

MAY  
2015

PROTECTION OF SAMOA'S  
TRADITIONAL KNOWLEDGE  
REPORT 14/15



Samoa  
Law Reform Commission

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Komisi o le Toefuataiga o Tulafono a Samoa





**GOVERNMENT OF SAMOA**

**OFFICE OF THE PRIME MINISTER AND MINISTER FOR THE SAMOA LAW  
REFORM COMMISSION**

The Honourable Speaker  
**THE LEGISLATIVE ASSEMBLY OF SAMOA**

In compliance with section 9 (2) of the Law Reform Commission Act 2008, I have the honour to submit to you copies of the Report on the Protection of Samoa's Traditional Knowledge, as referred to the Samoa Law Reform Commission for review.

This report sets out the Commission's recommendations for reform of the Samoa's Traditional Knowledge after its public consultations and research on the changes to be in accordance with section 4 of the Law Reform Commission Act 2008.

A handwritten signature in blue ink, appearing to read 'Tuilaepa', written over a light purple rectangular background.

(Hounourable Tuilaepa Lupesoliai Fatialofa Dr. Sailele Malielegaoi)  
**PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM  
COMMISSION**



## GOVERNMENT OF SAMOA

Honourable Tuilaepa Lupesoliai Fatialofa Dr. Sailele Malielegaoi  
**PRIME MINISTER AND MINISTER FOR THE  
SAMOA LAW REFORM COMMISSION**

In compliance with section 9 (2) of the Law Reform Commission Act 2008, I have the honour to submit to you copies of the Report on the Protection of Samoa's Traditional Knowledge, as referred to the Samoa Law Reform Commission for review.

This report sets out the Commission's recommendations for reform of the Samoa's Traditional Knowledge after its public consultations and research on the changes to be in accordance with section 4 of the Law Reform Commission Act 2008.

A handwritten signature in blue ink, appearing to read 'Leota Theresa Potoi'.

(Leota Theresa Potoi)  
**EXECUTIVE DIRECTOR**  
**SAMOA LAW REFORM COMMISSION**

## Preface

The Attorney General of Samoa in a letter dated 27 November 2008 asked the Samoa Law Reform Commission (“**Commission**”) to:

- examine the current legal protection of traditional knowledge including the extent of legislative protection under intellectual property laws of Samoa;
- examine Samoa’s obligations under international and regional conventions and agreements relating to traditional knowledge; and
- make recommendations for improvements to legislative protection of Samoa’s traditional knowledge, if further protection is recommended.

In June 2010 the Commission published “The Protection of Samoa’s Traditional Knowledge and Expression of Culture Issues Paper”.<sup>1</sup> This Issues Paper invited public submissions from stakeholders and the general public on issues relating to the protection of Samoa’s traditional knowledge. The Commission held public consultations in Savaii and Upolu in November of the same year. The Commission continued to interview individual members of the public with relevant knowledge and experience on the subject matter of this reference in 2011 and early 2012.<sup>2</sup> The Commission also presented its work on this reference in several conferences, workshops and other public consultations.<sup>3</sup>

It is important to acknowledge the support from the members of the Traditional Knowledge Stakeholders Working Group comprising of representatives from: Ministry of Commerce Industries and Labour (**MCIL**), Ministry of Education Sports and Culture (**MESC**), Ministry of Women Community and Social Development (**MWCS**D), Ministry of Natural Resources and Environment (**MNRE**), National University of Samoa Centre of Samoan Studies (**NUS-CSS**), Samoa Tourism Authority (**STA**), Scientific Research Organisation of Samoa (**SROS**), Samoa Qualification Authority (**SQA**), and Samoa Umbrella for Non Governmental Organisations (**SUNGO**) in developing this Final Report.

The Commission is grateful for the support received from the following people: The Head of State of Samoa His Highness Tui o Atua Tupua Tamasese Efi, the late Reverend Oka Fauolo, the President of the Land and Titles Court Tagaloa Sale Kerslake, the late Professor Aiono Fanaafi Leota Pita, Su’a Paulo Suluape, So’o Levi, Soofaatasi Peniata Leota, Aiga Malalau, Sera Devoe, Professor Susy Frankel from the University of Victoria, and Dr. Miranda Forsyth from the Australian National University.

We emphasise that the views and recommendations expressed in this report is that of the Commission and does not necessarily represent those of the organisations or people who have assisted with this report.

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<sup>1</sup> Samoa Law Reform Commission, *The Protection of Samoa’s Traditional Knowledge and Expressions of Culture*, Issues Paper 08/10 (June 2010).

<sup>2</sup> These included the Head of State, Rev. Oka Fauolo, The President of the Land and Titles Court, Professor Aiono Fanaafi Leota Pita, Su’a Paulo Suluape (Master Tattooist), Soo Levi (Taulāsea), Soofaatasi Peniata Leota (Siapo make), Aiga Malalau (Weaver of the Ie Sae), Sera Devoe (Elei).

<sup>3</sup> For example, the *National Workshop on The Safeguarding of the Intangible Cultural Heritage*, SCOPA Hall (June 2010); *5th Measina a Samoa Conference*, National University of Samoa (September 2010); *Trade Intellectual Property and the Knowledge Assets of Indigenous Peoples: The Developmental Frontier Conference*, Wellington, New Zealand (Dec, 2010); *Pacific Heritage and Youth Workshop*, Honiara, Solomon Islands (July, 2012); *The 1<sup>st</sup> Pacific Cultural Rights Symposium*, Honiara, Solomon Islands, (July, 2012), *Access to Knowledge, Creativity, Innovation and Development in Pacific Island Countries*, Canberra, Australia (October 2012).

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## 1. INTRODUCTION

### The Importance of Samoa's Traditional Knowledge to Samoan Culture and Tradition

- 1.1 Samoa places a strong emphasis on upholding its culture and traditions. It is widely accepted by the Samoan people that traditional knowledge (TK) is an essential component of daily living of Samoans and is deeply rooted in the *fa'aSamoa* (Samoan way of life). Indeed, the general view from the public and stakeholders during consultations conducted by the Commission on the protection of TK is that TK is an important element of Samoan culture and tradition. In fact, the TK of Samoans (for example, in relation to healing techniques, medicine, agricultural practices, environmental knowledge, and handicrafts) is used and developed through the *fa'aSamoa*, and continues to be maintained and transmitted from generation to generation.<sup>4</sup>
- 1.2 In Samoa, TK can be referred to as *iloa totino tauave mai*, (knowledge passed from generation to generation); *tomai/iloa* (knowledge); *tomai/iloa fa'aanamuā* (ancient knowledge); *tomai/iloa fa'aleaganu'u*; *aga* (traditions, practices, usages); *tomai/iloa fa'aSamoa* (Samoan traditions, practices, usages).<sup>5</sup>
- 1.3 The general term given to custodians of TK is *matua o faiva* (master of a discipline or an art). The custodians of specific TK are given specific titles, which include: *tufuga fau fale* (master builder of Samoan fale); *tufuga tā va'a* (master canoe builder); *tufuga tā tatau* or *tufuga tā pe'a* (master tattooist); *taulasea* (traditional healer), *tulafale* (orator); *matua u'u* (master weaver); *faimea* (lure maker); *tautai ali'i* (expert fisher man or navigator).
- 1.4 In Samoa, TK is often transferred through specific cultural and traditional information exchange mechanisms from a custodian to a chosen recipient. One example is the transferring (*fafano*) of relevant TK of a traditional massage (*fofō*) from a *taulasea* to the chosen recipient (*nainai*) in order to continue the practice of *fofō*.<sup>6</sup> Another example is where the *tufuga tā pe'a* takes in apprentices chosen from the descendants of families practising traditional tattooing in Samoa. Once the apprentices have mastered the art of tattooing and preparing relevant ceremonies, they are given a *tuluma*.<sup>7</sup> The final stage of this apprenticeship is the bestowing of titles on the apprentice to signify that the apprentice is qualified to practice the art of tattooing.<sup>8</sup>
- 1.5 Samoa's TK is considered by most Samoan people as collectively owned and as the property of the entire community that does not belong to any single individual within the community. For example, a *nainai* or *chosen recipient* is entrusted with the TK of a *fofō*, to hold, maintain and keep for the benefit of the community. Views

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<sup>4</sup> Urwin Consulting in association with KVA Consult, *Consultancy For The Capacity Needs Assessment On Access & Benefit Sharing And The Protection Of Traditional Knowledge, Practices & Innovations*, Final Report (May 2003).

<sup>5</sup> These were terms that were identified during the Public and Stakeholders Consultations.

<sup>6</sup> Interview with Soo Levi, *taulasea* from Sogi (Apia, January 2012).

<sup>7</sup> A *tuluma* is an instrument that holds tattooing combs.

<sup>8</sup> Interview with Su'a Paulo Sulu'ape, master tattooist (Apia, April 2011).

expressed in consultations indicated general acceptance of TK as property of the entire community, particularly because such knowledge is often developed from the environment and utilising plants grown on lands belonging to the community.

## Definition of Traditional Knowledge

1.6 TK is not defined in any legislation in Samoa. Also, there is no 'one' accepted definition of TK at the international level, although references to it can be found in various international instruments and model laws (none of which have been expressly adopted by Samoa). (Refer to appendix A).

1.7 Niue and the Cook Islands have enacted legislation for the protection of traditional knowledge. The Cook Islands legislation, *Traditional Knowledge Act 2013* defines traditional knowledge as:

*"knowledge (whether manifested in tangible or intangible form) that is, or is or was intended by its creator to be, transmitted from generation to generation and originates from a traditional community; or was created, developed, acquired, or inspired for traditional purposes; and includes any way in which that knowledge appears or is manifested."*<sup>9</sup>

1.8 The definition of traditional knowledge under Niue legislation, *Tāoga Niue Act 2012*:

*"includes any knowledge that generally –*  
*(a) is or has been created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative, or recreational purposes; and*  
*(b) is or has been transmitted from generation to generation; and*  
*(c) is regarded as pertaining to a particular group in Niue; and*  
*(d) is collectively originated and held."*<sup>10</sup>

1.9 Common characteristics of traditional knowledge in the various references in the international level, regional model laws, and captured by the Niue and Cook Islands legislation are that it:

- i. consists in knowledge, know-how, skills, practices, originated and held in common by indigenous people and traditional communities;
- ii. is passed from generation to generation, without necessarily being codified; and
- iii. is constantly being improved and adapted to the changing needs of these indigenous or traditional communities.<sup>11</sup>

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<sup>9</sup> *Traditional Knowledge Act 2013* (Cook Islands), s. 4(1)(a)-(b).

