



**SUBMISSION**  
**on the Implementation of the Trans-Pacific**  
**Partnership Intellectual Property Chapter**

**30 March 2016**

**To: Ministry of Business, Innovation and Employment**

This Submission is from:

**Te Whakakitenga o Waikato Incorporated**

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## INTRODUCTION

1. This submission is made on behalf of Te Whakakitenga o Waikato Incorporated (formerly known as Waikato-Tainui Te Kauhanganui Incorporated). Te Whakakitenga o Waikato Incorporated is the governance entity for the iwi of Waikato-Tainui, which has over 67,000 members affiliating to 68 marae and 33 hapuu.
2. Te Whakakitenga o Waikato Incorporated is the trustee of both the Waikato Raupatu Lands Trust and the Waikato Raupatu River Trust and is the mandated iwi organisation for Waikato-Tainui for the purpose of the Maaori Fisheries Act 2004.
3. Te Whakakitenga o Waikato Incorporated (**Waikato-Tainui**) is concerned to ensure that:
  - (a) the Trans-Pacific Partnership Agreement (**TPPA**) does not adversely affect the rights, interests and opportunities of Waikato-Tainui; and
  - (b) if ratified, the TPPA is implemented in a manner that ensures that:
    - (i) the Crown continues to meet its obligations to Maaori, including Waikato-Tainui, under the Treaty of Waitangi and its principles; and
    - (ii) Waikato-Tainui is able to work closely with the Crown to ensure that any benefits from the TPPA are fully realised within the Waikato region.

## OVERVIEW OF WAIKATO-TAINUI POSITION

4. Waikato-Tainui has a range of rights and interests including, but not limited to:
  - (a) rights and interests arising under the 1995 Waikato Raupatu Lands Settlement (and the Waikato Raupatu Settlement Act 1995) and the 2008-2009 Waikato River Settlement (and the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010);
  - (b) rights and interests according to tikanga and customary law;
  - (c) rights and interests arising from the common law (including the common law relating to aboriginal title and customary law); and
  - (d) rights and interests under the Treaty of Waitangi and its principles.

5. Waikato-Tainui seeks to ensure that these rights and interests are recognised and protected following the Government's adoption and implementation of the TPPA.
6. Waikato-Tainui is aware that there are likely to be some national benefits arising from the adoption and implementation of the TPPA. However, having regard to the information that is currently available and noting the absence of any direct engagement with Waikato-Tainui regarding the TPPA, Waikato-Tainui wishes to ensure that:
  - (a) Waikato-Tainui has the opportunity to actively engage with the Crown in respect of the implementation of the TPPA and the potential affects and opportunities that it may have for both Waikato-Tainui and the Waikato region;
  - (b) the Crown's ability to regulate and develop domestic laws and policies that uphold the rights and interests of Waikato-Tainui is maintained and not compromised or otherwise inhibited by the terms of the TPPA;
  - (c) the Treaty of Waitangi Exception provisions in the TPPA protect the relationship that the Crown has with Waikato-Tainui and the rights guaranteed to Waikato-Tainui under the Treaty of Waitangi and its principles;
  - (d) the investor state dispute settlement provisions will not impinge the Crown's ability to regulate for the purpose of protecting and advancing the rights and interests of Waikato-Tainui; and
  - (e) an independent economic analysis on the costs and benefits to Waikato-Tainui and the wider Waikato regional economy — with a particular focus on the primary industry, property, social services and health sectors — is commissioned by the Crown prior to the ratification of the TPPA.

## **PRIORITY AREAS**

7. Waikato-Tainui notes that the Ministry for Business, Innovation and Employment (**MBIE**) has sought submissions on the implementation of intellectual property chapter of the TPPA and, in particular, the matters identified in MBIE's Targeted Consultation Document, *Implementation of the Trans-Pacific Partnership Agreement Intellectual Property Chapter (Consultation Document)*. However, before addressing those matters, Waikato-Tainui considers it important to make clear its key views in respect of the TPPA generally.

## **Crown Processes: Engaging with Iwi**

8. In its 2011 Report on Wai 262, *Ko Aotearoa Teenei*, the Waitangi Tribunal was critical of the Crown's engagement process with Maaori in entering into international agreement and recommended amendments to ensure that Maaori were appropriately engaged throughout. Disappointingly, there no direct engagement with Waikato-Tainui and no specific analysis of the potential affects and benefits of the TPPA for the Maaori economy.
9. In the event that the TPPA is incorporated into domestic legislation, Waikato-Tainui wishes to actively engage and work co-operatively with the Crown through all states of the implementation process. To this end, Waikato-Tainui seeks early engagement with the Crown in respect of the implementation of the TPPA, including in relation to both the active protection of the Waikato-Tainui's rights and interests and the opportunities that might exist for Waikato-Tainui and the Waikato regional economy.

