

2004

# *Inspirational Solutions*

## *Co-operative Co Ltd*

03.10.08

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Introduction of Cultural Industries as an Exception.

### Background:

*After in-depth analysis of the implications of trade liberalisation, the cultural industries and creative sector have come to the conclusion that the basic principles of the preparatory process raises application/interpretation problems for cultural industries [notably World Trade Organisation Outreach to Maori].*

*In fact, policies designed to preserve cultural and linguistic diversity may not be entirely compatible with the WTO outreach to Maori and so could be endangered.*

*As regards to direct restrictions on foreign investment, the standstill commitment is likely to make existing limitations ineffective, since sectors using new technologies would not be subject to such limitations. This would be unacceptable for this delegation Cooperatives Sector and would undermine the results of the Uruguay Round for the audio-visual sector. On completion of the Round other signatories - including the European Union and its Member States - did not agree to a standstill commitment with respect to mode 3 of the GATS [ "establishment of a commercial presence" ] in this sector.*

*As regards to indirect restrictions on investment, the type of disciplines to be included in the WTO Outreach to Maori or the Individual Action Plans are not yet precisely known.*

*However, the audio-visual and press sectors are governed by specific regulations, and need the capacity to help make a successful transition to custom, standards and conformance areas in which linguistic and/or nationality criteria play a central role. In this respect, it should be clear in how the capacity-building that APEC's ecotech activities in a State may treat too enterprises of these sectors differently, in particular according to the linguistic/interpretation content of the goods produced or the services supplied, consistent with the Translation services of the Executive Government Support Group within Internal Affairs.*

The Most Favoured Nation and National Treatment principle would also be difficult to apply to these sectors. In fact, *various international agreements make exceptions to the Most Favoured Nation and offer foreign enterprises of third countries preferential or even national treatment.*

Trade liberalisation should allow the Signatories to implement policies designed to promote cultural, creative and linguistic diversity and consequently, to protect and promote industries ensuring such diversity.

Only a cultural exception would make it possible to protect cultural industries from disciplines covered by agreement. [Contract or Estoppel agreements].

This general exception could be drafted as follows;

"Nothing in agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of these co-operatives/companies, in the framework of policies designed to preserve and promote cultural, creative and linguistic diversity."

There are many pressures and changes within the external environment of an organisation which impact upon the way services and production systems co-operate and are managed. Some external influences impose constraints on the services and production system while others offer opportunities.

Cultural constraints and their impacts are very indirect and not always apparent; the training or recruitment of personal for high contact service positions would need to take account of these cultural differences, also with the regulatory environment in the sense of constraints and the new production of technologies in terms of opportunities, these elements are interrelated and should not be viewed in isolation from each other.

The principles give direction to a Cultural Framework in the Order of Maori Training, Business, Industry and Trade. They are based on the premise that the individual is at the centre of all teachings and learning of a Cultural image and brand having it accepted for family/whanau, sub-tribal/hapu, Tribal/Iwi and Nga Hau e Wha/International Peoples to be of the highest quality - Taonga.

That in the consciousness of the people and the knowledge economy affirms and reflects New Zealand identity and recognition which have a value of their own in the commoditisation, as it were of the cultural and creative

world, and that the culture of creativity could set free the economy, rather than the economy being allowed to produce a surplus for the culture of a national direction, and then allowing for local family/whānau, sub-tribal/hapu and Iwi discretion.

Cultural Lag is a very specific part of the theory that looks at the world in terms of the interrelatedness of all phenomena, and in this framework an integrated whole; whose properties cannot be reduced to those of its parts, it is called kinship/whakapapa. This social-mandate is well founded and settles a standard to be built upon. The Order of power and with a Covenant for the Deconstruction of Sovereignty/Standards, establishes a minimum commitment for anyone who is a serious investor with project needs, over a minimum time of three years - Free Carriage.

This mark of independence is the right to communicate and has a community component, the people's right acknowledges the importance's of being autonomous and its cultural diversity, which makes the community creative. The knowledge economy as a substitute for the creative society is a recipe for disaster and is an unimaginative future.

The Uruguay Round remains unfinished business and a trade negotiation like the Uruguay Round between so many countries inevitably requires compromise. Many countries were not fully satisfied with what they achieved in the Uruguay Round. With a new round of negotiations to achieve further liberalisation, needs to be consistent with the three main objectives of the WTO.

### Introduction:

A Cultural exception that works as a process/protocol of elimination, to initially identify between cultural sensitivity and commercial sensitivity; within this broad scope and style of all participating countries could gain something through trade-offs and secured benefits; to agree to liberalise in sustainable sectors.

For developing countries this integrated approach to the world trading system can manage the uneven spread of benefits from world trade, this "new generation" of trade issues, such as investment, competition policy, the environment and electronic commerce. There is a need to also consider the interpretation of "Free Carriage" as a risk management approach to assurance, insurance and writ's etc that free trade and its role in promoting economic prosperity is an essential element in international stability and security.

Economic freedom is a prerequisite for political and other human freedoms/ de-colonising. A Liberal government who are colonial can't be responsible in Liberal terms. This deconstruction in the new humanity is of indigenous culture and the need for access to these cultural industries is a worldwide transformation. Naturalistic and Cultured are reversible in the process and how to look at responsibility off/for Consumers, Sovereignty and Justice; with there Domain's, Regulations/Codes and Standards.

The major industrialised economies will have their own priorities, as the major producers of inventions they will want to extend the **rules/standards/CC licences on intellectual property**. The WTO rules-based nature of the multilateral trade system and its binding commitments negotiated and undertaken freely by governments; "It is this transparent and profoundly democratic system that will be tested, as the dominant forces in financial services, telecommunications and other services, will want to further open up markets in these sectors"

These negotiations in the "Millenium Round" as tariff barriers are reduced, the focus of trade policy is shifting to **behind the border - to regulations and economic policies** that can have a significant impact on trade flows.

#### Payments and Gifts in the Maaori Communities;

The WTO Preparatory Process Outreach to Maori; and the articulated Treaty of Waitangi as the founding document of the nation. And its **authority constitutional in nature** which cannot be undermined by international agreements entered into by the Crown or its Treaty partner, a commitment to help and provide opportunities to develop a understanding of Maori Treaty Trades and a working relationship to meet the Crown's Treaty of Waitangi obligations/principle of 'good faith' and what properly constitutes a **guide for consultation with Maori**, has been designed with the intention of showing the appropriate processes that should be considered when **Inland Revenue** consults with Maori on taxation issues. It has not been designed as a prescriptive document but rather as a guideline to a practice that will evolve as our **partnership** with Maori grows.

It is important to note that when referring to Maori, there should be an understanding that this may mean;

iwi (tribal group), hapu (sub-tribal group), whanau (extended family group smaller than hapu), waka (related tribal groups identifying by descent from a particular canoe e.g Takitimu, Tainui, Mataatua etc).

Pan-tribal or urban Maori organisations, or individual Maori.

The framework provides for an Inland Revenue consultation, with Maori individuals and groups that will ensure a consistent approach to this issue, with an ethic of integrity, honour and respect in all its dealings with its Treaty partner.

The benefits of responsiveness to Maori are many; key amongst these are our ability to discharge the Treaty responsibility accepted by the Crown to "act in good faith and make informed decisions";

our ability to deliver high quality analytical information and policy advice;

to draw upon informed public opinion in making foreign policy choices;

developing our understanding of the unique place of Maori that they derive from the Treaty of Waitangi;

greater interaction with Maori;

developing the capability to anticipate and equip to respond appropriately to changes in the Crown/Maori relationship;

the enhancement ability in cross-cultural perspectives,

the potential for augmenting the motivation and satisfaction levels;

better performance of New Zealand/Aotearoa representatives overseas;

its contribution overseas as to how race relations in New Zealand are perceived

Traditional knowledge - "some rights reserved";

Te Whaanga Aronui - The Council for the Humanities; acknowledges Te Tiriti o Waitangi as the founding document of our nation and as our guide for establishing any institutional arrangements with tangata whenua of Aotearoa New Zealand.

