

ARTICLE

The Protection of Mātauranga Māori Associated with Taonga Species

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Eight years ago, the Waitangi Tribunal released its long-awaited report on the Wai 262 claim concerning the laws and policies affecting Māori culture, traditional knowledge and identity. A formal response from the Government is overdue. This article evaluates the Waitangi Tribunal's recommendations in relation to mātauranga Māori associated with taonga species (MMATS). Essentially, they fail to give kaitiaki absolute authority over taonga species and MMATS. The Waitangi Tribunal's approach, by limiting its recommendations to existing legal regimes, facilitates the fragmentation of MMATS. This article recommends an access and benefit sharing (ABS) regime to protect MMATS more holistically. The regime should require prior informed consent and mutually agreed terms for access and use. It should be based on tikanga Māori and interface with the intellectual property regime via an evidence of ABS compliance requirement. This would improve New Zealand's compliance with its obligations under Te Tiriti o Waitangi and international law. Eight years on, the Wai 262 report can only be a starting point in the discussion on the protection of MMATS in Aotearoa New Zealand.

I Introduction

In 1991, six individuals lodged a claim with the Waitangi Tribunal (Tribunal) on behalf of their iwi (tribes). They argued that the laws and policies of the Crown, since the signing of Te Tiriti o Waitangi (The Treaty of Waitangi) in 1840, have denied Māori the full exercise of their tino rangatiratanga (absolute authority), which is guaranteed under the second article of Te Tiriti, in relation to the conservation, use and development of Indigenous flora

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and fauna, me o rātou taonga katoa (and all their treasures). This became the 262nd claim on the Tribunal's register and also the Tribunal's first whole-of-government inquiry. The Tribunal's report, *Ko Aotearoa Tēnei*,¹ was finally released in 2011.

After eight years, the Government has yet to formally respond to *Ko Aotearoa Tēnei*. Some legislative changes consistent with the Tribunal's recommendations were enacted after the report, and there have been policy developments towards progressing a few of the Tribunal's recommendations. On 28 August 2019, the Minister for Māori Development, the Hon Nanaia Mahuta, announced that the Government is developing a whole-of-government approach to consider the issues raised in the Wai 262 claim and *Ko Aotearoa Tēnei*, recognising that "the time is right".² Te Puni Kōkiri (The Ministry of Māori Development) has conducted targeted engagement discussions with key Māori groups and individuals interested in the Wai 262 claim on the Government's preliminary proposals. The Government is currently working out how to organise Te Pae Tawhiti, the work programme. Meanwhile, the past eight years have seen efforts at the international level to reform legal frameworks for the protection of genetic resources and traditional knowledge continue in a range of forums. Eight years on, *Ko Aotearoa Tēnei* can only serve as a starting point in the discussion on the protection of mātauranga Māori (the Māori way of viewing the world) associated with taonga species (treasured species) in Aotearoa New Zealand. The concepts of mātauranga Māori and taonga species are explained in more detail below.

The Wai 262 claim is often called the Indigenous flora and fauna claim. But it was really about mātauranga Māori, which had developed as Māori ancestors, who had migrated from Hawaiki, adapted to their new environment in Aotearoa. Over generations, Māori ancestors changed how they grew and stored crops. They named unfamiliar plants and animals, sought explanations for those species' distinctive characteristics, and defined how humans relate to those species. They also created forms of design inspired by the flora and fauna. And they modified the traditions of the gods to reflect the greater presence of the whenua (land) and forest in Aotearoa, compared to the Polynesian islands from which the Hawaikians voyaged.³ At some point, the interactions between Māori ancestors and Aotearoa's environment took shape as mātauranga Māori, which incorporates culture and traditional knowledge, among many other aspects.⁴ In the words of a kaumātua (elder) of Ngāti Kahungunu, mātauranga Māori could be defined as "knowledge, comprehension or understanding of everything visible or invisible ... across the universe".⁵ Therefore, mātauranga Māori is core to Māori identity. Its protection is key to Māori economic, social and cultural development, which stands to benefit all of New Zealand.

1 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011). The Tribunal released an abridged version of the report along with the two-volume full report. The abridged version is subtitled *Te Taumata Tuatahi*. The full report is subtitled *Te Taumata Tuarua*. In this article, I refer to *Ko Aotearoa Tēnei* when citing the full report, and to *Te Taumata Tuatahi* when citing the abridged version.

2 Te Puni Kōkiri "Wai 262: Te Pae Tawhiti" <www.tpk.govt.nz>.

3 *Te Taumata Tuatahi*, above n 1, at 5–6.

4 At 6.

5 Maui Solomon "Protecting Maori Heritage in New Zealand" in Barbara Hoffman (ed) *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge University Press, New York, 2006) 352 at 352.

Mātauranga Māori is based on the value of whanaungatanga (kinship), which explains the relationships between tangata whenua (people of the land) and the elements of creation. Whanaungatanga categorises all animate and inanimate things in the universe, and allocates rights and obligations.⁶ These obligations are embodied in the concept of kaitiakitanga—the duty to care for persons or things as their kin. This duty confers rights to exercise control on kaitiaki (guardians). At the heart of the Wai 262 claimants’ concerns about the protection of mātauranga Māori was the need to protect the rights and responsibilities of kaitiaki—what I call kaitiaki interests—in relation to their taonga (treasures), which include certain flora and fauna, and the mātauranga Māori which underlies them.

Taonga species may be loosely defined as species that have associated mātauranga Māori.⁷ In other words, they have whakapapa (genealogy) which may be recited by tohunga (expert practitioners), and they have kaitiaki. I understand kaitiaki relationships with taonga species to be part of mātauranga Māori associated with taonga species (MMATS), because the broad significance of mātauranga Māori is the Māori way of viewing the world. Despite recognising this broad definition, the Tribunal addressed MMATS in the sense of traditional knowledge associated with taonga species. The Tribunal treated kaitiaki relationships with taonga species and MMATS separately in its analysis, because in te ao Pākehā (the Pākehā worldview), there is a distinction between what is tangible and intangible. Thus, such division is convenient when discussing how various laws and policies of the Crown affect mātauranga Māori.

The Tribunal limited its recommendations to existing legal regimes, arguing that they could incorporate recognition of kaitiaki interests to a sufficient degree. In this article, I argue that the Tribunal’s approach facilitates fragmentation and piecemeal protection of MMATS, and leaves many gaps in protection. To meaningfully protect MMATS, a more holistic approach is required. I recommend an access and benefit sharing (ABS) regime to protect MMATS as a whole. The ABS regime should be based on tikanga Māori and recognise a system of rights in mātauranga Māori. This would better address the Wai 262 claimants’ concerns, and would improve compliance with Te Tiriti and New Zealand’s obligations under international law.

Part II of this article explains the concerns of the Wai 262 claimants in relation to MMATS. Part III discusses how the intellectual property (IP) rights system fails to protect MMATS. Part IV summarises the Tribunal’s findings and recommendations, along with subsequent legislative changes and policy developments since *Ko Aotearoa Tēnei*, that are relevant to MMATS. Part V evaluates the Tribunal’s recommendations and the gaps they leave in protection. Part VI discusses the advantages and disadvantages of an ABS regime. I conclude that the advantages of an ABS regime outweigh the disadvantages, and accordingly make recommendations on how an ABS regime should be developed.

I note that I am not Māori and do not represent a Māori voice. I am an individual who has endeavoured to understand te ao Māori (the Māori worldview) while being educated in New Zealand. This article expresses a legal perspective. Mātauranga Māori varies across iwi and hāpu (sub-tribes), but my comments on mātauranga Māori are generalised. My intention is to describe commonalities with reference to examples. I apologise if any errors are made.

6 *Ko Aotearoa Tēnei*, above n 1, at 35.

7 At 114–115.

II The Wai 262 Claimants' Concerns

The Wai 262 claimants' concerns were founded in the fear that interference with the control of Māori over mātauranga Māori was destroying their culture and identity.⁸ As explained in the introduction, mātauranga Māori encompasses culture, traditional knowledge and other aspects which are integral to Māori identity.⁹ When laws and policies allow appropriation of taonga species or MMATS for research or commercial purposes to the detriment of kaitiaki relationships, Māori values are violated, representations of Māori culture are distorted, it is harder for Māori to determine what is their own culture, and te ao Māori is eroded.¹⁰ This is happening in the context of historical and ongoing dispossession of Māori lands, suppression of Māori culture and urbanisation of Māori.¹¹ Thus, the claimants sought protection for MMATS, primarily within the IP regime, by asserting ownership over new forms of IP rights. This was seen as a necessary means for kaitiaki to exercise control over taonga species and MMATS, so that they could fulfil their responsibilities and receive the benefits of any commercial use.¹²

The Wai 262 claimants raised concerns in three areas of law and policy in relation to MMATS:¹³

- (1) unauthorised use of mātauranga Māori in bioprospecting;
- (2) genetic modification of taonga species, contrary to whakapapa; and
- (3) grant of IP rights in the genetic and biological resources of taonga species without adequate protection of kaitiaki interests.

The Tribunal addressed the bioprospecting, genetic modification and IP regimes separately, but recognised that they are interconnected on “a single path from discovery to exploitation of commercially valuable material” which normally culminates in IP rights.¹⁴ The importance of this observation is seen in Part VI of this article, where I argue for an ABS regime to protect MMATS at the earliest step on the path of research, before IP rights are concerned.

Bioprospecting is the search for and extraction of genetic or biological resources to develop a commercial product.¹⁵ Various studies have tried to compare the probabilities of finding useful genetic or biological resources, and of developing a marketable product,

8 At 14–15. See Maui Solomon and others “Closing Submissions for Ngati Kuri, Ngatiwai and Te Rarawa” (5 September 2007) Wai 262 <wai262.weebly.com> at [214].

9 The importance of culture to identity is recognised for all Indigenous peoples. See *Role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples: Study of the Expert Mechanism on the Rights of Indigenous Peoples* UN Doc A/HRC/21/53 (16 August 2012) at [55]–[64]; and Andy Gargett *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* UN Doc HR/PUB/13/2 (August 2013) at 13–14.

10 Jessica Christine Lai *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer, Cham (Switzerland), 2014) at 12–16.

11 At 21–22.

12 *Ko Aotearoa Tēnei*, above n 1, at 70–71; and Fleur Adcock “Diluted control: a critical analysis of the Wai 262 report on Māori traditional knowledge and culture” in Matthew Rimmer (ed) *Indigenous Intellectual Property; A Handbook of Contemporary Research* (Edward Elgar Publishing, Cheltenham (UK), 2015) 497 at 503.

13 *Ko Aotearoa Tēnei*, above n 1, at 140.

14 At 143.

15 At 141.

with and without the use of traditional knowledge.¹⁶ The point is always that the use of traditional knowledge greatly increases the likelihood of recouping the cost of research and development. New Zealand currently has no law or policy on bioprospecting per se. It leaves bioprospecting to be regulated by general common law or statutes.¹⁷ This has permitted, for example, mānuka plant samples to be sent to researchers in Dresden to identify the source of the antibacterial activity in mānuka honey and the environmental conditions that grow high-potency manuka.¹⁸ There was no acknowledgment of any Māori contribution, despite mātauranga Māori about the medicinal properties of mānuka being the origin of research efforts.

