Simpson Grierson

FYI

December 2011

INTELLECTUAL PROPERTY

WAI 262: PROTECTION OF TREASURED INTELLECTUAL PROPERTY

The report on the Wai 262 claim, released earlier this year by New Zealand's Waitangi Tribunal, includes a number of recommendations relating to intellectual property rights and treasured elements of Māori culture.

BACKGROUND OF WAI 262

The Wai 262 claim has run for over 20 years, and relates to the control and use of taonga (treasured works which are significant to Māori culture and identity), including taonga species of flora and fauna, and mātauranga Māori (traditional Māori knowledge and values). It also concerns traditional Māori roles such as kaitiaki (guardians) and their relationship with taonga.

WHAT THE TRIBUNAL FOUND

The Tribunal found that current laws are not designed to support the relationships of kaitiaki with taonga or mātauranga Māori. The Tribunal considered that the kaitiaki relationship with taonga species of flora and fauna requires a reasonable degree of protection, while taonga-derived works (works combining both taonga and pakeha elements, such as generic tiki) were considered by the Tribunal to require a more limited degree of protection. This is because taonga-derived works have no obvious kaitiaki and do not invoke the same degree of traditional stories or ancestry.

The Tribunal considers that the interests of kaitiaki in taonga are not absolute, and do not amount to rights of exclusive ownership. Rather, the interests of kaitiaki must be balanced with interests in the wider community, including the interests of intellectual property rights holders, the community's right of free access to information in the public domain, and the public good resulting from research relating to taonga species of flora and fauna. This balancing of various interests is reflected in the Tribunal's recommendations.

THE TRIBUNAL'S RECOMMENDATIONS

The Tribunal made a number of recommendations relating to intellectual property in taonga works and mātauranga Māori:

a. A system for objecting to use of taonga works, taonga-derived works and mātauranga Māori

The Tribunal recommends establishing a system allowing anyone (both Māori and non-Māori) to object to derogatory or offensive public use of taonga works, taonga-derived works or mātauranga Māori. The system would also allow kaitiaki to object to commercial use of taonga works (but not taonga-derived works) without kaitiaki consultation or consent where appropriate.

b. Establishment of a Commission

The Tribunal also recommends establishing a Commission to

replace the Trade Marks Advisory Committee, which currently advises the Commissioner of Trade Marks whether the proposed use or registration of a trade mark that appears to derive from a Māori word or image is likely to be offensive to Māori. The role of the Commission would be to consider, and make decisions on, objections relating to the offensive use of taonga works and the unauthorised use of taonga works for commercial purposes. The Commission would also maintain a registry of taonga works and kaitiaki. Persons proposing to use taonga could apply to the Commission for a declaration on whether their proposed use is permissible.

c. New principles for the involvement of kaitiaki in the commercial use of taonga

Once taonga works and their kaitiaki are identified, the Tribunal recommends developing guidelines for the involvement of kaitiaki in any commercial use of the taonga. For example, guidelines could indicate whether consultation and/or consent from kaitiaki is required for the proposed commercial use.

d. Establishment of a Māori advisory committee to advise on patent and plant variety right applications

The Tribunal recommends establishing a Māori advisory committee to advise the Commissioner of Patents regarding any mātauranga Māori which forms part of any patent application. Patent applicants would be required to disclose whether mātauranga Māori or taonga species of flora or fauna have contributed to the invention in any way.

The Tribunal also recommends enacting new legislation with the power to refuse a plant variety right application if it would adversely affect kaitiaki relationships with taonga species. The Māori advisory committee would advise the Commissioner of Plant Variety Rights in this respect so that the Commissioner, when making a decision, may balance the interests of kaitiaki with those of the applicant and the wider public.

INTERNATIONAL IMPLICATIONS

According to the Tribunal, implementing the recommendations would not constrain New Zealand's ability to protect intellectual property rights in accordance with international treaties to which New Zealand is a party.

The Tribunal's recommendations reflect recent efforts to develop international laws relating to indigenous culture. The World Intellectual Property Organisation (**WIPO**) draft provisions for the protection of traditional cultural expression/folklore and traditional knowledge and the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) both recognise and provide protection for indigenous cultures. The WIPO draft provisions are yet to be finalised, while New Zealand endorsed the non-binding UNDRIP in 2010.

Although implementation of the Tribunal's recommendations in New Zealand would not limit the use of taonga overseas, any proposed use of taonga overseas should still be considered carefully. For example, previous use of the haka in advertisements overseas has caused controversy which has been reported internationally.

IMPLEMENTING THE TRIBUNAL'S RECOMMENDATIONS

The Tribunal's recommendations are not themselves binding on the Crown. Implementation of any of the recommendations would likely be via new legislation. No timeframe for consideration of the Report has been released by the Crown.

Regardless of whether they are ultimately put into operation, the Tribunal's recommendations reinforce concern to safeguard taonga and mātauranga Māori. For businesses that use or intend to use features of Māori culture commercially, the Report highlights the desire for consultation with Māori where such use of taonga is contemplated.

Consultation with Māori has increasingly been part of positive business practice. An expectation that there will have been consultation with Māori prior to certain types of commercial use of taonga and mātauranga Māori may itself be getting closer to having legal teeth. In some cases, consultation with Māori may be expected, particularly if consultation has become standard practice in relation to particular taonga or mātauranga Māori. If this expectation of consultation can be shown, use without consultation could be misleading and deceptive conduct in trade, in breach of the Fair Trading Act 1986.

CONTACT DETAILS

EARL GRAY – PARTNER
T. 09 977 5002 **M.** 029 977 5002 **E.** earl.gray@simpsongrierson.com

RAYMOND SCOTT – SOLICITOR
T. 09 977 5061 **M.** 021 627 547 **E.** raymond.scott@simpsongrierson.com

A SIMPSON GRIERSON PUBLICATION