<sup>10</sup> *Tāoga Niue Act 2012* (Niue), s. 2.

<sup>11</sup>WIPO, *Traditional Knowledge*, <<http://www.wipo.int/tk/en/tk/>> (Accessed 14/09/2014); United Nations University, *The Role of Registers and Databases in the Protection of Traditional Knowledge A Comparative Analysis*. UNU-IAS Report (2003) 10 <<http://www.icimod.org/resource/2234>> (Accessed 14/09/2014); Christoph Graber and Martin Girsberger, *Traditional Knowledge at the International Level*, (2006) 5 <[https://www.unilu.ch/fileadmin/shared/Publikationen/graber-girsberger\\_tkcd\\_endg.pdf](https://www.unilu.ch/fileadmin/shared/Publikationen/graber-girsberger_tkcd_endg.pdf)> (Accessed 14/09/2014).



1.10 Traditional Knowledge is usually classified in a narrow sense, and in a general sense.

- i. In the narrow sense (*stricto sensu*), traditional knowledge refers to the specific content or substance of knowledge itself resulting from intellectual activity in a traditional context. This includes know-how, practices, skills, innovations, practices and learning that forms part of TK systems of traditional communities. For example, customary systems of governance; traditional building techniques; traditional methods of preservation, processing and conservation of food; tattooing techniques; medicinal knowledge; farming and agricultural knowledge; traditional fishing; and traditional modes of environmental and biodiversity conservation and sustainability such as sustainable water and soil management.<sup>12</sup>
- ii. In a 'general sense' (*lato sensu*), traditional knowledge includes know-how, practices, skills, innovations, practices and learning that form part of TK of traditional communities, as well as as traditional cultural expressions (TCE).<sup>13</sup>

1.11 For the purpose of this Report, TK is defined in a general sense.

### **Protection of Traditional Knowledge - the objective**

1.12 Consultations conducted by the Commission on the protection of TK, revealed that whilst some people are prepared to obtain financial benefit from their TK (for example divulging their TK for a fee), others prefer to keep their TK secret. In Samoa, as in many developing countries with strong traditional cultures, the issue of protection of TK has generally two dimensions. Firstly, there is the desire to preserve TK for future generations and protect it from misuse and misappropriation. Secondly, there is the aspiration to gain economic benefits from the use of TK in a non- traditional context by means of some form of commercialization.

1.13 The term 'protection' of TK, can relate to various concepts, including the:

- i. preservation or conservation of TK in the face of pressures resulting from rapid social change;
- ii. facilitation of commercialisation by traditional holders themselves; or
- iii. misappropriation of TK, including its misuse.<sup>14</sup>

1.14 The objectives sought to be achieved by this review, is the protection of TK against misuse and misappropriation, which relates to the kind of protection

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<sup>12</sup> Traditional knowledge in a narrow sense excludes 'traditional cultural expressions'.

<sup>13</sup> 'Traditional cultural expressions' may be considered as the forms in which the traditional culture is expressed, and includes traditional music, dance, art, designs, names, signs, symbols, performances, handicrafts and other artistic or cultural expressions.

<sup>14</sup> M Forsyth, *Do You Want it Gift Wrapped?: Protecting Traditional Knowledge in the Pacific Island Countries*, (2010) <<http://press.anu.edu.au/wp-content/uploads/2012/08/ch09.pdf>> (Accessed 14/09/2014).

normally considered in intellectual property law. For example, legal measures that limit the potential use of TK by third parties by providing exclusive rights, preventing use or setting conditions on their permitted use, and also providing moral rights or rights of attribution.<sup>15</sup>

1.15 Further objectives sought to be achieved, is to provide owners of TK with the means to commercialise their TK so as to derive an income from it, whilst not diluting their ownership of it or damaging its integrity. As with many traditional communities, it is important to recognise the owners' stewardship of that knowledge for past and future generations, whilst not being committed and restricted to a non development policy in respect of it.

1.16 In considering the overriding concerns expressed by the Samoan community during consultations as to the kind of protection that would be appropriate to protect TK, the Commission distilled into 4 major protection groups what appeared to best promote the objectives of this project:

- i. Recognition of collective or community ownership of TK;
- ii. Provision of moral rights of traditional communities, which includes the right to attribution or recognition of traditional owners as being the source of TK, and not to subject the TK to derogatory action;
- iii. Provision of economic rights of traditional communities, which includes exclusive rights to prevent use by third parties, or setting conditions on their use, such as the requirement for prior informed consent, and a fair and equitable sharing of benefits between the user for commercial purposes and traditional communities; and
- iv. Protection in perpetuity.

## **2. SAMOA'S TRADITIONAL KNOWLEDGE RELATING TO PLANTS**

2.1 Agriculture is the most important economic activity in terms of employment in Samoa with 32.9% in this sector.<sup>16</sup> The export of Samoa's agricultural products in 2014 totalled up to \$4.349 million tala, comprising 3.86% of total exports.<sup>17</sup>

2.2 TK relating to the techniques of cultivation and harvest may help to improve the development of a profitable commercial agriculture sector in Samoa. For example, information sharing of techniques based on TK could promote sustainable development and provide mutual benefits for custodians and recipients of such TK.

2.3 It is considered that Samoa's TK associated with the use of plant varieties for healing purposes may hold significant commercial value for research institutes and pharmaceutical companies. The World Health Organization has estimated that the global market for traditional therapies is in excess of US \$70 billion a year.

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<sup>15</sup>The 'protection' referred to here is not the kind related to the preservation or conservation of TK, which arguably may still be enhanced by the protection of TK from misuse and misappropriation.

<sup>16</sup> Samoa Bureau of Statistics, *Population and Housing Census 2011: Analytical Report* (2011) 70.

<sup>17</sup> Samoa Bureau of Statistics, *Agriculture Export Products* (2015).

Worldwide sales of pharmaceutical drugs that are based on traditional medicines are estimated to be worth US\$32 billion each year.<sup>18</sup>

- 2.4 What emerged from the consultations is concern over the interest of third parties in the use of Samoa's TK, for example, in the healing properties of plants. This interest demonstrates that Samoa's TK may be a viable commodity that if properly protected and promoted, may be a significant source of revenue for the economy of Samoa. The opportunity to use TK in a commercial context is therefore potentially significant.
- 2.5 Samoa's plants, animals and related TK have been studied in the past by researchers and bio-prospectors from developed countries. Research carried out in 2003 suggested then that up to 40 researchers came to Samoa each year to study useful properties of plants and animals as well as access to related TK.<sup>19</sup>
- 2.6 There are documented examples of scientific research on Samoan plants conducted by bio-prospectors from developed countries that raised national concerns about the dangers related to the exploitation of Samoa's genetic resources and associated TK by third parties with little or no economic benefit for Samoa or owners or custodians of that TK. This report discusses a few well-known examples to illustrate national concerns.

### **The Mamala Tree** <sup>20</sup>

- 2.7 In Samoa, traditional healers have for a very long time treated viral infections, for example *fiva samasama* (hepatitis), with the bark of the native *Mamala* tree.
- 2.8 In 1984, an American ethno botanist, Paul Cox, worked in Falealupo, collecting plant samples to test them for useful medical properties and interviewing *taulasea* (traditional healers). Paul Cox sent samples of the *Mamala* tree to the United States for testing and promised to share any profits resulting from his work with the families of *taulasea* and the village of Falealupo. Results of scientific tests in the USA showed that a compound extracted from the bark of the *Mamala* tree, 'Prostratin', has potential for the treatment of HIV/AIDS, hepatitis and certain forms of cancer. The National Institute of Health (NIH) patented in the United States the process of extracting Prostratin from the bark of *Mamala* tree and using it for HIV/AIDS treatment. The patent listed Paul Cox among the inventors, but not the traditional healers from Falealupo who shared their TK about the medical properties of the bark of *Mamala* tree with the American ethno-botanist. The same invention was

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<sup>18</sup> K Vasisht and V Kumar, *Trade and Production of Herbal Medicines and Natural Health Products*, United Nations Industrial Development Organization (UNIDO) (2002).

<sup>19</sup> Urwin Consulting in association with KVA Consult, *Consultancy For The Capacity Needs Assessment On Access & Benefit Sharing And The Protection Of Traditional Knowledge, Practices & Innovations*. Final Report (May 2003) 5.

\*There is no available information indicating whether or not the number of researchers has increased or decreased.

<sup>20</sup> B Stay, Dr. David and E Martin, *Samoa Mamala & Prostratin Recommendations: Pharmaceutical Plant Proposal*, M-CAM (June 2008);

Urwin Consulting in association with KVA Consult, *Consultancy for the capacity needs assessment on access & benefit sharing and the protection of traditional Knowledge, practices & innovations*, Final Report (May 2003).

also patented in Japan, Spain, the European Union, Canada, Australia, Austria, Germany and Denmark.

2.9 The NIH granted the AIDS Research Alliance (**ARA**), a non-profit organization, an exclusive license to develop prostratin as an anti- HIV drug.<sup>21</sup>

2.10 In 2001, the ARA entered into an agreement with the Government of Samoa to share a percentage of any future royalties from medication developed from the prostratin extracted. The agreement set out that the percentage of future royalties would be shared as between the Samoan Government, the village of Falealupo, and the families of the two *taulasea* that shared their TK. While this agreement appeared to benefit the families and villages of the *taulasea* and the Samoan government, in fact, it produced no financial benefit to any of them.

2.11 This is partly because royalties are calculated only on the profit made from the commercialisation of any medicines resulting from the patent. Therefore if the commercial returns of the patent do not outweigh the production and testing costs, there will be no profits to share.<sup>22</sup> Also, there is a time delay due to pharmaceutical testing and approval which may take many years.