Genetic modification involves the deletion, change, moving, transfer or construction of genes, either within an organism or from one organism to another.¹⁹ Genetic modification is governed under the Hazardous Substances and New Organisms Act 1996. This Act provides some procedural and substantive safeguards for Māori interests, but the Wai 262 claimants argued that the safeguards lack the power to be effective.²⁰ For example, pursuant to the Act, the Environmental Risk Management Authority (ERMA) granted approval for blood samples to be taken from Takapourewa (Stephens Island) tuatara for gene mapping, to the dismay of its kaitiaki, Ngāti Koata, who were not consulted.²¹

A company that invests in bioprospecting or genetic modification, or that engages in plant breeding and variety creation, will usually seek to protect the commercial value of the product. It may do so by applying for a patent under the Patents Act 2013 or a plant variety right (PVR) under the Plant Variety Rights Act 1987 (PVRs Act). Many patents and PVRs have been granted over products, processes or plant varieties of taonga species with limited or no recognition of pre-existing mātauranga Māori, protection of kaitiaki interests and sharing of benefits. Examples include harakeke, koromiko, pōhutukawa and mānuka.²² The grant of patents or PVRs over inventions derived from the use of mātauranga Māori or plant varieties of taonga species may lead to the abandonment of that mātauranga Māori or the destruction of kaitiaki relationships.²³

The Wai 262 claimants argued a range of issues in relation to bioprospecting, genetic modification and IP, and taonga species. The issues may be summarised as follows:

- (1) MMATS should not be used without the consent of kaitiaki, even if it has entered the public domain in published form.²⁴ The claimants who focused on this issue claimed ownership in MMATS.

16 At 142; Erica-Irene Daes *Discrimination Against Indigenous Peoples: Study on the protection of the cultural and intellectual property of indigenous peoples*, by Erica-Irene Daes, *Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations* UN Doc E/CN.4/Sub.2/1993/2008 (28 July 1993) at [90]; Chidi Oguamanam *International Law and Indigenous Knowledge: Intellectual Property, Plant Biodiversity and Traditional Medicine* (University of Toronto Press, Toronto, 2006) at 5–6; and Maui Solomon “Indigenous Peoples Rights versus Intellectual Property Rights” in Nin Thomas (ed) *Collective Human Rights of Pacific Peoples* (International Research Unit for Maori and Indigenous Education, Auckland, 1999) 61 at 63.

17 *Ko Aotearoa Tēnei*, above n 1, at 153.

18 At 130.

19 At 158.

20 At 159 and 166–169.

21 At 135.

22 At 120–121, 123 and 130–131.

23 Lai, above n 10, at 43.

24 *Ko Aotearoa Tēnei*, above n 1, at 144 and 178.

- (2) The genetic and biological resources of taonga species should not be accessed or exploited by bioprospectors or patent- and PVR-holders if it harms kaitiaki relationships.²⁵ Some claimants claimed the right to veto any proposed use that damages kaitiaki relationships. Others claimed ownership over the genetic and biological resources of taonga species, a form of IP similar to patents and PVRs but without expiration. For exceptional species such as the tuatara, some claimants claimed ownership of the species as a whole.
- (3) Some claimants raised concerns about exploitation without due recognition to the kaitiaki of the taonga species or MMATS that was used, or without benefit sharing with these kaitiaki.²⁶

These issues are all relevant to the relationships between kaitiaki and taonga species, which are part of MMATS. Therefore, the myriad of claims are all expressions of Māori trying to assert control over MMATS within the IP rights system and te ao Pākehā,²⁷ and to protect MMATS.

III The IP Rights System's Failure to Protect Mātauranga Māori Associated with Taonga Species

The problem with seeking to protect MMATS within the IP rights system is that patents and PVRs can only offer limited protection for MMATS at best. This is because the primary purpose of patents and PVRs is to enable commercial exploitation and incentivise research. The Tribunal agreed with the Crown's argument that the IP regime was never intended to respond to kaitiaki interests or accommodate mātauranga Māori, although it did not agree that the IP regime was ill-suited to the task at the time.²⁸ The claimants were also aware that the IP regime was not fully compatible with their expectations. Their argument was intended to point out the failures of current laws and policies. For example, Ngāti Kahungunu submitted:²⁹

The real issue ... is not whether Maori/Ngati Kahungunu interests can be protected by patents because they patently cannot. Rather, the issue is the use of patents by third parties to isolate rights to particular aspects of indigenous and/or taonga species without providing for the Maori/Ngati Kahungunu interest.

The claimants made claims to ownership or right to veto where they saw opportunities to translate kaitiaki interests into concepts recognisable in the IP rights system.³⁰ However, subjecting Indigenous peoples to the IP regime generally has the effect of fragmenting their identity and facilitating the alienation of the pieces, like the effect of individualising land ownership.³¹ The only way to adequately protect mātauranga Māori is to recognise the guarantee in the second article of Te Tiriti—the te reo Māori version—of “te tino rangatiratanga o o rātou wenua o rātou kāinga me o rātou taonga katoa”, which translates

25 At 144 and 179.

26 At 145 and 179.

27 Adcock, above n 12, at 503.

28 *Ko Aotearoa Tēnei*, above n 1, at 188 and 191.

29 At 179.

30 For an anthropological perspective on why Māori appeal to the IP regime to protect mātauranga Māori, see Toon van Meijl “Māori Intellectual Property Rights and the Formation of Ethnic Boundaries” (2009) 16 *IJCP* 341 at 345–346.

31 Daes, above n 16, at [32].

to “the unqualified exercise of their chieftainship in their lands, villages and all their treasures”.³² This is required to manage mātauranga Māori as an integrated whole and in accordance with tikanga Māori (Māori customs and practices). The following analysis of the IP regime sets out why modifying existing laws would still only partly address the claimants’ concerns about MMATS. It foreshadows my appeal for a sui generis regime, a coherent system of law which takes into account the unique nature of mātauranga Māori.³³

There is no concept of IP in te ao Māori. Mātauranga Māori is not something that can be owned or sold, but is a concept that carries rights and responsibilities of kaitiakitanga.³⁴ Since mātauranga Māori links tangata whenua to everything in the universe, it forms Māori identity. It is shared by iwi and hāpu collectively, passed down from generation to generation, and in constant evolution.³⁵ In this context, protection of mātauranga Māori primarily means exercise of control by Māori over mātauranga Māori. This may be contrasted with the kind of protection primarily considered in the context of IP, which is protection against unauthorised use or inequitable exploitation of the protected material.³⁶

Furthermore, the kind of protection offered by the IP regime is not available for most MMATS. Most mātauranga Māori would not meet all of the requirements of patentability, being that the invention is a manner of manufacture, is novel, involves an inventive step and is useful.³⁷ The requirement of novelty is particularly problematic for mātauranga Māori as it means that the invention could not be disclosed to the public prior to the patent application. Mātauranga Māori is, by definition, transmitted from generation to generation and known to a section of the wider community.³⁸ Much mātauranga Māori has also been published.³⁹ The criteria for PVRs includes a comparable condition of newness,⁴⁰ which taonga species may not satisfy.⁴¹

The fact that most mātauranga Māori does not meet the standard of novelty does not mean that mātauranga Māori is not innovative.⁴² Mātauranga Māori, by its nature, develops and adapts to new circumstances. But patents are designed to recognise the commodity of innovation in products and processes, while innovation in mātauranga Māori is relationship-based, and characterised by the linkages and interactions between

32 Hugh Kawharu “Translation of the te reo Māori text” (19 September 2016) Waitangi Tribunal <www.waitangitribunal.govt.nz>.

33 Lyndel V Prott and Patrick J O’Keefe “‘Cultural Heritage’ or ‘Cultural Property?’” (1992) 1 IJCP 307 at 312.

34 *Ko Aotearoa Tēnei*, above n 1, at 192–194; and Solomon, above n 5, at 354.

35 Lai, above n 10, at 60–61.

36 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *The Protection of Traditional Knowledge: Updated Draft Gap Analysis* UN Doc WIPO/GRTKF/IC/40/7 (9 April 2019) at [11]–[13].

37 Patents Act 2013, s 14.

38 *Ko Aotearoa Tēnei*, above n 1, at 171; and Daes, above n 16, at [99].

39 *Ko Aotearoa Tēnei*, above n 1, at 191; and Susy Frankel and Jessical C Lai *Patent Law and Policy* (LexisNexis, Wellington, 2016) at 29–30.

40 Plant Variety Rights Act 1987, s 10(2)(d).

41 *Ko Aotearoa Tēnei*, above n 1, at 174; and Lai, above n 10, at 153–155.

42 Antony Taubman “Preface: Indigenous Innovation: New Dialogues, New Pathways” in Peter Drahos and Susy Frankel (eds) *Indigenous Peoples’ Innovation: Intellectual Property Pathways to Development* (ANU E Press, Canberra, 2012) xv at xv–xvi.

institutional actors, such as iwi and the environment.⁴³ Tikanga Māori, which governs preservation and development of mātauranga Māori, is different in structure to the IP regime.⁴⁴ This is problematic for the recognition of mātauranga Māori as IP.

Even if a patent could be obtained, it is only operative for 20 years,⁴⁵ whereas kaitiaki relationships continue perpetually.⁴⁶ Once the patent expires, the subject matter enters into the public domain and becomes open to use by all.⁴⁷ However, there is no notion of public domain in tikanga Māori.⁴⁸ Although mātauranga Māori may be publicly shared, its use is always subject to the determination of its kaitiaki. Furthermore, mātauranga Māori cannot be attributed to an identifiable inventor, which must be detailed on patent applications.⁴⁹ A translation of kaitiaki interests may mean that kaitiaki are listed as inventors, such as incorporated iwi.⁵⁰ However, this entails kaitiaki obtaining legal ownership of mātauranga Māori with exclusive rights. Such rights do not align with responsibilities to preserve and develop mātauranga Māori so that it can be enjoyed by present and future generations in accordance with tikanga Māori.⁵¹

Since most mātauranga Māori is not patentable, kaitiaki are unable to prevent third parties from acquiring rights in inventions derived from the genetic and biological resources of taonga species or from MMATS. The IP regime regards the relationships between kaitiaki and taonga species as a peripheral consideration at best.⁵² The Patents Act 2013, which was enacted after *Ko Aotearoa Tēnei*, added *ordre public* as a ground to exclude patentability on top of morality, and established the Māori advisory committee. The *ordre public* exclusion might be wide enough to accommodate kaitiaki interests if they are seen to reflect values fundamental to New Zealand society.⁵³ However, there is no explicit power in the Patents Act 2013 for the Commissioner of Patents to reject a patent if the specified invention would be inconsistent with kaitiaki relationships. Additionally, the Māori advisory committee can only advise the Commissioner on request. This means kaitiaki interests are merely a factor which might be considered to exclude patentability on the ground of *ordre public* or morality under s 15 of the Patents Act 2013.

Even if the Commissioner had explicit power to reject a patent for its effect on kaitiaki relationships, or the Māori advisory committee could provide advice as it saw fit, the burden may still mostly fall on kaitiaki to monitor and challenge patent applications or patents under subpart 9 of the Patents Act 2013.⁵⁴ A problem is that it would be difficult

43 RR Nelson “National Innovation Systems: A Retrospective on a Study” (1992) 1 Industrial and Corporate Change 347, as cited in Peter Drahos and Susy Frankel “Indigenous Peoples’ Innovation and Intellectual Property: The Issues” in Peter Drahos and Susy Frankel (eds) *Indigenous Peoples’ Innovation: Intellectual Property Pathways to Development* (ANU E Press, Canberra, 2012) 1 at 4.

