Rights of Attribution for Ka Mate Haka

The Ngāti Toa Rangatira iwi (Ngāti Toa) and the Crown initialled a Deed of Settlement (Deed) on 30 August 2012, intended to provide redress to Ngāti Toa for historical acts and omissions of the Crown in breach of the Treaty of Waitangi. The Deed proposes special attribution legislation (Attribution Legislation) to acknowledge that the haka Ka Mate is a taonga (treasure) and an important part of Ngāti Toa's identity. Ngāti Toa's values and their role as the kaitiaki (guardians) of the haka Ka Mate are also recognised in the Deed.

Haka are traditional dances with accompanying songs of the indigenous Māori people of New Zealand. The haka Ka Mate is well-known for its performance by New Zealand's national rugby team, the All Blacks, before their matches.

The Attribution Legislation would provide Ngāti Toa with a perpetual and enforceable right of attribution for the haka Ka Mate. Attribution would be required by any parties that publish (issue copies to the public) the haka Ka Mate for commercial purposes, transmit the haka Ka Mate to the public via electronic means, or show any film to the public that includes the haka Ka Mate.

The right of attribution would not apply to public performances of the haka Ka Mate, use of the haka Ka Mate for educational purposes or for the purposes of criticism, review or news reporting. It is therefore unlikely to affect community kapa haka and sports teams who perform the haka Ka Mate, including the All Blacks. However, a public performance of the haka Ka Mate transmitted for commercial purposes would require attribution, such as commercial broadcasts of sports teams performing the haka Ka Mate. The Office of Treaty Settlements has reported that attribution would be required for any...
advertisements featuring the haka Ka Mate, but will exclude official sponsor advertisements featuring the All Blacks performing the haka Ka Mate.

It is intended that the Attribution Legislation will allow Ngāti Toa to enforce the right of attribution by obtaining a declaratory order from the court. The Attribution Legislation would allow for the recovery of associated court costs by Ngāti Toa but, recognising this will be a cultural rather than economic right, does not contemplate awarding damages for failure to attribute. The redress does not allow Ngāti Toa to claim royalties or compensation for use of the haka Ka Mate.

**Implications for Businesses**
The requirements for attribution of the haka Ka Mate are not onerous and reveal no surprises. They are influenced by the moral rights provisions under the Copyright Act 1994, although it seems that they will not be legislated as an amendment to the Copyright Act. This reflects the Crown’s intention of balancing appropriate redress for claimants with public expectations and New Zealand’s intellectual property framework.

The Deed does not acknowledge rights of ownership in the haka Ka Mate that would prevent use by other persons. This is because the haka Ka Mate is a work that is in the public domain and used by various persons in a range of commercial and non-commercial contexts. This is reflected in a decision of the Assistant Commissioner of Trade Marks, which denied registration of trade mark applications for KA MATE, UPANE KAUPANE, WHITI TE RA and KA ORA on the basis that these phrases formed part of the haka Ka Mate, which is a New Zealand icon that is performed by a range of persons.

Attribution of the haka Ka Mate is unlikely to have significant commercial implications for businesses, and is most likely to impact businesses that broadcast or publish the haka Ka Mate for commercial purposes. Practically, attribution is likely to be easy to implement as it would require attribution to be identified “clearly and reasonably prominently” where necessary. This obligation is similar to the moral right under the Copyright Act requiring authors of works to be identified in certain circumstances.

The consequences of a failure to attribute are likely to be measured in any costs award sought by Ngāti Toa if enforced in court, and any associated negative media.

There are also no restrictions on the form of use of the haka Ka Mate, and consent to use the haka is not required from Ngāti Toa. Businesses that show films of, transmit or publish the haka Ka Mate outside of New Zealand are unlikely to be caught by the attribution requirement.

The definition of the haka Ka Mate may require further clarification in the Attribution Legislation. The Deed defines the haka Ka Mate as “the words and associated actions and choreography whether in whole or in part of the haka known as Ka Mate”. The definition could include any still image of a person posing with an action used in the haka Ka Mate, or use of particular phrases from the haka Ka Mate, even where at the time the still image was taken or phrase used it was not actually part of the haka Ka Mate. The definition does not include the melody (the combination of pitch and rhythm) that has become associated with the performance of the haka Ka Mate.

Although the Deed acknowledges Ngāti Toa as the kaitiaki of the haka Ka Mate it does not propose restoring their authority as kaitiaki. The consequence is that Ngāti Toa would be unable to prevent derogatory treatment of the haka Ka Mate by other persons.

**The Future - Relevance of the Wai 262 Report and International Law**
The Wai 262 report relating to traditional Māori knowledge and culture proposes greater protection for the haka Ka Mate (as a taonga) than the Deed. The Wai 262 report makes a number of recommendations regarding the use of taonga works (see our previous FYI). This includes establishing a system allowing kaitiaki to object to derogatory treatment or commercial use of taonga works.

However, the Deed does acknowledge the potential implications of the Wai 262 claim and New Zealand’s ongoing discussions with international organisations on the protection of indigenous knowledge. In expectation that recommendations in the Wai 262 report may be implemented, or that international laws relating to indigenous knowledge will be realised, the Deed proposes reviewing the Attribution Legislation five years after its commencement. The purpose of the review is to consider whether additional protection for the haka Ka Mate should be introduced.

The Deed requires approval by the Ngāti Toa iwi before it is formally signed by both parties. It is expected that a draft form of the Attribution Legislation will be attached to the Deed on signing. We will report further on this process and the progress of the Attribution Legislation as it takes form.
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