2.12 In June 2008, the Prostratin still had not entered full-scale therapeutic clinical trials. It is not clear when the patent expired although it is believed to be in 2014.<sup>23</sup>

2.13 Upon expiry of the patent, any invention based on the TK shared by the *taulasea* of Falealupo becomes in the public domain. Once this stage is reached, anyone can freely use the TK disclosed in the patent application without any commercial returns or recognition for Samoa, Falealupo or *taulasea*, from this use.

2.14 In fact, the filing of the patent over the medical properties of the Prostratin long before its commercialization may have deprived the Government of Samoa of its ability to exploit the TK relating to the healing properties of the bark of *Mamala tree* for the economic benefit of Samoa and the owners or custodians of the TK. Furthermore, control of the economic opportunity relating to this TK developed by the people of Samoa over centuries, may now be lost to Samoa.

### **Samoan-Japanese Cooperative Botanical Inventory Programme<sup>24</sup>**

2.15 The Samoan-Japanese Cooperative Botanical Inventory Programme was a project conducted by the National University of Samoa (NUS) and Nihon University (Japan) from 1998 to 2000. The aim of the project was to develop a national herbarium for

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<sup>21</sup> Aids Research Alliance, *Prostratin: A Potential Cure Strategy* (n) <<http://aidsresearch.org/cure-research/prostratin/>> (Accessed 4/08/2014).

<sup>22</sup> Under the agreement future royalties is calculated on net revenue above and beyond personnel costs, costs for work performed by ARA, work by third parties in which ARA incurred, payments and royalties to the US Government, costs associated with raising funds for the development of Prostratin, legal fees, and costs covered by third grantors.

<sup>23</sup> Online research suggests that the patent has already expired (January 2014) but it has been difficult to find any further information on this issue.

<sup>24</sup> Urwin Consulting in association with KVA Consult “*Consultancy for the capacity needs assessment on access & benefit sharing and the protection of traditional Knowledge, practices & innovations*” Final Report (May 2003).

Samoa by collecting and cataloguing all Samoan plant species. In addition to the plant specimens gathered and indexed for the Samoan collection, samples were also sent to Japan. In January 2000, Japanese researchers collecting plant specimens in Savai'i, sought to interview *taulasea* about the medicinal qualities of various plants that Samoan traditional healers use in their healing practices.

2.16 In order to provide some safeguards for interviewing *taulasea*, NUS sought to enter an agreement with Nihon University in 2000. The agreement highlighted the cooperative nature of the research, and provided for training requirements and technology transfer for the benefit of NUS, and incorporated a Code of Conduct for researchers setting parameters for the collection and use of the samples.

2.17 Unfortunately, the agreement provided minimal requirements about any longer-term benefits relating to discoveries based on the *taulasea's* TK about plant properties. In fact, the sharing of any future economic benefit relies heavily on Nihon University's goodwill to advise NUS that commercial gains have been made. Moreover, the agreement is silent on the issue of the *taulasea's* prior informed consent to the use of TK.

### 3. SAMOA'S TRADITIONAL KNOWLEDGE AND TOURISM

3.1 Tourism is one of the major revenue earners for the Samoan economy. In the period October 2012 – September 2013, the gross tourism revenue was \$332.56 million tala with about 134,000 visitors.<sup>25</sup> One of the principal aspects of the tourism experience in Samoa is the showcasing of traditional cultural expressions, which includes the presentation of Samoan culture through the performance of traditional dances and music, showing the traditional methods of weaving of *siapo*, or the sale of handicrafts as souvenirs.

3.2 The development of tourism in Samoa also raises concerns about the use of TCE for commercial purposes which may result in misappropriation, and or a loss of the sacred or ritual value of these expressions. For example:

- i. *elei* designs copied by overseas fabric manufacturers which are then sold in Samoa;
- ii. unauthorised recording and broadcasting of traditional Samoan songs; and
- iii. unauthorised use of traditional designs from *tatau*.

3.3 The above examples of use and exploitation of Samoa's TCE highlight different issues relating to the protection of Samoa's TK.

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<sup>25</sup> Ministry of Finance (Samoa), *Quarterly Economic Review September 2013*, (Issue No. 58, 2013).

This review summarizes the state of the economy during the first quarter (Sep quarter) 2012/13 and the twelve months review (Oct 2011-Sep 2012).

<<http://www.mof.gov.ws/Services/Economy/QuarterlyEconomicReviews/tabid/5617/ItemId/317/Default.aspx>> (Accessed 08/08/2014).

## 4. LEGAL PROTECTION OF TRADITIONAL KNOWLEDGE UNDER THE CONSTITUTION AND VILLAGE FONONO ACT 1990

4.1 The current Samoan legal framework provides some protection of TK. The *Constitution of Samoa 1960* and the *Village Fono Act 1990* discussed briefly below, do not directly protect TK but recognise customary law, which is crucial to the protection of TK as an important element of Samoan culture and tradition and an essential component of daily living of Samoans. Intellectual property laws that provide some protection of TK include the *Copyright Act 1998* (**Copyright Act**) and the *Intellectual Property Act 2011* (**Intellectual Property Act**).

### Constitution of Samoa 1960

4.2 Under the Constitution, *Matai* titles and customary land may be held in accordance with custom and usage and with the law relating to Samoan custom and usage.<sup>26</sup> The *Constitution* also establishes a Land and Titles Court, which has jurisdiction to adjudicate disputes pertaining to *Matai* titles and customary land.<sup>27</sup>

4.3 'Custom and usage' is referred as being part of the laws of Samoa if it has acquired the force of law under an Act or Court judgement.<sup>28</sup> This reference appears to give customary law legal recognition, and could be viewed as an integration of customary law into the Constitution. Subsequent laws have been passed by Samoa's Parliament that takes into account Samoa's customary laws.<sup>29</sup>

### Village Fono Act 1990

4.4 The *Village Fono Act* validates and recognises the roles and functions of the Village Fono (i.e. the Village Council which consists of an assembly of the *Alii* and *Faipule*) in accordance with the custom and usage of their villages, confirms and grants certain functions, and provides for incidental matters.<sup>30</sup> In particular, a *Village Fono* has the power to make rules governing the development and use of village land for the social and economic betterment of its village.<sup>31</sup> Such rules could extend over or have an impact on the use of TK according to the custom and usage of the village, particularly as TK is often developed from the biological resources from the environment (for example plants grown on customary lands belonging to a traditional community) and is generally viewed as collectively owned, being maintained and kept for the benefit of the community.

4.5 The powers of *Village Fonos* however only extend to their own villages. Any protection of Samoa's TK through the *Village Fono*, using customs and usages of the village, is limited to the village level only and specifically to each village individually, as deemed appropriate by each village council.

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<sup>26</sup> *Constitution of the Independent State of Samoa 1960*, Art. 100 and 101.

<sup>27</sup> *Ibid*, Art. 103.

<sup>28</sup> *Ibid*, Art. 111.

<sup>29</sup> For example the *Alienation of Customary Land Act 1965* which allows the leasing of customary land provided it is in accordance with customs and usage; the *Lands and Titles Court Act 1981* that provides for customary land and titles and the Land and Titles Court; and the *Village Fono Act 1990*.

<sup>30</sup> *Village Fōnō Act 1990* (Samoa), Preamble.

<sup>31</sup> *Ibid*, s. 5.

## 5. LEGAL PROTECTION OF TRADITIONAL KNOWLEDGE UNDER INTELLECTUAL PROPERTY LAWS

- 5.1 As a consequence of becoming member of the World Trade Organization (**WTO**) in 2012 Samoa reformed its intellectual property laws to comply with the minimum standards for the protection of intellectual property rights set out in the Agreement on Trade Related Aspects of Intellectual Property Rights (**TRIPS**).<sup>32</sup> This reform initiative also included amendments to intellectual property laws to provide some form of protection of TK.
- 5.2 These reforms resulted in amendments to the *Copyright Act* and the consolidation and expansion of intellectual property related legislation (i.e., trademarks, industrial designs, patents, plant breeder's rights and circuit layouts) under the *Intellectual Property Act*.
- 5.3 Some intellectual property laws such as copyright law, patent law, and design law are potentially more relevant than others in the protection of TK. Discussions under this part will include protection that may be provided under these intellectual property systems, and will also touch upon other intellectual property laws such as trademarks and collective marks, geographical indications, plant breeders rights, etc, which may provide some indirect protection of TK.
- 5.4 Various impediments to effective protection of TK under copyright law, patent law, design law and trademark law, which would not be adequately addressed by any amendments to such laws, will be discussed in this part.

### Copyright Laws – Protection of works under the *Copyright Act 1998, Part IA*

- 5.5 Copyright law protects the form of expression of ideas, or ways in which ideas are expressed in a literary or artistic form. Part IA of the *Copyright Act* protects literary and artistic works (**works**), which is defined as '*original intellectual creations in the literary and artistic domain*'.<sup>33</sup> The *Copyright Act* also offers protection over derivative works, such as translations, adaptations, arrangements and other transformations or modifications of works, and collections of works.<sup>34</sup>
- 5.6 A work is protected under the *Copyright Act* by the sole fact of its creation, irrespective of its form of expression, content, quality and purpose.<sup>35</sup> Therefore, original intellectual creations in the literary and artistic domain do not need to be formally registered to be protected. Instead an automatic right arises as soon as such 'original' works are in material form. This aspect would make copyright protection quite attractive for Samoan traditional artists, as they would not be required to pay fees to protect their creations, which are automatically protected upon creation.

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<sup>32</sup>The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

<sup>33</sup> *Copyright Act 1998* (Samoa), s. 3(1).

<sup>34</sup> *Ibid*, s. 4(1).

<sup>35</sup> *Ibid*, s. 3(2).

5.7 The term of copyright protection is the period of the life of the author, plus 75 years after his or her death.<sup>36</sup>

5.8 The *Copyright Act* grants economic and moral rights to the authors of protected works. Economic rights give exclusive rights to the copyright owner of a work to exclude others from carrying out certain acts in relation to the work without the authorization of the owner of the work.<sup>37</sup> Moral rights, on the other hand, include rights of attribution to the author and to object to distortion or other modification or derogatory action to the work.<sup>38</sup> Under this Act, only the author of the work has moral rights, even if that person is not the current holder of the economic rights.<sup>39</sup>

5.9 Works that may receive copyright protection includes stage productions of works and ‘traditional cultural expressions that are apt for such productions’.<sup>40</sup>

5.10 Many cultural expressions of Samoa’s TK are creations in the literary and artistic domain may potentially be provided some protection under the *Copyright Act*, such as traditional tattoos; *elei* designs; carvings and handicrafts; traditional buildings; music; dances; and costumes. However there are some key requirements of copyright law that appear to be incompatible with aspects of TK and therefore an impediment to providing proper protection.