## **Treaty Exception**

10. The Treaty Exception provisions, set out in Article 29.6 of the TPPA, state:
  - (1) Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.
  - (2) The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be required to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.
11. Waikato-Tainui is aware that, although the Treaty Exception Clause has been included in New Zealand's free trade agreements since 2001, it has not yet been tested and uncertainty remains with respect to its interpretation.
12. Waikato-Tainui wishes to ensure that the Treaty Exception Clause protects the relationship that the Crown has with Waikato-Tainui and that the rights guaranteed to Waikato-Tainui under the Treaty of Waitangi and its principles are upheld and not negatively affected.

## **Investor State Dispute Settlement (ISDS)**

13. The TPPA provides a greater level of protection for foreign investors and their investments than New Zealand's existing trade and investment treaties. Investors are conferred rights that they can directly enforce through the dispute settlement provisions of the Investment Chapter. TPPA parties are liable to be sued by investors on the basis of the alleged breach of the investor protections.
14. Waikato-Tainui wishes to ensure that the ISDS provisions will not impinge the Crown's ability to regulate for the purpose of advancing Waikato-Tainui's rights and interests or otherwise adversely impact on potential development opportunities for Waikato-Tainui.

## **Economic Implications**

15. Waikato-Tainui has an economic base of \$1.2 billion. It is the largest ratepayer in the Waikato region. Waikato-Tainui is a major investor in the Waikato region and beyond with its diversified investment portfolio including retail, residential, commercial, industrial and rural properties and interests in the both the primary sector and tourism.
16. While there have been high-level economic analysis done on the impacts of the TPPA on the broader New Zealand economy, Waikato-Tainui is concerned that there has been a lack of economic data focused on the economic benefits and risks to the Maaori economy.
17. In particular, Waikato-Tainui is interested to understand the effects of the TPPA on growth and development in the Waikato region, and job growth or loss in the areas of employment in which Waikato-Tainui and its iwi members are currently engaged.
18. Waikato-Tainui repeats its request — which it has recently made to the Foreign Affairs, Defence and Trade Committee in the context of its International Treaty Examination of the TPPA — that the Crown commission an independent economic analysis on the costs and benefits to Waikato-Tainui and the wider Waikato regional economy, with a particular focus on the with a particular focus on the primary industry, property, social services and health sectors. This analysis should be completed in time for it to be considered by Waikato-Tainui, other iwi and the Committee prior to the ratification of the TPPA.

## INTELLECTUAL PROPERTY CHAPTER

### Treaty of Waitangi

19. The Consultation Document states that MBIE's overarching objectives in developing its approach to implementing the intellectual property chapter of the TPPA have been to:<sup>1</sup>
- (a) enable New Zealand to meet the TPPA obligations;
  - (b) minimise the impact of changes to intellectual property settings to maintain an appropriate balance between rights holders and users; and
  - (c) provide certainty and minimise compliance costs.
20. In this regard, Waikato-Tainui wishes to express its concern at the absence of any reference to the Crown's obligations to Maaori under the Treaty of Waitangi and its principles. The Treaty Exception provisions referred to in paragraph 10 above are of the utmost importance to Maaori and were clearly included in the TPPA in recognition of the importance of the Crown's obligations under the Treaty of Waitangi and, one can reasonably presume, the Crown's intention to uphold and fulfill those obligations when implementing the TPPA.
21. In these circumstances, Waikato-Tainui considers that one of the overarching objectives of the implementation of the intellectual property chapter of the TPPA — and, in fact, the implementation of all parts of the TPPA — should properly be to “ensure that the Crown meets its obligations under the Treaty of Waitangi”
22. Linked to this, Waikato-Tainui is concerned that the current intellectual property framework in New Zealand is insufficient to adequately protect maatauranga Maaori and the traditional knowledge of iwi, including Waikato-Tainui. This fact was recognised by the Waitangi Tribunal in its 2011 Wai 262 Report, *Ko Aotearoa Teenei* (the **Wai 262 Report**) in which the Tribunal found that the Crown had breached its obligations to Maaori by failing to provide adequate protections for Maaori intellectual and cultural property under the current intellectual property framework.<sup>2</sup>
23. Waikato-Tainui is further concerned that, despite the Waitangi Tribunal's extensive recommendations in the Wai 262 Report regarding the need to reform the intellectual property system to better protect maatauranga Maaori,

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<sup>1</sup> Targeted Consultation Document, *Implementation of the Trans-Pacific Partnership Agreement Intellectual Property Chapter* (MBIE) at para 19.

