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**Strengthening Traditional Knowledge Systems
and Customary Law**

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**STRENGTHENING TRADITIONAL
KNOWLEDGE SYSTEMS AND
CUSTOMARY LAWS.**

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<i>Ko Te Rangaapene Te Maunga</i>	<i>(Te Rangaapene is my mountain)</i>
<i>Ko Te Awa Inganga Te Awa</i>	<i>(Te Awa Inganga is my river)</i>
<i>Ko Manukau Te Whenua Tapu</i>	<i>(Manukau is my sacred lands)</i>
<i>Ko Te Awapatiki Te Kopinga</i>	<i>(Te Awapatiki is the sacred meeting place)</i>
<i>Ko Te Kopinga Te Marae</i>	<i>(Te Kopinga is our meeting house)</i>
<i>Ko Rekohu Te Motu</i>	<i>(Chatham Islands is the island)</i>
<i>Ko Tame Horomona Rehe Te Rangatira</i>	<i>(Tommy Solomon is my grandfather)</i>
<i>Ko Rongomaiwhenua Te Karapuna</i>	<i>(Rongomaiwhenua was the founding ancestor on Rekohu)</i>
<i>Ko Moriori Te Iwi</i>	<i>(Moriori is my tribe)</i>
<i>Tihe Mauri Ora!</i>	<i>(I sneeze the breath of life)</i>
<i>Ko tenei te mihi ki a koutou, te hau kainga, nga tangata whenua o tenei motu. He mihi hoki ki a koutou katoa e huihui mai nei Tena koutou katoa</i>	<i>(Greetings to you the local Tangata Whenua (people of this land) and to other peoples present at this meeting)</i>

Introduction

1. In this paper I will address some of the essential conflicts between the existing intellectual property rights system (IPR) and the customary law systems of indigenous peoples and why IPR is undesirable as a mechanism for protecting knowledge of indigenous cultures. (In this paper I use the terms “indigenous peoples” and “indigenous cultures” to refer to indigenous, traditional and local peoples and their cultures). I focus in the main on the Maori and Moriori peoples and cultures of Aotearoa/New Zealand as these are the peoples with whom I am most familiar. I will also discuss the nature of indigenous custom law, the imposition of a mono-cultural legal/political system and its effects on Maori and some of the initiatives being made by Maori tribes to enhance and protect what remains of their traditional knowledge systems.
2. Although there are an incredibly diverse range and variety of indigenous cultures all over the world, each with their own history of colonisation and legal systems, there are, nevertheless, many threads of commonality that permeate most, if not all, indigenous cultures. For example their spiritual beliefs and the holistic way in which they view themselves as part of, and not superior to, the natural world in which they live.

3. Thus, whilst most of my comments and observations relate specifically to the New Zealand cultural context with which I am most familiar, there are obvious parallels to be drawn with many, if not most, indigenous cultures around the world.
4. Finally, and most important in the context of this paper, I will argue that priority needs to be given to the strengthening and development of existing customary law systems as it is these systems which reflect and nourish the underlying values of the relevant cultures and the corresponding biodiversity. The indigenous values of respect for the natural world have been major factors in the preservation and maintenance of biological diversity within most indigenous communities. If the values of the indigenous peoples are not respected and protected within the legal frameworks to be developed then there is a real risk that both cultural and biological diversity will be further and perhaps irrevocably endangered.

Intellectual Property Rights and Indigenous Peoples Rights

5. Western intellectual property rights are private individual rights. They evolved out of the Industrial Revolution to recognise and protect the legal and economic interests of private enterprise in relation to investment of intellectual and financial capital. By comparison indigenous peoples rights have evolved over many millennia as a result of the collective and individual efforts of closely connected kinship groups. By their nature indigenous peoples' rights are communal or collective rights. These communal systems acknowledges obligations to respect the *mauri* (inherent life force) of natural resources before they can be exploited by humans. Reciprocal obligations of respect for the spiritual integrity of the natural world are regarded as fundamental by indigenous cultures the world over.
6. The IPR system seeks to regulate and control rights of ownership and access to the means to create wealth. Indigenous cultures seek to understand and harmonise humankind's relationship with the natural world for their survival. The IPR system is protected and entrenched within the modern legal regimes of the world. Indigenous customary systems because of their (usually) collective nature, are generally unrecognised and unprotected within modern legal systems.
7. Whilst there may be some cases where IPR *may* be an appropriate mode of protection, these cases are the exception and not the rule. The main focus needs to be on strengthening existing customary laws and their underlying value systems, and not on adapting these systems to fit within the current IPR regime. Round pegs do not fit well within square holes.