## Limitations of Protection of Works under the *Copyright Act*

### *Originality Requirement*

5.11 Copyright law protects literary and artistic works, as long as they are an ‘original intellectual creation’. This requirement is the primary impediment to copyright protection of TCE. This is because a key attribute of TK is that it is passed from generation to generation and constantly being improved and adapted to the changing needs of communities. According to scholars, a work is original if it involved some degree of intellectual effort and is not a mere copy of a previous work.<sup>41</sup> Works inspired by or based on pre-existing traditional creations may be sufficiently original to be protected under copyright law, however mere copies are unlikely to comply with an originality requirement, and would remain in the public domain.<sup>42</sup>

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<sup>36</sup> Ibid, s. 16.

<sup>37</sup> Ibid, s. 6.

<sup>38</sup> Ibid, s. 7.

<sup>39</sup> Ibid, s. 16.

<sup>40</sup> Traditional cultural expressions’ is defined in the *Copyright Act*, s.2. Although the list of works in s. 3(1) is not exhaustive, it expressly refers to ‘traditional cultural expressions that are apt for such productions’ (ie stage productions). This indicates that other traditional cultural expressions that are not apt for such productions, such as traditional arts, in particular drawings, paintings, carvings, sculptures, pottery, woodwork, handicrafts, costumes, may not be captured and protected under Part 1A of the *Copyright Act 1998* (Samoa).

<sup>41</sup> See for example S Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*. (London, 1987), 228 - 234.

<sup>42</sup> A work is considered to be in the public domain if there is no legal restriction for its use by the public.

Black’s Law Dictionary defines the public domain as “[t]he universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge”. See also Intergovernmental Committee on Intellectual Property and Genetic Resources, “*Glossary of key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions*”. Traditional Knowledge and Folklore. Twenty-Second Session, Geneva, July 9 to 13, 2012.



5.12 Furthermore, forms of TK currently in the public domain would not qualify for copyright protection due to the requirement for originality.

#### *Tangible form*

5.13 The need for expression to be in a tangible form is another impediment to copyright protection. Very often TK will be in an intangible form, such as healing practices or medicinal techniques.

#### *Limited Protection period*

5.14 Views expressed by interested parties/traditional holders in consultations revealed that there is an underlying expectation among village communities that protection of their TK and TCE will remain in perpetuity, as an embodiment of their cultural and social identity, standards and values. However, copyright protection for works is only for a limited time before the works can be freely accessed by the public.

#### *No Communal ownership of rights*

5.15 A further impediment to copyright protection of TK (in the form of TCE) is that copyright law does not recognise communal ownership and therefore would not protect the rights of the traditional community. Instead, the concept of ownership under copyright law is intended as private ownership.

5.16 According to Samoan customary law and practices, the ownership of TK is considered collective, belonging to the traditional community or village where the TCE derives.

5.17 In *Fauolo v. Gray*,<sup>43</sup> Chief Justice Sapolu when commenting on *Ladbrooke (Football) Ltd v. William Hill (Football) Ltd*,<sup>44</sup> stated that leadership and the act of making a request are not susceptible to copyright law because there is no copyright in a suggestion. He took the view that a person must make material contributions to a creation before his or her rights to such a creation are recognised under copyright law.

5.18 In light of the principle set out in this ruling, an elder in a Samoan village who advises a group of women in the village on *siapo* making would not have any moral or economic rights in the *siapo*, although TK passed on by the elder could have been decisive for making the *siapo*. In accordance with this ruling, the elder must provide material contributions such as drawing designs on the mulberry paper before it can be said that he or she may have moral and economic rights to the *siapo*.

5.19 Under copyright law, (assuming other requirements of copyright law is satisfied) it is likely that only the group of women could hold the moral and economic rights over the *siapo*, and may license or assign their rights over the *siapo* in favour of a third party interested in producing copies for commercial purposes.

5.20 However in a customary context, the women who made the *siapo*, as members of the village would be subject to its customary rules and the village would be entitled

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<sup>43</sup> *Fauolo v Gray* [1997] WSSC 1; CP 364 1995 (5 August 1997).

<sup>44</sup> *Ladbrooke (Football) Ltd v William Hill (Football) Ltd* [1964] All ER 465.

to exercise a level of stewardship over the TK embodied in the *siapo*. The *siapo* would therefore be considered the TCE of a traditional community, and not only of the group of women or any particular individual of the community. The village would be the custodian of its TK and in charge of preserving it for future generations.

#### Protection of Traditional Cultural Expressions under the *Copyright Act 1998*, Part IV

5.21 The *Copyright Act* has specific provisions under Part IV designed to provide some protection of TK, namely TCE, against reproduction, communication to the public by performance, broadcasting, distribution by cable or other means; and adaptation, translation and other transformation – when made either for commercial purposes or outside their traditional or customary context.<sup>45</sup>

5.22 Under the *Copyright Act* TCE is defined as follows:  
*“a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.”*<sup>46</sup>

5.23 Unlike protection of ‘works’ where originality is required for copyright protection, the law is silent in regards to the originality of a TCE. It is unclear whether this may be because TCEs (such as *elei* design, *ie toga*, or handicrafts) are unlikely to demonstrate originality.

5.24 The *Copyright Act* enables the establishment of a Competent Authority determined by the Minister, in which rights to authorise reproduction, adaptation, performance, broadcasting of TCE would be vested.<sup>47</sup> Such Competent Authority may also authorise the assignment or licensing of the economic rights over a TCE.

5.25 The *Copyright Act* also provides for ‘other uses’ of TCE that do not require authorization from the Competent Authority which can be undertaken by third parties without breaching the Act. This includes the use by a person exclusively for his or her personal purposes, use of short excerpts for reporting current events, or use for face to face teaching or scientific research.<sup>48</sup>

5.26 In relation to all printed publications and in connection with any communication to the public of any identifiable TCE, its source is required to be indicated in an appropriate manner and in conformity with fair practice, by mentioning the community or place from where the TCE was derived.<sup>49</sup>

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<sup>45</sup> *Copyright Act 1998* (Samoa), s. 29(1).

<sup>46</sup> *Ibid*, s. 2.

<sup>47</sup> *Copyright Act 1998* (Samoa), s. 29(4).

<sup>48</sup> *Ibid*, s. 29(2).

<sup>49</sup> *Ibid*, s. 29(3).

5.27 Any person, who uses TCE contrary to the Act is liable to the Competent Authority for damages, injunctions or any other remedies, that the Court would deem fit, in each claim.<sup>50</sup>

5.28 To date a Competent Authority has never been established. Furthermore, it appears that even if one were to be established, protection of TCE would still be very limited, and not to the extent set out in paragraph 1.16.

### **Limitations of Protection of Traditional Cultural Expressions under the *Copyright Act***

#### *No identifiable author*

5.29 Most TCEs would not have an identifiable author, as these expressions are derived from the traditional know-how of a community which has been passed down from generation to generation.<sup>51</sup> For example, there is unlikely to be an identifiable author of the graphic elements of *tapa* fabrics sold in the local markets. However, an author of contemporary tradition-based cultural expressions is more likely to be identified, because they would be creations made by newer generations and there may be a record of authorship.

#### *No Economic rights*

5.30 Traditional communities are not granted any economic rights, which are instead vested in a Competent Authority (if one is established). This may be attributed to difficulty with determining the rightful author or owner of a TCE.

5.31 Prior consent of the traditional holders to authorize the use of TCEs in a commercial or non customary context is also not required. Again this may be attributed to the difficulty in determining ownership of a TCE. In fact, there is no guarantee that authorisation by the Competent Authority would only be given if it is in the interests of the traditional holders. Furthermore, in the absence of an explicit provision providing for equitable benefit sharing, there is no guarantee that traditional holders would receive any share from the use of TCEs or that monies collected would go towards cultural development of that particular group or community.<sup>52</sup> Also, it is unclear whether traditional holders, who wish to use TCEs for commercial purposes, or for purposes outside their traditional or customary context, may be required to first seek authorisation from the competent authority.

#### *Limited Moral rights*

5.32 Traditional communities are only granted very limited moral rights. The source of publications and communications to the public of any identifiable TCE must be indicated in an appropriate manner and in conformity with fair practice by mentioning the community or place from where the TCE was derived. What constitutes an appropriate manner that conforms with fair practice is not clear. Furthermore, the means of determining the community or place where an expression was derived is not addressed at all.

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<sup>50</sup> Ibid, s. 30.

<sup>51</sup> WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*, Background Paper No 1 (2003) 37.

<sup>52</sup> *Copyright Act 1998* (Samoa), s. 29(5). All monies collected from TCEs for fees, damages and compensation are to be used for the development of culture.

### *Broad exemption relating to 'other uses'*

5.33 The 'other uses' of traditional cultural expressions which can be undertaken by third parties without seeking authorization from the Competent Authority appears quite broad. For example, third parties may potentially engage in unauthorised use of TCE under the exemption relating to 'scientific research' as it is not defined and can be interpreted very broadly.

### **Protection of Performers, etc under the *Copyright Act 1998, Part II***

5.34 Part II of *Copyright Act* provides for the protection of performers, which includes singers, musicians, and other persons, who sing, deliver, play in, or otherwise perform literary and artistic works or TCEs.<sup>53</sup> The Performer has exclusive right to carry out any of the acts set out in section 20(2) of the Act, with the term of protection from the actual performance until the end of the 75<sup>th</sup> calendar year.<sup>54</sup>

5.35 Certain uses are excluded from authorisation requirements. This includes where used by a physical person exclusively for his or her own personal purposes; use of short excerpts for reporting current events; use for the purpose of face-to-face teaching activities or for scientific research; and similarly where a 'work' can be used without the authorisation of the owner of copyright.<sup>55</sup>

### **Limitations of Protection of Performers under the *Copyright Act***

5.36 It appears that a performer of TCEs, who may not necessarily be the traditional owner or traditional custodian can authorise the acts (set out in paragraph 5.34) to be carried out. It is not clear, what, if any protection is provided to the traditional owners or traditional custodians of the TCE that is performed. For example, there is no requirement of prior informed consent of the traditional owner or traditional custodians, or recognition or attribution to traditional owners or traditional custodians, of the TCE being performed.