44 Frankel and Lai, above n 39, at 34.

45 Patents Act 2013, s 20.

46 *Ko Aotearoa Tēnei*, above n 1, at 191; Solomon, above n 5, at 355; and Lai, above n 10, at 65 and 133.

47 Lai, above n 10, at 64–66.

48 *Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain* Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, Fifth Session (9 July 2003).

49 van Meijl, above n 30, at 343.

50 Lai, above n 10, at 134.

51 At 61 and 143.

52 *Ko Aotearoa Tēnei*, above n 1, at 192.

53 At 176.

54 Adcock, above n 12, at 510.

for the committee to represent the mātauranga of all Māori.⁵⁵ At the international level, possibilities for the IP rights system to give practical effect to Indigenous peoples' expectations are mostly defensive measures, for example preventing the grant of patents for inventions that misappropriate traditional knowledge.⁵⁶ Therefore, by treating mātauranga Māori as a check on patentability but not a system of rights itself,⁵⁷ the IP rights system can only offer piecemeal protection of mātauranga Māori. It cannot tackle the underlying issues of self-determination,⁵⁸ such as autonomy over Māori economic, social and cultural development.⁵⁹

IV The Tribunal's Findings and Recommendations, and Subsequent Legislative Changes and Policy Developments

The Tribunal found that applying the guarantee in art 2 of the Treaty of Waitangi—the English language version—of full exclusive and undisturbed possession is inappropriate in relation to the genetic and biological resources of taonga species.⁶⁰ It said that since Māori did not create taonga species, cultural association alone could not justify legal ownership in the genetic and biological resources of taonga species.⁶¹ There was a sense that recognising such ownership would be contradictory to Māori concerns about protecting kaitiaki interests in taonga species, because these interests are not equivalent to legal ownership as understood in te ao Pākehā.

According to the Tribunal, the answer is found in the guarantee of tino rangatiratanga in the te reo Māori version of Te Tiriti.⁶² Since kaitiaki are essentially interested in preserving and developing their relationships with taonga species, the “principle” of tino rangatiratanga commands “some level” of control sufficient to protect kaitiaki relationships to “a reasonable degree”.⁶³ The Tribunal argued that in this way, kaitiaki relationships could be protected as a whole rather than as a form of IP in the genetic and biological resources of taonga species.⁶⁴ The Tribunal emphasised that the appropriate level of control would vary, depending on the perspectives of kaitiaki and the balance between kaitiaki interests and competing interests.⁶⁵ The appropriate degree of protection should be determined in each particular case. However, the Tribunal recognised that for some species such as the tuatara, the kaitiaki relationship is so transcendent that the kaitiaki might have interests in respect of every living example of the species.⁶⁶

As mentioned in the introduction of this article, the Tribunal considered MMATS separately to the genetic and biological resources of taonga species. Even though mātauranga Māori was created by Māori, the Tribunal took the view that MMATS could not

55 Lai, above n 10, at 138.

56 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, above n 36, at [31]; and Taubman, above n 42, at xvii–xviii.

57 Justin Graham “The future of patent law” [2008] NZLJ 363 at 368.

58 Solomon, above n 5, at 355; Lai, above n 10, at 62–63; and Daes, above n 16, at [4].

59 See Gargett, above n 9, at 19–23.

60 *Ko Aotearoa Tēnei*, above n 1, at 192.

61 At 193.

62 At 193.

63 At 193.

64 At 194.

65 At 193–197.

66 At 193.

be subject to legal ownership because much of it has been published.⁶⁷ On this basis, the Tribunal thought that it would be unrealistic to “claw back exclusive and undisturbed possession” of mātauranga Māori, and it would be wrong to exclude non-kaitiaki from “experiencing the richness of te ao Māori”.⁶⁸ In place of legal ownership, the Tribunal found it “amply justified” for kaitiaki to have three rights in respect of any commercial exploitation of MMATS. They are the right to acknowledgement, right to a reasonable degree of control and right to “proper recognition” of their interests.⁶⁹ These rights depend on the circumstances and the balance with the interests of researchers and IP rights-holders. Proper recognition might require consent in some cases, and disclosure and consultation in others.

Generally, the recommendations of the Tribunal were to redesign the existing regimes of bioprospecting, genetic modification and IP to balance between competing interests.⁷⁰ All of the Tribunal’s recommended reforms were intended to operate within those regimes. Although the Government is still developing a formal response to *Ko Aotearoa Tēnei*, some legislative changes consistent with the Tribunal’s recommendations have been enacted since the report. Furthermore, the Ministry of Business, Innovation and Employment (MBIE) has consulted on an Issues Paper and an Options Paper in the current PVRs Act review.⁷¹ Cabinet has agreed to make changes to the PVRs Act and new legislation will be drafted.⁷² Additionally, MBIE has also consulted on a patent disclosure of origin discussion document.⁷³ The following summary of the Tribunal’s recommendations is combined with a summary of the relevant legislative changes and policy developments.

A *The bioprospecting regime*

The Tribunal recommended three reforms in relation to bioprospecting. First, it recommended that the Department of Conservation lead the development of a comprehensive bioprospecting regime, but only within the conservation estate which it administers.⁷⁴ Second, the Tribunal recommended that the role of pātaka komiti (panels made up of representatives from local iwi) be expanded to encompass making joint decisions with the regional conservator on bioprospecting applications for scientific or commercial purposes.⁷⁵ Third, the Tribunal recommended that ABS on the basis of prior informed consent (PIC) should not be a blanket requirement for bioprospecting applications, because this would assume that every bioprospecting application interferes with kaitiaki relationships and give too much priority to kaitiaki interests.⁷⁶

67 At 194–195.

68 At 195.

69 At 195.

70 At 198–210.

71 Ministry of Business, Innovation and Employment *Issues Paper: Review of the Plant Variety Rights Act 1987* (September 2018) [MBIE *Issues Paper*]; and Ministry of Business, Innovation and Employment *Options Paper: Review of the Plant Variety Rights Act 1987* (July 2019) [MBIE *Options Paper*].

72 Ministry of Business, Innovation and Employment “Plant Variety Rights Act 1987 review” (20 November 2019) <www.mbie.govt.nz>.

73 Ministry of Business, Innovation and Employment *Discussion paper: Disclosure of origin of genetic resources and traditional knowledge in the patents regime* (September 2018) [MBIE *Discussion paper*].

74 *Ko Aotearoa Tēnei*, above n 1, at 198.

75 At 198.

76 At 199.

B *The genetic modification regime*

In relation to genetic modification, the Tribunal's first recommendation was to change ERMA's methodology for multi-disciplinary risk assessments of genetic modification, so that it stops automatically privileging the scientific perspective over Māori perspectives.⁷⁷ Secondly, the Tribunal recommended that s 5 of the Hazardous Substances and New Organisms Act 1996, which sets out the principles relevant to the purpose of the Act, be amended so that persons exercising functions, powers and duties under the Act must recognise and provide for the relationships between kaitiaki and taonga species.⁷⁸

Thirdly, in relation to Ngā Kaihautū, the Māori committee which provided advice to the ERMA on request, the Tribunal recommended that it maintain its advisory role, but should have power to appoint at least two of its members to the ERMA itself.⁷⁹ Ngā Kaihautū should give advice when it considers that Māori interests are relevant to an application, not only when requested.⁸⁰ Since *Ko Aotearoa Tēnei*, the Environmental Protection Authority (EPA) has superseded the ERMA. Section 20 of the Environmental Protection Authority Act 2011 requires the EPA to set terms of reference for Ngā Kaihautū. The current terms of reference are wide enough to allow Ngā Kaihautū to provide advice from a Māori perspective on any application that raises concerns of significance to Māori.⁸¹ The Tribunal's recommendations for Ngā Kaihautū have therefore been partly implemented.

C *The IP regime*

In relation to IP, the Tribunal said generally that changes were needed to explicitly recognise kaitiaki interests in the Patents Act and the PVRs Act.⁸² There were separate recommendations for patents and PVRs.

(1) Patents

The Tribunal endorsed the Crown's expressed intention to create a Māori committee to advise the Commissioner of Patents.⁸³ It recommended that the Māori committee have the mandate to advise on the requirements of patentability, and on the existence of kaitiaki interests in relation to the *ordre public* and morality exceptions.⁸⁴ After *Ko Aotearoa Tēnei*, but not in response to it, a Māori advisory committee for patents was established under the Patents Act 2013.⁸⁵ The Tribunal's recommendations on its mandate were not incorporated. At present, the Māori advisory committee is to advise on whether inventions were derived from "Māori traditional knowledge or from indigenous plants or animals", and if so, whether "commercial exploitation of that invention is likely to be contrary to Māori values".⁸⁶

77 At 199.

78 At 199.

79 At 199.

80 At 199.

81 Ngā Kaihautū Tikanga Taiao *Incorporating Māori Perspectives into Decision Making* (Environmental Protection Authority) at 6 and 13.

82 *Ko Aotearoa Tēnei*, above n 1, at 200.

83 At 200.

84 At 201.

85 Patents Act 2013, s 225.

86 Section 226.

The Tribunal further recommended that the Māori committee have an advisory role like Ngā Kaihautū.⁸⁷ It should be able to provide advice as it sees fit, prepare guidelines and protocols to help applicants, and investigate any application filed or patent granted. For applications that raise Māori issues, the Commissioner of Patents should be required to take formal advice from the Māori committee. This differs from the Patents Act 2013, under which the Māori advisory committee can only provide advice to the Commissioner on request,⁸⁸ although the Commissioner is required to consider the Māori advisory committee's advice.⁸⁹ As of December 2018, the Māori advisory committee had not received any requests for advice since being established.⁹⁰ A final recommendation on the Māori committee was that when the Commissioner needs to decide on an issue of tikanga Māori, they should sit jointly with the chairperson of the Māori committee to expand the Commissioner's expertise.⁹¹ This was not implemented in the Patents Act 2013.

Besides the Māori committee, the Tribunal recommended that the Commissioner have power to exclude patentability on the ground of *ordre public*.⁹² In the Tribunal's view, this would enable the Commissioner to reject a patent application for the reason that the invention unduly interferes with kaitiaki relationships. As discussed above, the Patents Act 2013 incorporated an *ordre public* ground for excluding patentability. But it did not provide an explicit power for the Commissioner to refuse a patent application because the invention would be inconsistent with kaitiaki relationships, which the Tribunal had recommended. The Tribunal had qualified this recommendation with a requirement to balance kaitiaki interests with other interests in making *ordre public* or morality decisions.⁹³

Another recommendation in relation to patents was to create a voluntary register of kaitiaki interests in taonga species and MMATS, while maintaining a right to object regardless of whether an interest has been registered.⁹⁴ There should also be a disclosure requirement, mandating the disclosure of "the source and country of origin of any genetic and biological resource that contributed in any material way to the invention", and any mātauranga Māori "used in the course of research ... that prompted the inventor to take the course of research" even if it is not integral to the invention.⁹⁵ The consequences of failure to disclose should be decided at the Commissioner's discretion, sitting with the Māori committee's chairperson.⁹⁶ The Patents Act 2013 did not implement a patent disclosure of origin requirement, but MBIE is considering adopting such a requirement.⁹⁷ Finally, the Tribunal decided that evidence of PIC and ABS should not be a condition for patent applications. It thought that there was no justification for mandatory ABS in every case, and that PIC and ABS would evolve naturally from the early engagement of kaitiaki, stimulated by the disclosure requirement.⁹⁸

87 *Ko Aotearoa Tēnei*, above n 1, at 201.