Consequently the Council is committed to recognising the importance of matauranga Maaori as an indigenous taonga and its unique role in establishing and supporting the contemporary strategic development of the humanities in Aotearoa New Zealand. The Council is further committed to facilitating the ongoing involvement by Maaori scholastic communities in achieving the mission and the goals of the Council.

The Council for the Humanities is leading the project for Creative Commons Aotearoa New Zealand (CCANZ) and has just launched a dynamic web project that offers a new approach to copyright. Creative Commons began in 2001 with the aim of establishing a fair middle way between the extremes of copyright-control, and the uncontrolled exploitation of intellectual property. Its primary tool is the use of a range of copyright licences/freely available for public use, which allow creators to fine-tune control/over their work, so enabling as wide a distribution as possible. Originally those licences were written for worldwide use and were grounded in American law and practice.

The CCANZ website allows New Zealanders to choose "some rights reserved" copyright for their own creative works. The international Creative Commons movement towards internet-friendly copyright is embraced in more than 40 countries and its generic licences have recently been tailored to New Zealand's legal jurisdiction.

Your patents, trademarks, designs and plant variety rights which make up your Intellectual Property rights, form part of your intangible assets. They should be insured like any other property and goods and chattels that you own. It is accepted practice to insure your property and your goods chattels if you want to use them as security to raise capital.

It is also becoming more common for venture capital providers to invest only in potentially great ideas when they know that the patents that they are investing in are insured too. There are two insurance policies one covers Patent applicants and the other one covers the Patent-holder. A "deterrent" and/or "bargaining power" is vital for a patent applicant when they are testing the market or negotiating a licence/royalty agreement.

Policies can by choice, provide cover in all countries subscribing to the Berne Convention Participating Countries, E.U. Patent Cooperation Treaty Participating Countries in which the patent is applied for/granted. Policies can also be extended.

### Sponsorship and Brand Spirit:

Providing information to communities/public must start with an understanding of the audience/culture. The people-centred approach, the essential core of which is sometimes referred to as social marketing; that must engage people emotionally. **Social marketing** is a methodology for engaging those things that drive people's perceptions by providing them with information which they can use to make decisions. To facilitate this, it is

essential to offer people something that responds to their questions and concerns.

By increasing understanding, the social marketer aims to broaden the knowledge, and as a result, change the attitudes and behaviour of the wider public - consumers, policy makers, and influential interest groups alike. Changing attitudes - that seem to challenge preconceived ideas on how governments should work. This assumes a particular government has decided it wants to liberalise and the job is to offer an approach to help build domestic support for that policy and APEC's Trade liberalisation credibility.

When conducting communications/contemporary strategies in New Zealand, the research shows us that it is essential that abstract economic arguments need to be made relevant to daily life. Governments in general are seen as influenced by their inherent need to be re-elected every three years, and are therefore not regarded as credible advocates for the long-term process of liberalisation. People are more likely to be influenced by the things they see around them; in other words, anecdotal evidence is more believable and persuasive than rigidly tested economic theory. The object is to assist people to see this life change as an opportunity to re-educate, retrain and realign their career paths.

### Reinventing Co-operation:

Maori and New Zealanders have been hard hit by the economic reforms and now the economic recession and the pain felt by constituencies (as individuals and communities) has been very real. The income and employment losses from the credit crunch and tariff reductions and the resulting social problems, are indeed a consequence of liberalisation. However they are temporary as businesses restructure themselves by getting out of unprofitable activities, and focus their effort on activities in which they are better suited. The culture of restructuring the Maori workplace, to take advantage of a more dynamic, higher skilled and re-focused workforce, needs the changes in the economy, due to liberalisation. The challenge is to make policy meaningful to them.

Liberalisation is a philosophy that is all pervasive in the global scheme of things. The idea of liberalisation is that it encourages the economy to put its resources into areas where it is truly competitive. When the price signals and market conditions are right/viable, this will also provide the incentive for individuals to develop/design practices to use resource efficiently.

Defining words and terms will provide certainty for resources users, where as ambiguity in the meaning of terms can result in confusion and uncertainty for resource users, which can also contribute to unforeseen compliance and administration costs. The Resource Management Bill was not designed or intended to be a comprehensive social planning statute; it is to promote the sustainable management of Natural and Physical resources. Government and Local Government do not have the yard stick for rapidly changing technology and environmental practices etc.

The fact that doing business in the latter part of the twentieth century is an energy intensive endeavour that gulps down resources. I don't mean to decry the efforts made by companies/corporations to reduce their negative impact on the environment. I applaud them greatly, but it is clear that all companies/corporation were/are essentially proscribed from becoming ecologically sound and environmental standards only underlines the fact that commerce and sustainability were/are antithetical by design, not by intention. Companies/corporations are trying to change the nature of business and move toward socially responsible commerce, this is only part of the overall solution. Rather than a management problem, we have a design problem a flaw that runs through all business.

The rationale is to create an enduring society; we will need a system of commerce and production where each and every act is inherently sustainable and restorative. Business will need to integrate economic, industrial research, biologic and human/cultural systems to create a sustainable method of commerce.

We can not fully succeed until the institutions surrounding commerce are redesigned. Just as every act in an industrial society leads to environmental degradation, regardless of intention, we must design a co-operative society/system where the opposite is true; where the natural every day acts of "good faith", work and life accumulate into a better world as a matter of course not a matter of conscious altruism. Our human destiny is in inextricably linked to the actions of all other living things. Respecting this principle is the fundamental challenge in changing the nature of business.

### Kaitiakitanga - Guardianship;

With global trends moving toward heritage and cultural activities; Maori have cultural assets and are inherently in a prime position to commercial exploit the opportunities available. As stakeholders in an interdependent ecological environment; management frameworks are only now beginning to



formally endorse and address the detrimental exploitation practices that generate a need for ecological preservation and sustainability. The terminology has now become, balancing productive efficacy with ecological sovereignty.

In this new environment the concept of competing against other nation states should carry far less weight for as we are seeing now, if our neighbours fall so do we. As it's been touted in recent years, the business sector has been able to see the co-operative model being applied over competition. Together with business basics and adequate funding we have seen that a co-operative model cannot just meet cultural, social and environmental objectives, but can also improve the bottom line.

This is aimed to promote this method of conflict resolution as a practical, affordable and a highly effective complement to the traditional adversarial judicial system. It is apparent that our ability to handle conflict has to change. There is no doubt that competition can be healthy. It creates drive, inspiration and heightened performance, but works optimally only when coupled with a collective vision that includes all stake-holders. The best of mutual Co-operation has yet to come the wheels are turning if only out of necessity, if nothing else.

Co-operation and less competition may be the only way ahead if we are to handle the greatest threat we have come to face; our-selves. The removal of trade barriers, such as Tariff reduction is only one part of liberalisation; tariff removal also increases exposure to international standards and technology, and a reduction in administration costs, both for the Government and for business. APEC is now making steady progress on improving the mobility of business people within the region. Economies are genuinely under a lot of pressure to make a commitment to change and are heeding calls from business people for reform.

The growth in the APEC Business Travel Card Scheme; the commitment to expand the use of multiple entry visas for business travellers, and improvements in border management capabilities, all of which provide practical benefits to New Zealand/Aotearoa. Once tariffs are gone from the New Zealand economy, we will be urging other nations to avoid the pitfalls of protectionism and follow our lead.

The WTO and all international conventions and agreements do not take precedence over domestic law, policies or practices and have to be consistent with domestic law, it is at this negotiating stage that the International

*Covenant on Economic, Social and Cultural Rights* undertake to ensure, nothing in this article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and the Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

### Cultural framework:

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995), convinced of the fundamental importance of the protection of cultural heritage and of cultural exchanges for the promoting of understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation.

Also the Convention on the Protection and Promotion of the Diversity of Cultural Expression October 2005. As part of the activities for the Decade (1995 to 2005), the United Nations Assembly adopted this Convention. This Convention is fundamental flawed, simply because it does not provide the necessary cultural framework, Core generic, classification levels, cross-crediting, seamless system investment and insurance for the value systems inherent in culturally sensitive and commercially sensitive considerations as they relate to the Protection and Promotion of the Diversity of Cultural Expressions.