Customary Laws : What are They?

8. What then are customary laws and how do they operate today?
9. Like most other indigenous peoples, Maori have a unique relationship with their natural world. They view themselves as part of and not dominant over their natural flora and fauna. The people, the land, the sea, the forest and all living creatures, are all members of the same family.
10. In the beginning was *Te Kore* or total darkness. There was no life, only potential. *Papatuanuku*, the Earth Mother and *Ranginui*, the Sky Father were locked together in an embrace which stifled all growth. Their children, desperate for light, devised a plan to forcibly separate their parents. This job fell on the shoulders (literally) of one of the children, *Tane Mahuta*, God of the Forests. Binding to his mother below, he pushed upwards with his legs with all his strength and pushed his father apart from the earth.
11. Into the light created between *Papatuanuku* and *Ranginui* sprang the raging winds of *Tawhirimatea* (God of the Winds), the swirling seas of *Tangaroa* (God of the Sea) and all his progeny, the towering forests of *Tane Mahuta* and all his progeny and the varieties of cultivated and uncultivated crops. *Tane Mahuta* fashioned the first
12. human, *Hine-ahu-one* from the clay of his mother. He slept with her and begat a daughter, *Hinetitama*. With *Hinetitama*, *Tane* begat other children. Discovering her father and lover were the same, *Hinetitama* fled to the underworld, where she lives still in the name of *Hine nui ite po*. The spiritual home of Maori, the home of their gods and of creation is known as:
13. The Maori name for indigenous peoples is *Tangata Whenua*. This literally means “peoples of the land”. My own Moriori people of *Rekohu* claim to have sprung from the earth (no ro whenua ake). Legends tell of different waka or canoes arriving on *Rekohu* and *Aotearoa* from *Hawaiiiki* in various migrations from about 900 AD. They named every landmark, stream, rock, mountain and other natural feature in the landscape, including the flora and fauna they found there. Maori regard themselves as one with their natural world. Maori have a direct *whakapapa* or genealogical connection to the land through their ancestress *Papatuanuku*, the Earth Mother; to the sea and its marine creatures through their ancestor *Tangaroa*; to the forest and all its inhabitants through their ancestor *Tane Mahuta* and to the heavens and all of its celestial domain through their ancestral Sky Father, *Ranginui*.
14. During a period of 1,000 years occupation of *Aotearoa*, the ancestors of the Maori developed complex rituals , protocols and laws for regulating behaviour between themselves and the environment in which they lived. Essential to this relationship was respect for the spiritual integrity and *mauri* of the resources upon which they depended for their survival. Without first showing respect for the creator gods and

the various guardians of the lands and waters, they and their families would not in turn be protected or provided with the physical and spiritual sustenance these resources had to offer.

15. As one environmental commentator has noted: *“A philosophy of respect for mauri involves understanding the nature of each creature and ecosystems, understanding their distinctive qualities, understanding what makes them of value to one another, and learning to respect them for what they are. If we manage to do all that, chances are we will have a good environmental philosophy. Although there is more than one way of expressing in Maori the idea that the natural world must be respected, the concepts involved are not independent. The idea of life force or mauri, for example, might not on its own seem to offer an outsider a compelling reason for respecting other creatures. It may not be until we realise that our mauri are interconnected with the mauri of all other creatures that we see the importance, to us, of treating them with respect. That is, the ideas of ‘mauri’ and ‘kinship’ can be employed together, in a Maori-based environmental philosophy.”*¹

16. This indigenous cultural belief system or environmental philosophy is quite at odds with the western capitalist system in which resources are primarily seen as objects for human exploitation. The former is more concerned with ensuring that resources are utilised in a way that protects them for future posterity. The western capitalist system is more concerned with ensuring that resources are utilised for present and future prosperity. A balance of these two systems is needed

17. But the Maori world was not a perfect one. Like all cultures, mistakes were made by Maori in their interaction with their environment. Some species such as the large flightless Moa bird found by Maori on their arrival in Aotearoa, was hunted to extinction. Lessons learnt were incorporated into customary practices. Thus, as populations grew and pressures became intense on scarce resources, *rahui* or prohibitions on the taking of certain species at certain times of the year, became common place. Homage was also paid to the spiritual guardians of the land, the sea and the forests. In order for Maori to survive and prosper from the land and sea, they had first to acknowledge and respect the deities and the Gods of those places. Ritual *karakia* or blessings were spoken and permission sought before cutting down a tree for canoe building or taking fish from the sea to feed their families.

