTEAROA SUBMISSION ON THE PATENTS BILL

1 Appearance

- 1.1 Te Hunga Roia Māori o Aotearoa / the New Zealand Māori Law Society Inc does wish to appear before the Commerce Committee.

2 Te Hunga Roia Maori o Aotearoa

- 2.1 This submission is made for and on behalf of Te Hunga Roia Maori o Aotearoa (THRMOA).
- 2.2 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).
- 2.3 THRMOA ensures the effective networking of members, 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 provides an annual opportunity for Maori lawyers to discuss and debate issues relevant to Maori.
- 2.4 The current co-presidents of THRMOA are Damian Stone and Jolene Patuawa.

3 General comments

- 3.1 We note that the Bill will update New Zealand's patent regime to, amongst other things, ensure the interests of Maori in their traditional knowledge and indigenous plants and animals are protected.
- 3.2 Prior to addressing the manner in which the Bill seeks to achieve this, it is important to firstly place this issue in its broader context.

Wai 262

- 3.3 At the outset, we acknowledge and recognise the significance of this issue to Maori. As the Commerce Committee may be aware, the Wai 262 claim (often referred to as the 'indigenous flora and fauna claim') asserted a number of Treaty breaches by the Crown regarding indigenous flora and fauna and Maori traditional knowledge including:
- a. a failure to actively protect the exercise of tino rangatiratanga and kaitiakitanga by the claimants over indigenous flora and fauna and other taonga, and also over mātauranga Māori (Māori traditional knowledge);
 - b. a failure to protect the taonga itself; and
 - c. usurping tino rangatiratanga and kaitiakitanga of Māori in respect of flora and fauna and other taonga through the development of policy and the enactment of legislation.
- 3.4 We note that the Waitangi Tribunal has yet to release its report regarding the Wai 262 Inquiry but understand that this may occur this year. The findings and recommendations within that report could include proposed changes to New Zealand's patent regime. It is critical for the integrity of the Tribunal process that provision is

made to adequately consider the report's findings and recommendations and to enable amendments to be made to the Bill. We seek clarification as to whether the Government can provide this assurance. In the event that the Government issues its response to the Wai 262 Report after the Bill is passed, we would expect that this would not be used as an excuse not to implement particular recommendations requiring legislative change.

Strengthening of intellectual property laws

- 3.5 The patent system and other areas of intellectual property law have come under considerable criticism for failing to prevent the misappropriation of traditional knowledge. While there is a general consensus that positive protection of traditional knowledge cannot be successively achieved through the patent system, consideration is being increasingly given to options for using the patent system in a defensive manner to combat misappropriation.
- 3.6 A number of measures have been discussed and developed at the international level, including a legal requirement to disclose the origin of genetic resources and associated traditional knowledge in patent applications as well as ensuring that prior art searches fully take into account existing traditional knowledge as part of the state of the art. We discuss these measures later in our submission under 'Additional matters'.

Related policy areas

- 3.7 The interests of Maori in their traditional knowledge and indigenous plants and animals are also closely connected with other policy workstreams currently being progressed, in particular, the traditional knowledge work programme and bioprospecting work being led by the Ministry of Economic Development.
- 3.8 With respect to the latter, THRMOA made a submission in October 2007 on the bioprospecting discussion document distributed by the Ministry of Economic Development. A copy of this submission is available at <http://www.kryptonitesites.com/maorilaw/sitefiles/thrmoabioprossub.pdf>.
- 3.9 Our submission referenced a number of measures that can be incorporated in bioprospecting policy that can support the protection of traditional knowledge, such as the requirement to obtain the prior informed consent of the traditional knowledge holders. This measure is often linked with and supported by the disclosure of origin requirement in patent law. For this, and many other reasons, it is critical that these policy workstreams are appropriately linked. We understand that bioprospecting policy is still in development and would expect, in a similar manner to consideration of the Wai 262 Report, that any proposals for legislative change to the patent regime will be appropriately considered despite the advancement of this Bill.