The intention to recognise the importance of intellectual property rights in sustaining those involved in cultural creativity and/or being convinced that cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value, for this does not ensure the so called diversity of Cultural expression.

The Cultural framework policies and measures are too general in quantifying and qualifying cultural values and practises, along with measures aimed at providing public financial assistance does not provide protection or promote cultural diversity. All it will create is cultural dependency on the State.

For Maori, cultural dependency would be in conflict with the Treaty of Waitangi and all of its founding principles and articles which in turn impacts on Tikanga Maaori and the Maaori World view of its value system here in Aotearoa/New Zealand. The International Fund for Cultural Diversity, also sets a dangerous precedence as the funds-in-trust is

established in accordance with the Financial Regulations of UNESCO, there is nothing Cultural diverse about these financial regulations.

The only alternate source of Maaori wealth, apart from the settlement of Treaty claims and the social spending of Government, will be due to overseas trade.

This will require a capacity to participate internationally in recognising the development of a closer economic relationship since the commencement of the Australia New Zealand Closer Economic Relations-Trade Agreement and the benefits of free trade in goods; and will ultimately be in accordance with the market access rules established at the WTO.

Attempting to use trade for social and cultural purposes often ends up damaging both, so as the exception of cultural industries may be required human capital, innovation, skills and experience need to be focused on intellectual property rights as a result of inherent origin. Governments must plan carefully to harness this knowledge economy and its growth.

International conventions have allowed intellectual property rights systems to be applied across borders. Two of the earliest of these agreements were the Berne Convention (covering copyright) and the Paris Convention (covering patents, industrial designs, and trademarks). These international agreements for copyright and trademarks are administered by the World Intellectual Property Organisation.

Indigenous and traditional communities have Indigenous knowledge relevant to the world's biological diversity that is based on traditions quite different from those of the western science, but these traditions have effectively developed extensive knowledge of the food, medicinal and other biological resources in their territories. This traditional knowledge takes place communally rather than individually, holistically rather than 'scientifically' and sometimes over generations, western style intellectual property law does not recognise the rights of these communities and their traditional knowledge.

But western industry is beginning to realise the value of cultural industries knowledge in order to develop new products. This activity is sometimes called "bio-prospecting". The industrial development of raw indigenous species for pharmaceutical use and often obtained intellectual property rights over products developed, from those traditional communities that provide the source information may receive very little in return.

In recent developments of genetic science new concerns have been introduced, genetically engineered organisms are made from the combination of genetic material from different organisms. As Aroha Mead stated in a recent seminar on the issue.

"My cultural framework simply does not enable me to regard as a good thing the manipulation of Ranginui and Papatuanuku offspring, my ancestors, to such a degree that the outcome bears little resemblance to the richness of their original form and purpose".

Two alarming trends in genetic research are the collection of human genetic material and the patenting of life forms.

The Convention on Biological Diversity was negotiated under the auspices of the United Nations Environment Programme (UNEP) and was ratified by New Zealand on 16 September 1993. The convention recognises the role of the indigenous peoples in preserving biological diversity. In article 8.(j) signatories promise to "respect, preserve and maintain knowledge, innovations and practises of indigenous and local communities" with respect to biological diversity.

The world trade system encourages discipline on the part of Governments, which requires them to be certain and clear about their national interests and helps promote international peace through a balanced view of trade policy, that are shielded against lobbying from narrow interest groups, but requires companies and workers to change.

A set of principles that promote co-operation/competition and minimised business costs, within the context of sound and coherent legal frameworks should be of significant assistance in the process of reforming financial markets. The only contribution humans make to the principles of economics is Labour with what a Market will bear, at what every level and its natural order.

It is with Covenant/Kawenata that this task has been accomplished, and by this same Covenant our jurisdiction and authority, venue and status, is encompassed in Absolute, validated by the ancestral court of Hawa'iti. This status was and is, recognised by the Sovereign of the Vatican, through its Agent, the Sovereign of England.

The foundation of partnership and trusteeship (Crown and Maori) as it relates to our intent in Trade, Peace and Order for a small export-dependent country like New Zealand, with reliance on economic and technical co-

operation is a critical area of development for the strengthening market initiatives. Often the key challenge in this area is putting in sound legal framework to ensure that markets are well governed. The issues surrounding the regulation of domestic financial markets are not too different from the issues surrounding the regulation of markets in general.

### Engagement with Maori on International Treaties:

In 2001 the Government approved a strategy, developed by the Ministry of Foreign Affairs and Trade (MFAT) and Te Puni Kōkiri aimed at ensuring effective engagement with Maori by the Government during the negotiation and implementation of international treaties that might be relevant to Maori.

Considerable care must be taken to address the concerns of the public/cultural industries if forward movement is to be maintained. Much of this work needs to be carried out in terms of, the domestic outreach programme/activities (WTO Outreach to Maori 1999). Electronic Commerce/Business that APEC Business Advisory Council have recommended for key measures, which must be addressed by APEC Governments and the private sector working together. They want to see an agreement in the WTO not to impose (the exception) any new customs duties on electronic transactions over the Internet.

This sound administration/base is essential to an efficient and effective co-operation. To understand and strive to achieve/oversee the objective/function of cultural industries, there must be a good political background, expertise specific to the objective, faithful management and people skills with professional appearance. Embodied as part of the Government structure, APEC Experts Group on Business Mobility is increasingly important in the global trade and investment marketplace, APEC Business Travel Card, Visa Free Entry and Multiple-Entry Visas provide a fairer trading environment which promises enormous gains.

The Ministry for Culture & Heritage have a number of initiatives in place that address some of the above interests. One in particular is the Cultural Diplomacy International Programme, where there is still a lot of work to be done, but has made a good start to.

**OPTION 1.** As a culture (Maori) we need to make a constructive contribution to the above activities, this can be achieved through the unique cultural industries Maori have been practising for generations in cultural exchange (Powhiri/Pohiri). This exchange/trade as an exception will provide access to a "cultural privilege" with explicit

guarantees/quality assurance and the relevant Maori Standards (Mana tohu). To secure international standards a "diplomatic privilege/s" will allow continued preservation and promotion of cultural and linguistic diversity.

**OPTION 2:** To participate in official bilateral trade visits overseas and meet with foreign visitors to New Zealand. This can be achieved on a level through business groups, eg Chambers of Commerce, NZ Cooperatives Assn. The Ministry of Foreign Affairs and Trade operates a small visitors unit which liaises with regional divisions to assist with arrangements of official visits. Foreign countries communicate a desire to travel to New Zealand to investigate potential business or cultural ventures. The country will furnish the Ministry with specific industry interests.

The Ministry co-ordinates an itinerary of meetings, by contacting local business, Government departments, tourist facilities and cultural organisations. A programme is submitted to the visiting country. Once a programme is agreed, arrangements are confirmed. If resources allow, an escort officer (usually from the bilateral division of the country visiting) is assigned to the visitor or party. The success of a programme's standard's, is imperative to developing business/cultural ventures.

Visits arranged through Embassies receive communications of the visit and liaise with the host Government. The host Government acknowledged the official visit. The business group is accorded "diplomatic courtesies" although they do not have diplomatic status. The post arranges official social activities, meetings and dinners.

**OPTION 3:** To seek "diplomatic immunity" through the formal status of indigenous groups of foreign countries. These groups will need to establish their own status/standards. Once this is achieved world-wide (Nga/Hau e Wha) a process/protocol could be developed in the international arena to recognise the exception of "indigenous privileges and immunity". Such privileges can only be held by a recognised Indigenous Group (which must have the origins/interests of the entire culture/industry at heart) of each peoples/country.

As representatives from private industry along with key government agencies do need to focus on developing robust policies, projects and programmes at a regional and international level.