18. This reciprocity of respect and caring between the people and their creator gods was central to the relationship. By demonstrating caring and respect for the *kaitiaki* or ancient guardians, they in turn would ensure that the needs of the people were satisfied. There were rights to access and utilise resources within a tribal territory but only after observing the ritual obligations of reciprocity and respect.

¹ John Patterson, *People of the Land: A Pacific Philosophy*, Dunmore Press Limited, Palmerston North, New Zealand (pages 69-70)

19. Maori society was essentially communal by nature with property rights centred within and exercised by *whanau*(extended families) and *hapu*(sub-tribes), all based on tribal *whakapapa* or *genealogical* connection . In times of war or other political upheaval, the hapu would form themselves into larger alliances called *Iwi*. The concept of land ownership was foreign to Maori, rather , they had communal use rights and retained the *mana* (power/prestige/authority) to exclude others from it. Decision making was usually vested in those with hereditary chiefly authority but that authority was not absolute. Decisions had to reflect the will of the people and there was long and vigorous debate on the marae (traditional meeting place), before important decisions were taken.

Suppression of Customary Law Systems

20. The active destruction and dismantling of indigenous systems of customary law have followed a common pattern wherever colonisation has occurred around the world. The system of Parliamentary representation imposed on Maori after 1840 was based on the mono-cultural dominance of British constitutionalism. From 1856-1868, Maori representation was at the pleasure of the Governor. In 1868, Maori were represented through four seats in the Parliament (increased to five seats only in the 1999 election), and powerless to prevent the framing of legislation and policies which continued the confiscations of land and ignored the aspirations of Maori.
21. By 1877, in the infamous case of *Wi Parata v The Bishop of Wellington*, Chief Justice Prendergrast declared the Treaty of Waitangi to be a “simple nullity”. He could not accept that Maori had “any kind of civil government” or “any settled system of law”, and certainly were not capable of entering into an international Treaty. In 1901, the Privy Council in *Nireaha Tamaki v Baker* rejected the argument that “there is no customary law of the Maori of which the Courts can take cognisance”. But any cognisance that was taken was in the context of the all-encompassing assumptions of the British common law, where Maori customary law is treated as analogous to “local custom” in England. The custom is easily supplanted by statute, and is usually only given recognition where the relevant statute specifically requires it to do so. Being politically powerless to influence the law making process, Maori customary law and practices were marginalised.

Renaissance of Indigenous Rights

22. The last two decades have witnessed a revival and reassertion by Indigenous Peoples worldwide of their customary rights both at the local and international levels. Work by Indigenous Peoples and others on the United Nations Draft Declaration on the Rights of Indigenous Peoples has been instrumental in raising international awareness of indigenous rights issues. The growing recognition by developed countries that the preservation of cultural diversity is inextricably linked to the preservation of biological diversity,has also been a vital factor. Lobbying by Indigenous Peoples (and support from certain State Parties) at the

Earth Summit in Rio de Janeiro in 1992, resulted in the inclusion of Article 8(j) and other provisions into the Convention on Biological Diversity

23. Increasing the effective participation of Indigenous Peoples at all levels within the UN system will be vital to the successful implementation of provisions such as Article 8j and related provisions of the CBD. Adequate resources need to be made available by States, UN organisations and international agencies to ensure this participation takes place. And by effective participation, I don't just mean being consulted and being left out of the final decision making process. That's not a remedy for finding long term solutions. If States and UN agencies are committed to finding durable solutions in relation to recognition and protection of traditional knowledge systems and customary laws, then they need to talk *with* and not just *about*, indigenous peoples.
24. International bodies such as the International Society of Ethnobiologists(ISE), which provides an open forum for direct debate and dialogue between indigenous peoples and the scientific community, are extremely valuable for building understanding and dialogue between indigenous and non-indigenous peoples.
25. The Code of Ethics developed and adopted by the ISE over a period of 12 years and finally adopted in Aotearoa/New Zealand by the ISE in 1998, calls for respect and strengthening of indigenous cultural systems by researchers of traditional knowledge. The code includes recognition by researchers of the principles of self determination, prior informed consent, active protection of cultural systems and equitable benefit sharing. The code has been used by indigenous groups and research institutions alike to defend their positions in relation to the research of traditional botanical knowledge, including the proposed research project by the Maya ICBG in Chiapas, Mexico. The code is an important watershed in the recognition and protection of traditional knowledge in the increasing haste to gain access too and commercialise traditional knowledge of genetic resources.
26. At the local State level, indigenous groups have also been very active in reasserting their rights. In Aotearoa/New Zealand, much progress has been made over the 15 or so years, mainly as consequence of long and hard fought legal and political battles. These case have resulted in Maori regaining a small measure of control and ownership over resources including broadcasting rights for promotion of Maori language, fisheries, land, forests, *waahi tapu*(sacred sites) and cash settlements. Treaty settlements are seen by Maori as restoring to them resources necessary to assist in the development of an economic base and strengthening of their cultural base.
27. Treaty claims and court action are the often the only resort that Maori have to gain recognition and protection of their cultural and legal rights. Whilst there have been successes in the recent past, progress has slowed considerably in the last 5-6 years with many Maori beginning to lose faith in the Waitangi tribunal process. It is not helped when the government is starving the tribunal of adequate funds to undertake hearings. Often claimants have to wait years to have their claims heard because of the pressures on the tribunal, and then years more before they receive a