88 Patents Act 2013, s 226.

89 Section 227.

90 Nanaia Mahuta *The Section 81 Report: A report on the progress made in the implementation of recommendations made to the Crown by the Waitangi Tribunal* (Te Puni Kōkiri, December 2018) at 11.

91 *Ko Aotearoa Tēnei*, above n 1, at 201.

92 At 202.

93 At 202.

94 At 202–203.

95 At 204.

96 At 205.

97 MBIE *Discussion paper*, above n 73, at [2].

98 *Ko Aotearoa Tēnei*, above n 1, at 205.

(2) Plant variety rights

In relation to PVRs, the Tribunal first recommended that the Commissioner of Plant Variety Rights (Commissioner of PVRs) have power to reject a plant variety name when they believe that its use or approval would likely offend a significant section of the community, including Māori.⁹⁹ Second, discovered plant varieties should not be eligible for PVRs, as they currently are.¹⁰⁰ These two recommendations were originally proposed in the draft Plant Variety Rights Amendment Bill 2005 and are being reconsidered in the current PVRs Act review.¹⁰¹

The Tribunal's third recommendation was for the Commissioner of PVRs to also have power to refuse a PVR on the ground that it would affect kaitiaki relationships.¹⁰² This was included in MBIE's recommended proposals for achieving Treaty of Waitangi compliance in the PVRs Act review.¹⁰³ I note that MBIE's proposal only allows the Commissioner of PVRs to refuse a PVR if the negative impact on kaitiaki interests cannot "be mitigated to a reasonable extent such as to allow the grant".¹⁰⁴

The Tribunal added that the Commissioner of PVRs should be supported by the same Māori committee that it recommended for patents.¹⁰⁵ In the PVRs Act review, MBIE prefers the establishment of a new PVR Māori advisory committee.¹⁰⁶ The committee's role would be to develop guidelines on engagement for plant variety breeders and kaitiaki, provide pre-application advice to breeders and kaitiaki, and provide advice to the Commissioner of PVRs and the chairperson of the committee.¹⁰⁷ The Commissioner and chairperson would jointly decide whether the PVR should be granted.

MBIE has also proposed new disclosure requirements for PVRs.¹⁰⁸ Applicants would be required to provide information on:

- (a) the origin of the plant material used to develop the plant variety;
- (b) any kaitiaki;
- (c) any engagement with kaitiaki; and
- (d) the applicant's assessment of any effects of commercialising the plant variety on kaitiaki interests and how these effects would be mitigated.

V The Gaps Left by the Tribunal's Recommendations

The Tribunal's recommendations responded to a number of the Wai 262 claimants' concerns to some extent. These included low Māori involvement in decision-making on matters that affect Māori interests, the subordination of Māori perspectives to the scientific perspective in ERMA decisions, and the grant of patents and PVRs over inventions

99 At 206; and David Nowak "WAI 262, Patents and Plant Variety Rights revisited" (2017) 8 NZIPJ 35 at 39.

100 *Ko Aotearoa Tēnei*, above n 1, at 206.

101 MBIE *Options Paper*, above n 71, at [60], [118] and [159]–[162].

102 *Ko Aotearoa Tēnei*, above n 1, at 206.

103 MBIE *Options Paper*, above n 71, at [34]–[35] and [51]. Treaty compliance is a proposed objective of the PVR regime. See MBIE *Options Paper*, above n 71, at [18] and [75].

104 MBIE *Options Paper*, above n 71, at [34] and [51].

105 *Ko Aotearoa Tēnei*, above n 1, at 206.

106 MBIE *Options Paper*, above n 71, at [51] and [118].

107 At [51].

108 At [51] and [106].

and plant varieties that interfere with kaitiaki relationships with taonga species.¹⁰⁹ Many other concerns were left to be addressed on a case-by-case basis, such as the degree of protection given to kaitiaki relationships, the level of recognition—potentially including consent or consultation—owed to kaitiaki interests in MMATS, and the obligation of ABS on the basis of PIC.

Thus, the Tribunal's recommendations only partly addressed the Wai 262 claimants' concerns about MMATS. This is unsurprising, as all of the reforms recommended are capable of operating within the existing bioprospecting, genetic modification and IP regimes. The Tribunal thought these regimes were a "sufficiently robust" platform for the integration of kaitiaki interests.¹¹⁰ But, as discussed in Part III, the IP regime, for which many reforms were recommended, can only provide limited protection of MMATS. It cannot tackle the fundamental issues of self-determination underlying the Wai 262 claim. Reforming the bioprospecting and genetic modification regimes could only provide limited protection against access or use, on a case-by-case basis, for some MMATS which happen to be within the conservation estate or subject to genetic modification. Issues of self-determination must be addressed by reforms built on a foundation of tikanga Māori.¹¹¹

Essentially, the Tribunal's findings aligned with the Wai 262 claimants' argument that taonga species should not be used or exploited if it harms kaitiaki relationships, as recognised by MBIE.¹¹² However, the Tribunal weakened this conclusion by saying that the principle of tino rangatiratanga only justified protecting kaitiaki relationships to a reasonable degree.¹¹³ This was not what the Wai 262 claimants wanted, which was the right to veto any proposed use inconsistent with kaitiaki relationships, ownership in the genetic and biological resources of taonga species, or ownership in the whole living example of taonga species. For MMATS, the principle of tino rangatiratanga meant that kaitiaki had rights to acknowledgement, a reasonable degree of control and proper recognition of kaitiaki interests, but only in respect of commercial exploitation.¹¹⁴ This was again less than the Wai 262 claimants' claim to ownership in mātauranga Māori.

The Tribunal refused to translate kaitiaki interests into legal ownership in the genetic and biological resources of taonga species and in MMATS, because these interests are not equivalent to legal ownership as understood in te ao Pākehā. However, ownership was seen by the claimants as the only way for kaitiaki to exercise the level of control demanded by kaitiakitanga and the right to develop mātauranga Māori within the IP rights system.¹¹⁵ The Tribunal did not make recommendations beyond existing legal regimes, nor recommend reforms that would address the Wai 262 claimants' concerns as far as possible within te ao Pākehā. While eschewing the English text of full exclusive and undisturbed possession, and focusing on the Māori text of tino rangatiratanga, the

109 For an analysis of New Zealand's ability to implement the Tribunal's recommendations while complying with its international legal obligations, see Seamus Woods "Patents, PVRs and Pragmatism: Giving Effect to Wai 262" (2014) 19 *Canta* LR 97 at 103–112.

110 *Ko Aotearoa Tēnei*, above n 1, at 210.

111 Maui Solomon "Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities" in Mary Riley (ed) *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions* (AltaMira Press, Walnut Creek (CA), 2004) 221 at 240.

112 MBIE *Issues Paper*, above n 71, at [273].

113 *Ko Aotearoa Tēnei*, above n 1, at 193.

114 At 195.

115 Adcock, above n 12, at 503; and Interview with Moana Jackson, Ngāti Kahungunu and author of the original Wai 262 claim (Piripi Moore, Roma Marae, Ahipara, 1 July 2011) videos published on YouTube.

Tribunal denied Māori absolute authority over taonga species and MMATS,¹¹⁶ for the reason that full tino rangatiratanga was no longer practicable.¹¹⁷

The Tribunal thus reduced tino rangatiratanga to three levels of protection: autonomous decision-making power, shared decision-making power or partnership with the Crown, and influence through consultation on decisions that affect kaitiaki relationships.¹¹⁸ Following the Tribunal's recommendations, Māori would rarely have full decision-making power over taonga species and MMATS.¹¹⁹ For this reason and others, the recommendations have been criticised as too pragmatic and unambitious.¹²⁰ The weakening of Māori control through the Tribunal's general approach and its reliance on Māori advisory committees, and the gaps left behind by the Tribunal's recommendations, are discussed in more detail below.

A The weakening of Māori control through the Tribunal's general approach

An optimistic view of the Tribunal's general approach to the protection of MMATS is that it is a start, something that Māori can work with.¹²¹ *Ko Aotearoa Tēnei* may be read as suggesting that the guarantee of tino rangatiratanga in Te Tiriti obliges the default position to be that full decision-making power in relation to taonga katoa (all treasures) rests with Māori, even though other interests may need to be balanced against kaitiaki interests.¹²² However, a deep source of disappointment for the claimants was that without the level of control which comes with ownership, Māori are unable to be kaitiaki, because kaitiakitanga is part of tino rangatiratanga and depends on it.¹²³ The emphasis that the Tribunal placed on giving kaitiaki sufficient control to protect kaitiaki relationships without recognising ownership is “illogical and culturally flawed”.¹²⁴ This facilitates the reduction of tino rangatiratanga to lesser levels of control down “a vague sliding scale, and subject to competing interests”.¹²⁵

One of the Tribunal's justifications for not recognising ownership in MMATS—despite accepting that Māori created mātauranga Māori—was that ownership denotes exclusive rights. The Tribunal was concerned that having ownership of mātauranga Māori would result in the clawing back of all uses of mātauranga Māori, including in education, and prevent non-kaitiaki from learning about and experiencing te ao Māori.¹²⁶ I said in Part III that the bundle of exclusive rights accompanying ownership in the IP rights system does

116 David Williams “*Ko Aotearoa Tenei*. Law and Policy Affecting Maori Culture and Identity” (2013) 20 IJCP 311 at 318.

117 *Te Taumata Tuatahi*, above n 1, at 24.

118 Williams, above n 116, at 319; and Carwyn Jones “Wai 262 — The Tribunal's general approach” (4 July 2011) Ahi-kā-roa <ahikaroa.wordpress.com>.

119 Adcock, above n 12, at 508; and Williams, above n 116, at 319.

120 Adcock, above n 12, at 508; and Williams, above n 116, at 322–323.

121 Jackson, above n 115; Interview with Haami Piripi, Te Rarawa (Piripi Moore, Roma Marae, Ahipara, 1 July 2011) videos published on YouTube; and Interview with Leo Watson, Lead Counsel for the Wai 262 claim (Piripi Moore, Roma Marae, Ahipara, 1 July 2011) videos published on YouTube.

122 Jones, above n 118. Contrast Adcock, above n 12, at 509–510, which disagrees with this assessment.

123 Jackson, above n 115; and Rahui Katene “Maori should dare to take the leap of faith in planning for survival” (12 July 2011) Stuff <www.stuff.co.nz>.

