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The Patents Māori Advisory Committee of Aotearoa New Zealand: Lessons for indigenous knowledge protection

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Abstract

Using freedom of information requests, we examine the operation of the Patents Māori Advisory Committee of Aotearoa New Zealand. The Committee advises the Intellectual Property Office of New Zealand on whether inventions claimed in a patent application are derived from Māori traditional knowledge or from indigenous plants or animals; and if so, whether the commercial exploitation of that invention is likely to be contrary to Māori values. There is limited publicly available information on the operations of the Committee and the decision-making process undertaken in reviewing applications. The requests and our searches identified 13 patents referred to the Committee, of which most (9 of 13) dealt with inventions related to Mānuka (*Leptospermum scoparium*), a taonga species known for its role in producing unique honey. Only two applications have been found to be contrary to Māori values, and these applications have both since been abandoned. The review of applications found to be 'not contrary to Māori values' is instructive, identifying important considerations taken into account by the Committee in reaching a decision, including the importance of benefit sharing and engagement with Māori in considering whether an

invention may be contrary to Māori values. The analysis highlights the limitations of the Committee in reviewing only those applications filed in Aotearoa New Zealand and referred to the Committee for advice and identifies the importance of mechanisms such as disclosure of origin to ensure all relevant applications are reviewed by the Committee. The paper concludes by highlighting how the operation of the Committee may inform the development of similar bodies in other jurisdictions, such as Australia.

KEYWORDS
indigenous knowledge, New Zealand, patent law

1 | INTRODUCTION

Under its intellectual property legislation, Aotearoa New Zealand has established Māori Advisory Committees responsible for providing advice to the Intellectual Property Office of New Zealand (IPONZ) on applications for patents,[1] trade marks[2] and plant variety rights.[3] The purpose of these Committees is to consider New Zealand domestic intellectual property applications 'under the context of values, concepts, practices and knowledge associated with Māori culture'[4] and provide advice on or make decisions with respect to certain applications consistent with applicable legislation.[5] In particular, the function of the Patents Māori Advisory Committee is to provide advice to the Commissioner of Patents on whether an invention is derived from Māori traditional knowledge or indigenous plants or animals and, if so, whether the commercial exploitation of the alleged invention would likely be contrary to Māori values.[6]

There has been minimal reporting about the Māori Advisory Committees, particularly the Patents Māori Advisory Committee. Therefore, there has been an assumption within intellectual property circles that they have not had a significant impact to date. However, in this article, we use documents obtained under freedom of information laws (the Official Information Act 1982 [NZ]) to highlight that there have been reviews of patent applications by the Patents Māori Advisory Committee, which have resulted in the advice 'contrary to Māori values' and then been subsequently abandoned. The examination of other applications found 'not contrary to Māori values' provides valuable guidance to patent applicants and the wider community on the approach and expectations of the Patents Māori Advisory Committee with respect to patents involving Māori traditional knowledge or indigenous plants or animals. We examine the implications of this and consider the benefits of the Patents Māori Advisory Committee within the context of wider global intellectual property and indigenous knowledge negotiations and forums.

These Committees are clearly important for Māori people and values from a domestic perspective in Aotearoa New Zealand. They are also interesting and important in the international context because they represent innovative approaches for examining how Indigenous knowledge might be considered within intellectual property examination processes to prevent cultural harm or 'biopiracy'.

Other countries are seeking to introduce similar mechanisms. For example, Australia is now looking to introduce an Indigenous Advisory Panel to provide an Indigenous voice to IP Australia.[7] The experience of the Patents Māori Advisory Committee in Aotearoa New Zealand, and the findings in this paper may inform the development of similar bodies in other jurisdictions. This paper will first provide a brief overview of the Patents Māori Advisory Committee, its structure and functions and the broader domestic and international context within

which the Committee was established. The second part will outline the information requested from IPONZ and set out observations on the decision-making process of the Patents Māori Advisory Committee with reference to three specific cases as illustrations. Third, the paper will compare the outcomes of this analysis against the 'patents of concern' identified in the Lai et al, patent landscape study 'Māori knowledge under the microscope' published in 2018.[8] Finally, the paper will identify ways the review of applications by the Patents Māori Advisory Committee could be enhanced and identify lessons for other jurisdictions seeking to introduce a similar oversight body.

2 | BACKGROUND TO THE PATENTS MĀORI ADVISORY COMMITTEE

Before commencing an examination of the Patents Māori Advisory Committee under the Patents Act 2013 (NZ), it is important to situate the development of this innovative mechanism within the broader context of colonial-settler relations postinvasion and the legal context in Aotearoa New Zealand as well as the international context in forums such as the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO). This paper briefly outlines these important contexts here.

Te Tiriti o Waitangi/The Treaty of Waitangi was entered into by a representative of Queen Victoria and around 500 Māori chiefs in 1840.[9] Article 2 of the English version of the Treaty of Waitangi provides that

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.[10]

Te Tiriti o Waitangi/The Treaty of Waitangi is documented in both English and te reo Māori. In the te reo Māori version of article 2, 'The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures…'[11] This language, guaranteeing to Māori peoples 'tino rangatiratanga (absolute sovereignty) over their taonga',[12] is much more robust in its conception of Māori rights than those outlined in the English language version of Te Tiriti o Waitangi/The Treaty of Waitangi. In the 1970s, the Waitangi Tribunal was established to respond to Māori Treaty claims, with most in the ensuing years made by Iwi related to the taking of lands.[13]

Since the early 1990s, there has been growing concern in Aotearoa New Zealand about the possibility of misappropriation of Indigenous knowledge relating to plants, animals and other genetic resources. This has included statements from Māori and Pasifika authors, experts and leaders about gene patents, misappropriation without prior informed consent or benefit-sharing, and broader implications for intangible cultural heritage such as those conveyed in the Wai 262 claims (which we explore in further detail below) and in scholarly writing by experts such as Aroha Te Pareake Mead and Steven Ratuva.[14]

In 1991, an unprecedented claim (Wai 262) was made by six individuals on behalf of six Iwi, being a broader claim on behalf of all Māori in respect of 'the customary tikanga rights inherent in and associated with the natural resources of Indigenous flora and fauna—*me o ratou taonga katoa*. Rights which the claimants argued were guaranteed to them by *Te Tiriti o Waitangi*' (Treaty of Waitangi).[15] At the time, the patent legislation did not provide a useful mechanism to prevent the patenting of mātauranga Māori (knowledge). Under the Patents Act 1953 (NZ), there was the possibility of limiting the patenting of mātauranga Māori under a morality exclusion.[16] However, this exclusion was under-utilised and not specific to mātauranga Māori, instead encompassing any invention that may be considered contrary to morality for New Zealand society as a whole or a significant section of the community.[17]

Following 20 years of deliberation, the Tribunal issued its final report on the Wai 262 claim in July 2011. The report 'Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity'[18] outlined a wide-ranging suite of recommendations and proposed reforms, recognising the

importance of the Crown-Māori partnership as envisaged in Te Tiriti o Waitangi/The Treaty of Waitangi and affirmed by the Waitangi Tribunal.[19] Most importantly, for the purpose of this paper, the report identified the potential role of a Māori patent advisory committee to inform decisions regarding patentability. The report recommended that the Commissioner of Patents be required to take advice from such committee on applications raising 'Māori issues' and that the committee should be able to initiate investigations into 'any application or patent filed or granted in New Zealand, and advise the commissioner accordingly.'[20] The Wai 262 claims and report have influenced policy-making and amendments to laws, including environmental management and intellectual property laws.[21] The establishment of such a committee consistent with the recommendations of the Wai 262 report had the potential to support the fulfilment of the Treaty Crown–Māori partnership, and this paper will consider the extent to which this potential has been achieved further below.