*“Without any formal system of protection we can do little to stop the misappropriation and misuse of traditional knowledge and cultural expressions & industry, but with the World Intellectual Property Organisation’s Intergovernmental Committee this Traditional Knowledge is been addressed. But the WIPO process is in response to concerns about the IP system and its impact on traditional knowledge.*

*Just as IP is only one of the issues or problems that make up the wider traditional knowledge debate, the IP system can only provide some of the possible solutions.*

**Mr Marcel P Wainohu**

**Cooperator/Transacting Shareholder.**

RELEASSED UNDER THE  
OFFICIAL INFORMATION ACT

# Inspirational Solutions

## Co-operative Co Ltd

Submission; Maori Trustee and Maori Development Amendment Bill.

### Introduction;

12.05.08

This submission is on behalf of Inspirational Solutions Cooperative Company Limited and contact details are set out below.

I/we wish to speak to some of the introduced changes arising out of the review of the Maori Trustee and Maori Trustee Office, by looking at *the work and ways of bringing together functions supporting Maori business*, undertaken by Te Puni Kokiri, the Maori Trustee and potentially other organisations.

### Specific comments I/we wish to raise and background

Will be necessary in considering the Maori Trustee and Maori Development Amendment Bill as it is to amend the Maori Trustee Act 1953. The review has produced a substantial amount of work already, so that this Bill may address some of these concerns, that in essence, where dead or poorly used money could be better used to underpin Maori social and economic development within a range of agencies.

The Office of the Maori Trustee was expected to provide fair, proper and prudent administration and management of clients' assets within the principles and obligations of trusteeship and agency, the Maori Trustee was *set up to take over the role of the Public Trustee*.

The Maori Trust Office currently administers more than 2200 properties and special trusts. It cares for more than 156,000 owners and manages some 115,000 owner accounts.

### The transfer of liability;

1. With the Bill leading to some major changes as it relates to the nature and appointment of the Maori Trustee, the Maori Trustee will actually have its independence further recognised and given greater powers along with a range of monies. At the end of this process, the money under the control of the Maori Trustee *will be sufficient to have a real leveraged effect* in terms of Maori social and economic development.

*In developing this policy, is this leverage sufficient enough to underwrite (indemnified or insured), the absolute Maori trusteeship?*



2. The Maori Trustee needed to be reorganised, reformed to face the challenges of the future of trusteeship.

Poor governance can put organisations at risk of commercial failure, financial and legal problems for directors/trustees or allow an organisation to lose sight of its purpose and its responsibilities to its owners and people who benefit from its success. Although **good governance principles and practices are universal**, no two organisations are ever the same. There are also particular characteristics of Maori organisations which bring extra dimensions, to the practice of governance.

*The set up of a new independent statutory corporation to further Maori economic development; may not provide the legal impetus to substantiate absolute trusteeship?*

3. The principles and obligations of the Maori trusteeship and/or agency will also require, **power of modernisation that delivers a minimum national and international Maori standard**. The Maori Lands Act 93 (Te Ture Whenua Maori Act 1993) sets a precedent, for Maori Trustees powers contained within the Trust Order made by the Maori Land Court and a further term's of reference is the Trustee Act 1956.

*This Ownership is based on the intention of the Trustees Powers generally interpreted in Trust as;*

In furtherance of the objects of the Trust and except as hereinafter may be limited to do all or any of the things which they would be entitled to do, as they were the **absolute owners** of the land provided however that the Trustees shall not alienate the whole or any part of the fee simple, by gift or sale other than by way of exchange on the basis of land for land, value for value and then effected by Court Order or in settlement of a proposed acquisition pursuant to the Public Works Act or similar statutory authority or by partition as hereinafter provided.

*Does this precedent provide for the settlement of a proposed acquisition pursuant to similar statutory authority?*

New Zealand statute law needs overhaul says Law Commission (12 September 2007);

“New Zealand statute law is in a chaotic state”, there are acts on the statute books that are totally obsolete much of this clutter should be re/moved. There is no obvious order or logic about statute books. *The law on one topic can be scattered over several acts.*

“Provisions on some subjects can be hidden in places where no one would ever think to look for them and it is hard to be certain when researching the content of the law that everything on a particular problem has been found”.

What is worse, **there is no official index to our statute** and there have been changes in drafting styles over the years.

Some of the older Acts still in force are very hard to understand, and where these older Acts have been amended over the years the new amendments are likely to be in a different style. *The old and new style together can make matters even more untidy.*

Maori development as a Trustee and its related agencies will carry a huge public and private liability for Maori nationally and internationally that will require -

**A. Trust territory;**

A non-self-governing territory placed under an administrative authority by the Trusteeship Council of the United Nations as being a former mandate under the League of Nations or a territory voluntarily placed under the international system by the state responsible for its administration.

**B. Trustification;**

The process of forming a trust or organising into a system of trusts.

**C. Trust institution;**

A corporation engaged in the business of administering estates and trusts, the Trust department of a trust company or other banking institution.

**D. Trusty;**

To give the devil his/her due (honourably). A sentiment that provides moral conditions for probity.

**E. Trusteeship;**

The office or function of a trustee, authorised supervisory control by one or more countries as trustee of the administration of trust territory under the international system of the United Nations.

**F. Trustee security;**

A security in which a trustee may properly invest and which is often described in the trust instrument or in an approved list established in accordance with law.

**G. Trustee process;**

The process of attachment by garnishment or in the New England states by foreign attachment (Equitable garnishment).

**H. Trust agreement;**

An agreement establishing and setting forth the material terms of a trust.

**I. Trust indenture;**

A document under which a trust (*as a mutual investment fund*) is conducted.

**J. Trust certificate;**

A certificate issued and sold as one or a series by the trustee of designated trust property (as an investment trust, railroad equipment or business trust) legally held evidencing a specified fractional equitable or beneficial interest in the trust property existing in the holder or registered owner of the certificate, incorporating the particular trust agreement, setting forth the principal rights of the certificate owner to share in the income, profits, or gains realised from the trust property and in any current or future distributions of it, and *prescribing the mode of the transfer of the certificate*.

**K. Charitable Trustees;**

Are the Trustees of a trust that has at least one purpose that is charitable and are responsible for managing that charity. Legally, the trustees are the 'trust' in that they 'own' the assets and are responsible for the management of the assets, including distribution.

**L. Donee organisation;**

Means a special type of organisation that is seen by Inland Revenue to meet certain requirements in the Income Tax Act 2004. Certain individuals and companies may receive tax benefits by making gifts of money to a donee organisation. A charity can be a donee organisation.

**M. Duty of care;**

Refers to the legal obligation of anyone who manages or governs a charity to take care when administering the charity's affairs.

**N. Duty of Loyalty;**

Refers to the law that prohibits anyone within a charity from using their position for themselves or others at the charity's expense.

**O. Stakeholders;**

Are the people or organisations who have an interest in the activities of a charity.

**P. Values;**

Refer to the set of principles that guide an organisation's day to day operations. A charity's values will be reflected in its mission and aims.

**Q. The catchword for Trusts is 'Independence';**

Trusts are a valuable instrument, but there is general misunderstanding about their benefit and how they should be used and managed. People need to get the right advice from the outset to ensure they don't unwittingly put themselves at risk. The way small businesses are structured and operate is constantly evolving, so there is a greater need for people to protect their personal wealth from potential risk.

"A trust is a complex and sophisticated legal structure that can provide substantial benefits, but this does come at a cost beyond the initial set up fees. As well as giving trustees the ability to hold assets out of harm's way, it also places legal duties on them and gives the beneficiaries rights.

A good adviser will be able to assist in not only drafting a trust deed that reflects a client's wishes and specific needs, but will also make sure the client *understands exactly what they have created, why they have done so and what needs to be done to ensure that the arrangement is future proofed.*

All too often there are people who are trustees in their trusts, or have appointed advisers or trust companies set up by their advisers as their trustees, without having understood what role of the trustee is and what is expected of them, *as appointed trustees they need to act independently.*

They will look at your situation in depth, and will ensure that a trust is the best option for your intentions and that it will stand up to any legal scrutiny.

