LAWPUBL 422 Contemporary Tiriti Issues 2024

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The lack of protection for Māori words, plants and traditional knowledge in the Trade Marks Act 2002 falls short of the Crown's obligations under Te Tiriti o Waitangi.

Positionality Statement

As a pretext, I wish to acknowledge my position regarding the subject of this essay. I cannot speak from within te ao Māori in submitting these arguments or reaching the conclusions I have. I am of Pākehā descent and was born and raised in Tūranganui-a-Kiwa. I acknowledge that my experience of the world and perception thereof is from the perspective of te ao Pākehā. I am proud mother to a tamahine of Te Aitanga ā Māhaki descent. I gratefully acknowledge the tangata whenua as the rightful kaitiaki of Aotearoa and have tried to set out the arguments below in a way that is conscious of my tauiwi perspective.

I Argument

The lack of protection for Māori words, plants and traditional knowledge in the Trade Marks Act 2002 falls short of the Crown's obligations under Te Tiriti o Waitangi.

I will argue this point by analysing the approach taken by the Intellectual Property Office of New Zealand ("IPONZ") to the taonga status of mānuka, as both a plant and a te reo Māori kupu in the recent certification mark opposition of *Manuka Honey Appellation Society Incorporated v Australian Manuka Honey Association Limited [2023] NZIPOTM 19 (22 May 2023),*[1] ("*Manuka Honey*") against the relevant recommendations of *Ko Aotearoa Tēnei* ("WAI 262 Report").

[1] *Manuka Honey Appellation Society Incorporated v Australian Manuka Honey Association Limited* [2023] NZIPOTM 19 (22 May 2023).

The analysis does not delve into trade mark law per se or even the specific requirements of distinctiveness on which the *Manuka Honey* decision hinged, except as necessary in the context of the argument.

A Taonga Defined

Taonga is broadly defined as treasured resources and possessions.[2] Although taonga and taonga-derived works are recognised as intellectual property, taonga is not defined in the Trade Marks Act 2002. However, the IPONZ definition includes native flora and fauna of New Zealand that are considered taonga by Māori.[3] Taonga species can be endemic, indigenous, native, cosmopolitan or cryptogenic, many of which have been given unique Te Reo Māori names.[4] According to the Waitangi Tribunal, trade mark law may protect Māori words on the basis they are relevant to commerce, but this is not because they are mātauranga Māori or taonga works – nor because they have value in themselves.[5]

Te Reo Māori is also recognised as a taonga of iwi and Māori under Te Ture Mō Te Reo Māori 2016[6] and is protected as such by Article II of the Treaty of Waitangi.[7] The statute acknowledges that iwi and Māori are the kaitiaki of the Māori language[8] and sets out the Crown's commitment to protect and promote the language in partnership with Māori.[9]

B Crown Obligations to Protect Māori Intellectual Property

Article II of Te Tiriti recognises the tino rangatiratanga (sovereignty) of hapū over their lands and taonga.[10] Honourable Justice Joseph Williams has described the Maori language text as

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[2] Te Aka Maori Dictionary "Taonga" Te Aka <maoridictionary.co.nz>.
[3] IPONZ Practice Guidelines "Maori Advisory Committee and Maori Trade Marks: Meanings of specific concepts" <www.iponz.govt,nz>. at 1.2.3.
[4] At 1.2.3.
[5] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 64.
[6] Te Ture Mō Te Reo Māori 2016, s 4(1).
[7] Section 8(g).
[8] Section 8(c).
[9] Section 6(2).
[10] Irirangi te Motu NZ on Air "Te Tiriti Framework and Evidence for News Media" Irirangi te Motu NZ on Air (March 2023) at 14.

'transferring law-making power (kawanatanga) to the Crown in exchange for the autonomy right expressed as tino rangatiratanga.'[11]

This right of self-determination and kaitiakitanga is consistent with the Government's international obligations as a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The declaration provides the right for indigenous peoples to 'maintain, control, protect and develop their intellectual property in cultural heritage, traditional knowledge and cultural expressions'.[12] In addition to intellectual property, UNDRIP recognises Māori rights to their ownership of genetic materials, including native flora and seeds,[13] and imposes an obligation on the State to take adequate measures to recognise and protect those rights.[14]

The Waitangi Tribunal first introduced Te Tiriti as a set of guiding principles in the Waitangi Tribunal Act 1975 preamble. Those principles encompass concepts of protection, redress and partnership.[15] While the principles may solve some ambiguity in interpretation, Ani Mikaere argues that approaching the Treaty as a set of principles instead of a 'treaty proper' is a form of 'doublethink' that amounts to "intellectual dishonesty".[16] According to Mikaere, doing so enables "the construction of new layers of deceit" concerning the nature of the Crown's relationship with Maori.[17]

C Legal Status of Te Tiriti in Trade Mark Legislation

[11] Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 7.