In 2019, the New Zealand government announced Te Pae Tawhiti, a whole of government approach that is intended to address the Wai 262 claim and report, with activities across three broad areas or 'kete': Taonga Works me te Mātauranga Māori; Taonga Species me te Mātauranga Māori; and Kawenata Aorere/Kaupapa Aorere.[22] In 2022, the New Zealand Government revised the focus of the Te Pae Tawhiti programme, taking into account progress to date and the impacts of the Covid-19 pandemic.[23] According to Te Puni Kōkiri, the New Zealand Ministry of Māori Development, the priorities of the programme are to 'establish a domestic bioprospecting regime, a Māori-Crown partnership-based system for mātauranga Māori, strengthening Māori involvement in international agreement-making and measuring progress in these areas.'[24]

Concurrent with the progress of the Wai 262 claim in Aotearoa, New Zealand, the protection of traditional knowledge was also receiving increased attention in various international forums. Under the WTO Framework Agreements from 1994, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[25] raised global minimum intellectual property standards and enforcement, including specific provisions dealing with the patentability of microorganisms, plants and animals. Article 27 of the TRIPS Agreement outlines which inventions Member states are obliged to make eligible for patenting and what they can exclude from patenting, making it one of the most controversial paragraphs within TRIPS. Article 27.2 has become known as the 'ordre public or morality' exclusion, which states that:

> Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

Article 27.3 then also asserts that Members may also exclude from patentability:

> (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.

In response to concerns from many Member states, Indigenous peoples and local communities, the TRIPS Agreement required a review of Article 27.3(b) within 4 years. This was extended under Paragraph 19 of the 2001 Doha Declaration to broaden the discussion such that the TRIPS Council should also look at the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity (CBD),[26] the protection of traditional knowledge and folklore.[27] Discussions on these aspects essentially stalled around 2005, at which time the stalemate has largely since seen a shift in forum focus to the neighbouring forum in Geneva at WIPO. Since 2000, WIPO has hosted the Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The WIPO IGC has worked for more than two decades towards three possible

legal instruments that might provide some mechanisms to protect, respectively: Genetic Resources; Traditional Knowledge; Cultural Expressions and Folklore. The negotiations of the WIPO IGC have progressed slowly but steadily, and a Diplomatic Conference will consider a draft international legal instrument relating to intellectual property, genetic resources and traditional knowledge associated with genetic resources in 2024.[28]

2.1 | Introduction of the Patents Māori Advisory Committee into legislation

The Patents Māori Advisory Committee was included in the Patents Bill introduced to Parliament in 2008 before the Wai 262 report was released. Although the Wai 262 report contained significant proposed reforms to intellectual property laws in New Zealand, there is no evidence that the Patents Bill was modified after its introduction to respond to the Wai 262 recommendations, including the proposal to introduce an advisory committee.[29] As introduced above, the Wai 262 report recommended the introduction of an advisory committee that would not only provide advice to the Commissioner on issues relating to patentability but also advise on kaitiaki (guardian or custodian) interests.[30] The report suggested that the Commissioner should be required to take formal advice from the committee and that the committee should have the 'mandate to investigate any application or patent filed or granted in New Zealand'.[31] As identified above, the proposed committee had the potential to support the Treaty Crown–Māori partnership. However, the implementation of the committee in practice has failed to do so.

A revised Patents Bill was introduced in 2010 with a new proposal for a Patents Māori Advisory Committee. The role of the proposed Patents Māori Advisory Committee was significantly narrower than that envisaged under the Wai 262 final report. The new legislation was intended to mirror the existing provisions establishing a Trade Marks Māori Advisory Committee under the Trade Marks Act 2002 (NZ) that is established to provide advice on 'whether the proposed use or registration of a trade mark that is, or appears to be, derivative of a Māori sign, including text and imagery, is, or is likely to be, offensive to Māori.'[32]

The reforms were ultimately implemented in the Patents Act 2013 and took effect in 2014. The new Patents Māori Advisory Committee was established to provide advice to the Commissioner on whether:

(a) 'the invention claimed in a patent application is derived from Māori traditional knowledge or from indigenous plants or animals; and
(b) if so, whether the commercial exploitation of that invention is likely to be contrary to Māori values'.[33]

The Patents Māori Advisory Committee is comprised of a small number of experts appointed by the Commissioner of Patents.[34] Committee members are selected because they have a 'deep understanding of mātauranga Māori (Māori traditional knowledge) and tikanga Māori (Māori protocol and culture)'.[35] While the Patents Act 2013 establishes the Patents Māori Advisory Committee, it only provides for a limited role in advising the Commissioner, who must consider the advice but is not bound to adopt the recommendations of the Committee.[36]

There is no guidance in the legislation or Patent Examination Manual to determine whether an invention is derived from Māori traditional knowledge or indigenous plants or animals, or the meaning of 'Māori values'. This will likely be a difficult task for patent examiners given that Māori traditional knowledge may be unpublished or held in confidence as secret or sacred knowledge or simply misunderstood by examiners.[37] Nothing in the Patent Examination Manual shows how examiners should identify or refer applications to the Patents Māori Advisory Committee for consideration. Similarly, there is no public guidance to applicants nor public terms of reference for the Patents Māori Advisory Committee (as will be discussed below).

The requirement to consider whether the 'commercial exploitation of an invention' may be contrary to Māori values is directly linked to the ordre public and morality provisions of the Patents Act 2013.[38] Section 15 provides

that an invention is not patentable if the commercial exploitation of the invention is contrary to public order or morality. This is consistent with the allowed exclusions to patentability under the TRIPS Agreement. Indeed, section 15 explicitly references the term 'ordre public' in article 27.2 of the TRIPS Agreement when explaining the meaning of 'public order'. The legislation makes it clear that in determining whether commercial exploitation of an invention is contrary to public order or morality, the Commissioner may seek advice from the Māori Advisory Committee or any other person that the Commissioner deems appropriate.[39]

2.2 | Determinations by the Patents Māori Advisory Committee

The IPONZ website includes a page dedicated to the Māori Advisory Committees, and this page sets out an overview of both the Trade Marks Māori Advisory Committee and the Patents Māori Advisory Committee, including the function and members of the Committee along with a brief overview of the Māori Advisory Committee process. Patent applicants seeking information on the process are advised that they will be informed if their application is referred to the Māori Advisory Committee and that the advice of the Committee will be provided to the applicant once a decision is reached.[40] Applicants are reassured that the advice of the Māori Advisory Committee is not binding on the Commissioner and that they will be given an opportunity to respond in the event that their application is declined based on the advice of the Māori Advisory Committee.[41]

Applicants have little insight into the decision-making process of the Patents Māori Advisory Committee. The IPONZ website does not include information on the cases referred to the Patents Māori Advisory Committee, the decision-making process, or the outcomes of any review. A search of the IPONZ Patent Register may be refined by selecting 'Māori traditional knowledge of NZ indigenous species'[42] or 'Case referred to Māori Advisory Committee' however, the documents available on the Patent Register do not provide any information on the decision-making process of the Patents Māori Advisory Committee.[43] Instead, the Examination Reports typically only refer to the fact that the application has been referred to the Patents Māori Advisory Committee for consideration and then provide information on the outcome of this review. While the IPONZ Year in Review report provides a limited overview of the number of cases referred to the Patents Māori Advisory Committee,[44] this information also does not include specific details regarding the applications referred for review or the decision-making process. Unlike the Trade Marks Māori Advisory Committee, there are no terms of reference or memorandum of understanding governing the operation of the Patents Māori Advisory Committee published on the IPONZ website.[45]

To obtain a greater understanding of the activities and decision-making process of the Patents Māori Advisory Committee, the authors sought information from IPONZ. In two separate Official Information Act requests[46] the following information was requested:

1. Information on applications referred to the Patents Māori Advisory Committee for consideration including: patent application number, patent title, date referred to the Patents Māori Advisory Committee, decision of the Patents Māori Advisory Committee, and date of decision of the Patents Māori Advisory Committee.
2. Number of times that the Patents Māori Advisory Committee has met since its establishment under the Patents Act 2013.
3. Any documents relating to decisions of the Patents Māori Advisory Committee including decisions relating to patent applications referred to the Committee.
4. Terms of Reference and Memorandum of Understanding for Patents Māori Advisory Committee.[47]

In response to the Official Information Requests, IPONZ provided information on 11 applications that had been referred to the Patents Māori Advisory Committee for consideration. These applications are outlined in Table 1 below, rows 1–11. Of these 11 applications, two were identified as likely contrary to Māori values, and these two cases will be discussed in further detail below. The vast majority of the cases (8 of 11) dealt with inventions related

TABLE 1 Applications referred to the Patents Māori Advisory Committee.