124 Jackson, above n 115.

125 Adcock, above n 12, at 511.

126 *Ko Aotearoa Tēnei*, above n 1, at 194–195.

not match kaitiaki interests in ensuring that present and future generations are able to enjoy mātauranga Māori. However, ownership is the closest thing to kaitiaki interests within the IP rights system. The effect of recognising ownership in mātauranga Māori would not be to put it back into some kind of sacred box, as the Tribunal imagined.¹²⁷ The Māori value of manaakitanga (hospitality) imposes an obligation to share what one has. Successive witnesses for the Wai 262 claimants had given evidence that they would share their taonga species and MMATS, provided that their tino rantagatiratanga in respect of these taonga is acknowledged.¹²⁸

What is required is a sui generis regime that recognises property-like rights in taonga species and MMATS, and governs these “property” in accordance with tikanga Māori. This adheres to the concept of IP only as far as it recognises that kaitiaki have absolute authority over access and use of taonga species and MMATS. Sharing of these taonga should be governed by tikanga Māori, rather than the notion of the public domain. Any sui generis regime for the protection of MMATS needs to interface with the IP regime so that the two regimes do not conflict with each other.¹²⁹ The scope of any potential sui generis regime is discussed later in this article. For now, it is sufficient to say that the Tribunal was too fixated on the implications of ownership as understood in te ao Pākehā, and failed to accord Māori the ownership-like level of control necessary to protect kaitiaki relationships.

If it is not possible for kaitiaki to own taonga species and MMATS, the level of control that comes with ownership, being exclusive power to regulate use, must be provided by the creation of a sui generis regime that establishes a new type of right.¹³⁰ The creation of a sui generis regime is implied by art 31(1) of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration).¹³¹ This asserts the right of Indigenous peoples to:¹³²

... maintain, control, protect and develop their cultural heritage, traditional knowledge and ... the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of flora and fauna ...

Notably, ownership is not listed as a right in relation to the resources listed in art 31(1) of the Declaration. While the Declaration is not binding, it is the most supported and comprehensive legal instrument on the rights of Indigenous peoples, and is consistent with and relevant to the interpretation of the principles of Te Tiriti.¹³³

127 At 195.

128 Solomon and others, above n 8, at [40].

129 Susy Frankel *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2011) at 152; and Susy Frankel “A New Zealand perspective on the protection of mātauranga Māori (traditional knowledge)” in Christoph Graber, Karolina Kuprecht and Jessica Lai (eds) *International Trade in Indigenous Cultural Heritage: Legal Policy and Issues* (Edward Elgar Publishing, Cheltenham (UK), 2012) 439 at 453–454.

130 Lai, above n 10, at 298; and Valmaine Toki “Tikanga Māori — a traditional knowledge system” in Natalie P Stoianoff (ed) *Indigenous Knowledge Forum — Comparative Systems for Recognising and Protecting Indigenous Knowledge and Culture* (LexisNexis Butterworths, Chatswood (NSW), 2017) 457 at 478.

131 Alexandra Xanthaki “Indigenous Rights in International Law over the Last 10 Years and Future Developments” (2009) 10 *Melbourne Journal of International Law* 27 at 31.

132 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), art 31(1).

133 Claire Charters “Use It or Lose It: The Value of Using the Declaration on the Rights of Indigenous Peoples in Māori Legal and Political Claims” in Andrew Erueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017) 137 at 142–150.

The right in art 31(1) is strong but different to ownership.¹³⁴ It does not connote the exclusive right to possess, while preserving the exclusive right to regulate use. This is more consistent with kaitiaki interests than the ownership model. However, the Wai 262 claimants made claims to ownership precisely because kaitiakitanga was being disregarded until Māori translated kaitiaki interests into forms of property.¹³⁵ This was evidently necessary in the Wai 262 claim, considering that the Tribunal did not create a sui generis regime which establishes a new type of right, despite being confronted with the issue.

The Tribunal's recommendations have been characterised as sui generis rights in the sense that they create Māori rights to participate in decision-making on matters that affect kaitiaki interests.¹³⁶ However, these rights which are capable of operating within the existing regimes of bioprospecting, genetic modification and IP do not create a sui generis regime.¹³⁷ They do not establish a new type of right, such as patents or PVRs, which may be governed by tikanga Māori. Until this occurs, Māori cannot realise their right to “maintain, control, protect and develop” mātauranga Māori because the key is that it must be Māori who develop the system of protection, based on tikanga Māori.¹³⁸ The starting point should be the recognition that Māori have full tino rangatiratanga over taonga species and MMATS.¹³⁹ The focus would then be on how these taonga may be protected in partnership with the Crown within te ao Māori.¹⁴⁰

B The weakening of Māori control through reliance on Advisory Committees

The Tribunal recommended expanding the role of the Māori committee or creating a Māori committee in each of the bioprospecting, genetic modification and IP regimes. The Tribunal was satisfied with an advisory role for Ngā Kaihautū—the Māori Advisory Committee which provides advice to what is now the EPA—and the Māori advisory committee for patents. However, it recommended that those committees be able to advise the EPA or Commissioner of Patents as they deem appropriate. Considering the difficult task of monitoring patent applications,¹⁴¹ the Māori advisory committee for patents needs

134 Lai, above n 10, at 298.

135 Solomon, above n 5, at 354.

136 Lai, above n 10, at 299. See also Frankel “A New Zealand perspective on the protection of mātauranga Māori (traditional knowledge)”, above n 129, at 454.

137 Adcock, above n 12, at 512.

138 See evidence of Mason Durie as cited in Solomon and others, above n 8, at [262]; and Solomon, above n 111, at 249. Lai, above n 10, at 299 comes to a different conclusion that the sui generis rights recommended by the Tribunal “would establish a non-ownership means by which Māori could realise their right to ‘maintain, control, protect and develop’ their cultural heritage”. But, as discussed, the Tribunal's recommendations do not allow Māori to exercise the level of control necessary to be kaitiaki.

139 See Annie Mikaere “Collective Rights and Gender Issues: A Maori Woman's Perspective” in Nin Thomas (ed) *Collective Human Rights of Pacific Peoples* (International Research Unit for Maori and Indigenous Education, Auckland, 1999) 79 at 82 on the need for the starting point to be the recognition that Māori have an inherent collective right to self-determination which was reaffirmed in the Declaration of Independence and the Te Tiriti guarantee of tino rangatiratanga.

140 Toki, above n 130, at 477.

141 From 1 July 2018 to 30 June 2019, there were 6,301 patent applications in New Zealand, not including provisional applications. See Intellectual Property Office of New Zealand “Facts and Figures” <www.iponz.govt.nz>.

administrative support to have its own investigative capacity.¹⁴² Despite recognising this, the Tribunal did not expressly recommend that the Māori advisory committee for patents have an executive unit, as it did for the commission on taonga works.¹⁴³

According to the Tribunal's recommendations, only pātaka komiti—regional panels of local iwi representatives—should have shared decision-making authority for bioprospecting applications within the conservation estate.¹⁴⁴ Unusually, however, the Tribunal recommended that Ngā Kaihautū have power to appoint at least two of its members to the EPA itself.¹⁴⁵ This would accord Ngā Kaihautū a diminished shared decision-making role, as the EPA is made up of six to eight members, at least one of whom must have knowledge and experience of Te Tiriti and tikanga Māori.¹⁴⁶ It is unclear whether the Tribunal intended the two Ngā Kaihautū appointees to be additional to the six to eight members. In any case, representatives of Māori interests may constitute less than half of the EPA.¹⁴⁷

Another point of uncertainty in the Tribunal's recommendations is the circumstances in which the chairperson of the Māori advisory committee for patents may sit jointly with the Commissioner of Patents. The Tribunal said that this should happen when the Commissioner is making a decision on an issue of tikanga Māori, apparently in addition to the requirement that the Commissioner take formal advice from the Māori advisory committee when considering applications that raise Māori issues.¹⁴⁸ The Tribunal did not elaborate further. It seems that the chairperson of the Māori advisory committee would, as the voice of the committee, have shared decision-making authority as the Commissioner sees fit, because it is the Commissioner's discretion to decide whether an application requires deciding on an issue of tikanga Māori.

The overall problem with Māori committees is that, historically, their advice tends to be ignored.¹⁴⁹ In 2011, the Special Rapporteur on the rights of indigenous peoples reported that consultation procedures with Māori had been applied inconsistently and were not always in accordance with tikanga Māori.¹⁵⁰ In 2018, the Committee on Economic, Social and Cultural Rights continued to observe that limited efforts have been made to ensure meaningful Māori participation in decision-making where it impacts on their rights.¹⁵¹ Māori committees could be viewed as a step towards advancing the partnership between Māori and the Crown, and the interface between tikanga Māori and Pākehā law.¹⁵² However, effective partnership demands shared decision-making on matters that affect Māori interests, not a one-sided relationship in which the Crown merely consults

142 *Ko Aotearoa Tēnei*, above n 1, at 200.

143 Lai, above n 10, at 267.

144 *Ko Aotearoa Tēnei*, above n 1, at 198.

145 At 199.

146 Environmental Protection Authority Act 2011, s 9.

147 Lai, above n 10, at 263 says that three Māori perspectives amongst eight to ten members would not be a poor showing.

148 *Ko Aotearoa Tēnei*, above n 1, at 201.

149 Jackson, above n 115.

150 James Anaya *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of Maori people in New Zealand* UN Doc A/HRC/18/35/Add.4 (31 May 2011) at [21].

151 Committee on Economic, Social and Cultural Rights *Concluding observations on the fourth periodic report of New Zealand* UN Doc E/C.12/NZL/CO/4 (1 May 2018) at [8].

152 See Pat Hohepa and David V Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at [141], where Williams talks about the interface between tikanga Māori and general (Pākehā) law.

and then does what it pleases.¹⁵³ Moreover, Māori should have autonomous decision-making power over their taonga under Te Tiriti, which guarantees tino rangatiratanga over taonga katoa. This extends to Māori issues,¹⁵⁴ by which I mean issues relating to taonga, including mātauranga Māori and tikanga Māori. Specifically, within te ao Māori, it is kaitiaki who should have autonomous decision-making power over their taonga. To make clear the distinction between what is subject to tino rangatiratanga versus what is subject to the principle of partnership, it is worth stating that tino rangatiratanga is guaranteed under Te Tiriti for all taonga, while partnership extends to all matters that affect Māori interests, not only in relation to taonga.

The Tribunal recommended joint decision-making in limited situations: when making a decision on bioprospecting applications within the conservation estate, and when making a decision on an issue of tikanga Māori within the context of patents. In particular, the latter is supposed to be within the guarantee of tino rangatiratanga. Furthermore, the definition of issues as Māori and therefore subject to tikanga Māori, or as general and therefore subject to the principle of partnership,¹⁵⁵ is assumed to be within the sole discretion of the Commissioner of Patents. This results in an imbalance of power. In addition, the Tribunal did not recommend reforms as to how Ngā Kaihautū and the Māori advisory committee for patents are appointed. Currently, the EPA appoints Ngā Kaihautū,¹⁵⁶ and the Commissioner of Patents appoints the Māori advisory committee for patents.¹⁵⁷ Thus, the Tribunal's recommendations on advisory committees, although intended to increase Māori involvement in decision-making on matters that affect Māori interests, only provide for minimal Māori input. They do not give Māori the absolute authority over taonga guaranteed under Te Tiriti.

