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DELIVERING GOOD SERVICES TO THE PUBLIC WITHOUT COMPROMISING THE CULTURAL AND INTELLECTUAL PROPERTY OF INDIGENOUS PEOPLES

THE ECONOMICS OF CUSTOMARY KNOWLEDGE

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INTRODUCTION

Last year, I had the honour of representing the MAORI CONGRESS as the Treaty of Waitangi Partner in the New Zealand delegation to the United Nations Conference on Environment and Development, or the UNCED Earth Summit as it is more popularly known. UNCED and the four preparatory meetings leading up to the Earth Summit, provided an experience which has profoundly influenced and clarified my thinking on a number of issues. In particular it has made me focus on cultural and intellectual property issues as I have seen and heard the despair of peoples and countries whose sovereignty has been severely eroded, in some cases, destroyed, because of lost control over both their resources AND their knowledge. It is commonly accepted that information is power and those who control information have become very powerful but we are being unwisely naive if we don't add to that equation - the economics of knowledge. The price of knowledge, the price people - companies and governments are prepared to pay to acquire information and the price people pay when they lose control of their knowledge. Inadequate access to information is as much a factor in the cause of disparity amongst populations as is inadequate access to resources.

I have said on other occasions, that we are facing a whole new era of colonisation as governments negotiate at an international level for the 'liberalisation' of life forms, culture and information. At this very time in Geneva no doubt very heated discussions are underway at the G.A.T.T. Uruguay Round talks on TRIPS (Trade Related Intellectual Property) where amongst other issues, governments are considering a proposal to allow the patenting of all life forms as well as the patenting of cultural expressions.

If governments agree to this, it will increase the vulnerability of all peoples, but particularly indigenous peoples, to further exploitation and alienation of the very taonga[1] which make us unique. Taonga which in a New Zealand context were guaranteed by government, protection of, under the Treaty of Waitangi[2].

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1. Taonga is interpreted as including both tangible and intangible.

2. Article II of the Maori language version of the Treaty of Waitangi states (literal translation of the Maori text):

> "The Queen of England agrees and consents (to give) to the Chiefs, hapu and all the people of New Zealand the full chieftanship of their lands, villages, and all their possessions (taonga: everything that is held precious but the Chiefs give to the Queen the purchasing of those pieces of land which the owner is willing to sell."

Sometimes it requires exposure to a global situation to make one actually see what is happening in our own backyard. When we realise the global environment, and understand the international alliances which governments' forge it gives us a much better feel for where national policies are heading - the rationale behind the decisions, and the possible 'outcomes' both positive and negative. Global awareness often profers the final piece to the puzzle.

My own experience and interest is in the area of foreign policy. It is an area which I been involved in for some 15 years and more recently I have chanelled this experience into the Maori Congress. The Maori Congress Foreign Policy Committee[3], is responsible for advising Iwi of global considerations in their tribal development planning, as well as encouraging Iwi to form their own views on global events and issues. It is also the role of the Committee to rectify the incorrect assumption made by successive New Zealand governments that there existed an exclusive right for only one of the Treaty partners (namely The Crown) to represent the international personality of Aotearoa NZ at global fora.

The implications of this assumption has meant amongst other things that the country sees and promotes itself as a Western European OECD industralised nation. Maori Congress, as the collective national voice of many of the hapu and Iwi signatories to the Treaty of Waitangi, does not agree. Congress considers Aotearoa a proud member of the Pacific and very much a Developing Country. Our global alliances and perspectives are consistent with this identity. Maori certainly are a developing peoples and it is debatable just how valid the OECD identity is for the rest of the population. Maori Congress considers it quite unacceptable that government negotiates at an international level with assets that don't belong to it and most importantly that government enters into international agreements (such as the G.A.T.T.) without informing and consulting with us. You can appreciate therefore, the dilemna and the conflicts which this difference in identity presents to both Treaty partners. That however, is another paper at another seminar (which in fact will be held next month by the Department of Internal Affairs).

THE GLOBAL ENVIRONMENT

The discussions between the developed and developing worlds throughout the drafting of the UNCED Earth Summit's Agenda 21 as well as the drafting of the Biodiversity and Climate Change Conventions (all of which were being drafted at approximately the same time), highlighted the negative impacts of "information and technology control".

The global environment shows us that in this day and age, the ethics of governments, companies and professionals are neither transparent nor accepting of limitations or subject to guilt when a mistake has been made. At one end of the spectrum, the US government is attempting to claim an exclusive patent monopoly on the cell line of an indigenous woman from Central America[4] . One of 160 US government patent claims involving materials of human origin.

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3. The Maori Congress was established in 1990 and comprises 43 member Iwi. There are 15 Congress Committees tasked with developing specific issues for consideration by Iwi at the regular Congress Executive Meetings. The Foreign Policy Committee is comprised of both Iwi delegates and co-opted non-Congress experts.

4. US Patent Claim (WO 9208784 A1), Mr Ron Brown, United States Secretary of Commerce, Washington D.C. Priority Application US 612, 707.