	Patent case no	Patent title	Applicant	Species or knowledge	Advice from PMAC	Status
1	736052	Water soluble mussel extract	The New Zealand Institute for Plant and Food Research Limited	Mussels	Not contrary to Māori values	Abandoned
2	750401	Manuka honey based dietary supplement	Custard Square Limited	Mānuka	Likely contrary to Māori values	Abandoned
3	755776	Lipid combinations	Pharmalink International Limited	Mussels	Not contrary to Māori values	Under opposition
4	750236	Kawa Kawa Pesto	Motoka Limited	Kawa Kawa	Likely contrary to Māori values, if claimed	Abandoned
5	728460	Compositions comprising honey, a preservative and an aqueous carrier and methods of use	Melcare Medical Pty Ltd	Mānuka	Not contrary to Māori values	Granted
6	749405	Antiparasitic compositions and methods	University of Canberra	Mānuka	Not contrary to Māori values	Granted
7	721272	Composition, system and method for treating skin	Biomedical Concepts LLC and DTR Dermal Therapy Research Inc.	Mānuka	Not contrary to Māori values	Granted
8	759509	Composition, system and method for treating skin	Biomedical Concepts LLC and DTR Dermal Therapy Research Inc.	Mānuka	Not contrary to Māori values	Granted
9	755876	Composition for treating rhinitis and rhinitis ointment containing the composition	Beggi Pharmaceuticals Limited	Mānuka	Not contrary to Māori values	Granted
10	722140	Marker compounds of leptospermum honeys and methods of isolation and assaying thereof	Comvita Limited	Mānuka	Not contrary to Māori values	Granted
11	783390	Use of a composition comprising 3,6,7-trimethyllumazine for preventing, ameliorating or treating MMP-9 associated conditions and inflammation	Comvita Limited	Mānuka	No objection	Under examination
12	727844	Propolis and extracts thereof for the treatment qof skin cancers and improvement of skin health	Manuka Health New Zealand Limited	Mānuka	Not contrary to Māori values	Under examination
13	793006	Extraction method for bio-active fractions	Pharmazen Limited	Mussels	Not contrary to Māori values	Under examination

Abbreviation: PMAC, Patents Māori Advisory Committee.

to Mānuka (*Leptospermum scoparium*), a taonga species known for its role in producing unique honey, as well as for a range of external skin and wound care purposes and with parts of the plant prepared by Māori people and used also for a range of medicinal internal purposes.[48] In addition to providing this information, IPONZ released a series of email correspondence between Patents Māori Advisory Committee members discussing each application. It appears that decisions are typically made via email correspondence. The Patents Māori Advisory Committee has only met three times with IPONZ noting that meetings are separate from reviewing cases.[49]

An additional two cases were identified following a search of the IPONZ Patent Register selecting the option 'Cases referred to Māori Advisory Committee'. The examination reports for both of these applications were published in May 2023 after the date of the second Official Information Act request. Interestingly, searching the IPONZ patent register using the filter 'Māori traditional knowledge or NZ indigenous species' (as opposed to 'Case referred to Māori Advisory Committee') identifies seven applications, none of which have been referred to the Patents Māori Advisory Committee for consideration. However, these cases primarily appear to relate to provisional patent applications that have subsequently been closed or, in one case, a patent application that has been withdrawn.[50] One provisional application is marked as filed.[51]

2.3 | Observations on the decision-making process of Patents Māori Advisory Committee

As outlined above, unlike the Trade Marks Māori Advisory Committee, there is no Memorandum of Understanding or Terms of Reference for the Patents Māori Advisory Committee published on the IPONZ website. In response to the request for both of these documents, IPONZ advised that they do not hold a current Memorandum of Understanding and while draft Terms of Reference have been prepared, they are not available to the public at this stage and will not be released under the Official Information Act request 'to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty.'[52] IPONZ advised that they intend to publish the Terms of Reference on the IPONZ website once it is finalised.[53] The lack of a Terms of Reference for the Patents Māori Advisory Committee is significant. By comparison, the Trade Marks Māori Advisory Committee Terms of Reference set out the functions of the Committee, the membership and appointment process, and, most importantly, guidance on how assessments will be made when considering trade mark applications referred to the Committee.[54] While there are limited details, with reference made to other supporting guidelines to be developed, the Trade Marks Māori Advisory Committee Terms of Reference provide some important transparency as to the process.

In the absence of publicly available Terms of Reference, applicants must rely purely on the legislative provisions establishing the Patents Māori Advisory Committee and the limited guidance on the IPONZ website for information on the decision-making process. The email correspondence between Patents Māori Advisory Committee members reveals a thoughtful analysis of applications referred for consideration typically structured around a two-step test taking into account the following three considerations or questions. The first limb of the test considers two questions: whether the invention is derived from Māori traditional knowledge and whether the invention is derived from indigenous plants and/or animals. The second limb of the test deals with whether the commercial exploitation of the invention is likely to be contrary to Māori values. These considerations mirror the requirements of section 226 of the Patents Act 2013 however, the communications between members of the Patents Māori Advisory Committee reveal insights into the decision-making process regarding the first step. The response to the Official Information Act request reveals that Committee members have generally taken the view that where the claimed invention involves indigenous plants or animals, the invention will always involve Māori traditional knowledge. This approach reflects an understanding that mātauranga Māori is rooted in cultural connections and practice with the environment as defined by two core Māori values described in the Wai 262 Report: the first is whanaungatanga or

kinship with the environment, deeply rooted in culture and practice; the second is kaitiakitanga, which is often translated as meaning spiritually derived intergenerational obligations of guardianship or stewardship.[55] The Wai 262 Report uses a Māori saying to emphasise the point: 'Kei raro i ngā tarutaru, ko ngā tuhinga a ngā tūpuna' (beneath the herbs and plants are the writings of the ancestors).[56]

Upon ascertaining that the invention claimed in the application is derived from Māori traditional knowledge or indigenous plants or animals, the Committee then considers the second limb of the test. As identified in the applications discussed below, the Patents Māori Advisory Committee considers the extent to which Māori have an interest in the commercial exploitation of particular indigenous plants or animals and Māori traditional knowledge and whether there is evidence of engagement and benefit sharing with Māori.

2.4 | Applications found 'contrary to Māori values'

As outlined in Table 1 above, two applications referred to the Patents Māori Advisory Committee have been identified as contrary to Māori values. Both applications have since been abandoned; however, further analysis reveals that the reason for this decision may not be limited or solely related to the findings of the Patents Māori Advisory Committee.

The first of the applications claimed a 'Manuka Honey based Dietary Supplement' and 'relates to the manufacture and supply of consumer ready dietary supplements using monoflora and multiflora Manuka honey as the base ingredient with nutritional supplements added and the final product being in liquid, semi liquid or creamed form.'[57] The examination report[58] identifies a number of grounds for objection to the application in addition to the referral to the Patents Māori Advisory Committee. These include that the claims are not clear, the invention is not novel, the invention is obvious, the claims relate to collocation and are therefore not a manner of manufacture, the invention is contrary to morality, and other procedural matters. Looking specifically at the objections raised by the Patents Māori Advisory Committee as described in the examination report, they advised that not only did the invention use Mānuka honey, an indigenous plant and taonga species, it is 'widely used in rongoā Māori' and therefore encompassed traditional Māori knowledge satisfying the first limb of the two-step test outlined above.[59] When considering the second limb as to whether commercial exploitation of the invention may be contrary to Māori values, the Patents Māori Advisory Committee noted 'that Māori have significant interest in the commercial exploitation of Mānuka honey and therefore growing objections to the commercial exploitation of Mānuka honey at the expense of Māori producers.'[60] On these grounds, the Committee advised that the commercial exploitation of the invention was likely to be contrary to Māori values.

The second of the applications claimed a 'Kawa Kawa Pesto'.[61] Again, the first examination report identified a number of grounds for objection, including the significant issue of a lack of claims outlined in the specification preventing further examination of the application.[62] Despite the lack of claims, the application was referred to the Patents Māori Advisory Committee for consideration. Correspondence between the Patents Māori Advisory Committee and IPONZ identifies that the invention is both derived from an indigenous plant and is therefore derived from Māori traditional knowledge and notes that in the absence of further information, it cannot be determined that the commercial exploitation of the invention would not be contrary to Māori values.[63] The application was abandoned after the applicant failed to respond to the matters raised in the examination report by the due date.