<sup>2</sup> Waitangi Tribunal, *Ko Aotearoa Tēnei – Te Taumata Tuatahi* (Wai 262), 2011, Chapter 1.

the Crown has done little to implement any of those recommendations since the Wai 262 Report was released in June 2011.

24. Waikato-Tainui notes the position expressed in the Consultation Document that:<sup>3</sup>

- (a) the consultation is confined to TPPA implementation;
- (b) feedback is not sought on other intellectual property issues; and
- (c) broader issues around intellectual property are being examined in other Crown policy processes.

25. An example of this is identified in the Consultation Document when reference is made to New Zealand being required to make changes to the Plant Variety Rights Act 1987. In this regard, the Consultation Document states:<sup>4</sup>

When implementing this obligation, New Zealand would have the right to adopt any measures that it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi. Those options are not covered in this targeted consultation document as they do not need to be implemented before New Zealand ratifies the TPP. They can be made within three years of the TPP entering into force for New Zealand (the period for implementing these changes could therefore be up to five years after the TPP was signed).

26. While referring to the potential for such changes to fulfill the Crown's obligations under the Treaty of Waitangi to be implemented, there is no commitment at all by the Crown to effecting those changes within that period, if at all. Sadly, this only reinforces the lack of commitment that the Crown has shown in relation to the implementation of its Treaty of Waitangi obligations in the important area of intellectual property where broader integrated reform to better recognise and protect maatauranga Maaori is well overdue.

27. In these circumstances, Waikato-Tainui considers that the implementation of the TPPA in this important area of law should not reasonably be considered in New Zealand without reference to:

- (a) the unique attributes of maatauranga Maaori; and

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<sup>3</sup> Targeted Consultation Document, *Implementation of the Trans-Pacific Partnership Agreement Intellectual Property Chapter* (MBIE) at para 18.

<sup>4</sup> Targeted Consultation Document, *Implementation of the Trans-Pacific Partnership Agreement Intellectual Property Chapter* (MBIE) at para 13.

- (b) the broader issues relating to intellectual property that need to be addressed in terms of the Crown's obligations under the Treaty of Waitangi.
28. Waikato-Tainui is further concerned that limited ad hoc changes to implement the TPPA without any Crown commitment to the necessary broader reforms that are required will create unreasonable international expectations regarding the New Zealand intellectual property landscape and may in turn have an adverse impact on the ability and willingness of the Crown to substantively address the protection of maatauranga Maaori in the future.
29. In Waikato-Tainui's view, the implementation of the TPPA provides the Crown with the opportunity to conduct a much needed broad review of the intellectual property framework in New Zealand and implement reforms that enable the Crown to fulfill its Treaty of Waitangi obligations to Maaori, including Waikato-Tainui, by better recognising and protecting maatauranga Maaori. Notably, the extract quoted in paragraph 25 above is the sole reference to the Treaty of Waitangi in the Consultation Document. That is wholly inadequate.

### **Performers' Rights**

30. Waikato-Tainui notes that the TPPA requires New Zealand to join the WIPO Performers and Phonograms Treaty (**WPPT**) and that to do so will in turn require amendments to the Copyright Act 1994.
31. In this regard, the Consultation Document proposes amendments to the Copyright Act that:<sup>5</sup>
- (a) provide moral and property rights to performers for aural and sound recordings (with exceptions);
  - (b) optionally extend moral rights (not property rights) to the totality of the live performance (including audio and visual aspects of the performance); and
  - (c) provide for assignment and succession of property rights.
32. Waikato-Tainui is concerned that these amendments are insufficient to protect the rights and interests of Maaori, including Waikato-Tainui and its members, in relation to performances of works that are taonga (or taonga-derived) or involve maatauranga Maaori, whether those works are new or traditional.

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<sup>5</sup> Targeted Consultation Document, *Implementation of the Trans-Pacific Partnership Agreement Intellectual Property Chapter* (MBIE) at paras 107-130.