Alongside this, is the US Human Genome Diversity Project originally developed to map the genetic structure of human beings but now also focusing on gathering hair and tissue samples of over 700 "endangered indigenous communities". Apparently, the scientists have taken a benevolent view that should any of the 700 communities become extinct (through racism), then science will bring them back. All so simple. The racism will still be there, so will the poverty and the lack of clean water, but then science can't do everything. Science can however genetically alter the 700 indigenous cell lines and that thought is positively frightening, but sadly quite possible. After all, why is the US government attempting to patent an exclusive mononpoloy on an indigenous woman's cell line or whakapapa.

In the middle of the spectrum is the startling realisation that with a mere 7% of the earth's surface hosting between half and three quarters of the world's biological diversity with virtually none of that residing anywhere near Europe or North America it certainly makes sense that industralised nations are pushing for the patenting of lifeforms and customary knowledge.[5]

A small volcano in the Philippines has more tree species than Canada and a 15 hectare plot in Borneo has more tree species than all of North America. So concentrated has the industralised world's push to breed 'super-species', it has been estimated that 100 species a day are being lost through 'Northern' agricultural and harvesting practices. Asia has 140 breeds of pigs compared to 19 in North America. 86% of apple and 88% of pear diversity in the US is now extinct. Consider also, that the:

"annual market value of pharmaceutical products derived from medicinal plants discovered by indigenous peoples exceeds $43 billion, but the profits are rarely, if ever, shared with indigenous peoples."[6]

In the same vein, "only 1,1000 of the earth's 265,000 species of plants have been thoroughly studied by western science, but as many as 40,000 may have medicinal or undiscovered nutritional value for humans, many are already used by tribal healers who can help scientists greatly focus their search for plants with useful properties." [7]

You can see that when you combine natural resources, in this case, biodiversity, with customary indigenous knowledge it equates to huge profits for transnational companies and governments and a sizeable 'red' balance for indigenous peoples as they lose;

- management and use rights of customary resoources
- retention of rights to promote customary knowledge and environment practices
- opportunities for economic development
- ability to fulfill their guardianship responsbilities to their future generations

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5. The Conservation and Development of Indigenous Knowledge in the Context of Intellectual Property Systems, RAFI for UNDP

6. UN Centre for Human Rights, 1993 International Year for the World's Indigenous People "Indigenous Peoples Intellectual and Cultural Property Rights"

7. Lost Tribes, Lost Knowledge TIME Magazine, September 23, 1991 Edition

At the other end of the spectrum, which is of particular relevance to the responsibilities of Ombudsman Offices (as I understand it) is the daily 'hoarding' indigenous customary knowledge which government departments, academics, and other professionals working in research, accumulate and often copyright in their own publications. The same 'professionals' rarely acknowledge and credit their indigenous sources - but that might be a blessing for the indigenous informants when their communities find out what they've been giving away!

Clearly defined accepted codes of ethics exist within and amongst 'western white professionals'. It would be unheard of for a scientist to claim as his/her own discovery the proven process or project results of a colleague and yet on a consistent basis, indigenous processes and knowledge are routinely acquired by 'western white professionals' and regurgitated as their own.

There are a lot of people who make a profitable living out of stealing cultural and intellectual property. It has been a common and accepted practice for a long time but tolerance levels of indigenous peoples worldwide is fast changing.

Government departments in particular are notorious for unethical research methodology and retention of Maori knowledge and ideas. Two recent publications which have come to my attention, illustrate a curious government trend to claim ownership of Maori information.

1. **An Introductionn To Environment And Resource Management Planning,** Te Puni Kokiri

   Written under Contract by a Maori writer whose name was removed from the acknowledgements as were the names of the Maori advisors. The publication carries a Crown Copyright and yet its purpose is to provide a practical step-by-step Guide for Iwi to write Resource Management Plans.

2. **Customary Fisheries,** Te Puni Kokiri 1993

   A booklet which describes as its purpose providing a "refreshing insight into the traditional Maori principles and practices of fisheries resource management". Also copyrighted by the Crown it contains an interesting disclaimer which reads:

   > "While every effort has been taken in the preparation of this publication, neither Te Puni Kokiri nor the individual writers (who are not acknowledged) accept any responsibility or liability whether in contract, tort (including negligence) or otherwise, for anything done by any person in reliance, whether wholly or partially, on any of the contents of this publication."

What exactly does that mean? "Trust me but I don't actually know what I'm doing." Why do government departments copyright and claim ownership of Maori and public information, information which in many cases is gathered primarily through public submissions and interviews with informants. The New Zealand government has managed to copyright a disturbing amount of Maori knowledge. Its dismal history of alienating Maori lands and resources is well known - lesser known is the alienation occuring right now of indigenous knowledge.

History and current global trends tells indigenous peoples that having lost our lands, resources and livelihoods in past generations, we stand to lose a lot more in this and future generations. We see the inability of others to accept limitations, we see the greed, and the arrogant belief that any western value, including academic, beauracratic, and scientific is inherently superior to any other value and above reproach and accountability.