**Summary:**

**I/we support this clause because-**

The Maori Trustee may have a number of responsibilities to contend with as an *independent corporation*, but none more important than the payments and gifts in the Maori community from a Maori perspective on volunteering and cultural obligations within the charity sector or business sector, as the benefit to the public is obvious.

What we also felt is that privacy should be granted to organisations if they do not seek public money and specifically request confidentiality. "Maori charities that are run as *private philanthropic trusts* are not raising money, and therefore not risking money from the public, so there should be no concern about restricting public access to Maori information.

An automatic privacy policy on some of the public registers could be restricted, and would not compromise public confidence as the various public registers will still obtain relevant records and other required information for each charity or business i.e. Charities Commission, Land Information, Maori Land Court etc.

If the Maori Trustee were unable to maintain privacy, Maori development would be focused on innovative structures in an effort to retain anonymity, the cost of which would probably reduce the amount dedicated to charity or they might stop giving altogether, which would definitely not be in the public interest or Maori interest.

These public registers would publicly divulge the names of voluntary trustees in a private philanthropic trust. "These are not professional trustees – they're people from the Maori community/marae who donate their time to charitable organisations and revealing their details puts them at risk of unwanted approaches about the funds they look after. If their privacy can't be protected, such people will be harder to find in the future.

*I/we support the intent of this bill because-*

*For Maori development* to be most effective, it needs to be closely aligned with Maori world-views and Maori aspirations and progress in areas such as trusteeship and business, but these can not be accomplished without "taking cognisance of Maori values and *the realities of modern Maori experience.*

*Recommendations-*

Humanities Research has identified Non-Profit Institutions in New Zealand and mapped the size and nature of the non-profit sector to address the shortage of comprehensive and reliable data in composing that of the nation; ideas, people, histories, languages, cultures and economic. National identity is a strategic priority of the New Zealand government and a critical issue in the evolution of the nation-state in an era marked by globalisation, new ICTs, post-colonial revision of national histories, cultural and religious conflict, knowledge societies and creative economies.

To foreground the diversity of research into these issues being carried out in Aotearoa New Zealand; to explore the relation between this research and public policy formation on national identity; and showcase this research, build coalitions of interests, and identify new lines of enquiry, especially across disciplines, cultures and media.

The roles and identities of Translators and Interpreters in the 21<sup>st</sup> Century perils and still exist while working on the frontline as an intermediary between two parties. It can be argued that part of the difficulty arises from the lack of understanding, both inside and outside of the profession, in regard to the appropriate roles and identities of the Maori translator and/or Maori interpreter. *The role of a "Maori provocateur"* through discussion and dialog rather than to suggest solutions may provide a way forward, there are a number examples where translators and interpreters go beyond their sphere of professional competence as a result of economic pressures, unrealistic client

expectations and the issues of maintaining standards within the profession and in particular the highly contentious issue of re-accreditation.

The challenges facing the Maori translators in light of increasing globalisation, internationalisation and the new buzzword of the profession, *localisation*. Localisation stems from the translation and adaptation of Maori software and systems for target markets, *has now developed a broader meaning*, that of adapting texts while taking cultural, linguistic, social and legal norms into account are all values of trusteeship and business. With increased information exchange, and with the tools of the trade in the form of translation memory software becoming increasingly sophisticated and streamlined, there is a real risk that the translator will be pushed into the background in terms of the general public's perception of the translation process.

Professional translator's role will be to adapt to the new requirements as well as to be openly critical of them. Only through consensus among professionals on issues facing the profession can any affirmative action ensue, within specific sectors of society such as Maori society, the judiciary, maintaining standards within the profession, or increasing general levels of remuneration.

Such is the power of modernisation and the Maori developments the Maori Trustee and his agencies will have in future-proofing them, for their present and future Maori generations. The biggest Maori and Crown investment to date!?

Noho ora mai - Marcel P. Wainohu  
Co-operator.

Trans-Pacific agreement submission form.

**Full name:** Ben Nolan  
**Organisation:**  
**Address:**  
**Email:** bnolan@gmail.com  
**Phone:**

**Potential benefits:**

Better visa support for business travellers to the United States.

**Potential risks:**

New Zealand being subject to the over-reaching copyright, dram and software patent law of the United States. Many in the software industry in the USA feel that these laws stifle innovation and remove fair-use from users, and hand control of these rights over to large copyright-enforcing organisations.

**Impact:**

Easier travel to the states hopefully, also - we would likely be at risk of litigation from patent sharks that prey on small software houses in the USA, if NZ was under the same patent law we would be at risk from their strong-arm (but usually fraudulent if the plaintiff is willing to take the case to court) tactics.

**Are there specific outcomes?:**

Easier work visa processing for business travellers.

**Is there any specific information you can provide?:**

**General comments:**

Please avoid including us in the US copyright empire, the EU community has fought hard to not be part of the copyright and intellectual property nightmare the US has inflicted upon themselves - please don't bring it to New Zealand.

**Supporting document 1:**  
**Supporting document 2:**  
**Supporting document 3:**

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**SUBMISSION FOR THE TRANS PACIFIC PARTNERSHIP  
TRADE NEGOTIATIONS**

by the

**DAIRY COMPANIES ASSOCIATION OF NEW ZEALAND**

The Ministry of Foreign Affairs and Trade has requested submissions on the upcoming negotiations between the members of the Trans-Pacific Economic Partnership Agreement and the United States.

DCANZ is the association of dairy processing companies in New Zealand. Its members include almost all the processing capacity for dairy products in NZ.

In particular DCANZ recognises the significant regional nature of the negotiations covering countries in Asia, Oceania and the Americas. DCANZ is encouraged by the announcement at the APEC meeting of the participation of other countries such as Australia and Peru in the initial negotiations. The further potential to add additional countries to TPP is also welcomed as a means of reducing trade barriers in the Asia-Pacific Region.

This negotiation is an opportunity to develop a high quality FTA agreement with wide coverage and high standards across a number of major markets for NZ dairy products.

The USA is the largest market for DCANZ members comprising 10% of all dairy exports to a level of 1 billion New Zealand dollars in 2007. For all the likely members of the P7 negotiating group total NZ dairy trade is \$1.8 billion or 19% of total NZ dairy exports.

There remain significant trade barriers to trade for NZ dairy products in the USA. Examples are the outside quota tariff for cheddar cheese of US\$1227/tonne and that NZ only has access to cheese quotas of 22,500 tonnes as compared to domestic consumption of over 4 million tonnes.

There have been suggestions in the USA that dairy products be excluded from the TPP negotiations with the USA. DCANZ strongly opposes this in requesting that market access and other provisions specifically include dairy.



## THE TPP AGREEMENT

*Withheld under S 9(2)(b)(ii) OIA  
and S 9(2)(ba)(i) OIA*

### NZ DAIRY EXPORTS TO TPP

The key features of New Zealand's dairy exports to those countries currently intending to participate in TPP are:

**Australia** – total trade of NZ\$533 million in 2007 with the major products being cheese (\$211m) and butter (\$40m).

**Chile** – total trade of NZ\$8 million in 2007 with the major products being caseinates (\$3m) and lactose (\$1.7m).

**Singapore** – total trade of NZ\$235 million in 2007 with the major products being skim milk powder (\$89m) and whole milk powder (\$49m).

**Brunei** – total trade of NZ\$1.6 million in 2007 with the major product being butter (\$1.2m).

All these markets are covered by existing FTAs with New Zealand.

Separate comments follow on USA and Peru.

## NZ DAIRY TRADE WITH USA

### USA Dairy Sector

- The USA is a large dairy market with consumption of over 80 million tonnes of milk. Imports currently account for only 5% of total consumption.
- In recent years the US dairy market has shown significant growth in milk production. The current production level is 85 million tonnes.
- The US industry is now a net dairy exporter with a sharp growth in exports. Exports now comprise around 12% of production. There is considerable potential to further expand exports from NZ.
- Imports of dairy products comprise only 5% of USA dairy consumption.
- The USA has a complex set of internal market regulations including a price support system.