4 Specific comments

- 4.1 To assist the Committee, we have structured our comments according to the general headings in the Explanatory Note, as opposed to by priority. As well, we have confined our comments to issues that fall within our general mandate as follows:
- a. Criteria for granting patent;
 - b. Exclusions to patentability;
 - c. Interests of Maori;
 - d. Challenging grant of patent.

Criteria for granting patent

- 4.2 As noted in the Explanatory Note, the standard of examination required under the 1953 legislation is relatively low compared with other countries. The Bill seeks to address this by strengthening the criteria including through the introduction of an “absolute novelty” standard, and examination for inventive step and usefulness.
- 4.3 The novelty criteria has been previously cited as an obstacle to obtaining protection for traditional knowledge under patent law. The consensus now, however, is that the preferred way forward is to develop new forms of protection (*sui generis* measures) whilst strengthening patent law to provide defensive protection (that is, prevent the acquisition of intellectual property rights over traditional knowledge or genetic resources by parties other than the customary custodians of the knowledge or resources). Therefore, we support the strengthening of criteria in the manner proposed under the Bill.
- 4.4 We also note that the disclosure of origin requirement discussed under ‘Additional matters’ below can assist in ensuring that the novelty criteria is met.

Exclusions to patentability

- 4.5 We note that the Bill will provide specific exclusions from patent protection for human beings and biological processes for their generation, methods of medical treatment of human beings, plant varieties and inventions whose commercial exploitation would be contrary to public order or morality.
- 4.6 Maori and many other Indigenous peoples throughout the world have expressed strong opposition to the patenting of life forms. For example, there was significant opposition to the Human Genome Diversity Project on the basis that it violated the genetic integrity of Indigenous peoples. Further, we note that in the development of this Bill, submissions from Maori (since at least 1994 onwards) have highlighted the cultural and spiritual implications of the alteration of life forms, and how the patents system can potentially incentivise such innovation.
- 4.7 We there support this change.

Interests of Maori

- 4.8 We note that the Bill will establish a Maori advisory committee to advise the Commissioner with regard to patent applications for inventions involving traditional knowledge or indigenous plants and animals. The committee will advise the Commissioner as to whether inventions are novel, or involve an inventive step, or whether the commercial exploitation of such inventions would be contrary to Maori values.
- 4.9 We support this change. It is our view that the proposed purpose and function of the committee will help to reduce the incidents of both misappropriation and the granting of offensive patents. As well, such a measure will assist the government to meet its obligations established by the Treaty principle of active protection.
- 4.10 As the Committee may be aware, a similar Maori advisory committee was established under the Trade Marks Act 2002. This initiative was a world-first and has received considerable attention and commendation at the international level, including within the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

- 4.11 Lastly, we note that a range of experience and expertise is needed (for example, tikanga Maori, rongoa Maori, matauranga Maori) to advise the Commissioner on the matters specified above. As it would be unusual for one individual to hold such a range of knowledge, we support the committee approach (as opposed to, for example, a staff member within the Intellectual Property Office of New Zealand). This will enable the Commissioner to access the diversity of expertise required, and also on an as needs basis which will help to promote efficiency.

Challenging grant of patent

- 4.12 We note that the Bill will streamline the procedures for challenging the grant of a patent, including through the introduction of a re-examination procedure. As the Committee may be aware, there have been numerous incidents throughout the world where a patent has been granted where there invention has not in fact been novel or lacked an inventive step.
- 4.13 Many of these incidents have involved the use of misappropriated traditional knowledge. In order to challenge the granting of these patents, indigenous and local communities have had to incur considerable costs as well as lengthy and administratively burdensome procedures. We therefore support the proposed change within the Bill to streamline procedures in this regard.
- 4.14 We further note that complementary policy measures have also been identified such as the provision of legal assistance to communities to file objections.

5 Additional matters

- 5.1 There are several proposals that we consider to have considerable merit that are notably absent from the Bill:
- a. Disclosure of origin requirement
 - b. Prior art searches
- 5.2 We address each of these proposals separately below.