ruling from the tribunal. My own Moriori tribe completed our hearing in 1995 and we are still waiting for the tribunal to issue a report.

28. There is also an active undermining of the tribunal process by some current politicians. A recent example was a statement a Minister of the Crown made to the media on the day prior to the tribunal conducting an urgent hearing into some tribes claim to petroleum on their traditional lands. The Minister stated that the government would ignore any findings of the Tribunal and the courts if they found in favour of Maori. While tribunal findings are not binding on the Crown (unlike court findings), statements like this only serve to undermine Maori confidence in the only process that exists in New Zealand today to deal with treaty claims. The tribunal is an important release valve for racial tension in New Zealand society. Some may say that it has inflamed racial tension by upholding many claims of Maori. But without some form of redress or outlet for their longstanding grievances, Maori will continue to feel marginalised by the majority culture.
29. The extent to which Maori customs and law can be given effect within the current New Zealand legal system is dependent upon incorporation of relevant protective provisions within legislation. This in turn is dependent upon the will of Parliament to include such provisions within new legislation. Maori have consistently argued for inclusion of provisions respecting their treaty rights in both domestic law and international trade agreements being entered into by the New Zealand government. The Free Trade agreement recently signed between New Zealand and Singapore is a recent example of this. Unfortunately for Maori, the “will” of Parliament reflects the majority) non-Maori opinion which is usually opposed to including such protective measures. Maori comprise 15% of the population. For example, in 1995, Parliament voted(narrowly) against the inclusion of a Treaty protection clause in the Bill implementing the Uruguay Round of the GATT-TRIPS agreement.

The Wai 262 claim

30. The major initiative currently being undertaken by Maori to protect and strengthen their customary laws and traditional knowledge is the claim filed in 1991 with the Waitangi Tribunal known (colloquially)as the Wai 262 indigenous flora and fauna claim
31. Concerned over the increasing loss of native plants and animals, the destruction of ecosystems and the continuing erosion of *matauranga Maori*, a group of Maori elders got together in 1988 to formulate the claim to the Waitangi Tribunal. The claimants represent Ngati Kuri Te Rarawa, Ngati Wai, Ngati Porou, and Ngati Kahungunu. I represent the three tribes of Ngati Kuri, Te Rarawa and Ngati Wai.
32. The claim concerns indigenous flora and fauna and cultural and intellectual heritage rights. It is founded upon the rights guaranteed in Article 2 of the Treaty of Waitangi which guaranteed to Maori(in the English version) “*the full exclusive and undisturbed possession of their lands, forests, fisheries and other properties...*” And in the Maori version they were guaranteed *tino rangatiratanga*

(translated as “their full chiefly authority”)over these resources “*me o ratou taonga katoa..*” which is translated as all of their treasures

33. The Statement of Claim which was filed in 1991 with the Waitangi Tribunal and amended in 1997 states as follows:

34. “2 THE CLAIM

- 2.1 The claim relates to Te Tino Rangatiratanga o Te Iwi Maori in respect of indigenous flora and fauna *me o ratou taonga katoa* (and all their treasures) including but not limited to matauranga, whakairo, waahi tapu, biodiversity, genetics, Maori symbols and designs and their use and development and associated indigenous, cultural and customary heritage rights in relation to such taonga. ‘Taonga’ in this claim refers to all elements of a tribal groups’ estate, both material and non-material, tangible and intangible.
- 2.2 Reference to ‘indigenous, cultural and customary heritage rights’ in this claim is deemed to include all rights (including intellectual and property rights) past, present and future in relation to taonga o te Iwi Maori.
- 2.3 Te tino rangatiratanga o te Iwi Maori is the authority residing within and exercised by te Iwi Maori o Aotearoa me te Waipounamu/Rekohu prior to the arrival of the colonial government which includes but is not limited to the full and exclusive rights and responsibilities of manaakitanga, kaitiakitanga and tapu and the development of these rights.
- 2.4 Te tino rangatiratanga o te Iwi Maori incorporates a right of development which permits the Iwi to conserve, control, utilise and exercise rights over indigenous flora and fauna *me o ratou taonga katoa*.
- 2.5 Te tino rangatiratanga o te Iwi Maori incorporated and incorporates:
 - (a) Decision-making authority over the conservation, control of, and proprietary interests in natural resources including indigenous flora and fauna *me o ratou taonga katoa*;
 - (b) The right to determine indigenous cultural and customary heritage rights in the knowledge and use of indigenous flora and fauna *me o ratou taonga katoa*;
 - (c) The right to participate in, benefit from, and make decisions about the application of existing and future technological advances as they relate to the breeding,