### NZ Trade with USA

- The NZ dairy industry has been a long term supplier of dairy products to the USA market. Recent levels of supply have been (in millions of NZD):

Product	2005	2006	2007
Casein and caseinates	323	319	380
Milk protein concentrates	218	255	247
Milkfat	212	289	233
Cheese	116	119	88
Whey protein concentrates	37	26	42
Whole milk powder	8	10	5
Other	41	5	6
<b>Total</b>	<b>920</b>	<b>1,022</b>	<b>1,002</b>

- The USA market received 10% of all NZ dairy exports in 2007.
- Imports of quota products occur at low tariffs without quotas while cheese, butter and milk powders are constrained by quotas and high tariffs.
- DCANZ members have had a long term involvement in selling in the USA and in investing in domestic processing.

### Trade Barriers

There are major trade barriers for butter, cheese and milk powders. Examples include:

- A tariff for butter of US\$1646/t and quota access of 6,977 tonnes of quota access.
- For cheddar cheese a quota of 8,200 tonnes with an outside quota tariff of US\$1227/tonne.
- For other cheese types a further 3 quotas of 14,300 tonnes also with high tariffs.
- For protein products such as casein, caseinate and milk protein concentrate the tariffs are zero or very close to zero. There are no quotas but there have been efforts in the USA to impose quotas.

- For the current WTO quotas there are in tariff quota rates of around 10%. These are unnecessary as there is already a quantitative control through the quota.
- Also for many WTO quotas there are import licensing requirements that constrain trade channels. Within a TPP agreement an objective for DCANZ would be for open access to importers for NZ exporters into USA quotas.

## INVESTMENT

- There is already investment in the US dairy industry in marketing and processing from the NZ dairy sector and scope for additional investment.
- There have already been negotiations between TPP and the USA on investment and financial services.
- Within the TPP negotiations DCANZ strongly supports the inclusion of an investment chapter to protect existing NZ investments in the USA.
- DCANZ also endorses the inclusion of the investor-state concept whereby investors can directly take legal action against the state.

## TECHNICAL ISSUES

- There are currently no major technical or regulatory market access issues facing NZ exporters to the USA.
- It is important that the TPP negotiations result in continued acceptance by USA authorities of NZ's standards for dairy products and the certification for export of dairy products.
- The relevant chapters in P4 on technical issues like SPS should aim generally at WTO plus outcomes and enhanced consultation procedures for resolving technical issues.

## PERU

Peru was formerly a significant market for NZ dairy products but volumes have fallen away significantly in recent years. The decline in imports is strongly linked to the growth of local milk production.

Dairy exports to Peru totalled NZ\$30 million in 2007 with the major product being 2,500MT of skim milk powder.

Currently milk powders are free of duties and 9% tariffs are applied on liquid milk, buttermilk, whey, milk protein concentrates and whey protein concentrates.

DCANZ  
8<sup>th</sup> December 2008

Trans-Pacific agreement submission form.

**Full name:** Brenda Chawner  
**Organisation:**  
**Address:** 3 Ngaio Road, Kelburn, Wellington  
**Email:** brendac@of2minds.net  
**Phone:** (04) 475 7938

**Potential benefits:**  
More open access to a large market

**Potential risks:**  
They will use their size to negotiate terms which are unfavourable to New Zealand and the other members of the Trans-Pacific Agreement

**Impact:**  
very little

**Are there specific outcomes?:**  
No

**Is there any specific information you can provide?:**  
No

**General comments:**

**Supporting document 1:** ip\_submission.pdf  
**Supporting document 2:**  
**Supporting document 3:**

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Ministry of Foreign Affairs & Trade  
Private Bag 18-901  
Wellington

8 December 2008

## **Trans-Pacific Strategic Economic Partnership Agreement Negotiations with the United States: Submission**

### **Summary**

Extending the term of copyright and/or allowing software to be patented is likely to harm New Zealand's economic interests, rather than enhance them. I strongly oppose any moves to extend the term of copyright and/or extend patent coverage to software, if this is a condition of negotiating a Trans-Pacific Strategic Economic Partnership Agreement with the United States.

### **Introduction**

One of the expected areas of negotiation for the proposed Trans-Pacific Strategic Economic Partnership Agreement Negotiations with the United States is intellectual property. Copyright law and patents are legal approaches that are used to limit access to information and knowledge (in all of their many forms), hindering innovation and allowing rights holders to hold society to ransom.

### **Copyright**

Copyright law came into being when the printing press made it possible to mass produce books and other publications, and its initial limited term (a maximum of 28 years, after which works passed into the public domain) was intended to be an incentive for authors to create new works and preserve their income. In recent years, the purpose of copyright appears to have changed, with the longer copyright terms designed to allow copyright owners (who are not necessarily the authors) to receive maximum economic benefit from other people's use of copyright material. This has had the unintended consequence of stifling creativity and limiting people's ability to generate new ideas. In recent years, a number of developments, such as the Creative Commons licensing schemes, and the free/libre and open source software movement, have made it possible for authors, musicians, and software developers to share their work in a way that encourages reuse and repurposing.

I do *not* support extending the term of copyright beyond its present term (50 years after its creator's death, in the case of literary dramatic, musical or artistic works), if this is a condition of negotiating a Trans-Pacific Strategic Economic Partnership Agreement with the United States.

### **Patents**

Patents cover new inventions that involve a "manner of new manufacture" (Ministry of Economic Development, 'Patent Protection in New Zealand', 2008). In New Zealand,

this excludes "products of nature", mathematical operations, bare principles, mathematical algorithms, schemes or plans and methods of medical treatment of humans. Software resembles a mathematical algorithm more closely than a "manner of new manufacture", and thus does not appear to qualify for patent coverage. At a practical level, most programs involve using a number of different techniques, each of which could be patented individually, and therefore writing a new program would become an exercise in identifying relevant patents, rather than in developing software. Most software is improved incrementally; Nobel prize-winning economist Eric Maskin (along with James Bessen) has shown that patent protection tends to decrease innovation in this context (Sequential Innovation, Patents, and Imitation, James Bessen and Eric Maskin, Massachusetts Institute of Technology, Working Paper Department of Economics, 00-01, January 2000 (<http://www.researchoninnovation.org/patent.pdf>)). Red Hat, an company that produces free/libre and open source software, has said that it patents software as a defensive mechanism, building a portfolio of software patents for the purpose of defending against patent aggression (Brief of Amicus Curiae Red Hat, Inc. in support of appellee, [http://www.redhat.com/f/pdf/federal\\_circuit\\_brief.pdf](http://www.redhat.com/f/pdf/federal_circuit_brief.pdf)). In October 2008, the United States Court of Appeals for the Federal Circuit found that a patent cannot be granted on a process, including software algorithms and business processes, if the grant will preempt the use of a fundamental principle (re *BiSKI* 2008, <http://www.ca9c.uscourts.gov/opinions/07-1130.pdf>).

I do *not* support extending the patents to cover software, if this is a condition of negotiating a Trans-Pacific Strategic Economic Partnership Agreement with the United States.

### Conclusion

New Zealand is a small country, with limited resources and a need to be more successful in the global marketplace. I fully support extending the Trans-Pacific Strategic Economic Partnership Agreement to other nations, as long as this is done in a way that does not limit our ability to be innovative and 'work smarter, not harder'.

Information and knowledge share a common characteristic – they are what economists term 'non-rivalrous', meaning that they continue to exist even when they have been shared, and they can be reused without affecting their content or quality. New ideas and knowledge grow from shared access to previous knowledge—our current way of life has developed over many centuries, building incrementally on previous discoveries. In order to continue this type of development, we need to ensure that people have as much access as possible to the information and knowledge they need to foster innovation and creativity. Extending the term of copyright and allowing software to be covered by patents is not consistent with this aim.

Brenda Chawner  
3 Ngaho Road, Kelburn  
Wellington  
(04) 475 7938

## Trans-Pacific agreement submission form.

**Full name:** Gold  
**Organisation:**  
**Address:**  
**Email:** gold@evolved.net.nz  
**Phone:**

**Potential benefits:**

I really don't see any. The impact of what we'd have to concede in order to achieve this would outweigh the benefits.