C *The gaps left by the Tribunal's recommendations*

The weakening of Māori control over taonga species and MMATS—especially the failure to accord Māori full exercise of their tino rangatiratanga by recognising ownership or creating a new type of right—leaves many situations where kaitiaki relationships may not be protected. For example, although lack of proper recognition of kaitiaki interests in MMATS or undue interference with kaitiaki relationships may prevent the grant of patents or PVRs, it may not prevent commercial exploitation of the invention or plant variety. Patents and PVRs are a form of protection for their holders, not a requirement for exploitation.¹⁵⁸

Additionally, the number of situations in which patents may be refused on the ground of *ordre public* may be fewer than what the Tribunal intended in practice, even if an explicit power to reject patents for inconsistency with kaitiaki relationships were implemented. This is because the wording of the grounds for excluding patentability under s 15 of the Patents Act 2013 may be interpreted as only permitting the refusal of a patent where the commercial exploitation of the invention is contrary to *ordre public* or morality. Refusal of

153 Solomon and others, above n 8, at [39].

154 EM McLeay “Two Steps Forward, Two Steps Back: Maori Devolution, Maori Advisory Committees and Maori Representation” (1991) 43 Political Science 30 at 33–34.

155 At 46, McLeay identifies the defining of exclusively Māori issues and general issues as the major obstacle in ensuring just political representation for Māori, because insufficient definition causes political conflict between Māori and non-Māori decision-making structures.

156 Environmental Protection Authority Act 2011, s 18.

157 Patents Act 2013, s 225.

158 Adcock, above n 12, at 514; and Doug Calhoun “Intellectual Property and Human Rights: Does the Wai 262 Report Accommodate Both?” (2011) 6 NZIPJ 821 at 823.

a patent may not be permitted where the granting of the patent is contrary to *ordre public* or morality but the exploitation of the invention is not objectionable.¹⁵⁹ One could therefore imagine a situation where a patent that excludes kaitiaki from exploiting MMATS is granted to a third party because the exploitation of the mātauranga Māori itself is not contrary to *ordre public* or morality.

The Tribunal's finding that previously published mātauranga Māori could not be clawed back opens another significant gap in protection, because much MMATS has been published. An example recognised by the Tribunal is Murdoch Riley's book, *Māori Healing and Herbal: New Zealand Ethnobotanical Sourcebook*,¹⁶⁰ which contains "a wealth of mātauranga Māori in respect of many taonga species".¹⁶¹ As explained above, it would not be as difficult as the Tribunal imagined to recognise ownership in mātauranga Māori because it would be subject to manaakitanga or the duty to share what one has. Furthermore, the lack of protection for mātauranga Māori that has been published or entered the public domain does not sit well with art 11(2) of the Declaration, which recognises Indigenous peoples' right to redress for "their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs".

It is arguable that art 11(2) of the Declaration only requires redress for "property" as understood within te ao Pākehā.¹⁶² It may not require redress for interests not equivalent to legal property. But the Tribunal's recommendations still run into issues because the Tribunal denied protection for MMATS that was published without kaitiaki consent, even where such mātauranga Māori could have met the requirements of patentability. Furthermore, nothing in the Declaration prevents States from providing redress wider than the scope of art 11(2),¹⁶³ especially where such redress is guaranteed by another instrument, in this case Te Tiriti. The Tribunal also did not address the possibility of taking a nuanced approach to the public domain.¹⁶⁴ For example, the public domain may be seen as having multiple dimensions with differing boundaries so that the use of mātauranga Māori that is in the public domain may still be regulated.¹⁶⁵

The Tribunal's refusal to mandate ABS may perhaps leave the biggest gap in protection and a great deal of uncertainty for patent and PVR applicants. For example, ABS on the basis of PIC would address the problem of relying upon defensive measures to prevent the grant of patents or PVRs, that defensive measures would not prevent commercial exploitation of the invention or PVRs. The ABS regime should require mutually agreed terms prior to access. However, the Tribunal rejected a blanket requirement of ABS on the basis of PIC for bioprospecting applications within the conservation estate. It did not recommend reforms for bioprospecting outside the conservation estate, instead relying on the benchmarking effect of a bioprospecting regime within the conservation estate. The

159 Nowak, above n 99, at 38.

160 Murdoch Riley *Māori Healing and Herbal: New Zealand Ethnobotanical Sourcebook* (Viking Sevensseas, Paraparaumu, 1994).

161 *Ko Aotearoa Tēnei*, above n 1, at 178.

162 Lai, above n 10, at 296–300.

163 At 299.

164 Adcock, above n 12, at 513.

165 At 513. For an argument in support of a nuanced conception of the public domain, see Susy Frankel and Megan Richardson "Cultural Property and 'the Public Domain': Case Studies from New Zealand and Australia" in Christoph Antons *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International, Alphen aan den Rijn (The Netherlands), 2009) 275.

Tribunal reasoned that the conservation estate is large and biodiverse, and that the bioprospecting regime within the conservation estate would operate alongside the Tribunal's recommended reforms in relation to patents and PVRs.¹⁶⁶

The Tribunal disregarded the Wai 262 claimants' specific concerns about the existing bioprospecting regime's failure to protect taonga species and mātauranga Māori beyond the conservation estate, and failure to deliver ABS.¹⁶⁷ As the Tribunal refused mandatory ABS at the bioprospecting stage, it also refused mandatory ABS at the patent and PVR application stage. The Tribunal left the protection of MMATS mostly to mechanisms to prevent the grant of patents or PVRs, particularly the *ordre public* ground for excluding patentability and the power to refuse PVRs for their potential effect on kaitiaki relationships. Not only is this inadequate to protect kaitiaki interests in taonga species and MMATS because it weakens Māori control and leaves gaps in protection, it generates great uncertainty in the research process. Patent and PVR applicants could have a fully developed product before being "caught out" by the *ordre public* provision or the Commissioner of PVRs' power to refuse a PVR.¹⁶⁸

The Tribunal rationalised this uncertainty by assuming that PIC and ABS would evolve naturally from the early engagement of kaitiaki, which would be encouraged by the disclosure requirement that it recommended.¹⁶⁹ If kaitiaki consent is obtained and an ABS arrangement is made, the risk of the Commissioner of Patents or Commissioner of PVRs refusing a patent or PVR, on the advice of the Māori committee, could be mitigated.¹⁷⁰ This assumes that the patent or PVR applicant is aware that their invention or plant variety is derived from the genetic and biological resources of taonga species, or MMATS. However, as the Tribunal recognised, there are kaitiaki interests in taonga species and MMATS that may not be known.¹⁷¹ It is for this reason that the Tribunal recommended a kaitiaki register to act as a form of notice to researchers or patent and PVR applicants.¹⁷²

At least some of the Wai 262 claimants took the view that databases of mātauranga Māori would not do much for preventing the piracy of mātauranga Māori.¹⁷³ To the contrary, they feared that databases would facilitate the misappropriation and misuse of mātauranga Māori, unless the register were confidential. Another difficulty is that kaitiaki may not want sacred kaitiaki relationships or mātauranga Māori to be published.¹⁷⁴ There is also concern internationally that catalogues of Indigenous peoples' cultural and intellectual heritage would encourage others to think that Indigenous peoples' heritage may be sold.¹⁷⁵ However, the register must be public to work as notice to potential researchers and applicants.¹⁷⁶ Thus, the Tribunal stated that the register would best address the needs of kaitiaki whose interests are in mātauranga Māori that is already in the public domain.¹⁷⁷ However, since the Tribunal had found that such mātauranga Māori could not be clawed back, the utility of registering it is unclear.

166 *Ko Aotearoa Tēnei*, above n 1, at 198.

167 At 155.

168 Woods, above n 109, at 121–123.

169 *Ko Aotearoa Tēnei*, above n 1, at 205.

170 Woods, above n 109, at 123.

171 *Ko Aotearoa Tēnei*, above n 1, at 202–203.

172 Nowak, above 99, at 39.

173 Solomon and others, above n 8, at [1009].

174 *Ko Aotearoa Tēnei*, above n 1, at 203.

175 Daes, above n 16, at [167]; and Daniel Gervais "Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach" [2005] *Mich St L Rev* 137 at 164–165.

176 *Ko Aotearoa Tēnei*, above n 1, at 203.

177 At 203.

Kaitiaki of secret mātauranga Māori are faced with a catch-22. They may keep their mātauranga Māori secret, and wait for it to be accessed or used without consent and to the detriment of kaitiaki relationships. Alternatively, they may register their interests in their mātauranga Māori, and wait for it to be accessed or used without consent and to the detriment of kaitiaki relationships anyway, until there is a chance to object at the stage of applying for patents and PVRs. Here, the critique of the Tribunal's recommendations comes full circle to the failure to recognise mātauranga Māori as giving rise to a system of rights itself. This would enable kaitiaki to exercise control over mātauranga Māori and receive the benefits of any commercial use.¹⁷⁸ It would confer positive protection,¹⁷⁹ rather than merely defensive measures.

VI The Advantages and Disadvantages of ABS Legislation

An ABS regime may be a way of introducing a new type of right to be governed by tikanga Māori. Internationally, ABS regimes have not been governed by Indigenous law,¹⁸⁰ but this does not have to be so. The key advantages of an ABS regime are better compliance with Te Tiriti, enforceability independent of the IP regime, and consistency with international efforts to reform legal frameworks to protect genetic resources and traditional knowledge. While the IP regime would remain mostly intact, an ABS regime could deliver the Māori control that the Wai 262 claimants sought if an evidence of ABS compliance requirement for patents and PVRs were also introduced. An ABS regime may also enable partnerships between Māori and research bodies, and confer positive ability to pursue third parties for remedies.

Certainly, there are disadvantages to ABS legislation. For example, it would be hard to implement and would fragment MMATS from taonga katoa. There would also be difficulties in ensuring that kaitiaki are fully informed on what the researcher proposes to do, locating the relevant kaitiaki, resolving conflicts between iwi or hāpu, and ensuring that the terms of ABS are equitable. However, these issues may partly be addressed if the ABS regime were governed by tikanga Māori. The advantages of an ABS regime outweigh the disadvantages. The Wai 262 claimants' concerns in relation to taonga species were focused on control over MMATS, including kaitiaki relationships with taonga species. Te Tiriti guarantees tino rangatiratanga. Therefore, the ABS regime should be developed by Māori, be based on tikanga Māori and have priority over the IP regime.

A The advantages of ABS legislation

(1) Better compliance with Te Tiriti

An ABS regime has the potential to deliver full tino rangatiratanga over taonga species and MMATS if it is governed by tikanga Māori and has priority over the IP regime. An ABS

178 Woods, above n 109, at 126.

179 At 125–127.

180 ABS legislation has tended to focus on preventing the free and abusive utilisation of genetic resources across provider and user countries, and the legal frameworks have sometimes been fragmented and ambiguous, requiring multiple PIC from different stakeholders on the basis of different laws. See Nicolas Pauchard "Access and Benefit Sharing under the Convention on Biological Diversity and Its Protocol: What Can Some Numbers Tell Us about the Effectiveness of the Regulatory Regime?" (2017) 6 Resources, Article 11 at 8.

regime based on tikanga Māori could allow kaitiaki to decide whether and how taonga species or MMATS could be used. To this end, the ABS regime should require that PIC be obtained prior to *accessing* taonga species or MMATS for any purpose, including mutually agreed terms on the conditions of access. It should further require PIC prior to *using* taonga species or MMATS for commercial or other purposes, and mutually agreed terms on the conditions of use and on benefit sharing. This would provide improved compliance with Te Tiriti and its guarantee of tino rangatiratanga. It would allow MMATS to be managed as an integrated whole and be governed by tikanga Māori. The ABS regime should apply regardless of where taonga species are—within or outside the conservation estate—and regardless of whether MMATS has entered the public domain.