genetic manipulation and other processes relevant to the use of indigenous flora and fauna;

- (d) The right to control and make decisions about the propagation, development, transport, study or sale of indigenous flora and fauna;
- (e) The right to protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna;
- (f) A right to environmental well-being dependent upon the nurturing and wise use of indigenous flora and fauna;
- (g) The right to participate in, benefit from and make decisions about the application, development, uses and sale of *me o ratou taonga katoa*;
- (h) The right to protect, enhance and transmit the cultural and spiritual knowledge and concepts found in *me o ratou taonga katoa*.

2.6 The exercise of te tino rangatiratanga o te Iwi Maori as it relates to indigenous flora and fauna *me o ratou taonga katoa* was and is a recognition of an Iwi interest in the continued existence of flora and fauna and cultural taonga as particular species and as interconnected threads of te ao turoa.

2.7 That such recognition vested in Whanau, Hapu and Iwi all rights and responsibilities relating to the protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation and restrictions upon the use of indigenous flora and fauna and the genetic resources contained therein.

35. Indigenous flora and fauna includes the genetic resources contained therein and the environment in which they reside.

36. *Me o ratou taonga katoa* includes but is not limited to whakairo, rongoa Maori, waahi tapu, pa sites and Maori cultural images, designs and symbols and associated indigenous, cultural and customary heritage rights in relation to such taonga.

2.10 The claimants say that they are or are likely to be prejudicially affected by ordinances, Acts, regulations, Orders in Council, proclamations, notices and other statutory instruments, and the policies, practices, acts or omissions adopted by or proposed to be adopted by or on behalf of the Crown and further as set out in this statement of claim.

37. The claimants further claim that all of the ordinances, Acts, regulations, orders, proclamations, notices and other statutory instruments, and the policies, practices,

acts or omissions adopted by or on behalf of the Crown referred to are and remain inconsistent with the principles of Te Tiriti o Waitangi/Treaty of Waitangi.”

38. The claim also includes reference to native species of flora and fauna and to the Crown’s obligations to Maori in relation to international treaties and Conventions. In that context, the claimants argue that the New Zealand Government should not make commitments under international treaties and protocols without the prior consultation and agreement of Maori where these treaties impact on Maori rights under the Treaty of Waitangi.
39. Without the rights of *tinu rangatiratanga* (including rights of ownership, control and decision-making), Maori are unable to exercise their obligations of *kaitiakitanga* (guardianship and protection) and *manaakitanga* (sharing and providing for others). How can Maori care for the land and its resources if they are denied ownership or control over it?
40. So what are the Maori claimants seeking by way of remedies? Firstly, they seek recognition of the continued relevance of their customary laws and values within a modern day context. Secondly, they are seeking restoration of customary control and ownership over resources that were guaranteed to them under the Treaty of Waitangi signed in 1840. Maori assert that just because the dominant culture has ignored a constitutional compact for 160 years, that does not invalidate that compact.
41. At the heart of the claim is the protection of the underlying values that support the traditional knowledge systems of the claimant tribes. Legal systems are based on and reflect the values of the society. In New Zealand, as in every country where indigenous peoples have been colonised, those values reflect the majority non-indigenous European culture. To the extent that domestic legislation incorporates a requirement to “take into account” Maori values and treaty rights, these provisions are ad-hoc, limited and inconsistently applied.