**Potential risks:**

Patents and DRM stifle innovation. You'll be seeing this a lot in the submissions. While I'm keeping this brief I would like the weight of this submission added to theirs. I don't think the points need to be repeated.

**Impact:**

It will potentially restrict the client base I'm able to work with. My business runs on open source software and requirements for DRM are very much a Microsoft thing which means I wouldn't be able to go for this sort of job. Also, patents in this field make it risky to innovate without excessive amounts of money being spent to ensure "your idea" wasn't already someone else's.

**Are there specific outcomes?:**

Truely "Free" trade would be a good start. This agreement does not do that.

**Is there any specific information you can provide?:****General comments:**

I could list many things here. But probably nothing that you've not already read.

**Supporting document 1:**

**Supporting document 2:**

**Supporting document 3:**

## SUBMISSION ON THE TRANSPACIFIC STRATEGIC ECONOMIC PARTNERSHIP AGREEMENT NEGOTIATIONS WITH THE UNITED STATES

To: Ministry of Foreign Affairs & Trade

### Introduction

This Submission is from Nathan Torkington[1], an author[2], musician[3], and software professional[4] whose address is:

Nathan Torkington  
124 Ti Point Road  
RD 5  
Leigh 0985

### Summary

*I strongly oppose any proposals to extend the term of copyright, entrench digital rights management, assign investigation or enforcement powers to rights holders beyond those already in law, or otherwise use copyright law against consumers and artists. I also strongly oppose any interference with parallel importing.*

### Submission

New Zealand technology companies and New Zealand artists are all creative professionals attempting to sell their work in the world's marketplace. To be successful these creative industries need:

1. Open and ready access to markets overseas.
2. Open and ready access to the commons of production.
3. As little regulation and interference in possible in their production and distribution activities.

I support extending the P4 agreement to other nations. The more markets we can freely compete in, the better our local software, music, radio, television, and film industries will become. Competition forces local producers and distributors to improve the quality of their product and their distribution channels. New Zealanders have benefited from parallel importing, for example, as competition between distributors lowers the middlemen's price.

Both software and the arts have commons, a set of works that new works can draw upon. In software, it's open source. In the arts, it's the public domain. It's important to keep both wellsprings available and growing because the commons lower production costs. For example, a recent report[5] found that the Linux operating system was worth US\$10.8B and supports a US\$25B ecosystem. As a folk musician, I draw heavily upon the commons of American folk music. Even the modern copyrighted songs in my genre



are heavily influenced by the works that have gone before and frequently feature “quotes” or reuse traditional chord patterns and melodies.

The borders around the commons of software and arts are drawn by IP law, particularly copyright and patent law. “Strengthening” IP law consists of encroaching upon the commons. For example, extending copyright terms keeps works out of the commons that otherwise would have been available for reuse and repurpose. Extending copyright to cover previously uncopyrighted things (e.g., databases of fact) similarly turns previously public property into private property. As a software professional I strongly oppose software patents in principle as well as in practice: they are rarely awarded for originality, and it has not been shown that their costs in retarded innovation justify whatever economic benefits they may bring. Even Microsoft, the most successful software company ever, has never been the aggressor in a software patent lawsuit--only the recipient.

Technically it is possible to reuse and repurpose the private property, but generally it requires the permission of the copyright holder. One exception is the common act of recording a “cover” of a song, which is governed by a compulsory license (meaning that Gloria Gaynor doesn’t get to prevent my bluegrass band from covering “I Will Survive” but we have to make a small payment for the privilege). However, most media and most acts of reuse and repurpose aren’t covered by compulsory licenses.

Extending copyright terms locks up these works to the point where authors can rarely be found. The problem of these “Orphan Works” is well recognized in IP circles, and the US Copyright Office has recently attempted to find a solution to the problem which is still burdensome to the reuser (e.g., Google Print found 75% of the books they scanned were in copyright but the publisher and authors were unreachable). Extending copyright terms increases the number of these Orphan Works without providing a solution to a large and growing problem. It is unequivocally a bad idea.

On the subject of regulation and interference, I point particularly to Digital Rights Management (DRM, known in NZ law as Technical Protection Measures, TPM). DRM/TPM prevent reverse engineering, something that has traditionally been permitted as it is necessary to produce compatible products. Copyright law has traditionally respected the need for competition in the technology around the copyright work, because without such competition the artist is at the whims of the owner of the monopoly format. A recent change to NZ Copyright law has added support for DRM/TPMs without a reverse engineering clause, but there is hope in the technology community that this can be revisited. I do not want to see DRM/TPMs entrenched in trade agreements where a revisit of NZ law could not free it.

Another unnecessary burden of regulation and interference is the takedown provisions in NZ and US law. As a copyright rights holder (author of “Perl Cookbook”, composer of several pieces of music) I have measures enough under the Act to seek recompense if my book is pirated. In fact, my book is heavily pirated. My publishers send out frequent Cease and Desist letters. They do not need the ability to turn off the Internet access of

infringers, and do not want that ability. I believe these measures are unnecessary and furthermore place a high financial burden on ISPs and web site owners. These financial burdens make New Zealand ISPs and web site owners less able to compete internationally. I do not wish to see them in an international trade agreement.

For these reasons, I strongly oppose any proposals to extend the term of copyright, entrench digital rights management, assign investigation or enforcement powers to rights holders beyond those already in law, or otherwise use copyright law against consumers and artists. I also strongly oppose any interference with parallel importing.

#### References

1. <http://nathan.torkington.com>
2. <http://oreilly.com/catalog/9780596003135/>
3. <http://pipickers.com>
4. <http://radar.oreilly.com/nat>
5. <http://www.linuxfoundation.org/publications/estimatinglinux.pdf>
6. <http://www.copyright.gov/orphan/>

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## Trans-Pacific agreement submission form.

Full name:  
 Organisation:  
 Address:  
 Email:  
 Phone:

s 9 (2) (ba) (i)

**Potential benefits:**

The involvement of one of the world's leading economies would surely bring some benefits to the Trans-Pacific Agreement, however I have been unable to read any documents to form an exact opinion on potential benefits nor what exactly those benefits would be.

**Potential risks:**

Potentially there may be greater exposure to the downsides of the United States economy, such as the current credit crisis. New Zealand should in general be wary of implementing policies and statutes similar to those of the United States, particularly in the realms of finance and intellectual property (including copyright, digital rights management, and patents).

**Impact:**

Not applicable.

**Are there specific outcomes?:**

I would like to see specific outcomes in the sense that I do not wish changes to be made to New Zealand's intellectual property policies and law, such as: extending the term of copyright beyond the death of the author, allowing recognition of US patents, or enforcement/recognition of US copyright and digital rights management in New Zealand.

**Is there any specific information you can provide?:**

No.

**General comments:**

No.

Supporting document 1:

Supporting document 2:

Supporting document 3:

**POWELL  
WEBBER  
& Associates**  
Barristers & Solicitors

8 December 2008

Trans-Pacific Agreement Submissions  
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**SUBMISSION ON TRANS-PACIFIC STRATEGIC ECONOMIC PARTNERSHIP  
AGREEMENT NEGOTIATIONS WITH THE UNITED STATES**

We **attach** a copy of Ngati Kahungunu Iwi Incorporated's submission regarding the upcoming Trans-Pacific Agreement negotiations with the United States.

Naku noa na

  
**LG Powell/Jennifer Braithwaite**  
Partner/Senior Solicitor  
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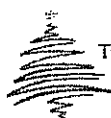
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The Partners & Staff wish you the very best for the festive season.  
Our office will close on Monday 22 December 2008 at 5 pm  
and reopen on Wednesday 14 January 2009.