While the second application relating to Kawa Kawa Pesto does not provide much instruction in terms of the process undertaken by the Committee in reviewing applications, the first application dealing with the 'Manuka Honey based Dietary Supplement' is instructive as to the considerations taken into account by the Patents Māori Advisory Committee in determining whether commercial exploitation of an invention is likely to be contrary to Māori values. In particular, it speaks to the interest and involvement of Māori Mānuka honey producers and the potential for commercial exploitation of the invention to be at their expense.[64] This approach reflects some of the

Wai 262 claims, where some claimants noted that kaitiaki could participate in the commercial exploitation of taonga species and argued that the law must recognise the importance of kaitiaki–taonga species relationships.[65] Some claimants suggested that the law should allow kaitiaki a decisive say in research and the commercial use of taonga species to prevent what they consider to be abuses.[66] Some, though not all, also said that kaitiaki should participate in the benefits of commercial exploitation of taonga species where this is consistent with tikanga Māori.[67] This will be explored further in the following example of the Comvita applications reviewed by the Patents Māori Advisory Committee.

2.5 | Not contrary to Māori values—The case study of Comvita

In 2016, Comvita filed a complete application for the invention 'Marker Compounds of Leptospermum Honeys and Methods of Isolation and Assaying Thereof'.[68] This application covered 'marker compounds of Leptospermum honeys, isotopically labelled marker compounds of Leptospermum honeys and methods of isolation and assaying thereof, for use in the verification of the quality and purity of Leptospermum honeys such as Mānuka honey.'[69] As the invention was related to Mānuka honey, the application was referred to the Patents Māori Advisory Committee.[70] Reviewing the application under the two limbs of the test outlined above, the application involves indigenous plants and, therefore, involves Māori traditional knowledge. The question for consideration by the Committee was then whether the commercial exploitation of the invention was likely to be contrary to Māori values. This application is of particular interest for the purpose of this paper due to the considerable review undertaken by the Patents Māori Advisory Committee and communication with the applicant, Comvita, documented in the examination reports and related responses by the applicant.

In noting that the invention is likely to be of use to address the issue of counterfeit honey, the Committee considered whether the commercial exploitation of the invention was likely to be contrary to Māori values. The Committee raised the following concerns about the claimed invention (as communicated to the applicant in the examination report):

- 'No acknowledgement of Māori knowledge, practice and/or taonga.
- How Māori will be included in the commercialisation of the invention, including relevant access to working the invention.
- The invention encompasses a form of identifying whakapapa. Whakapapa is an all-embracing term which includes the recognition of the relationship of all things to each other'.[71]

The Committee sought additional information from the applicant on the details of any consultation with indigenous producers, iwi or Māori and how the applicant intends to commercialise the invention.[72] The request for additional information was communicated to Comvita in the first patent examination report, along with a number of objections to the application, including that the claimed invention was not novel or inventive in light of the prior art base.[73] It should be noted that the concerns of the Patents Māori Advisory Committee were outlined in the section of the examination report titled 'Additional comments' with advice to the applicant that these matters were 'brought to your attention as informal notices. You may wish to comment or amend the application in response to these items.'[74]

In its response to the examination report, Comvita addressed some of the concerns of the Patents Māori Advisory Committee, recognising 'Māori as Kaitiaki of all taonga including Mānuka.'[75] Comvita noted that the claimed invention was intended to address the potential issues raised by counterfeit honey and affirmed its support for 'efforts to protect the "MANUKA HONEY" trade mark, to ensure that it may only be lawfully used on products containing Mānuka honey from Aotearoa New Zealand.'[76] In addressing the commercial aspects of Comvita's

business, the response to IPONZ notes that the 'relevance of Comvita's business to Mātauranga Māori is in helping identify and preserve the whakapapa of Mānuka in certain rohe so their intrinsic values are not lost or corrupted.'[77]

Comvita pointed to several areas of operation that may be considered to deliver in-kind and monetary benefits to Māori communities and stakeholders. The response outlines that Comvita provides economic benefits through employment opportunities and supply arrangements and that Māori shareholders benefit from commercial activities, noting that Māori Investments Limited is a significant shareholder in Comvita.[78] In specifically addressing the issue of Māori values, Comvita notes that their economic activity 'aligns with Māori values to deliver a stronger commercial outcome for local Iwi land owners and New Zealand as a whole, enjoying trade, environmental and cultural benefits.'[79] The Committee considered the Comvita response in deliberations in July–August 2022. Based on the information provided by Comvita about benefit sharing and engagement with Māori, the Patents Māori Advisory Committee advised that the commercial exploitation of the invention was not likely to be contrary to Māori values.[80] The patent was subsequently granted.

The importance attached by the Patents Māori Advisory Committee to the concept of benefit sharing is instructive, particularly in relation to how the Committee will assess whether the commercial exploitation of an invention is contrary to Māori values. Benefit sharing is central to the principles outlined in the CBD and the related Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.[81] The CBD, to which New Zealand is a party, has the objectives of the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the utilisation of genetic resources.[82] Member countries are obliged to establish access and benefit sharing regimes in relation to genetic resources and associated traditional knowledge.[83] The objective of fair and equitable benefit sharing is further reinforced in the Nagoya Protocol, which outlines specific examples of benefit sharing, including monetary benefits such as salaries and preferential terms as well as nonmonetary benefits such as contributions to the local economy, and food and livelihood security benefits.[84] In the case of this patent and the patents discussed below, while we are not aware of direct monetary benefit-sharing for specific research and development milestones, there are claims of broader economic benefits for Māori people involved in production locally. While New Zealand is not a party to the Nagoya Protocol, these examples are instructive for the implementation of obligations under the CBD. The Patents Māori Advisory Committee process could contribute to the process of monitoring access and benefit sharing by providing a checkpoint to ensure that benefits for the use of indigenous plants and animals and Māori traditional knowledge, where claimed in a patent application, are returned to Māori communities. This may take on particular relevance in any future bioprospecting regime, such as that proposed in Te Pae Tawhiti (as discussed above).[85]

2.6 | Comparison with existing 'patents of interest' identified by patent landscaping: Background on Lai et al. study

Only 13 patent applications were identified as part of the review of applications referred to the Patents Māori Committee since its establishment in 2013. This raised questions as to whether all relevant applications have been referred to the Committee for review. As a point of comparison, the patents considered by the Patents Māori Advisory Committee were compared with those identified as 'patents of concern' in the Lai et al. patent landscape study 'Māori knowledge under the microscope' published in 2018.[86] The Lai et al. study focused on 173 plants with associated mātaraunga Māori from Aotearoa, New Zealand. From the patent searching of the 173 species names, the study identified 1972 patent families with 2991 patent applications. To narrow down to mātaraunga Māori relevant patents, this large group had its patent claims analysed further against ethnobotanical texts. The Lai et al. team identified 77 patent families of interest (or concern about potential misappropriation) where the patent claims appear to be similar in substance to the Māori traditional knowledge of plant species uses. This study is a useful point of comparison to identify the breadth of patents being examined in the Patents Māori Advisory Committee, to

identify any notable gaps or patents missed either by the Lai et al. study or the Committee, and to provide further context and comparison for analysis of applications identified in Official Information Requests.

Three of the Patents Māori Advisory Committee patents align with the Lai et al. team's patent families of interest/concern. These include the Melcare Medical Pty Ltd patent application relating to Mānuka honey compositions,[87] the Biomedical Concepts LLC and DTR Dermal Therapy Research Inc patent for a Composition, System and Method for Treating Skin,[88] and the Comvita Limited patent application on marker compounds of Leptospermum (Mānuka) honeys discussed above.[89] All three applications were found to be 'not contrary to Māori values' and granted/accepted. This suggests that the potential sensitivities surrounding Leptospermum species derived honey, known typically in Aotearoa, New Zealand, as Mānuka is well known by both patent examiners and researchers. As explained above, the Comvita patent was found to be derived from Māori knowledge and found to be 'not contrary to Māori values' and granted/accepted, and the Lai et al. study notes the relevance of traditional knowledge to this application.[90] The Patents Māori Advisory Committee found that commercial exploitation was not contrary to Māori values and that Māori people may benefit through the supply of raw ingredients and commercial involvement in the production and development of the product.