Framework for Protecting Maori Customary Law

42. It is critically important to the claimants that any remedies are built on a foundation of tikanga Maori or Maori customary values. I refer to this as the “Tikanga Maori Framework of Protection”. Just “tweaking the edges” of the existing legislative regime and IPR system will not provide the protections needed. The strengthening of existing customary laws and values system is considered to be essential by Maori.
43. Although aspects of the existing IPR system may be accommodated within a Tikanga Maori Framework, it is important to start from first principles. That means viewing any system of protection from a Maori cultural viewpoint; not something imposed from the outside.
44. The claimants are still in the process of giving careful consideration to what such a system may look like, how it will be structured and how it will operate in practice. However, any system, to operate effectively must be owned and controlled by Maori and not simply another government agency set up by statute

with members appointed by the government. These State imposed structures and processes have in the past, (with a few exceptions) failed to protect or enhance Maori social, economic or cultural aspirations. Past attempts to *Europeanise*, and assimilate Maori into the mainstream culture have not worked. New and innovative solutions are needed.

45. A Tikanga Maori Framework of Protection would have some or all of the following characteristics:

- The system would be developed by Maori (in consultation with the government);
- The system would be based in tikanga Maori, reflecting Maori cultural values and ethos;
- Inherent in this system will be the acknowledgement, protection and promotion of rights and obligations to manage, utilise and protect resources in accordance with Maori cultural values and preferences;
- Flexibility will be very important. Whatever structure or structures are chosen will need to be flexible enough to take account of issues that affect Maori in a national sense as well as at the regional and local marae (traditional meeting place) level. The structure must also accommodate collective rights as well as the rights of individuals such as Maori artists, carvers, musicians and designers.
- How such a framework is mandated by Maori will be a vital and challenging ingredient. In New Zealand today there are many national bodies that represent Maori, including Maori Congress (an Iwi or tribal based organisation), New Zealand Maori Council (a statutory body), Maori Women's Welfare League, The Confederation of United Tribes (based on the 1835 Declaration of Independence), and others. There are also various Iwi (traditional tribal) organisations, Urban Maori Authorities, Land Trusts, Maori Incorporations and Marae trustees, to name a few.
- Indeed, one of the most challenging issues confronting Maoridom (and indigenous peoples elsewhere) is the vexed issue of who has the authority or mandate to represent and make decisions for their people? This makes it difficult and sometimes impossible to know who is the appropriate body or persons to deal with. This has particular relevance in the context of developing Prior Informed Consent procedures. The Maori Land Court has the power to make rulings on who represents a group of Maori for a given purpose and consideration is currently being given to strengthening these procedures. Traditional tribal structures in New Zealand are currently facing a serious challenge from Urban Maori Authorities over resource allocation and related issues. Whatever decision making structures Maoridom finally decide upon will need to take into account both traditional and modern day Maori aspirations.
- In terms of the resourcing of the framework, the claimants would seek an allocation of funds from the Crown (as part of their remedies package), to undertake nation-wide consultation with tribes and urban Maori to discuss the formation of any new structure. Funding would also be needed to implement and administer the new body on an ongoing basis.

- Finally, there are considerations of enforceability. In order to enforce compliance with this new regime, some form of legal recognition and protection will be necessary within the current New Zealand legal system. But there will also be non-legal codes of ethics, and protocols containing rights and obligations, designed to educate and persuade voluntary compliance with the framework of protection.
 - One of the dilemmas for Maori (and indigenous peoples everywhere) is that the codification of their values within the mainstream legal system, will result in the re-interpretation of those values by predominantly non-Maori people who make up the legal and regulatory enforcement system in New Zealand. On the other hand, without the sanction of the law there is no guarantee of protection. The solution to this problem is not immediately apparent, although the appointment of suitably qualified Maori to important decision making bodies would be a good start!
46. It will also be important to work out how the Maori system of protection interfaces with the mainstream legal system. This will involve a process of direct negotiation with the government either in the development of the protection system or once it is in place.

A national or regionally based TK protection authority would have the following responsibilities:

- Acting as a referral body to *Iwi* (tribes), *hapu* (sub-tribes) or *whanau* (families) or individuals, once it is determined at which level of Maori decision-making the relevant issue is most appropriately advanced. Where it was obvious that certain issues affected particular tribes, the issue would be immediately referred to that tribe to deal with. So, for example, if someone wanted to research the *Pupu Harakeke* (flax snail) they would have to deal with the Ngati Kuri people of the Far North. If it was a matter which affected Maori at a national level, then a national body could deal with and undertake research at that level; acting as a support agency for Maori tribes and organisations in the undertaking of their own research;
- liaisons with mainstream government departments, research institutions and private enterprise;
- consultative body with Maoridom. This would be a key component of any new authority. *Hui*(tribal meetings) and consultation with Maori would need to take place on a regular basis;
- assisting Maori in the formulation of policies to assist them in their role as kaitiaki of their various *taonga* (treasured things). Policies might deal with issues of respect for cultural values, access, use and where appropriate , commercial exploitation Such policies themselves would have to be flexible to take account of the different tikanga and relationship that each tribe or hapu has with the taonga within their own *rohe* (tribal territories);