[12] United Nations (General Assembly). (2007). Declaration on the Rights of Indigenous People, article 31(1).

[13] Karaitiana Taiuru “Tikanga Tawhito Tikanga Hou Kaitiaki, Kaitiaki Guidelines for DNA Research, Storage and Seed Banks with Taonga Materials” (2022) <www.taiuru.co.nz> at 67.

[14] Karaitiana Taiuru “Māori Culture Guidelines for Brand Owners and Marketing” (10 January, 2021) <www.taiuru.co.nz>.

[15] Taiuru, above n 13, at 66.

[16] Ani Mikaere *Te Tiriti and the Treaty: Seeking to Reconcile the Irreconcilable in the Name of Truth*, Colonising Myths : Māori Realities: He Rukuruku Whakairo (Huia Publishers, 2013) 73 at 82.

[17] At 82.

The Trade Marks Act 2002 does not require IPONZ to consider the taonga status of te reo kupu, indigenous plants and plant byproducts, or mātauranga Māori (traditional knowledge) as a legal source of intellectual property.

One of the purposes of the Act is to more clearly define the scope of rights protected by registered trade marks.[18] Another is to address Māori concerns about registering trade marks containing Māori signs, imagery or text.[19] Where a proposed registration mark contains or appears to be derivative of Māori content, an advisory committee makes non-binding recommendations regarding the likelihood of it being offensive to Maori.[20] Such advisors must have knowledge of te ao Māori (Māori worldview) and tikanga Māori (Māori protocol and culture).[21] The Commissioner has an absolute ground for refusal to register a mark if they believe it is likely to offend a significant section of the community, including Māori.[22] This function is consistent with the protective nature of Te Tiriti but is purely reactive and does not create any positive rights.

Mathew Palmer argues that unless the Treaty is incorporated into statute, it has no legal "status" and therefore "exists in a shadowland: half in and half out of the law."[23] If, as Palmer suggests, the Legislation is a symbol and expression of Government will in the exercise of power,[24] then the Treaty and its principles are conspicuously absent from the Trade Marks Act.

II The Wai 262 Report

The Wai 262 claim was lodged in 1991 by six claimants on behalf of their respective iwi.[25] It claims that the Crown's lack of support for Māori self-determination and ongoing failure to

[18] Trade Marks Act 2002, s 3(a).
[19] Section 3(c).
[20] Section 178.
[21] Section 179(2).
[22] Section 17(1)(c).
[23] Matthew Palmer “The Treaty of Waitangi in Legislation” [2001] NZLJ 207 at 207.
[24] At 207.
[25] Wai 262 “Kia Whakapūmau - Ngā Pātai” (2024) Wai 262 <www.wai262.nz>.

recognise tino rangatiratanga is a direct breach of Article II of the Treaty.[26] Further, it claims the Crown has "undermined or denied" Māori the guarantee of tino Rangatiratanga by allowing the misuse or appropriation of taonga.[27] It would take twenty years for all the evidence to be heard and the Waitangi Tribunal to form its response. By 2011, most of the original claimants had passed the torch to their descendants. Among them is Hori Parata of Ngātiwai, who describes the intergenerational delay and subsequent inaction of the Crown as a form of political violence.[28] Whatever the reason, it is clear that the Parliament's response in terms of meaningful redress has been woefully inadequate.

Ko Aotearoa Tēnei (Wai 262) was the Waitangi Tribunal's first whole-of-government report.[29] The Tribunal found that New Zealand law does not protect the interests of kaitiaki in mātauranga Māori, indigenous flora and fauna and taonga works, either at home or abroad.[30] It made non-binding recommendations regarding legislative reforms aimed at balancing the intellectual property interests of kaitiaki with the rights of others and strengthening protections owed to kaitiaki under the principles of the Treaty.[31] The Tribunal also noted the potential for New Zealand to extend the protection of geographical indications to products other than wines and spirits, such as traditional knowledge,[32] although this is yet to happen.

The Tribunal also canvassed the history and use of the mānuka plant in Māori culture, noting the development of mānuka honey production amongst iwi and the unique qualities of the soil, particularly around the East Cape, which gives the honey its potent UMF™ factor. It forewarned of the fact foreign researchers had claimed to have isolated the main active compound without "acknowledging any debt to mātauranga Māori", and the fact patents already existed outside of New Zealand[33] Claimants felt it was unfair that companies with no prior relationship

[26] Closing Submissions for Ngati Kuri, Ngatiwai and Te Rarawa (5 September 2007) Wai 262, S3 at [385].

[27] Karaitiana Taiuru, above n 13.