For the Melcare Medical Pty Ltd patent application relating to Mānuka honey compositions, the Patents Māori Advisory Committee found that the patent claims are generally derived from traditional knowledge but were not contrary to Māori values. This decision appears to have been arrived at because the invention is in line with existing uses of honey compounds and, therefore, not inconsistent with Māori values.[91]

In the case of the patent application using Mānuka for a 'Composition, System and Method for Treating Skin' filed by applicants Biomedical Concepts LLC and DTR Dermal Therapy Research Inc., the Patents Māori Advisory Committee also found the patent to be not contrary to Māori values. In this case, it is noted by the Patents Māori Advisory Committee that the patent claims are derived from traditional knowledge, but it is slightly less clear why it is considered not contrary to Māori values. The Patents Māori Advisory Committee discussion of the case refers to earlier decisions as precedents.[92]

The remaining patents referred to the Patents Māori Advisory Committee were not identified in the Lai et al. study, largely because of the timeline (filings at or after the data analysis was undertaken in approximately 2017 for the 2018 study), and/or because they have identified animal genetic resources which were beyond the scope for the Lai-led team's research. On the other side of the comparison, the remainder of the 77 patents from the Lai et al. study did not appear in the cases referred to the Patents Māori Advisory Committee mainly because they are foreign filings (often filed through the WIPO PCT, but without a national phase of examination in NZ), or because they are older patents applications filed before 2013 and thus not subject to review by the Patents Māori Advisory Committee.

This comparison suggests the Patents Māori Advisory Committee has not necessarily 'missed' many specific patents of interest/concern that we could identify. Still, it also highlights how the narrow scope of focus only on patent filings in Aotearoa, New Zealand, avoids scrutiny of dozens of patents of potential concern filed overseas. For example, the Lai et al. study notes several patents relating to *Phormium tenax* (New Zealand flax, which is native to Aotearoa New Zealand and Norfolk Islands) in recent years, including some relating to its traditional uses as a fibre (e.g., it was used in traditional Māori ceremonial cloaks)[93] and for many medicinal purposes.[94] The importance of New Zealand flax is outlined in the Wai 262 report, which states, 'It is hard to think of a plant more important to mātauranga Māori—indeed to traditional Māori life—than harakeke, or New Zealand flax (*Phormium tenax* and *P cookianum*)'.[95] One example, Korean patent KR 101229118 B1 '*Phormium tenax* Spun Yarn and Fabric Comprising the Same', draws some similarities to traditional uses as a fibre for clothes/fabrics.[96] A recent Mexican filing with application number MX 2021006890 A also relates to use of NZ flax fibres (entitled 'Obtaining Cellulose Fibers, Carbon Fibers and Graphite Fibers from the Phormium Plant [*Phormium tenax*])'.[97] In relation to medicinal and skin care uses, another Korean patent KR 101872010 B1 'Novel compounds from *Phormium tenax* and cosmetic composition comprising the same'[98] appears to relate to traditional uses of the NZ flax plant for skin care and cut or wound healing.[99]

There are also many patents filed in recent years relating to *Kunzea ericoides*, with some 32 filed by Mary Kay company for skin care products over 15 years. *Kunzea ericoides*, commonly known as kānuka or white tea-tree, is a tree or shrub in the myrtle family (Myrtaceae) and is endemic to New Zealand. The company is claiming patents for topical skin care and antiacne compositions which contain *Kunzea ericoides* and other ingredients.[100] Kānuka has a number of traditional uses, including as an antimicrobial and anti-inflammatory with various skin care uses.[101] It is unclear if Māori people receive direct benefit-sharing or would receive broader monetary or nonmonetary benefit from these foreign patents unless they have been included in value chains for the supply of ingredients.

These examples highlight the jurisdictional limitations of the Patents Māori Advisory Committee process. While foreign applications cannot be dealt with through domestic processes under the Patents Act 2013 in Aotearoa, New Zealand, IPONZ could potentially provide evidence to foreign patent offices of prior art and/or mātaraunga Māori and where foreign patent claims may be contrary to Māori values. While the Patents Māori Advisory Committee has an important advisory role to the IPONZ office for patent examination purposes, it could also have an advocacy and informatory role when patents of potential concern or in conflict with Māori values are identified in overseas patent filings. Other jurisdictions have taken similar approaches using databases to share potentially invalidating prior art with foreign patent offices.[102]

2.7 | Enhancing and improving the Patents Māori Advisory Committee process

The relatively small number of applications referred to the Patents Māori Advisory Committee since the Patents Act 2013 came into effect raises concerns as to the process by which applications are identified by patent examiners for consideration by the Committee. As discussed above, patent examiners may be unaware of whether a claimed invention may be derived from Māori traditional knowledge and thus subject to review by the Patents Māori Advisory Committee. As noted by Lai, '[w]ithout a compulsory requirement for patent applicants to divulge whether the alleged inventions are derived from Māori TK or "indigenous plants or animals," it could be difficult even for the Committee to identify the relevant interests.'[103] While applicants may tick a box on their patent application if they 'believe that [their] invention is derived from Māori traditional knowledge, or from plants or animals indigenous to New Zealand',[104] it is unclear what the consequences of failing to comply with this requirement are, if any. The inclusion of a mandatory disclosure process within the patent legislation or regulations in Aotearoa, New Zealand may facilitate the efficient review and referral of applications to the Patents Māori Advisory Committee. Such a process could require applicants to disclose on their application that the claimed invention is derived from Māori traditional knowledge or indigenous plants or animals and indicate the source and/or origin of the Māori traditional knowledge or indigenous plants or animals. Such disclosure requirements have been advocated for at an international level,[105] adopted by over 25 countries in domestic patent legislation,[106] and been the subject of consultation in Aotearoa New Zealand, with the Ministry of Business, Innovation and Employment releasing a Discussion Paper on 'Disclosure of origin of genetic resources and traditional knowledge in the patents regime' in September 2018.[107] The 'Economic Evaluation of Disclosure of Origin Requirements' report prepared by Castalia and commissioned by the Ministry of Business, Innovation and Employment found that the administrative and compliance costs of such a requirement would be a maximum of NZD20 per application over 30 years, a cost which would be balanced against the potential benefits arising from such a provision.[108] Furthermore, implementing a disclosure requirement would be consistent with the recommendations arising out of the Wai 262 claim.[109] Disclosure requirements would support greater transparency regarding the use of Indigenous and traditional knowledge more widely and would enhance the opportunities for access and benefit sharing agreements and better agreements under the Nagoya Protocol internationally.

From a procedural perspective, the Patents Māori Advisory Committee process could be enhanced by completing and publishing a Terms of Reference for the Committee along with guidance for applicants on the decision-making process. This would provide important transparency as to the process and the rationale behind the

decisions of the Patents Māori Advisory Committee. Alternatively, a similar approach to that taken under the Plant Variety Rights Act 2022 could be adopted. Part 5 of the Plant Variety Rights Act establishes a Māori Plant Varieties Committee that shall review plant variety rights (PVR) applications referred to it by the Commissioner and make a decision as to whether the application 'if granted, will or could have adverse effects on 1 or more kaitiaki relationships with the plant variety that is the subject of the PVR application.'[110] The legislation provides detailed guidance on the role of the Māori Plant Varieties Committee, the process, and the factors to be considered when making a decision.[111] Adopting this approach for the Patents Māori Advisory Committee would require amendments to the Patents Act 2013, and there are arguments both for and against this approach. Embedding decision making requirements in legislation provides certainty and may make it more difficult to change the process than if merely documented in Terms of Reference. However, there are advantages to relying on Terms of Reference in that the process may be easily changed or updated to reflect changes in circumstances or respond to difficulties in implementation.

While, to date, there has not been a scenario where the advice of the Committee has not been followed by the Commissioner, amendments to the Committee's mandate would further secure the interests of Māori people in a manner consistent with the recommendations of the Wai 262 report. While one of the purposes of the Patents Act 2013 is to 'address Māori concerns relating to the granting of patents for inventions derived from indigenous plants and animals or from Māori traditional knowledge',[112] the Patents Māori Advisory Committee, as established under the legislation, fails to recognise Māori tino rangatiratanga in relation to mātauranga Māori and taonga and does not reflect the principles of Crown–Māori partnership under Te Tiriti o Waitangi/The Treaty of Waitangi.

First, the Commissioner should be required to take the advice of the Committee as to whether the commercialisation of the invention would be contrary to Māori values. In implementing such a process, reference may be had to the new Māori Plant Varieties Committee to be established under the Plant Variety Rights Act 2022. Decisions made by the Māori Plant Varieties Committee are binding on the Commissioner and are to be made in accordance with the criteria set out in Part 5 of the Plant Variety Rights Act 2022.[113] While the Plant Variety Rights Act 2022 may not completely fulfil the promise of tino rangatiratanga as envisaged under Te Tiriti o Waitangi/The Treaty of Waitangi, the process set out under the Plant Variety Rights Act 2022 goes much further to support Māori sovereignty over taonga[114] than that established under the Patents Act 2013 and its implementation by the Patents Māori Advisory Committee.