- acting as a principal point of contact for those wishing to access and exploit traditional Maori knowledge of native flora and fauna for commercial gain. It may also include acting as a negotiating body with any research institution or pharmaceutical company where the local tribe requested such assistance.
 - education about Maori cultural values and their application within a modern day context. This might include the general public, government agencies and the corporate sector.
47. Unfortunately, due to a shortage of Government funding for the Waitangi Tribunal (which is confronted with over 800 claims to deal with), it is likely that the claim is still some four to five years away from completion. In response, many of the claimants have determined that they will proceed to develop their own system based on the framework outlined above. One of the options available to Maori is to directly negotiate with the Crown a settlement of the claim including the development of an agreed system of protection. These options are currently being explored by Maori.

Interim Measures of Protection

48. The Maori claimants have no control over how fast the system processes the claim. In the meantime, their *matauranga* or traditional knowledge continues to be the subject of exploitation and unauthorised use. To counter this, Maori are beginning to examine alternative interim protection measures as means to protect their traditional values. One example of this is an initiative being undertaken by Maori artists (including graphic designers, carvers, weavers and musicians) in collaboration with a national arts body in New Zealand to develop a national Maori made brand name and logo that would be used exclusively by the Maori artists. The Maori artists intend seeking legal protection by trade-marking the logo and brand name. Key elements of this process are:
49. Maori artists are working in close collaboration with a National Arts Council (a statutory body funded by Government), to develop the Maori mark;
50. A number of *wananga* (special meetings) have been convened around the country to discuss and debate important values, customs and designs and to develop options for protection;
51. Deciding to use an existing IPR tool (trademark) to protect a traditional and contemporary Maori artistic expressions;
52. Initially the intellectual property rights will remain with the National Arts Council but it is proposed that these rights will be transferred to a separate Maori owned and controlled entity within a period of 3 years;
53. Maori people are not only being consulted but are fully involved in the decision making at every stage of the decision making process and will ultimately have control and ownership of this tool for protecting Maori artworks.

54. As time passes, the issues raised by the WAI 262 Claim are assuming greater importance. This past decade has witnessed a marked growth in international interest in “cultural heritage tourism”. Tourists are attracted to the cultures of the indigenous peoples, and their artwork, music and indigenous designs are becoming highly prized commodities, and powerful marketing and branding tools. The use of Maori symbolism by Telecom, Air NZ and Adidas in promoting the All Blacks, are just some examples.
55. Many more businesses in New Zealand are beginning to appreciate the “added value” and marketing opportunities that a distinctive Maori identity, Maori place names and traditions give to New Zealand businesses operating in the international market. As Brian Richards, marketing strategist for this Maori Made Mark, observed back in 1994:¹
- “In worldwide research on New Zealand, “sheep” and “green” are the only two icons that stand out ... we can actually add value using our indigenous products. It will come from our Maori people, our artists, our playwrights and designers ... Maori custom and culture is absolutely wonderful. There is potential for developing Maori icons to our culture ... I would love to see New Zealand borrow from Maori elements and used them in a modern context, because they help to position us worldwide ... By drawing on Maori culture and referencing, we could produce the most stunning textiles and fabric. Nobody yet has exploited Maori graphics and curtaining fabrics etc.”
56. As commercial interest in indigenous culture, artwork and knowledge continues to grow, tribes need to retain control over, regulate and protect their cultural heritage rights.
57. The use and exploitation of indigenous knowledge and culture by non-indigenous people can be highly offensive. There is usually little recognition of the people to whom the knowledge belongs, and relatively few benefits are returned to those people.
58. The Wai 262 claim makes reference to many examples of the sorts of offence that can be caused when indigenous knowledge is treated without due respect for the rights of the holders of that knowledge. Maori designs, like the koru or kowhaiwhai appear on numerous government and corporate logos, or adorn the edges of glossy publications. Web sites and advertisements display tukutuku work to enhance the “indigenous flavour” of the product, often in circumstances where such tapu designs would never be used for commercial purposes. A chain of very successful camper vans relies on the heritage of a very important *tupuna*(ancestor), Maui, to promote its product. Imagine the public condemnation if a Maori company were to start driving around in “Jesus” camper vans! Air New Zealand carpeted large areas of its airports with the koru design, for it to be walked on by thousands of travellers each week. After complaints from Maori, the carpets were removed. Marae are finding photographs of their carved meeting

¹ Richards, Brian “Using the Chisel of the Mind”, *Kaupapa New Zealand: Vision Aotearoa*, 1994, page 209.

houses and other cultural symbols being reproduced on tourist brochures or postcards.