The Tribunal's reasons for rejecting a blanket requirement of ABS for bioprospecting applications may be addressed if the ABS regime is based on tikanga Māori. It said that a blanket requirement of ABS assumes that every bioprospecting application would interfere with kaitiaki relationships, and therefore gives too much priority to kaitiaki interests.¹⁸¹ The answer to the Tribunal's problems is that ABS on the basis of PIC would only be required if a taonga species is concerned. The basic definition of taonga species is that they have kaitiaki. Therefore, every bioprospecting application that concerns a taonga species necessarily interferes with kaitiaki relationships. PIC should always be required. Whether it is appropriate to impose conditions on access and use, and to require benefit sharing, should be decided by kaitiaki in accordance with tikanga Māori. Although the Tribunal left open the possibility that PIC and ABS might be required in some cases, it did not elaborate on what, in its view, may necessitate PIC and ABS. The Tribunal's approach was intended to ensure that protection of kaitiaki relationships does not exceed what is justified under the second article of Te Tiriti.¹⁸² This is only tenable if tino rangatiratanga is reduced to something less than absolute authority, as the Tribunal did.

(2) Parallel regimes of tikanga Māori and Pākehā law

While I do not agree with the Tribunal's position that it is no longer practicable for Māori to have absolute authority over taonga species and MMATS,¹⁸³ I find it difficult to believe the reality of an alternate universe where te ao Māori exists in isolation from te ao Pākehā. Nor is this what the Wai 262 claimants were seeking. They recognised that mātauranga Māori and Te Tiriti are capable of evolving and adapting to new circumstances, and that they have a right to develop mātauranga Māori and receive the benefits of any commercial use.¹⁸⁴ The reality is that contemporary protection of mātauranga Māori must occur in the context of a multicultural and globalised Aotearoa New Zealand, and in light of the undeniable impact that Pākehā law has had on it.¹⁸⁵

181 *Ko Aotearoa Tēnei*, above n 1, at 199.

182 *Lai*, above n 10, at 261.

183 *Te Taumata Tuatahi*, above n 1, at 24.

184 *Ko Aotearoa Tēnei*, above n 1, at 70–71; and Solomon and others, above n 8, at [186], [190] and [308].

185 Fleur Te Aho “The Governance of Mātauranga Māori after *Ko Aotearoa Tēnei*” in Robert Joseph and Richard Benton (eds) *Māori Corporate Governance* (Thomson Reuters, Wellington, 2019) (forthcoming). Note that mātauranga Māori and traditional knowledge are used interchangeably in this chapter but the same argument would apply to mātauranga Māori in the broad sense. Te Aho argued for a governance framework that draws substantively upon both tikanga Māori and Pākehā law to protect mātauranga Māori, and ensures that tikanga Māori is not merely tacked on as an afterthought to Pākehā law.

In my view, it is desirable to have an ABS regime that runs parallel to the IP regime, as long as the ABS regime recognises full tino rangatiratanga over taonga species and MMATS, such that the IP regime is not engaged unless the conditions of the ABS regime are satisfied. This ensures that Māori have autonomous decision-making power over their taonga and their issues, while respecting the partnership between Māori and the Crown, and providing an interface between tikanga Māori and Pākehā law. In the patent disclosure of origin discussion document, MBIE indirectly recognised that any form of a disclosure requirement would result in some degree of better compliance with Te Tiriti.¹⁸⁶ Implementing an ABS regime governed by tikanga Māori would provide a greater level of compliance, as discussed above. Effectively, kaitiaki would decide whether and how taonga species or MMATS could be used. This would affect whether the Crown could grant patents or PVRs over that taonga species or MMATS. The matter of whether the traditional requirements of patentability or eligibility criteria for PVRs are met would be for the Crown to decide.

Parallel regimes of ABS governed under tikanga Māori and IP governed under Pākehā law may also encourage partnerships between Māori and non-Māori researchers to develop the genetic and biological resources of taonga species or MMATS into marketable products. While Māori might have the capacity to do so on their own, realistically, non-Māori research bodies are likely to be involved,¹⁸⁷ as is common internationally.¹⁸⁸ If the commercial value of the product were not protectable under the IP regime, the involvement of non-Māori research bodies may stagnate.¹⁸⁹ Therefore, having parallel regimes of tikanga Māori and Pākehā law is desirable to advance the partnership between Māori and the Crown, and to allow Māori to reap the benefits of Pākehā culture, which must exist alongside Māori culture. The proviso, to ensure tino rangatiratanga as guaranteed by Te Tiriti, is that tikanga Māori must take priority.

(3) Positive protection for mātauranga Māori associated with taonga species

An ABS regime could provide positive protection for MMATS. It would not only prevent third parties from obtaining IP rights by introducing a disclosure of ABS compliance requirement, but also allow kaitiaki to pursue remedies against third parties if MMATS is accessed or used without PIC or in breach of mutually agreed terms. This may provide recourse, for example, where taonga species or MMATS are commercially exploited without PIC, regardless of whether patents or PVRs are sought by the offender. Positive protection is required for Māori to exercise the level of control required for kaitiakitanga. Otherwise there would be no power behind their right to be kaitiaki over taonga species and MMATS.¹⁹⁰

The availability of positive protection raises an issue as to whether remedies for failure to comply with the ABS regime should be founded in tikanga Māori or Pākehā law. While it is desirable for the process of obtaining PIC and the mutually agreed terms to be in accordance with tikanga Māori, sanctions for non-compliance should refer to Pākehā law. For example, non-compliance could give rise to contractual remedies for breach of

186 MBIE *Discussion paper*, above n 73, at [95].

187 Woods, above n 109, at 126.

188 Oguamanam, above n 16, at 88–89.

189 Woods, above n 109, at 127.

190 At 127.

mutually agreed terms or some statutory tort for failure to obtain PIC.¹⁹¹ The reason for reference to Pākehā law is that tikanga Māori is values-based, rather than rules-based. It is a legal system enforced by “community-backed sanctions for actions that cause serious imbalance”, rather than being enforced by a centralised entity.¹⁹² A legal system that depends upon the actors following what is morally appropriate, and upon the mana (prestige) of the actors, may only provide effective regulation if everyone in the society believes in the values underpinning the system. This is not the case in Aotearoa New Zealand, as te ao Māori exists alongside te ao Pākehā. Because the values of tikanga Māori must be understood as part of mātauranga Māori, and the histories and lived experiences of iwi and hāpu,¹⁹³ the legal system’s function of regulating behaviour might not be effectively performed if remedies for non-compliance with the ABS regime are founded exclusively in tikanga Māori, because Māori are a minority.

(4) Consistency with international efforts to reform legal frameworks for the protection of genetic resources and traditional knowledge

There are efforts at the international level to develop measures to protect genetic resources and traditional knowledge associated with genetic resources. These efforts are led primarily by the Convention on Biological Diversity (CBD),¹⁹⁴ although continuous work has also been done by the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).¹⁹⁵ New Zealand is one of 196 parties to the CBD and one of 193 members of WIPO.¹⁹⁶ The well-advanced stance in these forums is that PIC and ABS are crucial to prevent misappropriation of genetic resources and traditional knowledge associated with genetic resources.¹⁹⁷ Enacting an ABS regime and introducing a disclosure of ABS compliance requirement for patents and PVRs would bring New Zealand into compliance with the CBD and be consistent with the negotiations in the IGC.¹⁹⁸

One of the CBD’s key objectives is the fair and equitable sharing of benefits arising out of the utilisation of genetic resources.¹⁹⁹ This is inextricably linked with traditional knowledge associated with genetic resources, as evident in the Bonn Guidelines and confirmed in the

191 Gervais, above n 175, at 156 suggests a statutory tort against misappropriation of traditional knowledge.

192 Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 36.

193 Moana Jackson “Criminality and the Exclusion of Māori” (1990) 20(2) VUWLR 23, as cited in Jones, above n 192, at 37.

194 Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993).

195 World Intellectual Property Organisation “Intergovernmental Committee (IGC)” <www.wipo.int>.

196 Convention on Biological Diversity “List of Parties” <www.cbd.int>; and World Intellectual Property Organisation “Member States” <www.wipo.int>.

197 *Ko Aotearoa Tēnei*, above n 1, at 152.

198 For the latest draft articles by the IGC, see Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *The Protection of Traditional Knowledge: Draft Articles* UN Doc WIPO/GRTKF/IC/40/18 (19 June 2019) [IGC *Draft Articles*]; and Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *Consolidated Document Relating to Intellectual Property and Genetic Resources* UN Doc WIPO/GRTKF/IC/40/6 (9 April 2019) [IGC *Consolidated Document*].

199 Convention on Biological Diversity, art 1.

Nagoya Protocol.²⁰⁰ Article 15(7) of the CBD obliges each contracting party to take legislative, administrative or policy measures with the aim of sharing in a fair and equitable way the benefits arising from the utilisation of genetic resources with the party providing such resources. The principal provision dealing with traditional knowledge is art 8(j). It requires each party, subject to its national legislation, to encourage the equitable sharing of benefits arising from the utilisation of knowledge, innovation and practices of Indigenous and local communities.

The Tribunal found that the CBD requires New Zealand to establish an ABS regime for bioprospecting and, in doing so, to consider the interests of kaitiaki.²⁰¹ But while the wording of art 8(j) is weak, States that have enacted ABS legislation have tended to require PIC as a prerequisite for access and use of traditional knowledge.²⁰² Article 7 of the Nagoya Protocol specifically requires parties to take measures to ensure that PIC is obtained from Indigenous or local communities for access to traditional knowledge associated with genetic resources held by them, and to ensure that mutually agreed terms have been established. Article 5(5) requires measures for the sharing of benefits arising from the utilisation of such traditional knowledge in a fair and equitable way, on mutually agreed terms. Article 12(1) requires parties to take into account customary laws, community protocols and procedures of Indigenous and local communities when implementing their obligations under the Nagoya Protocol. Although New Zealand has not signed or ratified the Nagoya Protocol, the principles contained therein are relevant because it is part of the legal framework for implementing the CBD.²⁰³ Currently, the Nagoya Protocol has 123 parties.²⁰⁴ The Ministry of Foreign Affairs and Trade's website states that New Zealand is delaying a decision on whether to become a party to the Nagoya Protocol until it considers how to regulate the discovery and use of genetic resources and protect mātauranga Māori.²⁰⁵

Therefore, establishing an ABS regime based on tikanga Māori and that requires PIC and mutually agreed terms for access and use, including benefit sharing as appropriate, would bring New Zealand into total compliance with the CBD. MBIE has observed that implementing a disclosure requirement for patents without an ABS regime “would support New Zealand’s ability to meet its obligations under the CBD better than the status quo”, but a disclosure of ABS compliance requirement would provide the clearest link between patents and the CBD.²⁰⁶ Although MBIE preferred disclosure of source as an option to disclosure of ABS compliance, it noted that it would reconsider this preference if New

200 *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization* (Secretariat of the Convention on Biological Diversity, Montreal, 2002); and Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity (opened for signature 29 October 2010, entered into force 12 October 2014).