### **Patent Protection under *Intellectual Property Act 2011, Part II and III***

5.37 A patent protects inventions and grants exclusive rights to the inventor to exploit a patented invention for commercial purposes, for the period of the patent. Protection of patents is set out under Part II of the *Intellectual Property Act*. A patent is protected for a term of twenty years from the filing date of the application.<sup>56</sup>

5.38 Under section 5 of the *Intellectual Property Act*, an invention is patentable if it meets the following requirements:

- i. It is new;<sup>57</sup>
- ii. It involves an inventive step;<sup>58</sup>

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<sup>53</sup> Ibid, s. 2.

<sup>54</sup> Ibid, s. 20(5).

<sup>55</sup> Ibid, s. 24.

<sup>56</sup> *Intellectual Property Act 2011* (Samoa), s. 13.

Note: An invention is not new if it is known or used anywhere in the world, by publication or oral disclosure.

<sup>57</sup> Ibid, s. 5(2) An invention is new if it is not anticipated by prior art.

<sup>58</sup> Ibid, An invention is considered as involving an inventive step if, having regard to the prior art relevant to the invention, it would not have been obvious to a person having ordinary skill in the art.

iii. It is industrially applicable.<sup>59</sup>

5.39 An application for a patent must include a description of the invention in a manner which is complete enough for the invention to be carried out by a person having ordinary skill in the art.<sup>60</sup> If a patent is granted in respect of use a product, the right to exploit includes the right to make, import, sell, or use the product. If a patent is granted in respect of a process, the rights to exploit include the rights to make, import, sell, or a product obtained directly by means of the process.<sup>61</sup> However, with some limited exceptions, any person intending to exploit a patented invention in Samoa must first obtain the consent of the owner of the patent.<sup>62</sup>

5.40 The inventor is the holder of the rights over a patent. A patent can also be granted to two or more persons having jointly made the invention. This potentially means that holders of TK can negotiate with third parties who develop an invention using the holders' TK, to jointly own a patent.<sup>63</sup> The joint ownership of a patent would give traditional owners the right to commercially exploit the patent and obtain economic benefit from their TK that can be demonstrated to be associated with a protected invention. For example, the body inks and instruments developed from the traditional instruments for tattooing the *tatau* and *malu* may be protected under patent law and jointly owned by the tatoosist together with a third party that makes the ink and instruments, provided the strict requirements for a patent to be registered are met.

5.41 The *Intellectual Property Act* also introduces an 'innovation patent' for small scale inventions with a shorter period of protection of seven years. This new type of patent protects an incremental or lower level invention. The purpose of such protection is to foster innovation of all types in the Samoan economy by introducing a new intellectual property title category that can be easily used by the business sector in Samoa. The innovation patent does not require an inventive step, and is expected to be quicker and less costly to obtain.<sup>64</sup>

5.42 Specific provisions in the Act relating to TK require an applicant for a standard or an innovation patent to disclose if the invention is based on TK as well as the source and geographical origin of any biological material used for the invention.<sup>65</sup> The applicant may be required to furnish proof of the authority to use such material or knowledge.<sup>66</sup>

## **Limitations of Patent Protection under the *Intellectual Property Act***

### *Stringent Requirements of novelty and an inventive step*

5.43 The primary impediments to proper protection of TK under the patent law, is the strict requirements for an invention to be registered. Namely, that it must be new

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<sup>59</sup> Ibid, s. 5(6) An invention is industrially applicable if it can be made or used in any kind of industry.

<sup>60</sup> Ibid, s. 7(3)(d) and (5).

<sup>61</sup> Ibid, s12(3).

<sup>62</sup> Ibid, s12(2).

<sup>63</sup> Ibid, ss. 6 and 21.

<sup>64</sup> *Intellectual Property Act 2011* (Samoa), ss. 19-30.

<sup>65</sup> Ibid, s.7(3)(g) and (h) and s. 22(3)(g) and (h).

<sup>66</sup> Ibid, s.7(10).

and not previously known and that there is an inventive step, so it is not obvious and is produced with a reasonable level of technical know-how.

5.44 These requirements make patent protection appear incompatible with the protection of TK due to the nature of TK as a body of knowledge which is passed down from generation to generation. It is also not clear how to apply these strict requirements for claimed inventions that are TK as such, or derived from TK, or developed within a TK system.

#### *No Communal ownership of rights*

5.45 Another impediment to patent protection of TK is that rights over a patent are conferred on individuals or corporations, but not communally. As discussed earlier, according to Samoan customary law and practices, the ownership of TK is often collective, belonging to the traditional community.

#### *Limited protection period*

5.46 Patent protection expires after 20 years (7 years for innovation patents<sup>67</sup>) from the filing date of the application.<sup>68</sup> After this period, any TK disclosed in the patent proceeding falls within the public domain. In the case of pharmaceutical products (for example Prostatin, i.e. the compound extracted from the bark of *Mamala tree*), the effective period of protection may be even shorter because the testing and commercial approval for human use may take several years. This aspect of the patent protection is incompatible with the interests of traditional communities expressed in consultations in protecting their designs in perpetuity.

#### *Utilisation by third parties of information in original patent application*

5.47 The patent law requires the applicant to fully disclose the invention. This is another aspect of the patent system which may be incompatible with the protection of TK sought by traditional holders, but could probably be addressed if TK protection was in perpetuity. In fact, after the patent period of the original patent application, third parties would be able to obtain new patents based on the TK disclosed in the original patent application, by using that information to make alternative inventions that do not infringe the original patent insofar as they may involve an inventive step. In such cases Samoa would lose the commercial control over the TK disclosed in the original patent application and no benefits derived for these new patents would be shared with Samoans. This may be addressed if TK protection was in perpetuity.

5.48 The law recognises that development is to be encouraged, and to this extent recognises intellectual input from later third parties who develop an existing concept, without fettering the later input of valuable developmental contributions by others. However traditional holders consulted during the public consultations in 2010 stated that they would not approve their TK being freely accessible for commercial purposes by others who are not members of their group.

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<sup>67</sup> Ibid, s. 29.

<sup>68</sup> Ibid, s. 14.

### *Information in declined patent application made public*

5.49 If a patent application for an invention (for example, of a process derived from secret TK) is rejected by the Registrar, the TK disclosed in the patent would fall within the public domain.

### *Limited Moral rights where Invention derived from traditional knowledge*

5.50 Currently an applicant for a standard or an innovation patent is required to disclose if the invention is based on TK as well as the source and geographical origin of any biological material used for the invention. However, if the applicant does not disclose the source in their application (whether by mistake, or deliberately), or inaccurately discloses the source, it is not clear what happens. Furthermore, it is not clear in the Act what would suffice as clear evidence of an applicant's title or authority to use such material or knowledge.

### *No Economic rights*

5.51 There is no requirement for the prior consent of the traditional owners or community for use of their TK in an invention. Also, there is no requirement that traditional owners or community receive benefits from the use of their TK or derived from TK.

## **Protection of Marks and Collective Marks under the *Intellectual Property Act 2011*, Part V**

5.52 Protection of marks does not directly protect TK as such, but can provide some indirect protection, by providing a means of protecting distinctive signs, and symbols associated with TK. To be registered, the mark must be distinctive.

5.53 Under the Intellectual Property Act, a 'mark' is defined as a sign capable of being represented graphically and of distinguishing the goods or services of one person from those of another in the course of trade.<sup>69</sup>

5.54 A 'collective mark' is defined as a sign capable of being represented graphically and capable of distinguishing the origin or any other common characteristic, (including the quality of goods or services of members of the 'collective association'<sup>70</sup> that is the owner of the sign) from those of persons who are not members of the association.<sup>71</sup> Therefore, only the members of the association are entitled to use the collective mark. Typical examples of this are logos on commercial products, or advertising jingles that clearly define the services or product of one manufacturer from another.

5.55 A registered mark or registered collective mark confers an owner with exclusive rights to use his or her trademark in relation to any of the goods or services in

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<sup>69</sup> *Intellectual Property Act 2011* (Samoa), s. 45(1). The mark can consist of a wide variety of signs, such as a letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound, scent or taste or a combination of them.

<sup>70</sup> *Ibid*, s. 45(1). A collective association means an incorporated body that has or is able to have members, and is constituted for the joint benefit of its members.

<sup>71</sup> *Ibid*, s. 45(1).

respect of which it is registered.<sup>72</sup> A trademark is protected for 10 years from the filing date of the application. Such protection may be renewed for consecutive periods of 10 years upon the payment of the renewal fee.<sup>73</sup>

5.56 A registered collective mark may be used as a mechanism that indirectly provides some protection of Samoa's TK. For example the producers of *elei* can join together in an association (e.g. Elei Garment Association) and register the collective mark "ELEI- Samoan Traditional Design" to assure tourists and local consumers about the authenticity and quality of products, that the producers are Samoan, and the products are made according to traditional methods of production. This approach could also create a competitive advantage over similar products that are alike but are not marked with a sign indicating the Samoa's TK-based origin. Here, the protection is designed to apply to the collective name used to identify the various designs as being traditionally Samoan.

5.57 There are several examples of traditional communities who have adopted this strategy to provide some protection of TK. In Australia, the National Indigenous Arts Advocacy Association (NIAAA), a representative body for Indigenous artists, developed an Australian Indigenous arts certification system which comprised two certification marks. This system was developed in response to the many imitation products claiming to be indigenous and was designed to assist consumers to identify authentically produced Indigenous art and cultural products.<sup>74</sup>

5.58 In New Zealand, Maori artists have been making use of collective trademark protection since the launch of the trademark "Toi Iho" under the New Zealand's Government Arts Body. This trademark indicates to consumers that the creator of the products is a Maori descendent and the products are of a certain quality.<sup>75</sup>

5.59 Traditional communities expressed concern about the registration of their words, symbols and designs as trademarks by non-traditional or foreign businesses. These non-traditional entities using distinctive traditional words or symbols may seek to mark their products as 'indigenous' or 'exotic' to receive a commercial gain. These concerns are justified as use of such trademarks may falsely suggest an association with or endorsement by traditional communities and could mislead consumers as to the true origin of the marked products.<sup>76</sup> In this regard, some protection of TK against misappropriation and exploitation is provided through a general exclusion of all imitators, by a prohibition under the Act of the registration of marks or collective marks based on *matai* titles, names of persons or Samoan villages.<sup>77</sup>

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<sup>72</sup> *Intellectual Property Act 2011* (Samoa) s. 56, 60(1).