Second, the scope of the activities of the Committee should expand beyond considering cases referred to it and instead allow the Committee to investigate any application or patent filed or granted in New Zealand consistent with the recommendations in the Wai 262 report (as discussed above). Taking this even further, the role of the Committee could extend to reviewing patent applications or granted patents in overseas jurisdictions to identify whether such patents include indigenous plants or animals or Māori traditional knowledge and which may be contrary to Māori values. Such patents may be referred to the Committee, identified by members of the Committee or perhaps even identified through the use of automated notices for patent applications involving specific indigenous plants or animals. Such an approach could be supported by the adoption of patent disclosure requirements at an international level, including through the PCT. As discussed above, while the Committee would not have the power to influence those patent examinations directly, the Committee could provide evidence to patent authorities of other jurisdictions about the existence of Māori traditional knowledge as prior art.

As discussed earlier, New Zealand is considering the possible ratification of the Nagoya Protocol but needs to consider the implications for biodiscovery legislation, mātauranga Māori and Wai 262-related Treaty of Waitangi implications.[115] If or when this process moves forward, the Patents Māori Advisory Committee process could contribute to the process of monitoring access and benefit sharing by providing a checkpoint to ensure that benefits for the use of indigenous plants and animals and Māori traditional knowledge, where claimed in a patent application, are returned to Māori communities. We believe these measures would strengthen Māori rights to make control decisions about patenting consistent with the recommendations from the Wai 262 claims.

2.8 | Lessons for other jurisdictions and concluding remarks

This examination of the operation of the Patents Māori Advisory Committee has identified a number of lessons that could be useful for countries seeking to implement similar advisory committees or review mechanisms. One such example is that of Australia. Over the past decade, the national intellectual property office, IP Australia, has consulted on how the intellectual property system may be used to protect Indigenous Knowledge.[116] This review process has resulted in the release of two important reports: the 'Enhance and Enable Indigenous Knowledge Consultation Report' published in 2021, and the subsequent 'Scoping Study on standalone legislation to protect and commercialise Indigenous knowledge Final Report' published in 2023.[117] The Enhance and Enable Consultation sought feedback on specific proposals to enhance the intellectual property system 'to support Aboriginal and Torres Strait Islander peoples to benefit from and protect their Indigenous Knowledge (IK)'.[118] The proposals included the development of an Indigenous Advisory Panel at IP Australia to provide an 'Indigenous voice' to IP Australia.[119] IP Australia has indicated it will 'consider' establishing an Indigenous Advisory Panel that would operate based on a partnership model with inputs from panel members, Traditional Owners and custodians and IP Australia. It is envisaged that the Indigenous Advisory Panel would be responsible for:

- 'advising on strategy and policy to support Aboriginal and Torres Strait Islander peoples to commercialise and benefit from their IK
- helping to advise on applications for IP rights that contain IK
- engaging with Aboriginal and Torres Strait Islander communities about their IK'.[120]

While the language from the Enhance and Enable report may seem noncommittal, IP Australia has stated that the next stage of the project will be to prepare draft terms of reference for an Indigenous Knowledge Panel, and progress in establishing the Panel is part of the IP Australia Indigenous Knowledge Work Plan for 2022–2023 with the goal of identifying potential members for the panel by mid-2023.[121] While there is no public information to indicate that this goal has been met within this timeframe, the continuing efforts of IP Australia are an encouraging step forward. An extended timeframe may be appropriate given the need to engage in consultation with diverse Aboriginal and Torres Strait Islander communities in the design and implementation of such an Indigenous Advisory Panel.

Advisory Committees, such as the Patents Māori Advisory Committee, have an important role to play in representing the interests of Indigenous peoples in the intellectual property system and securing the bargain at the heart of the patent system by ensuring that patents are only granted for inventions that are novel and nonobvious. Such Committees can provide important advice on whether claimed inventions involve traditional knowledge and whether commercialisation of an invention would be contrary to the values of Indigenous communities. However, it is important to ensure that such Committees are appropriately resourced and that all relevant applications are referred to the Committee for consideration. This would be supported by a disclosure process that requires applicants to identify the origin or source of any biological resources involved and whether the invention is derived from traditional knowledge. This would support examiners in identifying and referring all relevant applications to the Committee for review. Furthermore, the decision-making process of such Committees should be transparent and subject to publicly available terms of reference. This will provide certainty to stakeholders—applicants, Indigenous peoples and communities, Committee members, the relevant IP office and the public—and support the effective and efficient administration of the patent system while considering the interests of applicants and Indigenous peoples and communities.

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ENDNOTES

[1] Patents Act 2013 (NZ) s 225.

[2] Trade Marks Act 2002 (NZ) ss 177–178.

[3] A Māori Plant Varieties Committee is to be established under Part 5 of the new Plant Variety Rights Act 2022 (NZ) in the near future. See 'Māori Committees for IP' (IPONZ) <https://www.iponz.govt.nz/about-ip/maori-ip/maori-committees-for-ip/> accessed 7 September 2023.

[4] Māori Committees for IP' (*IPONZ*) <https://www.iponz.govt.nz/about-ip/maori-ip/maori-advisory-committees/#jumpto-the-m__0101ori-advisory-committee-process0> accessed 7 September 2023.

[5] Trade Marks Act 2002 (NZ) s 178; Patents Act 2013 (NZ) s 226; Plant Variety Rights Act 2022 (NZ) s 58.

[6] Ibid.

[7] 'Enhance and Enable—Indigenous Knowledge Consultations 2021' (*IP Australia*) <https://consultation.ipaustralia.gov.au/policy/ik2021/> accessed 7 September 2023.

[8] Jessica C. Lai, Daniel F. Robinson, Tim Stirrup, Hai-Yuean Tualima, 'Maori Knowledge Under the Microscope: Appropriation and Patenting of Mātauranga Maori and Related Resources' (2018) 22 JWIP 205.

[9] 'The Treaty of Waitangi/Te Tiriti o Waitangi: Signing of the Treaty' (*Waitangi Tribunal*, 19 September 2016) <https://waitangitribunal.govt.nz/treaty-of-waitangi/signing-of-the-treaty/> accessed 7 September 2023; Doug Calhoun, 'Wai 262: The Long White Cloud over New Zealand IP Law' (2018) 114 IPF: JIIPSANZ 8, 12.

[10] Te Tiriti o Waitangi/The Treaty of Waitangi, art 2 as extracted in Treaty of Waitangi Act 1975 (NZ) Schedule 1.

[11] Translation by Professor Sir Hugh Kawharu 'Translation of the Te Reo Māori text: The Treaty of Waitangi/Te Tiriti o Waitangi' (Waitangi Tribunal Te Rōpū Whakamana i te Tiriti o Waitangi) <https://waitangitribunal.govt.nz/treaty-of-waitangi/translation-of-te-reo-maori-text/> accessed 22 January 2024.

[12] David J. Jefferson, 'Treasured Relations: Towards Partnership and the Protection of Māori Relationship with Taonga Plants in Aotearoa New Zealand' (2022) 25 JWIP 327, 348.

[13] Calhoun n 9, p. 12. Iwi means tribe or people. See John C. Moorfield, *Te Aka Māori-English, English-Māori Dictionary* (online) Definition of 'iwi' <maoridictionary.co.nz> accessed 11 October 2023.

[14] Aroha Te Pareake Mead and Steven Ratuva (eds). *Pacific Genes & Life Patents: Pacific Indigenous Experiences & Analysis of the Commodification & Ownership of Life* (Call of the Earth Llamado de la Tierra and The United Nations University Institute of Advanced Studies, 2007). See also, The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (June 1993) resulting from the First International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples calling for a range of proptections of Indigenous peoples' rights with respect to cultural and intellectual property <https://www.wipo.int/tk/en/databases/creative_heritage/indigenous/link0002.html> accessed 19 January 2024.

[15] *Ko Aotearoa tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te taumata tuatahi* (Wai 262 Waitangi Tribunal Report, 2011) ('Wai 262 Waitangi Tribunal Report: Te taumata tuatahi').