[28] Wai 262 “Hori Parata, Ngāto Wai” (Podcast, July 2021) Wai262 <www.wai262.nz>.

[29] Wai 262 Report, above n 5.

[30] At 32.

[31] At 19.

[32] At 61.

[33] At 67.

(whakapapa) with mānuka were able to acquire proprietary rights in the genetic and biological makeup of the plant without any recognition of Māori interests.[34] An early Ngāti Porou mānuka honey producer, Hirini Clarke, shared his concerns with the Tribunal on the lack of protections for what he called 'the Māori relationship with this important plant'.[35] The Tribunal put forward 'significant changes' to the law to better protect that kaitiakitanga[36] , focusing on the lack of Māori dimension in modern intellectual property law.[37]

Further recommendations include the establishment of a Register for taonga with corresponding identification of the relevant kaitiaki.[38] The advisory committee's role could be elevated to include binding and perpetual veto powers regarding proposed offensive and non-offensive use of mātauranga Maori and taonga works.[39] The most ambitious, perhaps, is the development of Suis Generis Legislation that facilitates tino rangatiratanga over the commercialisation of taonga works or mātauranga Māori where appropriate.[40] One possibility is the potential for an iwi-led consult + consent + benefit-sharing framework similar to those implemented overseas.

According to Lynell Tuffery Huria, the most crucial recommendation to "fall out" of the report was the need to protect Māori culture and identity because that is how we protect New Zealand culture and identity. Tuffery Huria said this is 'critical for how we move forward in this space … we need to protect it so that it can flourish as a matter of national interest'.[41] Perhaps one of the most tangible proposals from the inquiry was the creation of a category of collective marks for products based on mātauranga Māori. The Tribunal acknowledged that, like geographical indications, collective marks do not necessarily protect the kaitiaki relationship but can be a tool for economic development.[42]

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[34] At 67.
[35] Wai 262 Report, above n 5, at 129.
[36] Williams, above n 11, at 30.
[37] At 30.
[38] Wai 262 Report, above n 5, at 93.
[39] At 94.
[40] At 99.
[41] Lynell Tuffery Huria “Wai 262 Beyond the Intellectual Property Claim” (Podcast, July 2021) Wai 262 <www.wai262.nz>.
[42] Wai 262 Report, above n 5, at 92.

III The Mānuka Honey Certification Mark Decision – A Lost Opportunity

A recent decision of *Manuka Honey Appellation Society* to decline the New Zealand certification trade mark for MANUKA HONEY has dealt a cruel blow to what could have been a precedent-setting determination that gave tangible form to the obligations the Crown and its agents have under Article II of Te Tiriti/The Treaty of Waitangi.

The Australian Manuka Honey Association ("AMHA") successfully opposed the certification mark because it lacked the necessary distinctiveness, both inherent and acquired in New Zealand.[43] The average New Zealander would not understand "manuka" (without the macron) as a Māori word or even a derivative of te reo Māori, which denotes a plant exclusively from New Zealand.[44]

The NZ Mānuka Honey Appellation Society ("MHAS") referred to Article II of the Te Tiriti which preserves tino rangatiratanga over Māori lands and taonga katoa.[45] The need to consider Tiriti principles can be inferred from the purpose of the Act.[46] In light of the cultural and kaitiaki relationship that Māori have with mānuka, allowing the opposition to succeed would result in the Act being applied in a manner inconsistent with the Crown's obligations. [47]

AMHA countered that Te Tiriti is not part of New Zealand's domestic law and, therefore, is not directly enforceable.[48] It drew on the Wai 262 Report to argue the limited extent of protection afforded to kaitiaki interests in taonga and mātauranga Māori within the Act[49] . It highlighted the

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[43] *Manuka Honey Appellation Society*, above n 1, at [8].
[44] At [414].
[45] At [415].
[46] Trade Marks Act 2002, s 3(c).
[47] *Manuka Honey Appellation Society,* above n 1, at [420].
[48] At [422].
[49] At [425].

fact none of the recommendations had been implemented to better align the regime with Te Tiriti.[50] This is a sobering argument as it exposes the inadequacy of the Trade Marks Act to provide any sort of positive rights regarding Māori intellectual property.