**SUBMISSION OF NGATI KAHUNGUNU IWI  
INCORPORATED REGARDING THE TRANS-  
PACIFIC STRATEGIC ECONOMIC  
PARTNERSHIP AGREEMENT NEGOTIATIONS  
WITH THE UNITED STATES**

**8 DECEMBER 2008**

## INTRODUCTION

1. Ngati Kahungunu Iwi Incorporated ("Ngati Kahungunu") presents this submission on behalf of Ngati Kahungunu Iwi.

## NGATI KAHUNGUNU

2. Ngati Kahungunu is the third largest iwi in terms of population in New Zealand and occupies the second largest rohe. The Ngati Kahungunu rohe stretches from the Mahia Peninsula in the north to Lake Oroka and Wairarapa in the south and inland to the shores of Lake Waikaremoana and to Kaweka, Kamanawa, Ruahine, Taurarua and Rimataka Ranges.
3. As one of the six iwi claimants in Wai 262 Ngati Kahungunu have a significant interest in ensuring that New Zealand does not assume international obligations that may adversely affect the ability of the iwi to protect their matauranga (traditional knowledge) and other taonga or otherwise take away protections for the iwi guaranteed by the Treaty of Waitangi.

## ISSUES

4. Ngati Kahungunu wish to make submissions regarding both the consultation procedure to be followed during the upcoming negotiation process between New Zealand as a member of the Trans-Pacific Strategic Economic Partnership Agreement ("the Trans-Pacific Agreement") and the United States ("the negotiations") and the substantive issues to be discussed in the course of the negotiations.
5. At this stage it is unclear whether the negotiations will involve any significant amendments to the existing Trans-Pacific Agreement or whether the United States will simply become a party to the agreement. Therefore, Ngati Kahungunu are only able to make preliminary comments regarding the substantive issues to be discussed in the negotiations at this stage.

## CONSULTATION DURING NEGOTIATION PROCESS

6. Ngati Kahungunu submit that Maori, including Ngati Kahungunu, should be fully and meaningfully involved in the negotiations process and further consultation during this process, and certainly prior to any agreement being reached, is essential. Without the opportunity to comment on any proposals before agreement is reached any submissions made during the consultation process are unlikely to have any effect on the form of the agreement reached. In particular, Ngati Kahungunu are concerned to ensure that there is effective consultation regarding the protective mechanisms for Maori cultural knowledge and taonga.
7. As set out above, Ngati Kahungunu were one of the claimants in Wai 262. One of the issues raised by Counsel for Ngati Kahungunu in closing submissions to the Waitangi Tribunal was the Crown's assumption of international obligations in the past without first, or ever, addressing the Maori interest.<sup>1</sup> In the past the Crown has participated in the negotiation of international instruments without any input from Maori, and certainly without any formal consultation until the point at which the New Zealand Government was attempting to ratify the instruments into New Zealand law.
8. It is acknowledged and appreciated that, in this case, the Crown has sought submissions on the negotiations prior to their commencement and Ngati Kahungunu appreciate this opportunity. Ngati Kahungunu wishes to build on this opportunity and seeks further involvement throughout the negotiations.
9. In his evidence for the Crown in the Wai 262 Inquiry Mr Steel acknowledged that the principles contained in the Pacific Guidelines<sup>2</sup> would be a good starting point for developing Crown policy on a framework for addressing the interface between traditional knowledge and intellectual property rights. It is submitted that they are also applicable to the adoption of any international instrument such as the agreement to be reached pursuant to the negotiations. The relevant principles are, first, that the broad and active participation of Maori in policy development is necessary; secondly that policy development should be guided by aspirations and expectations expressed

<sup>1</sup> Powell & Hansen, "Closing Submissions on Behalf of Ngati Kahungunu Volume 2 – Issues Analysis" #S2 at para 46.  
<sup>2</sup> #R16, annexure "CC"

directly by traditional communities including Maori, and third that there needs to be respect for the rights of traditional communities under national and international law.<sup>3</sup>

10. Broad and active participation requires the opportunity for Ngati Kahungunu to consider and comment upon any proposals to amend the existing agreement while they are in the development stage.

### SUBSTANTIVE CONCERNS

11. Ngati Kahungunu also have significant concerns regarding some of the substantive issues that are likely to arise in the negotiations, in particular:

11.1 The protections for indigenous intellectual property rights; and

11.2 Pressure to change the PHARMAC regime to reduce the use of cheaper generic drugs.

#### *Protections for indigenous intellectual property rights*

12. As it is currently unclear whether, and to what extent, the negotiations will involve amendments to the existing Trans-Pacific Agreement Ngati Kahungunu reserve the right to comment on further substantive issues that arise during the course of the negotiations.
13. The maintenance of traditional knowledge is challenged by the lack of protection within the intellectual property regime dictated as it is by New Zealand's assumption of international obligations including the Trade Related Aspects of Intellectual Property Rights Agreement ("TRIPS"). The evidence presented to the Wai 262 Inquiry showed that much of the Ngati Kahungunu knowledge and resource base has been lost or marginalised, illustrated by the loss of knowledge of traditional arts, the practice of rongoa and inappropriate or unauthorised use affecting the integrity of various taonga, including waiata and other art forms.
14. Under the Trans-Pacific Agreement the parties reaffirm that they will respect the provisions of TRIPS and other relevant multilateral agreements on intellectual



property. TRIPS is expressed as requiring only minimum standards of intellectual property protection. However, any sui generis mechanism developed by New Zealand cannot be inconsistent with those minimum levels of intellectual property protection specified in TRIPS. Accordingly, to the extent that copyright (part of the TRIPS package) is held by a third party over a taonga work and the traditional knowledge is otherwise protected by some form of sui generis system, the copyright protection will take priority over any other protections enacted in domestic law.<sup>4</sup>

15. Accordingly, the entry into further FTAs, including the proposed agreement with the United States (or, more accurately, its inclusion in the Trans Pacific Agreement) containing provisions requiring the parties to respect TRIPS, has the effect of further entrenching that inadequate framework and, as a result of New Zealand assuming international obligations to maintain the intellectual property mechanisms specified in TRIPS, potentially further limits the potential protections available to kaitiaki for traditional knowledge.
16. Accordingly, Ngati Kahungunu oppose the extension of the coverage of the Trans Pacific Agreement to include the United States until adequate protective mechanisms are put in place for the protection of traditional knowledge and taonga works. Any such mechanisms should be developed in accordance with the Pacific Principles and should involve the broad and active participation of Maori.

*Pressure to change the PHARMAC regime to reduce the use of cheaper generic drugs.*

17. One of the issues that has arisen in relation to the Free Trade Agreement between the United States and Australia ("AUSFTA") is the effect of the agreement on Australia's Pharmaceutical Benefits Scheme and the cost of medicines. The Pharmaceutical Research and Manufacturers of America lobbied the United States negotiators during the negotiation process to seek a commitment from the Australian Government to change its scheme<sup>5</sup> and given US drug companies' opposition to the PHARMAC policy of tendering for the off-patent medicines which often results in the

<sup>4</sup> #R16, xrn transcript from page 393

<sup>5</sup> Pharmaceutical Research and Manufacturers of America. National Trade Estimate Report on Foreign Trade Barriers (NTE) 2004 cited in Harvey KJ, Faunce TA, Lokuge B, Drahos P. Will the Australia-United States Free Trade Agreement undermine the Pharmaceutical Benefits Scheme? *Med J Aust* 2004; 181: 256-259.

funding of cheaper generic medicines it seems likely that the US negotiators will be subject to similar lobbying regarding these negotiations.

18. Ngati Kahungunu oppose any changes to the PHARMAC scheme or the intellectual property regime that would reduce PHARMAC's ability to fund cheaper, generic drugs and, in particular, that would increase the costs of medicines to low income earners which are predominantly Maori.

#### CONCLUSION

19. Ngati Kahungunu wish to be involved at all key stages of the negotiations and, in particular, seek the opportunity to consider and comment on any proposed amendments to the Trans Pacific Agreement before the New Zealand Government agrees to them. Involvement during the course of the negotiations rather than simply at the end when decisions have been made is necessary for any consultation to be meaningful and to ensure consistency with the Treaty of Waitangi.
20. Ngati Kahungunu appreciate the opportunity to make submissions on the negotiations and look forward to further involvement as they progress.