<sup>73</sup> *Ibid*, s. 57, 60(1).

<sup>74</sup> T Janke, *Case Studies on Intellectual Property and Traditional Cultural Expressions*. WIPO (Case Study 8, 2003) 134-158.

<sup>75</sup> *Toi Iho, Toi Iho Maori Trademark of Quality and Authenticity* (2012) <<http://www.toiho.co.nz/>> (Accessed 9/02/2015).

<sup>76</sup> WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*. Background Paper No 1 (2003) 45-46.

<sup>77</sup> *Intellectual Property Act 2011* (Samoa), s. 47(1)(i) and s. 60(1).



## Limitations of trademark protection under the *Intellectual Property Act*

### *Mark or Collective Mark must be able to be represented graphically*

5.60 Trademark protection can cover only those aspects of Samoa's TK that consist of a sign which can be represented graphically, such as traditional words and symbols.

### *Unintended consequences of similar trademark*

5.61 Where a non-traditional entity registers a trademark over distinctive traditional words or symbols (or very similar), it is not inconceivable that according to the law relating to trademarks, this may lead to a traditional community being prevented at some future stage from using their own traditional words or symbols because of the close similarity to the non-traditional entity's registered trademark. This potential anomaly could possibly be addressed by having a general prohibition under the Act of the registration of marks or collective marks of distinctive traditional words or symbols, similar to the general prohibition based on *matai* titles, names of persons or Samoan villages.

### *Incorporating a collective association*

5.62 Traditional communities would be required to become a collective association in order to be able to be registered as owner of a collective mark that can distinguish the origin or other common characteristic from non members. There is a requirement for a collective association to have written rules governing the use of the collective mark.<sup>78</sup> Whilst not necessarily a limitation, establishing such rules would likely involve collaborative efforts by the Government and traditional communities. These rules are significant in that a collective mark may be challenged by any person seeking its invalidation on the basis that the owner of the mark uses or permits its use in contravention of the rules.<sup>79</sup> However, there may be some protection opportunities by adopting a similar model to the New Zealand collective trademark protection since the launch of the Maori "Toi Iho" trademark (see paragraph 5.58).

### *Limited protection period*

5.63 The period of protection of a trademark is 10 years from the filing date of the application, and may be renewed for consecutive periods of 10 years.<sup>80</sup> Traditional communities would need to ensure that it is renewed, otherwise the protection would lapse or expire, and the mark would be freely used by the public. This aspect of the trademark protection would not be compatible with the interests of traditional communities in protecting their designs in perpetuity. However, it is achievable, whilst perhaps not convenient.

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<sup>78</sup> *Intellectual Property Act 2011* (Samoa), s. 60(2).

<sup>79</sup> *Ibid*, s. 60(3)(b).

<sup>80</sup> *Ibid*, s. 57(1).

## Protection of Designs under the *Intellectual Property Act 2011*, Part IV

5.64 The *Intellectual Property Act* defines ‘design’ as any aspect of the shape, pattern or configuration (whether internal or external) of the whole or part of an article, or object.<sup>81</sup>

5.65 A ‘design right’ is a property right in an ‘original’ design that the creator (as the first owner) automatically has, if certain criteria are met.<sup>82</sup> However it is to be noted that the right does not apply to a design recorded, or article made, prior to 2011. A design is not original if it is commonplace in the relevant design field at the time of its creation.<sup>83</sup> Moreover, a design right can be vested in two or more people who jointly made or created the design, and can also be assigned or transferred.<sup>84</sup> Such right expires after 15 years from the end of the calendar year in which the design was first recorded in a design document or an article was first made to the design, whichever first occurred.<sup>85</sup> The owner of the design right has the exclusive right to reproduce the design, make, sell or import articles incorporating the design.<sup>86</sup> The design right does not extend to articles which have been put on the market (anywhere in the world) by the owner or with the owner’s consent.<sup>87</sup>

5.66 A design can be registered if it is ‘new’, meaning it has not been disclosed to the public in Samoa or anywhere in the world before the application for registration.<sup>88</sup> A registered design is protected for a period of five years from the filing date of the application for registration, and can be renewed for two further consecutive periods of five years.<sup>89</sup> The holder of the registered design has the exclusive right to exploit (by making, selling or importing articles incorporating the registered design) for commercial purposes.<sup>90</sup> Some protection of Samoan TK against misappropriation and exploitation is provided through a general exclusion of all imitators, by a prohibition of the registration of designs that are based on *matai* titles, names of persons or Samoan villages.<sup>91</sup>

5.67 A design right is infringed by a person who without the licence of the design right owner, does or authorises another to do anything which is the exclusive right of the design right owner.<sup>92</sup> Similarly a registered design is infringed by a person who

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<sup>81</sup> *Ibid*, s. 31. A design does not include a method or principle of construction; or features of shape or configuration of an article which are dictated solely by the function which the article has to perform; or are dependent upon the appearance of another article of which the article is intended by the designer to form an integral part

<sup>82</sup> *Intellectual Property Act 2011* (Samoa) s. 32 and 3. A design right may only apply to a design created by a national or person with permanent residence in Samoa, or designs first created in Samoa – and can only arise when the design has been recorded in a design document or an article has been made to the design. However it does not include a design which was recorded, or to which an article was made before the commencement of the *Intellectual Property Act*.

<sup>83</sup> *Ibid*, s. 32.

<sup>84</sup> *Ibid*, s. 38.

<sup>85</sup> *Ibid*, s. 34.

<sup>86</sup> *Ibid*, s.36.

<sup>87</sup> *Intellectual Property Act 2011* (Samoa),, s. 36.

<sup>88</sup> *Ibid*, s. 37.

<sup>89</sup> *Ibid*, s. 43.

<sup>90</sup> *Ibid*, s. 42.

<sup>91</sup> *Ibid*, s. 37.

<sup>92</sup> *Ibid*, s. 36(3).

without the licence of the registered owner of the design does or authorises another to do anything which is the exclusive right of the registered owner.<sup>93</sup>

## **Limitations of Design Protection the *Intellectual Property Act 2011***

### *Originality requirement*

5.68 The primary impediments to proper protection of TK under the design law, is that it must be new. This requirement makes the protection of designs appear incompatible with the protection of TK due to the nature of TK as a body of knowledge which is passed down from generation to generation.

### *Exclusion of designs recorded or made before 2011*

5.69 Design rights may be useful to protect several expressions of Samoa's TK such as textiles, wood carvings, jewellery and other forms of handicrafts. However, as a design right only applies to a design recorded, or according to which an article was made after the commencement of the *Intellectual Property Act 2011*, it is likely only to be relevant to designs which combine traditional motifs with contemporary elements to meet the originality requirement. Many traditional designs are already quite well known and have been commercially exploited, and as a result there may not be any design right potential for these designs (and neither therefore, any infringement by commercial exploitation) as they have not included contemporary elements beyond 2011.

### *Limited protection period*

5.70 The maximum period of protection of the design law is only 15 years.<sup>94</sup> After protection has expired, the design falls into the public domain and can be freely used by the public. This aspect of the design protection is incompatible with the interests of traditional communities in protecting their designs perpetually, especially in the case of designs with special and cultural significance.

### *Use by third parties of information in application*

5.71 The law protecting designs requires the applicant to fully disclose information about the design (similar to a patent application), which is an aspect of design law that is not entirely compatible with the protection of TK sought by traditional holders. This is because third parties may design things based on the TK disclosed in the application for design registration, in the event the application is not granted and information on the design becomes public.<sup>95</sup>

5.72 Another limitation of design law may be that where for example traditional holders have design rights on sacred designs which are kept secret and not disclosed even to the community, in order to determine if it is infringed under the Act, the design right owner would need to reveal the design document of an article which gives rise to concerns as to loss of design protection once the design becomes public.

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<sup>93</sup> Ibid, s. 42(5).

<sup>94</sup> *Intellectual Property Act 2011*(Samoa), s. 34.

<sup>95</sup> This practice is called 'design around' the original patents.

## Protection of Geographical Indications under the *Intellectual Property Act 2011*, Part VII

5.73 A ‘geographical indication’ is an indication, however expressed, which identifies a product as originating in a particular area,<sup>96</sup> if some quality, reputation or other characteristic of the product is essentially attributable to its geographical origin.<sup>97</sup> It can be name of a place, a symbol or a combination of both, and can be used to identify any natural or agricultural product, or any product of handicraft or industry.<sup>98</sup> Products which are most likely to benefit from a geographical indication are *elei* designs, *ava* (kava), nonu or cocoa, coconut cream and handicrafts in general.

5.74 A ‘geographical indication’ does not directly protect TK as such, but can provide some indirect protection, by preventing the use of misleading geographical indications that suggest that a product originated in an area other than its true area of origin, or that constitute unlawful competition.<sup>99</sup> For example the creation of a geographical indication for Samoan handicrafts would allow the Samoan producers to distinguish their products from other Pacific countries or from inferior quality copies from elsewhere. Only producers carrying on their activity in the geographical area in the register have the right to use in the course of trade a registered geographical indication, with respect to products specified in the register, provided such products possess the quality, reputation or other characteristic specified in the register.<sup>100</sup>

5.75 Any interested person may initiate proceedings before the Supreme Court in order to prevent the manufacture, sale, import or export of products if a misleading geographical indication is applied to the products or to seek any other remedies against the contravention of a geographical indication,<sup>101</sup> although this has not been known to occur. Whilst there is no definition of ‘interested person’, the Act appears broad enough to include producers of the product protected by a geographical indication, as well as consumers and associations established to represent the interest of the consumers. This may assist in the case of a small operator who cannot afford to institute proceedings of this nature.