[16] Patents Act 1953 (NZ) s 17(1). Mātauranga is defined as 'knowledge, wisdom, ways of knowing'. See Wai 262 Waitangi Tribunal Report: Te taumata tuatahi' (n 15) 252.

[17] See 'Intellectual Property Office of New Zealand 1953 Patents Act Practice Guidelines/Examination of Patent Applications' (*IPONZ*) <https://www.iponz.govt.nz/about-ip/patents/patents-act-1953/1953-patents-act-practice-guidelines/examination-of-patent-applications/> accessed 7 September 2023 cited in Susy Frankel and Jessica C. Lai, *Patent Law and Policy* (LexisNexis, 2016) 47. See also Susan Young, 'The Patentability of Māori Traditional Medicine and the Morality Exclusion in the Patents Act 1953' (2001) 32(1) VUWLR 255, 267. It should be noted that the guidance provided by IPONZ in 2008 regarding the interpretation of section 17(1) and the morality exclusion stated '… IPONZ will continue to raise objections under s17(1) where it appears that the use of the invention would be contrary

to morality for New Zealand society as a whole or **for a significant section of the community, including Māori**.' however this guidance was subsequently amended in 2009 to remove reference to Māori. See Intellectual Property Office of New Zealand, 2008 Business Update/IPONZ Practice Guidelines: Contrary to morality/Raising objections under section 17(1) <www.iponz.govt.nz> (2008) cited in Susy Frankel and Jessica C. Lai, *Patent Law and Policy* (LexisNexis, 2016) 47.

[18] Wai 262 Waitangi Tribunal Report: Te taumata tuatahi (n 15).

[19] Ibid xviii–xix.

[20] Ibid 92.

[21] Calhoun (n 9).

[22] 'Te Pae Tawhiti: Wai 262' (*Te Puni Kōkiri, Ministry of Māori Development*, 18 August 2023) <https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/wai-262-te-pae-tawhiti> accessed 7 September 2023; 'Mātauranga and Taonga Māori and the Intellectual Property System' (*Ministry of Business, Innovation and Employment, Hīkina Whakatutuki*) <https://www.mbie.govt.nz/business-and-employment/business/intellectual-property/matauranga-and-taonga-maori-and-the-intellectual-property-system/> accessed 7 September 2023. Kete means 'basket, kit'. See John C. Moorfield, *Te Aka Māori-English, English-Māori Dictionary* (online), Definition of 'kete' <maoridictionary.co.nz> accessed 11 October 2023.

[23] New Zealand Government, *Cabinet Paper, Te Tumu mō te Pae Tawhiti* (Office of the Associate Minister for Māori Development, 2022) <http://www.tpk.govt.nz/documents/download/documents-2275-A/Te%20Tumu%20m%C5%8D%20te%20Pae%20Tawhiti%20Cabinet%20paper.pdf> accessed 7 September 2023; See also, New Zealand Government, *Cabinet Business Committee Minute of Decision, Te Tumu mō te Pae Tawhiti* (CBC-22-MIN-0004, 25 January 2022) <https://www.tpk.govt.nz/documents/download/documents-2275-A/CBC-22-MIN-0004%20Minute-cab.pdf>.

[24] Te Pae Tawhiti: Wai 262 (*Te Puni Kōkiri, Ministry of Māori Development*, 18 August 2023) <https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/wai-262-te-pae-tawhiti> accessed 7 September 2023.

[25] Marrakesh Agreement Establishing the World Trade Organization, (opened for signature 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3 Annex 1C ('TRIPS Agreement').

[26] Convention on Biological Diversity, (opened for signature 5 June 1992, entered into force 29 December 1993) 1760 UNTS 30619 ('CBD').

[27] WTO, 'Doha Ministerial Declaration' WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) para 19.

[28] WIPO, 'Special Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Text of a Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources' WIPO/GRTKF/IC/SS/GE/23/2 (30 June 2023).

[29] Jessica Lai, 'Māori Traditional Knowledge and New Zealand Patent Law: The 2013 Act and the Dawn of a New Era?' (2014) 17(1–2) JWIP 34, 35, 39.

[30] *Ko Aotearoa tēnei: a report into claims concerning New Zealand law and policy affecting Māori culture and identity, Te taumata tuarua* (Wai 262 Waitangi Tribunal report 2011) ('Wai 262 Waitangi Tribunal Report: Te taumata tuarua') 201. Kaitiaki means guardian or protector. See Wai 262 Waitangi Tribunal Report: Te taumata tuatahi' (n 15) 251.

[31] Wai 262 Waitangi Tribunal Report: Te taumata tuarua (n 30) 201.

[32] Trade Marks Act 2002 ss 177–178; Lai (n 29) 35. Māori Trade Marks Advisory Committee members are appointed by the Commissioner of Trade Marks under section 177 of the Trade Marks Act 2002. Design applications with Māori elements may also be considered by the Trade Marks Māori Advisory Committee.

[33] Patents Act 2013 (NZ) s 226.

[34] Ibid s 225.

[35] Ibid s 225(3). The current members are listed on the IPONZ website at <https://www.iponz.govt.nz/about-ip/maori-ip/maori-committees-for-ip/> accessed 7 September 2023. Tikanga means traditional rules or custom. See Wai 262 Waitangi Tribunal Report: Te taumata tuatahi' (n 15) 254.

[36] Patents Act 2013 (NZ) s 227.

[37] Lai (n 29) 38; Wai 262 Waitangi Tribunal Report: Te taumata tuarua (n 30) 200–201.

[38] Lai (n 29) 38.

[39] Patents Act 2013 s 15(4).

[40] 'Māori Committees for IP' (*IPONZ*) <https://www.iponz.govt.nz/about-ip/maori-ip/maori-advisory-committees/#jumpto-the-m__0101ori-advisory-committee-process0> accessed 7 September 2023.

[41] Ibid.

[42] Selecting this option when searching across the entire register returns seven cases (June 2023). The applications identified in this list are all primarily closed (5) or withdrawn (1) with one provisional application listed as Filed.

[43] Selecting this option when searching across the entire register returns 13 cases (June 2023).

[44] At the time of writing (September 2023), the last published version of the IPONZ Year in Review is the 2020/21 IPONZ Year in Review covering activity during the 2020/21 financial year ending 30 June 2021. See 'IPONZ Year in Review 2020/21' <https://www.iponz.govt.nz/assets/pdf/about-iponz/iponz-year-in-review-2021.pdf> accessed 7 September 2023.

[45] The terms of reference and memorandum of understanding for the Māori Trade Marks Advisory Committee can be viewed on the IPONZ website at <https://www.iponz.govt.nz/about-ip/maori-ip/maori-committees-for-ip/> accessed 7 September 2023.

[46] Request one 4 November 2021, Request two dated 22 November 2022.

[47] Note that only the first request asked for the Terms of Reference and Memorandum of Understanding.

[48] Murdoch Riley, *Māori healing and herbal: New Zealand Ethnobotanical Sourcebook* (Viking Sevenseas NZ, 1994). Taonga means 'a treasured possession'. See Wai 262 Waitangi Tribunal Report: Te taumata tuatahi' (n 12) 254.

[49] Correspondence from IPONZ dated 7 December 2021 (on file with authors).

[50] IPONZ Patent Register (search filtered by 'Māori traditional knowledge or NZ indigenous species' conducted 22 June 2023).

[51] New Zealand Patent Application 798656 'Building Blocks', Willie Ngahere.

[52] Correspondence from IPONZ dated 7 December 2021 (on file with authors). This is consistent with section 9(2)(g)(i) of the Official Information Act 1982.

[53] Ibid.

[54] IPONZ 'Terms of reference for the Māori trade marks advisory committee' ss 8, 12. <https://www.iponz.govt.nz/assets/pdf/maori-ip/terms-of-reference-maori-advisory-committee.pdf> accessed 7 September 2023.

[55] Wai 262 Waitangi Tribunal Report: Te taumata tuatahi (n 15) 105.

[56] Ibid.

[57] New Zealand Patent 750401 'Manuka Honey based Dietary Supplement' Custard Square Limited, Abstract.

[58] IPONZ, First Examination Report, 750401 Manuka Honey based Dietary Supplement (7 November 2019).

[59] Ibid. Rongoā means 'traditional Māori healing; medicinal qualities.' See Wai 262 Waitangi Tribunal Report: Te taumata tuatahi' (n 15) 253.