33. In this regard, Waikato-Tainui supports in principle the recommendations made by the Waitangi Tribunal in the Wai 262 Report in relation to the establishment of new standards of legal protection governing the use of taonga works<sup>6</sup>, taonga-derived works<sup>7</sup> and maatauranga Maaori. In particular, the Waitangi Tribunal recommended that the law be amended to:
- (a) provide for two new mechanisms, namely:
    - (i) a general objection mechanism to prohibit the derogatory or offensive public use of taonga works, taonga-derived works and maatauranga Maaori; and
    - (ii) a mechanism by which kaitiaki can prevent any commercial exploitation of taonga works or matauranga Maaori unless there had been consultation and where appropriate, kaitiaki consent.
  - (b) establish a multidisciplinary expert Commission to replace the Trade Marks Advisory Committee and perform the following functions:
    - (i) hearing complaints from anyone alleging offensive or derogatory public use of taonga or taonga-derived works;
    - (ii) hearing complaints from kaitiaki about commercial use of taonga works;
    - (iii) determining whether something is a work is a taonga work or a taonga-derived work; and
    - (iv) determining who is a kaitiaki;
    - (v) establishing best practice guidelines to help users apply culturally appropriate practices; and
    - (vi) administering a register of kaitiaki in respect of particular taonga works.

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<sup>6</sup> A taonga work is defined as a work, whether or not it has been fixed, that is in its entirety an expression of maatauranga Maaori. It will relate to or invoke ancestral connections (whakapapa) and contain or reflect traditional narratives or stories. A taonga work will possess mauri and have living kaitiaki in accordance with tikanga Maaori. See Waitangi Tribunal, *Ko Aoteaora Tenei – Te Taumata Tuatahi* (Wai 262), 2011, at 1.8.

<sup>7</sup> A taonga-derived work is defined as a work that derives its inspiration from maatauranga Maaori or a taonga work, but does not relate to or invoke ancestral connections, nor contain or reflect traditional narratives or stories, in any direct way. A taonga-derived work is identifiably Maaori in nature, but has neither mauri nor living kaitiaki in accordance with tikanga Maaori. See Waitangi Tribunal, *Ko Aoteaora Tenei – Te Taumata Tuatahi* (Wai 262), 2011, at 1.8.

34. The Waitangi Tribunal envisaged that iwi, hapuu, whaanau or individuals could seek registration of a taonga work. Registration would be free and there could be a public notification process to provide for any objections. Once a work is registered as a taonga work, then the involvement of the recognised kaitiaki would be compulsory in respect of any future commercial use of it.
35. Waikato-Tainui considers that any reforms in relation to the issue of performers' rights should be comprehensive, not piecemeal, and should be extended to address the recommendations of the Waitangi Tribunal in the Wai 262 Report.
36. Such specific measures to address the Crown's obligations under the Treaty of Waitangi are expressly contemplated by the Treaty Exception provisions in the TPPA. However, rather than being deferred to a later date — if they are to be considered by the Crown at all — Waikato-Tainui is firm in its view that such matters should be addressed now at the same time as other changes to New Zealand's intellectual property laws are being made as a consequence of the TPPA.

## **CONCLUSION**

37. Waikato-Tainui notes that the feedback sought by MBIE in respect of the Consultation Document and the implementation of intellectual property chapter of the TPPA is extremely and unduly narrow.
38. At an overarching level, Waikato-Tainui wishes to ensure that:
  - (a) the TPPA does not adversely affect the rights and interests of Waikato-Tainui; and
  - (b) ratified, the TPPA is implemented in a manner that ensures that:
    - (i) the Crown continues to meet its obligations to Maaori, including Waikato-Tainui, under the Treaty of Waitangi and its principles; and
    - (ii) Waikato-Tainui is able to work closely with the Crown to ensure that any benefits from the TPPA are fully realised within the Waikato region.
39. In relation to intellectual property issues, notwithstanding the Treaty Exception provisions in the TPPA which contemplate that New Zealand's domestic law will provide for matters beyond the terms of the TPPA where required to fulfill the Crown's obligations under the Treaty of Waitangi, the Consultation Document reflects the Crown's lack of commitment to those obligations to Maaori and to Waikato-Tainui.

40. Waikato-Tainui's view is that such important matters regarding the intellectual and cultural property rights and interests (including maatauranga Maaori) of Maaori under the Treaty of Waitangi should be addressed at the same time as other changes to New Zealand's intellectual property laws are being made as a consequence of the TPPA.
41. For the reasons outlined in this submission, Waikato-Tainui advises that it seeks to be engaged directly with the Crown and its officials on both:
- (a) the ongoing process of ratification and implementation of the TPPA, including in respect of intellectual property issues; and
  - (b) wider issues regarding Maaori intellectual and cultural property, including maatauranga Maaori.

**30 March 2016**

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Te Whakakitenga o Waikato Incorporated

Redacted s.9(2)(a) OIA 1982