5.76 The registration of a geographical indication does not give the registered owner exclusive rights in that geographical indication. Rights conferred by a registered geographical indication are held collectively by the producers, and all producers who adhere to traditional practices would have the right to use the geographical indication in trade. Geographical indications cannot be assigned to overseas producers, since it would belong to the whole community and not to specific producers.

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<sup>96</sup> ‘Area’ includes a country, region, locality or place.

<sup>97</sup> *Intellectual Property Act 2011* (Samoa), s. 83. Example of famous and successful geographical indications overseas include “Champagne” to designate a French wine, “Parmigiano Reggiano” for an Italian cheese or “Tequila” for a Mexican spirit.

<sup>98</sup> *Ibid*, s. 83.

<sup>99</sup> *Intellectual Property Act 2011* (Samoa) s. 86(1) (a) and (b).

<sup>100</sup> *Ibid*, s. 100.

<sup>101</sup> *Ibid*, s. 87.

## Limitation of Geographical Indications in the Protection of Traditional Knowledge

### *Cost of development of indicators*

5.77 One of the most significant challenges for Samoa in the adoption of geographical indications as a measure contributing to the protection of TK is the associated cost of development of these indications. This includes costs associated with the creation of a production chain, the establishment of a producer organization, the implementation of a quality control system to maintain the unique qualities of the products, and the promotion of the indication in foreign markets. Therefore, any initiative to create geographical indications in Samoa would necessarily involve a detailed feasibility analysis, balancing the relative size of the Samoan internal market and estimated profits against costs of development, implementation and monitoring of geographical indications.

### **Plant breeder's rights under the *Intellectual Property Act 2011*, Part VI**

5.78 The *Intellectual Property Act* provides a legal framework to protect new plant varieties. The protection is achieved by means of granting an exclusive right to the breeder to exploit the new plant variety. A breeder is a person who bred or discovered and developed a plant variety, or the employer of that person or successor in title.<sup>102</sup>

5.79 Breeding new varieties of plants requires a substantial investment in terms of skill, labour, material and economic resources. Processes may take many years to develop (estimated up to 10 to 15 years in the case of many plant species). However, a new plant variety, once released into the market, can be readily reproduced by others, so as to deprive the breeder of the opportunity to profit appropriately from his or her investment. Third parties can benefit from the results of the breeder's work, unless new plant varieties are protected by intellectual property rights. The granting to a breeder of an exclusive right to exploit his/her variety both encourages investment into plant breeding and also contributes to the development of agriculture, horticulture and forestry industries.<sup>103</sup>

5.80 The plant breeder's rights system protects the plant variety itself. This means that a plant variety must physically exist in order to be protected. A new variety which has been developed using Samoa's TK can be protected if it meets the requirements of the law, that is, the variety must be new, distinct, uniform and stable.<sup>104</sup>

5.81 The *Intellectual Property Act* also requires that any application for registration of a new plant variety must contain a statement declaring whether or not the new plant variety is based on knowledge available within any local or indigenous community whether from Samoa or elsewhere. If the application is based on or derived from such knowledge, the Registrar may direct applicant to furnish evidence as to the applicant's title or authority to make use of such knowledge.<sup>105</sup>

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<sup>102</sup> *Intellectual Property Act 2011* (Samoa), s. 61.

<sup>103</sup> B Greengrass, *Plant Variety Protection and the Protection of Traditional Knowledge*, International Union for the Protection of New Varieties of Plants (2000) 2.

<sup>104</sup> *Intellectual Property Act 2011* (Samoa), s. 69 - 73.

<sup>105</sup> *Ibid*, s. 64(3)(f), (8)-(10).

5.82 Plant variety protection can be a central element of the Samoan agriculture. The plant variety system could be used in Samoa as a tool for promoting the traditional plant varietal innovations developed over generations by traditional communities and thus the commercialization of their TK. Samoa's TK may also be enhanced through appropriate plant breeding research programmes, and may be further used to improve varieties of taro, breadfruit, nonu and cocoa.

5.83 An exception to plant variety protection is known as 'Breeder's Exemption'. This exception allows third parties (e.g. other breeders or farmers) to use a protected plant variety as starting material for the development of other new varieties.<sup>106</sup> The breeder of the resulting new variety will be free to commercialise his or her new variety without authorisation of the breeder of the protected variety used as a source. The rationale of this exception is to ensure the continuity and further development of plant improvement. Without this exception, overall progress in plant breeding (and therefore benefits for society) would be greatly inhibited.<sup>107</sup>

### **Limitation of Plant breeder's rights in the Protection of Traditional Knowledge**

#### *Breeder's exemption*

5.84 The 'Breeders exemption' may undermine the suitability of the plant variety system as one means of protecting Samoa's TK. In fact, traditional holders willing to register plant varieties developed with their TK run the risk of losing the commercial control of their knowledge, as subsequent breeders may take this TK, develop new varieties and then be at liberty to commercialise that new variety. Therefore this exception may erode the resultant commercial value of the original holder's plant variety as soon as a new breed is developed, which therefore provides some disincentive for registration of original plant varieties in order to protect them from further breeding.

#### *Use by third party of information in application*

5.85 If a new plant variety for which protection is sought which involves use of Samoa's TK is declined by the Registrar, the TK would fall into public domain.

#### *Limited protection period*

5.86 Like other forms of intellectual property, the breeder's rights are subject to a limited term of protection of twenty years from the granting date, with a possible extension period not exceeding five years.<sup>108</sup> This limited term of protection would not be compatible with the expectation of traditional holders to protect their TK in perpetuity.

### **Views of the Commission**

5.87 The conventional intellectual property framework provides very limited protection of Samoa's TK, due to the nature of TK, which poses several challenges.

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<sup>106</sup> Ibid, s. 75(c).

<sup>107</sup> B Greengrass, *Plant Variety Protection and the Protection of Traditional Knowledge*, International Union for the Protection of New Varieties of Plants (2000) 6.

<sup>108</sup> *Intellectual Property Act 2011* (Samoa), s. 77.

TK in its various forms do not strictly conform to the provisions of contemporary intellectual property laws.

- 5.88 The fact that TK is passed down from generation to generation makes it very difficult to determine its rightful owners. Under intellectual property law, the identity of the creator and original owner of an intellectual property is vital in determining who has the authority to dispose of exclusive rights attached to intellectual property titles, as well as the date of creation in order to determine the commencement period for protection. It may also mean that such knowledge is generally not new or original. However, novelty and originality are requirements for protection under most conventional intellectual proprietary laws, such as copyright law, patent law and design law.
- 5.89 Contemporary creations based on TK may meet the novelty or originality requirements for protection under the conventional intellectual property framework; however forms of TK currently in the public domain would unlikely meet any originality requirement.
- 5.90 Protection offered under the intellectual property framework such as copyright law and patent law, is generally focused on individual persons or corporations, rather than communities or groups, (except in the case of the geographical indications which is costly to set up, implement and monitor, in the context of Samoa).
- 5.91 TK in an intangible form are also not considered in the scope of copyright and related laws. However a large part of TK is intangible, i.e. in the form of traditional practices and know-how and are very much intertwined in the *fa'aSamoa* and the expressions of culture. Because of this, any reforms to protect TK would be wide ranging and include both legislative and administrative approaches, rather than limited only to copyright laws or other specific intellectual property systems.
- 5.92 All intellectual property rights systems are available for use by traditional communities – however, the incompatibility outlined above means that such laws are unlikely to be used for the protection of TK in a manner consistent with expectations of traditional communities. Furthermore, the use of such laws would usually require sufficient knowledge of the workings of the relevant Act, legal assistance, adequate financial resources, and would likely be time consuming. These factors alone would provide significant constraints for traditional communities seeking to use these legislative options.
- 5.93 The Commission's view is that although amendments can be made to the *Copyright Act* to address some of the limitations such as the protection period to last into perpetuity, economic and moral rights, the impediments to copyright protection identified, reinforces the need for a *sui generis*<sup>109</sup> framework for the protection of TK.

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<sup>109</sup> *Sui generis* is a Latin expression that means “of its own kind or class”. The term is used in intellectual property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines. A *sui generis* system is a system specifically designed to address the needs and concerns of a particular issue. *Sui generis* approach is very common in intellectual property law:

## 6. SAMOA'S OBLIGATIONS UNDER INTERNATIONAL AND REGIONAL INSTRUMENTS RELATING TO TRADITIONAL KNOWLEDGE

### Samoa's International obligations

6.1 Samoa is a party to several international conventions relating to intellectual property, as well as conventions and international instruments that recognise and advocate in some way or form for the protection of TK.

6.2 In relation to intellectual property, these include the Convention establishing the World Intellectual Property Organisation 1967 (**WIPO Convention**); the Berne Convention for the Protection of Literary and Artistic Works (**Berne Convention**) formulated in 1886 (which has been subject to several revisions); and the Agreement on the Trade Related Aspects of Intellectual Property Rights (**TRIPS**).

#### *World Intellectual Property Organisation*

6.3 Samoa became a party to WIPO Convention in October 1997. The Convention sets out the mandate, governing bodies and procedure of WIPO. The objective of WIPO includes to the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with other international organizations.<sup>110</sup> Its functions include promoting the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in this field.<sup>111</sup> WIPO also offers assistance to States requesting legal-technical assistance in the field of intellectual property.

#### *Berne Convention*

6.4 The Berne Convention formed in 1886 has been subject to several revisions. Samoa became a party to the Berne Convention July 2006. This Convention deals with productions in the literary, scientific and artistic domain (which must be fixed in some material form), and the rights of their authors. Some basic principles upon which it is based includes 'automatic protection' for works, and reflects the principle of national treatment, that a contracting party must guarantee to authors of other contracting parties the rights that its own laws grant its own nationals.<sup>112</sup> The Convention also provides for moral rights as author or the work<sup>113</sup>, and allows certain exceptions on economic rights (where the works can be used without authorisation of the owner of copyright and without paying compensation).

#### *General Agreement on Tariffs and Trade 1994*

6.5 Samoa joined the World Trade Organisation (WTO) in May 2012. The WTO Agreement includes the General Agreement on Tariffs and Trade 1994 (GATT

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plant breeders' rights, the intellectual property protection of integrated circuits, databases, geographical indications or plant breeders' rights among others.

See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Glossary of key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions*, Twenty-Second Session, Geneva, (July 9 to 13, 2012).