Most importantly we see that it is up to us to develop appropriate protection mechanisms rather than rely on others and we realise that it is necessary to place limitations on external bodies in the absence of them identifying such limitations themselves.

All of these considerations led to the development of The Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples in June of this year. Arising out of the First International Conference on the same topic and hosted by the nine Mataatua Waka Iwi of the Bay of Plenty Region, the Mataatua Declaration has subsequently been signed by indigenous communities and nations from 60 different UN Member States. Here in Aotearoa, 25 Iwi have signed SO FAR. Already referenced in several international Science & Research journals, the Mataatua Declaration clearly signals that indigenous peoples are able, willing and ready to reverse the racist process which has existed with regard to accessing indigenous knowledge and physical resources.

In summary, some of the key issues raised in the Mataatua Declaration include;

- acknowledgement that cultural and intellectual property are intertwined rather than two separate fields.

A view upheld in the recently published UN Sub-Commission on the Prevention of Discrimination Against Minorities STUDY ON THE CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES.[6]

- affirmation that the first beneficiaries of cultural and intellectual property must be the direct descendants of the indigenous community
- recognition that all others (including other hapu and Iwi as well as agencies, governmental and non-governmental) at national, regional and international levels are EXTERNAL USERS
- direction for indigenous peoples to develop Codes of Ethics to be observed by External Users
- direction for research professionals, private and public sector to also develop codes of ethics

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7. United Nations Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples (Reference E/CN.4/Sub.2/1993/28) directed by the Sub-Commission under the auspices of Professor Erica-Irene Daes, Chairperson of the UN Working Group on Indigenous Populations, in Resolution: 1991/32 of 29 August 1991.

- recognition that indigenous peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to humanity provided their fundamental rights to define and control this knowledge are protected by the international community

- acknowledgement that current protection mechanisms are sufficient for the needs of indigenous peoples and need to be amended to incorporate the following:

    * collective as well as individual ownership and origin

    * retroactive coverage of historical as well as contemporary works

    * protection against debasement of culturally significant items

    * co-operative rather than competitve framework

    * first beneficiaries to the direct descendants of the traditional guardians

    * multi-generational coverage span

The Mataatua Declaration also covers quite specific recommendations in the areas of biodiversity, customary environmental management and cultural objects.

Since the Whakatane Conference, an International Association has subsequently been formed to promote awareness of cultural and intellectual property rights issues and to promote implementation of the Mataatua Declaration. Here on the home front we are currently trying to persuade the Ministry of Commerce to combine its 'consultations with tangata whenua on the review of NZ property rights legislation' with a Mataatua Declaration awareness programme.

CONCLUSION

I've covered a lot of topics with you in the hope of clarifying why indigenous peoples consider it unethical for governments and the Public Service to assume ownership of customary knowledge and resources. It is robbing us of our culture and history and responsiblities to our descendants. It is also robbing us of earning a culturally appropriate livelihood. Delivering good services to the public in the context of what I have just discussed means ensuring that research methodologies, policy development processes and compilations of public information follow set standards of ethical procedures consistent with the Mataatua Declaration.

The Public Service needs to adjust its attitude in considering 'the public' particularly the indigenous public, as a renewable expendable resource whose knowledge can be freely exploited and to rexamine the integrity of gathering and publishing under Copyright customary indigenous knowledge. Finally, the Service must rationalise the whole practice of copyrighting and other forms of assuming ownership of cultural information. How can the Crown Copyright information on Maori customary fisheries practices?

Joini Tutua, a former Minister in the Solomon Islands once said:

> You believe in survival of the fittest
> We believe in the survival of all

The problem is that not everyone is given an equal opportunity to survive and with the liberalisation of cultural and intellectual property, the survival chances of indigenous peoples will be even more threatened. The Public Service has within its midst advisors who are influencing the "big picture" as much as the local picture. They need to be more accountable to the public.

It seems ironical that while the public has to embark on quite a lengthy legal bureaucratic process to obtain information from government departments, there are no provisions to challenge and question the right of government departments to assume ownership of and exploit customary information.

I am not fully familiar with all the provisions of the Official Information Act which the Office of the Ombudsman administers, but would welcome the extension of the Ombudsman's responsibilities to include wrongful commercialisation and ownership of customary information by government departments.

Finally, I would like to suggest that the Office of the Ombusdman also has a role to play in questioning the right of governments to enter into legally binding international instruments, such as the G.A.T.T., which will definitely affect the lives and livelihoods of citizens without governments demonstrating even a token attempt to inform and consult citizens of the implications. I might add that we have been very busy these past two weeks flooding the Minister of Foreign Affairs with FAXes seeking the New Zealand government's undertaking that it will not support the US proposal at GATT and serving notice that Iwi will not be bound by any international agreement reached without our consent. To date, we have not had any response and yet the GATT Talks are underway.

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