[60] Ibid 2.

[61] New Zealand Patent 750236 'Kawa Kawa Pesto' Motoka Limited.

[62] IPONZ, First Examination Report, 750236 Kawa Kawa Pesto (10 February 2020).

[63] Correspondence between Patents Māori Advisory Committee Members and IPONZ dated 23 January 2020 (on file with authors).

[64] IPONZ, First Examination Report, 750401 Manuka Honey based Dietary Supplement (7 November 2019) 2.

[65] Wai 262 Waitangi Tribunal Report: Te taumata tuarua (n 30) 140.

[66] Ibid 144.

[67] Ibid 145.

[68] New Zealand Patent 722140, 'Marker Compounds of Leptospermum Honeys and Methods of Isolation and Assaying Thereof' Comvita Limited.

[69] Ibid Abstract.

[70] Application referred to the Patents Māori Advisory Committee on 7 October 2021. See line 10 of Table 1 above.

[71] IPONZ, Patent examination report 1 '722140 Marker Compounds of Leptospermum Honeys and Methods of Isolation and Assaying Thereof' (9 December 2021) 9-10.

[72] Ibid 9.

[73] Ibid 4-9.

[74] Ibid 9.

[75] Duncan de Geest and Rachel McIvor, AJ Park (acting for Comvita Limited), Response to Examination Report (8 July 2022) 11.

[76] Ibid.

[77] Ibid. Note that 'rohe' means the territories of a Māori iwi. See Wai 262 Waitangi Tribunal Report: Te taumata tuatahi' (n 15) 253.

[78] Ibid.

[79] Ibid.

[80] Correspondence between Patents Māori Advisory Committee Members and IPONZ dated 14 July 2022, 12 August 2022 and 14 August 2022 (on file with authors); IPONZ Patent examination report 2 '722140 Marker Compounds of Leptospermum Honeys and Methods of Isolation and Assaying Thereof' (29 August 2022) 6.

[81] CBD; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity (opened for signature 2 February 2011, entered into force 12 October 2014) UNEP/CBD/COP/DEC/X/1 ('Nagoya Protocol').

[82] CBD art 1.

[83] Ibid arts 8(j), 15.

[84] Nagoya Protocol Annex I.

[85] 'Te Pae Tawhiti: Wai 262' (*Te Puni Kōkiri, Ministry of Māori Development*, 18 August 2023) <https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/wai-262-te-pae-tawhiti> accessed 7 September 2023.

[86] Lai et al. (n 8).

[87] New Zealand Patent 728460 'Compositions comprising honey, a preservative and an aqueous carrier and methods of use' Melcare Medical Pty Ltd.

[88] New Zealand Patent 721272, 'Composition, System and Method for Treating Skin' Biomedical Concepts LLC and DTR Dermal Therapy Research Inc.

[89] New Zealand Patent 722140, 'Marker Compounds of Leptospermum Honeys and Methods of Isolation and Assaying Thereof' Comvita Limited.

[90] Lai et al. (n 8) 218.

[91] Correspondence between Patents Māori Advisory Committee Members and IPONZ (on file with the authors).

[92] Ibid.

[93] Rangihiroa Panoho, 'The harakeke—No place for the bellbird to sing: Western Colonization of Maori Art in Aotearoa' (1995) 9(1) CS 11–25.

[94] Riley (n 48).

[95] Wai 262 Waitangi Tribunal Report: Te taumata tuatahi (n 15) 118.

[96] Korean Patent KR 101229118 B1 '*Phormium tenax* Spun Yarn and Fabric Comprising the Same' Ko Cheon Woo, So Soo Il and Ko Hyo Kyoung. Patent granted in February 2013 but lapsed in 2019 due to unpaid annual fees.

[97] Mexican Patent Application MZ 2021006890A 'Obtaining Cellulose Fibers, Carbon Fibers and Graphite Fibers From the Phormium Plant (Pharmium Tenax) Polimeros Y Compositos S a De C V. Application filed 10 June 2021 and pending examination.

[98] Korean Patent KR 101872010 B1 'A novel compounds from *Phormium tenax* and cosmetic composition comprising the same' Hankook Cosmetics Mfg Co Ltd. Patent granted on 28 June 2018.

[99] Riley (n 48).

[100] See, e.g., US Patent 2014/0328958 A1 'Multi-Purpose Cosmetic Compositions' Mary Kay Inc; PCT application WO 2012/092389 A2 'Sebum Control and Anti-acne Composition' Mary Kay Inc.

[101] Riley (n 48).

[102] See, for example, the Traditional Knowledge Digital Library in India and the Public National Register of Collective Knowledge of Indigenous Peoples of Peru. Evana Wright, *Protecting Traditional Knowledge: Lessons from Global Case Studies* (Edward Elgar, 2020) Ch 5.

[103] Lai (n 29) 40.

[104] 'Apply for a patent' (IPONZ) <https://www.iponz.govt.nz/about-ip-patents/apply/> accessed 11 March 2024.

[105] See, for example, Communication from Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, the ACP Group, and the African Group, *Draft Decision to Enhance Mutual Supportiveness Between the TRIPS Agreement and the Convention on Biological Diversity*, WTO Doc TN/C/W/59 (19 April 2011).

[106] WIPO, *Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge* (2nd ed, 2020) 61–93.

[107] Ministry of Business, Innovation and Employment, Hikina Whakatutuki, 'Disclosure of origin of genetic resources and traditional knowledge in the patents regime' (Discussion Paper, September 2018) <https://www.mbie.govt.nz/dmsdocument/3706-disclosure-of-origin-discussion-paper> accessed 8 September 2023.

[108] ibid 17; Castalia, 'Economic Evaluation of Disclosure of Origin Requirements' (Report to Ministry of Business, Innovation and Employment, April 2018) <https://www.mbie.govt.nz/assets/137b70a333/castalia-economic-assessment-evaluation-disclosure-origin-requirements.pdf> accessed 8 September 2023.

[109] Wai 262 Waitangi Tribunal Report: Te taumata tuatahi (n 15) 93.

[110] Plant Variety Rights Act 2022 s 62(1).

[111] See for example, Plant Variety Rights Act 2022 ss 62–68.

[112] Patents Act 2013 s 3(e).

[113] Plant Variety Rights Act 2022 s 58.

[114] See, for example, David J. Jefferson 'Reconciling Guardianship with Ownership: Protecting Taonga Plants, Māori Knowledge, and Plant Variety Rights in Aotearoa New Zealand' (2023) JWIP 1, 7; David J. Jefferson, 'Treasured relations: Towards partnership and the protection of Māori relationship with taonga plants in Aotearoa New Zealand' (2022) 25 JWIP 327, 348.

[115] 'Genetic resources and living modified organisms' (New Zealand Ministry of Foreign Affairs and Trade, Manatu Aorere) <https://www.mfat.govt.nz/en/environment/biodiversity-and-species-conservation/genetic-resources-and-living-modified-organisms/> accessed 19 January 2024.

[116] IP Australia refers to 'Indigenous Knowledge' as encompassing both elements of traditional knowledge and traditional cultural expressions.

[117] Ninti One, 'Scoping study on standalone legislation to protect and commercialise Indigenous knowledge Final report' (IP Australia, 2023) <https://www.ipaustralia.gov.au/tools-and-research/professional-resources/data-research-and-reports/publications-and-reports/2023/07/03/05/26/scoping-study-on-standalone-ik-legislation> accessed 20 September 2023.

[118] IP Australia, 'Enhance and Enable Indigenous Knowledge Consultations 2021: IP Australia Consultation Report' (September 2022) 3 <https://consultation.ipaustralia.gov.au/policy/ik2021/user_uploads/enhanceandenableindigenousknowledgeconsultationreport2021.pdf> accessed 22 January 2024.

[119] 'Enhance and Enable—Indigenous Knowledge Consultations 2021' (IP Australia) <https://consultation.ipaustralia.gov.au/policy/ik2021/> accessed 19 September 2023.

[120] IP Australia (n 117) 5.

[121] IP Australia, 'Indigenous Knowledge Work Plan 2022-23' <https://www.ipaustralia.gov.au/about-us/our-agency/our-research/indigenous-knowledge-initiatives#:~:text=IK%20Workplan,activities%20in%20this%20work%20plan> accessed 22 January 2024.

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