AC Alley interpreted the Wai 262 Report as saying kaitiakitanga and property rights are just different ways of thinking about the same issue, namely how different cultures decide the rights and obligations of communities in their created works and resources.[51] Justice Joseph Williams shared this sentiment ten years earlier: "No right in resources can be sustained without the right holder maintaining an ongoing relationship with the resource. No relationship; no right."[52] Arguably, an opportunity was missed by downplaying the differences in world views. The Tribunal contrasted the Western technique of vesting a property right in the creator with the kaitiakitanga right, which bestows an obligation of protection towards the creation.[53]

This nuance matters because MHAS was trying to protect the origin and taonga status of both the word and the species, whereby the certification mark became the mechanic for kaitiakitanga. In contrast, the opponents did not regard what Justice Williams called "the reciprocal obligation to care for … its physical and spiritual welfare."[54]

AC Alley eschewed the chance to address the legislative imbalance by saying such issues are "complex and wide-ranging" and "must be left for the elected legislature."[55] Her decision was "constrained by how the legislature has, to date, chosen to address Māori concerns", noting that as yet, there was no precedent providing authority for how Te Tiriti principles and tikanga should be applied in terms of the distinctiveness requirement under s 18(2) of the Act.[56] Ironically, the

[50] *Manuka Honey Appellation Society*, above n 1, at [427].
[51] At [429].
[52] Williams, above n 11, at 4.
[53] Wai 262 Report, above n 5, at 48.
[54] Williams, above n 11, at 4.
[55] *Manuka Honey Appellation Society*, above n 1, at [430].
[56] At [430].

Wai 262 Report talks of mānuka, harakeke and fern as being "distinctly" 'New Zealand' and, as such, having special meaning for many New Zealanders, Māori and non-Māori.[57]

Respectfully, it appears that this is precisely the forum within which such matters must be resolved. A trade mark dispute that involves opposition from a foreign country as to the inherent or acquired distinctness of a te reo kupu or taonga species and the ability to protect that taonga from commercial misappropriation by parties outside of that culture falls squarely within the remit of IPONZ.

Admittedly, there is validity in the opposing argument that MHAS had self-appointed into the role of kaitiaki by seeking to acquire the certification mark. This proposition is contrary to tikanga and problematic in and of itself. However, MHAS countered this concern by having an option that allowed Māori interests to call for the assignment of the mark once consultation across Māoridom was completed.[58]

A certification mark was arguably the closest legal representation of the kaitiakitanga relationship that Māori – and other New Zealand producers could have in protecting the precious mānuka honey taonga from commercial exploitation without consultation, consent, attribution and commercial benefit-sharing.

Ultimately, the Commissioner justified the decision by saying that although the protection of te reo Māori kupu and Māori intellectual property rights are "undoubtedly of critical importance" and are recognised as such by the Tribunal, at the end of the day, its recommendations are not binding unless they have been incorporated into statute. AC Alley added that despite tikanga principles being "relevant", they could not override clear provisions in the Trade Marks Act.[59]

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[57] Wai 262 Report, above n 5, at 89.
[58] *Manuka Honey Appellation Society*, above n 1, at [438].
[59] At [9].

A Vulnerability of Māori Intellectual Property to Cultural Misappropriation

Dr Karaitiana Taiuru describes cultural misappropriation as the adoption of an element or elements of one culture or identity by members of another culture or identity.[60] Where this becomes particularly problematic is when members of a dominant culture appropriate from minority cultures.[61] Taiuru argues that while it may be "legal" to use Māori elements in a trade mark or brand name, such use without context or consultation is likely to offend Māori communities, and therefore, the current laws need an update to reflect Maori society.[62]

Lynell Tuffery Huria suggests that the issues Māori face with cultural misappropriation stem from the fact te ao Maori is based on collective ownership and values such as kaitiakitanga, manaakitanga, and whanaungatanga, which underpin how Māori regulate community and the collective ownership of resources.[63] Then, contrast that with te ao Pākehā and the accelerating demand for exclusive ownership of ideas as an off-shoot of the Industrial Revolution. According to Tuffery Huria, the resulting clash has manifested itself within the intellectual property system.[64]

The decision in *Manuka Honey Appellation Society* not only left Māoridom (and the local honey industry) exposed to free-riding and dilution of what is distinctly Maori intellectual property, but it also sent a message to the rest of the world that New Zealand cannot protect what makes us unique as a nation. The precedent it set means that other precious indigenous resources, such as taonga and knowledge, for example, those derived from Harakeke, such as oils, fibre, and building materials, are also fair game.

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[60] Karaitiana Taiuru, above n 13.
[61] At 13.
[62] At 13.
[63] Tuffery Huria, above n 41.
[64] At 41.

IV Closing

Over a decade ago, the Tribunal warned that adopting a "do-nothing" approach was no longer realistic.[65] Australia's internationally successful opposition to New Zealand's MANUKA HONEY certification mark is a startling example of why urgent reform is needed. Legitimising the relationship between taonga and kaitiakitanga within the trade mark ecosystem will provide all New Zealanders with better avenues for participation in the intellectual property regime. It will help to address current systematic failings while ensuring the Crown fulfils its obligations under Article II of Te Tiriti.

[65] Wai 262 Report, above n 5, at 98.