59. Maori culture makes New Zealand unique from the rest of the world. Whenever there are international leaders visiting such as the recent APEC Conference, Maori are called upon to undertake the welcoming ceremonies and cultural performances. Some of you may have seen a picture of a leading Maori elder from the *Ngati Whatua* tribe giving a traditional *hongi* greeting to U.S. President Bill Clinton when he arrived in Aotearoa for the APEC MEETING. This image was beamed all over the globe creating a positive (Maori) image of New Zealand in the eyes of world. There is enormous “intangible” value in this positive indigenous imaging.

Are Western Values and Indigenous Values Reconcilable?

60. Being able to appreciate and understand indigenous cultural values will be critical to developing any framework for protection. The old methods of imposing a mono-cultural framework over minority indigenous cultures and expecting the latter to conform, will simply not work. Time, patience and perseverance is going to be required in order to arrive at an understanding of these different cultural values. The ISE model is a good example of how western trained scientists and indigenous peoples can work to bridge the gaps in cultural understanding.
61. For example, a Maori person may look at a native totara tree and pay homage to an ancient member of his whanau or family. A scientist or geneticist may look at the same tree and think of ways to alter its genetic programming to make it grow faster or resistant to certain diseases. They consider ways to “improve” the tree by the application of modern technology.
62. Maori regard the genetic modification of flora and fauna as the interference or tampering with their *whakapapa* (genealogy). Modifying or mixing the genes of the same or different species is analogous to genetic experiments on one’s own family members. Whilst this may be regarded by many as emotive or even “cultural blackmail”, the issue really boils down to one of respect. Respect for the fact that Maori and indigenous peoples everywhere, have a special kind of relationship with their natural world that needs to be understood in the wider debate about the use and development of genetic resources
63. This issue has particular relevance in New Zealand at the present time with the recent approval by the Environmental Risk Management Authority(ERMA) of an application to implant a human gene into cows as a medical experiment. The application was opposed by a number of Maori groups, including the tribe upon whose land the cows are to be located. They objected on cultural and spiritual grounds and stated that the mixing of human genes with those of an animal was a violation of the tapu associated with the mauri(essential life essence) of the whenua or land and their relationship with that land. They also expressed concerns over the unknown risks (which were conceded by the applicant) and requested that ERMA apply the precautionary principle and not grant the application until the risks were better understood. In its decision granting the application, the Authority

rejected the concerns of the Maori people as “intangible” and therefore to be accorded much less weight than scientific evidence in favour of the application. In doing so they also dismissed the opinions of their own in-house Maori advisory committee. The decision has been referred to the High Court for review.

64. Under its governing legislation, ERMA has a statutory duty to *take into account the relationship of the Maori people with their lands, waters, sacred sites and other taonga (treasured things)*. My complaint is not so much that it found against the Maori objectors, but that the Authority quite clearly demonstrated in its written decision that it did not understand or comprehend the cultural (or indeed legal) viewpoints being expressed by Maori. In order for the decision-maker to take into account the Maori spiritual concerns, they should first have an understanding of what those concerns are, otherwise there is a sense of not having been heard or understood.
65. This problem is symptomatic of the circumstances of many colonised indigenous peoples who are required to argue their case (and place their faith) in a justice system that is in many respects foreign to their own set of cultural values. The answer lies in ensuring that these people views and opinions are properly understood and protected. The same might be said of researchers seeking to gain access to traditional knowledge and genetic resources of indigenous peoples. It is fundamental that the underlying cultural values are appreciated before work is undertaken and that the local people are fully engaged in the decision making processes.

Conclusions

66. As argued above, first priority needs to be given to strengthening and protecting existing customary law systems because of the important values inherent in those systems which are critical to the maintenance of the cultures concerned and also to the maintenance and enhancement of biological diversity.
67. Issues such as the extent to which the IPR system can be used to protect TK and the development of sui generis systems (and other relevant mechanisms) will need to be considered as part of this larger picture. But this should be in the context of how these various mechanisms may be used to **enhance and protect** TK and customary laws, rather than **access and exploit** such knowledge.
68. Finally, to ensure that Indigenous Peoples effectively participate in the development of these protective systems, an international expert group of Indigenous Peoples should be established to work directly with States and UN agencies in the development of international guidelines and principles. To this extent, States and UN agencies must ensure that adequate resources are made available to establish and fund this expert group on an ongoing basis. This approach will not only ensure effective participation takes place in practice but there is a degree of consistency and integration among the various agencies with responsibilities in this area.