Disclosure of origin requirement

- 5.3 The Bill does not incorporate a requirement for the disclosure of genetic resources and associated traditional knowledge in patent applications. This is a notable omission in light of international developments in this area. For example, we note that the European Community has advanced a proposal to the TRIPS Council to examine and discuss the possible introduction of a system that would allow States to keep track, at global level, of all patent applications with regard to genetic resources. Many developing countries, including Brazil, Pakistan, Thailand, Peru, India and the African Group, have also proposed amending the TRIPS Agreement to require patent applications to disclose the origin of genetic resources and associated traditional knowledge in inventions, as well as to provide evidence of prior informed consent and benefit sharing with communities with a view to combating misappropriation.
- 5.4 In addition to the TRIPS Council, discussions have occurred in other international fora including the World Intellectual Property Organization (WIPO) and the Convention on Biological Diversity. WIPO has examined issues regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications, including, options for model provisions on proposed disclosure requirements.

- 5.5 There is a general consensus that a disclosure requirement can considerably assist the protection of traditional knowledge. Discussions have focused on how it could be practically implemented. To date, there is no agreement as to the form of an ideal disclosure of origin requirement, its objectives, and whether it should be adopted within the framework of the WTO, CBD or WIPO. There is also a divergence of views as to the legal effect and practical consequences, whether disclosure should be mandatory or voluntary, and whether it should lead to an additional requirement to patentability or if the requirement could be inserted as part of the grant/administrative procedure, and the consequences of non-compliance from revocation of the patent to sanctions outside the patent system.
- 5.6 It is our understanding that exploratory work was being progressed by the Ministry of Economic Development regarding a disclosure of origin requirement but evidently it has not been incorporated into the Bill. To what extent were hapu and iwi consulted on this decision? Given the benefits associated with this measure, we would expect there to be a dialogue with Maori in this regard, consistent with the Treaty principle of partnership.

Prior art searches

- 5.7 An additional defensive measure under discussion in both the WTO and WIPO is to ensure that prior art searches fully take into account existing traditional knowledge as part of the state of the art.
- 5.8 This can be achieved through the use of databases and registers. An example is the Traditional Knowledge Digital Library in India for traditional medicine. Initially, India intended to make it available online to provide public domain evidence of prior art. However, while such a step could arguably defeat patents, it would also make the knowledge available for non-monopolistic exploitation. India has now decided to make it available to only select patent offices under strict agreements of non-disclosure. Malaysia is following a similar course of action.
- 5.9 That said, databases and registers have many problems and limitations. Nonetheless, without some sort of documentation, it can be considerably difficult to get preventive measures in place. Waiting for the point of a patent application to make the decision makes conflict inevitable as by this stage companies have invested considerable time, resources and dollars in development. Further, much traditional knowledge is difficult to document given its sacred-secret nature.
- 5.10 One approach that has been put forward is the use of due diligence requirements. In the Native American Graves and Repatriation Act in the USA, for example, there are a set of due diligence requirements in place when human remains are discovered. Any remains predating colonization are presumed to be Native American. When discovered, researchers, archaeologists, developers, etc. are required to make their finds known to tribal communities, who then are given the opportunity to demonstrate cultural affinity. After a determination of cultural affinity, the remains are then repatriated.
- 5.11 The analogous situation with traditional knowledge could be that if someone encounters traditional knowledge, the legal presumption would be that they must show due diligence in demonstrating that it is open for use. This is not uncommon – for example, if a song is broadcast on the radio, the law presumes it is reasonable to conclude that it is copyrighted, and to copy and redistribute it requires due diligence to show it is in the public domain.
- 5.12 An additional option is that distributed database systems could be constructed that could be made available to patent offices for prior art searches, with trade secret-type arrangements in place. These could serve as preventive measures for the issuing of patents. If disputes arose, the records could be reviewed in-camera by officers of the court without public disclosure, much as trade secret disputes are settled. In this way,

public requirements for accountability can be met without the need for open public disclosure.

- 5.13 A decision on whether databases or registers are acceptable measures of course lies with hapu and iwi, not an organisation such as THRMOA. However, we question what work has been carried out to assess the feasibility of this measure, and what engagement has occurred with Maori in this regard? While the proposed Maori advisory committee will assist in reducing the incidents of misappropriation, it is our view that further measures regarding prior art searches are also likely to be needed.

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