201 *Ko Aotearoa Tēnei*, above n 1, at 152.

202 Brendan Tobin “The Role of Customary Law and Practice in the Protection of Traditional Knowledge Related to Biological Diversity” in Christoph Antons (ed) *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International, Alphen aan den Rijn (The Netherlands), 2009) 127 at 130.

203 Tai Ahu, Amy Whetu and James Whetu “Mātauranga Māori and New Zealand’s intellectual property regime – challenges and opportunities since Wai 262” (2017) 8 NZIPJ 79 at 84.

204 Convention on Biological Diversity “Parties to the Nagoya Protocol” <www.cbd.int>.

205 Ministry of Foreign Affairs and Trade “Biodiversity and species conservation” <www.mfat.govt.nz>.

206 MBIE *Discussion paper*, above n 73, at [101].

Zealand were to implement an ABS regime.²⁰⁷ Without an ABS regime, a disclosure of ABS compliance requirement would mainly benefit foreign countries and Indigenous communities that have ABS regimes, rather than New Zealand and Māori.

An international standard for a disclosure requirement is being negotiated in the IGC and the World Trade Organisation Council for Trade-Related Aspects of Intellectual Property Rights. The IGC has taken the lead in international debate and has drafted provisions on the protection of traditional knowledge.²⁰⁸ There is considerable divergence of opinion on disclosure requirements,²⁰⁹ including the necessity of this type of provision and what form it should take.²¹⁰ Therefore, the Tribunal's comment that discussions on introducing protection for Indigenous interests "will crystallise into an enforceable international legal framework" is optimistic.²¹¹ Nevertheless, approximately 30 countries have adopted some kind of disclosure requirement,²¹² including a disclosure of ABS compliance requirement.²¹³

Domestic protection of MMATS is necessary in light of *Ko Aotearoa Tēnei*, Te Tiriti, the Declaration, the CBD and international debate in the IGC. However, international protection is also needed, since misappropriation of taonga species and MMATS is not limited to New Zealand territory. The implementation of an ABS regime mandating PIC and mutually agreed terms for access and use, including benefit sharing as appropriate, may offer some protection overseas if the user State's national laws require compliance with the provider State's ABS regime. This is not a purely idealistic concept. For example, Norway, under s 60 of its Nature Diversity Act 2009, requires imported genetic resources to be accessed in compliance with ABS provisions of the country of origin. The taking of measures by both user and provider States to support the objective of fair and equitable sharing of benefits was envisioned in the CBD and Nagoya Protocol. "The hope (however faint) may have to be that New Zealand will successfully model any new framework of protection to other nations."²¹⁴

B The disadvantages of ABS legislation

(1) Hard to implement

On a scale of how difficult it would be to implement measures to protect MMATS, the Tribunal's recommendations would fall towards the easy end. They are intended to operate within existing legal regimes. An ABS regime, which goes beyond existing legal regimes altogether, would be at the hard end. However, it would have greater potential to provide meaningful protection of MMATS because it goes beyond existing legal regimes.²¹⁵ Implementing a sui generis regime would require time and resources to make legal and

207 At [106].

208 At [47]–[48]; and Tobin, above n 202, at 135.

209 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, above n 36, at [39].

210 IGC *Draft Articles*, above n 198, Annex at 15–16; and IGC *Consolidated Document*, above n 198, Annex at 10–14.

211 *Ko Aotearoa Tēnei*, above n 1, at 206; and Lai, above n 10, at 273 says the Tribunal was arguably too optimistic.

212 MBIE *Discussion paper*, above n 73, at [29].

213 For example, Decision 391 — Common Regime on Access to Genetic Resources 1996 (Andean Community), second complementary provision.

214 Te Aho, above n 185.

215 Woods, above n 109, at 128.

policy changes, as well as political will.²¹⁶ It is difficult for many non-Māori to understand why mātauranga Māori should have perpetual protection, because it is consistent with Māori understanding of kaitiakitanga, but IP rights are premised on being limited in duration to balance the interests of researchers and rights-holders against public interests.²¹⁷ However, both changes to and beyond existing legal regimes are required if New Zealand is serious about protecting MMATS, and if it is to comply with its obligations under Te Tiriti and international law.

(2) Fragmentation of mātauranga Māori

By and large, mātauranga Māori is considered by Māori to be a seamless knowledge system—the Māori way of viewing the world. My argument for an ABS regime separates MMATS from mātauranga Māori associated with other taonga, such as taonga works, which are artistic and literary works. The Tribunal also separated taonga species from taonga works, reflecting the separation of traditional knowledge and traditional cultural expressions in international debate, such as in the IGC. Such separation is due to the lack of a conceptual and institutional framework capable of addressing Indigenous knowledge systems in an all-encompassing way.²¹⁸ This goes back to the fact that tikanga Māori is values-based and relies upon the entrenchment of those values into everyday life. Therefore, to avoid fragmentation of mātauranga Māori completely, there would need to be absolute tino rangatiratanga over taonga katoa, including lands, villages and other treasures, and sole governance of Aotearoa under tikanga Māori.

The ABS regime I recommend would carve out a sphere in which Māori could have tino rangatiratanga over MMATS. It offers more holistic protection than the Tribunal's recommendations. However, it needs to be implemented by legislation and enforceable by Pākehā law, for example in contract or tort. This is unavoidable because Māori culture exists alongside Pākehā culture. The challenge now is to develop mechanisms to secure compliance with tikanga Māori in a way that also secures legal certainty for both Māori and non-Māori.²¹⁹

(3) Issues that an ABS regime must address

There are a number of issues that may hinder the efficacy of an ABS regime. They include the potential that kaitiaki are not really informed before giving consent, locating the relevant kaitiaki to obtain PIC from, the potential of conflicts arising between iwi or hāpu, and ensuring that the mutually agreed terms of ABS are equitable, whatever equitable means.²²⁰ Some of these issues may be mitigated by building the capacity of kaitiaki. Other issues, like conflicts between iwi and hāpu, are primarily issues for Māori to resolve between themselves in accordance with tikanga Māori, for example at a hui (gathering) on the marae. If this does not resolve the conflict, an institutional framework for dispute

216 Lai, above n 10, at 201.

217 At 202–203.

218 Tobin, above n 202, at 128.

219 At 128.

220 Lai, above n 10, at 151–152.

resolution, such as a process to appoint a kaitakawaenga (mediator),²²¹ may be required. Any institutional framework should be developed by Māori and based on tikanga Māori. Therefore, the issues facing ABS regimes may partly be addressed if the ABS regime were governed by tikanga Māori.

C My recommendations

The disadvantages of an ABS regime—the difficulty of implementation, the fragmentation of mātauranga Māori and potential issues within the ABS regime—should not overshadow the advantages. An ABS regime could deliver better compliance with Te Tiriti, the Declaration and the CBD, and provide leverage for participation in ongoing international debate on protection of genetic resources and traditional knowledge. To these ends, I recommend an ABS regime that is governed by tikanga Māori, checked by an evidence of ABS compliance requirement that ensures that satisfaction of tikanga Māori is a precondition for IP rights. Sanctions for non-compliance should refer to Pākehā law so that kaitiaki can pursue remedies against Māori and non-Māori, and for effective guidance of behaviour in Aotearoa New Zealand.

VII Conclusion

Ko Aotearoa Tēnei provides a starting point in the discussion on the protection of MMATS in Aotearoa New Zealand. However, its recommendations fail to address the Wai 262 claimants' key concern, about loss of Māori control over MMATS. Control is necessary for kaitiakitanga and the right of Māori to develop mātauranga Māori and receive the benefits of any commercial use. The Tribunal approached the protection of MMATS as a matter of reforming existing legal regimes to protect kaitiaki relationships with taonga species and MMATS to some reasonable degree. The Tribunal refused to recognise ownership in the genetic and biological resources of taonga species and MMATS, because ownership was not equivalent to kaitiaki interests in these taonga. At the same time, it refused to recommend reforms outside of existing legal regimes to give Māori the full tino rangatiratanga guaranteed in the second article of Te Tiriti. Thus, the Tribunal reduced tino rangatiratanga to lesser levels of control to be determined in each case, generally by the Crown, with advice from Māori committees.

The protection that would be afforded to MMATS by the Tribunal's recommendations is piecemeal, because it shoehorns MMATS into existing legal regimes in te ao Pākehā, fragmenting it in the process. The Tribunal's recommendations leave many gaps in protection. These gaps include the inability to prevent commercial exploitation that interferes with kaitiaki relationships, the lack of any regulation for MMATS that has been published, the absence of a bioprospecting regime outside the conservation estate, and the uncertainty over whether ABS on the basis of PIC is required for bioprospecting applications within the conservation estate and for patent and PVR applications.

A new ABS regime, outside of existing legal regimes, would have greater potential to protect MMATS holistically, and to comply with New Zealand's obligations under Te Tiriti, the Declaration and the CBD. An ABS regime could protect kaitiaki relationships with

221 For example, in consultation leading up to the abandoned Te Ture Whenua Māori Bill 2016 (126), there was majority Māori support for a mediation process. See Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of the Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 235–237.

taonga species as part of MMATS as a whole. It should require PIC, and benefit sharing where appropriate, before access or use of taonga species and MMATS, regardless of whether the user goes on to seek patents and PVRs. However, an ABS regime would continue to fragment mātauranga Māori to some degree, since it would deal with MMATS and other taonga separately. Protection of mātauranga Māori without fragmentation would require full tino rangatiratanga over all taonga including lands, villages and other treasures, and the whole of Aotearoa to be governed by tikanga Māori.

To maximise the potential of an ABS regime, and to be consistent with tino rangatiratanga under Te Tiriti, the ABS regime should be governed by tikanga Māori and should be supported by a disclosure of ABS compliance requirement for patents and PVRs. This would mean that kaitiaki would decide whether and how taonga species or MMATS could be accessed or used in accordance with tikanga Māori. Once the requirements of tikanga Māori are satisfied, it would then be for the Crown to decide whether to grant patents or PVRs in accordance with Pākehā law. Having parallel regimes of tikanga Māori and Pākehā law is desirable because te ao Māori exists alongside te ao Pākehā, it reflects the principle of partnership between Māori and the Crown, and Māori should be able to reap the benefits of Pākehā culture, provided that tino rangatiratanga is guaranteed, through tikanga Māori being a prerequisite for the application of Pākehā law.

As I said at the outset, the New Zealand Government has not formally responded to *Ko Aotearoa Tēnei* in the eight years since its release. However, the Government has recently moved towards developing a formal response in the proposal of Te Pae Tawhiti. Therefore, the greatest disadvantage of an ABS regime so far has been the difficulty of implementation, due to the lack of political will. Te Pae Tawhiti appears to reflect an increase in political will, which is hopeful. Prior to Te Pae Tawhiti, the Government seemed to consider the Tribunal's recommendations in an ad hoc manner, for example in the 2018 PVRs Act review Issues Paper, the patent disclosure of origin discussion document and the Section 8I report on the Crown's progress in implementing Waitangi Tribunal recommendations. The hope is that if and when the approach to Te Pae Tawhiti is confirmed, and the Government gets to responding to *Ko Aotearoa Tēnei*, it will be serious about protecting MMATS and complying with its obligations under Te Tiriti and international law. *Ko Aotearoa Tenēi* can only be a starting point towards meeting those obligations.