<sup>110</sup> *WIPO Convention 1967*.

<sup>111</sup> *Ibid*, Art. 4.

<sup>112</sup> *Berne Convention*, Art.5.

<sup>113</sup> *Ibid*, Art. 6bis.



1994)<sup>114</sup>, which incorporates the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS provisions have the general objective of harmonising intellectual property rights protection at the global level and require countries without intellectual property rights systems to develop them in accordance with GATT provisions.

#### *Convention on Biological Diversity 1992 and Nagoya Protocol*

- 6.6 Samoa is also a party to conventions and instruments that include rights related to biological diversity and the environment, which is highly relevant as traditional communities consider TK interlinked with the environment and the land. These include the Convention on Biological Diversity (**CDB**)<sup>115</sup> ratified by Samoa in 1994, and the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilization on the CBD 2010 (**Nagoya Protocol**) acceded by Samoa in 2014.
- 6.7 The CBD recognises the importance of conserving the world's biodiversity and the sustainable use of biodiversity, socially, environmentally and economically. The three objectives of the CBD are the conservation of biological diversity, the sustainable use of its components; and the fair and equitable sharing of the benefits arising out of the utilization of the genetic resources.<sup>116</sup>
- 6.8 Before the CBD the exploitation of genetic resources was generally without any regard for traditional communities or from where such material was taken from. Often TK was used without any benefits or acknowledgment of traditional communities. However under the CBD, States are required to encourage equitable sharing of benefits which arise from the use of the knowledge, innovations and practices of traditional communities.<sup>117</sup>
- 6.9 Article 8(j) of the CBD states the need for governments to respect, preserve, maintain and promote the use of TK with the approval and involvement of traditional communities. For instance if third parties want to use TK in any research and product development, they are required to seek the prior informed approval of the relevant traditional communities and negotiate mutually agreed terms for the equitable sharing of any benefits that may arise from the use of this knowledge.<sup>118</sup>
- 6.10 The Nagoya Protocol is a supplementary agreement to the CBD that applies to genetic resources that are covered by the CBD. It provides a legal framework for the implementation of one of the three objectives of the CBD, namely the fair and equitable sharing of benefits arising out of the utilization of genetic resources. The

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<sup>114</sup> GATT was established in 1948 to promote free trading by allowing negotiation of, concessions on or removal of tariff protection.

<sup>115</sup> The Convention on Biological Diversity 1992 is one of the 3 conventions that emerged from the UN Conference on Environment and Development (Earth Summit) held in Rio de Janeiro in 1992.

<sup>116</sup> Convention on Biological Diversity 1992, Art. 1.

<sup>117</sup> Ibid, Art. 1.

<sup>118</sup> Ibid, Art. 15 sets out rules which govern access and benefit sharing. Here governments must put in place systems that facilitate access to genetic resources for environmentally sound purposes, and ensure that the benefits resulting from their use are shared fairly and equitably between the user and the relevant traditional communities.

Nagoya Protocol also covers TK associated with genetic resources that are covered by the CBD and the benefits arising from its utilization.

### *International instruments on cultural heritage*

6.11 In regards TK which are TCEs, issues related to the preservation and safeguarding of cultural heritage falls within the scope of the United Nations Educational, Scientific and Cultural Organisation (**UNESCO**), World Heritage Convention 1972, and the Convention on the Safeguarding of Intangible Cultural Heritage 2003, of which Samoa is party.

6.12 Samoa became a party the Convention on the Safeguarding of Intangible Cultural Heritage early 2014. The purpose of this Convention includes the safeguarding of intangible cultural heritage, and to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned.<sup>119</sup> Intangible cultural heritage is defined as practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.<sup>120</sup> The intangible cultural heritage is manifested in oral traditions and expressions; performing arts; social practices, rituals and festive events; knowledge and practices, and traditional craftsmanship.<sup>121</sup>

## **Model Laws on the Protection of Traditional Knowledge in the Pacific**

### *General*

6.13 Model laws are a high level framework to guide the development of national legislation, which each country would need to progress through the policy development process to ‘flesh out’ matters of detail and modify it to the particular Country’s need.

6.14 Collaborative work between the Pacific Islands Forum Secretariat (**PIFS**), Secretariat of Pacific Community (**SPC**) and South Pacific Regional Environment Programme (**SPREP**) resulted in the development of:

- i) the ‘Model Law for the Protection of TK and Expressions of Culture’ (**SPC Model Law**);<sup>122</sup> and
- ii) the ‘Model Law for the Protection of Traditional Biological Knowledge Innovations and Practices’ (**SPREP Model Law**).<sup>123</sup>

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<sup>119</sup> Convention on the Safeguarding of Intangible Cultural Heritage, Art. 1.

<sup>120</sup> Ibid, Art. 2.

<sup>121</sup> Ibid, Art. 2.

<sup>122</sup>The movement for protection of traditional knowledge came about in the Pacific Islands in 1999, when the United Nations Educational, Scientific and Cultural organisation (UNESCO) held a ‘Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures’ in the region. This Symposium resulted with a Declaration that “recommended technical assistance and support for a homogeneous system of legal protection, identification, conservation and control of exploitation, of indigenous culture”. As a result, the SPC developed the SPC Model Law in 2002 to assist policy-makers to develop national legislation for the protection of traditional knowledge and expressions of culture. The SPC Model law was adopted by Forum Trade Ministers in 2003. M Forsyth, *Do You Want it Gift Wrapped?: Protecting Traditional Knowledge in the Pacific Island Countries*,

6.15 Samoa has not yet elected to adopt either model.<sup>124</sup> In order to promote legislation in the region for the protection of TK and the expression of culture, an intellectual property based *sui generis system* which creates new intellectual property or intellectual property like rights are set out in the Model Laws.

#### *SPC Model Law*

6.16 The SPC Model Law provides a model law for Pacific Island Countries, to assist policy-makers to develop national legislation for the protection of traditional biological knowledge, innovations and practices.<sup>125</sup>

6.17 The policy objective of the SPC Model Law is to protect the rights of traditional owners in their TK and expressions of culture and permits commercialisation, subject to prior and informed consent and benefit-sharing. The Model Law is intended to complement (and not replace) conventional intellectual property laws.<sup>126</sup>

6.18 The key approach taken in the SPC Model Law is to create new legal rights in TK and expressions of culture which may not previously have been protected, and may have been regarded as in the public domain by conventional intellectual property law. These consist of traditional cultural rights and moral rights, which do not depend on registration.<sup>127</sup>

6.19 Under the SPC Model Law, traditional cultural rights grant exclusive rights to traditional owners for uses of TK and expressions of culture that are not used for customary purposes, regardless of whether for commercial purposes or not.<sup>128</sup> Derivative works from the TK and cultural expressions are also captured. If the derivative work is used for commercial purposes, the user of the work must share the benefits he or she receives from it with the traditional owner.

6.20 In relation to moral rights, traditional owners are given the right of attribution, the right against false attribution, and the right against derogatory treatment in respect of TK and expression of culture. For derivative works the user must acknowledge the origin of the TK or expressions of culture and respect the traditional owner's moral rights.

6.21 The SPC Model Law provides for the establishment of a statutory body called the Cultural Authority whose functions are to be determined by the country according to its needs. When a dispute arises pertaining to the ownership of TK or expressions of culture, the SPC Model Law provides that the relevant Cultural Authority refer the matter to the parties concerned to be resolved.<sup>129</sup> When the

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<sup>123</sup>The Model Law for the Protection of Traditional Biological Knowledge Innovations and Practices was developed in 2010 to assist policy-makers to develop national legislation for the protection of traditional biological knowledge, innovations and practices.

<sup>124</sup> The Cook Islands *Traditional Knowledge Act 2013* is based on the model laws.

<sup>125</sup> SPC Model Law, page 1 objective.

<sup>126</sup> *Ibid*, page 19.

<sup>127</sup> *Ibid*, page 20.

<sup>128</sup> This is a distinguishing feature between the two Model Laws. The SPC Model Law targets infringements arising from non-customary uses, while the SPREP Model law, targets infringements of a commercial nature.

<sup>129</sup> *SPC Model Law*, cl. 18.

Cultural Authority is advised by the parties that the matter in dispute has been resolved, then the Cultural Authority makes a written determination and publishes it.

6.22 Protection proposed under the SPC Model Law relates to all TK and expressions of culture whether it is in material form or not. The wide focus of the Model Law which proposes to capture all TK may reduce the effectiveness of protection offered under the Model Law, due to significant challenges in identifying all TK including intangible TK, as well as the challenges in determining the correct ownership of TK.

#### *SPREP Model Law*

6.23 The SPREP Model Law was formed by SPREP and PIFS from February 2001 to March 2008.<sup>130</sup> It was developed to assist policy makers to develop national legislation for the protection of traditional biological knowledge, traditional biological innovations and traditional biological practices.<sup>131</sup> Similar to the SPC Model Law, the SPREP Model Law is intended to complement protection that may be provided under the conventional intellectual property laws.

6.24 Under the SPREP Model Law, 'traditional biological knowledge' is defined as follows:

*"knowledge whether embodied in tangible form or not, belonging to a social group and gained from having lived in close contact with nature, regarding:*

- a. living things, their spiritual significance, constituent parts, life cycles, behaviour and functions, and their effects on and interactions with other living things, including humans, and the physical environment;*
- b. the physical environment;*
- c. the obtaining and utilising of living or non-living things for the purpose of maintaining, facilitating or improving human life."<sup>132</sup>*

6.25 The SPREP Model Law proposes retrospective effect regarding moral rights but not economic rights. This means that owners<sup>133</sup> who developed their traditional biological knowledge, innovation and practices before the enactment of the relevant national legislation adopting the SPREP Model Law provisions, would have retrospective moral rights to their traditional biological knowledge, innovation and practices. These rights will also extend to traditional biological knowledge,

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<sup>130</sup> SPREP, *The Legal Protection of Traditional Biological Knowledge, Innovations and Practices*, <[http://www.spc.int/hdp/index.php?option=com\\_docman&task=doc\\_download&gid=258&Itemid=44](http://www.spc.int/hdp/index.php?option=com_docman&task=doc_download&gid=258&Itemid=44)> (Accessed 24/07/2013).

<sup>131</sup> PIFS, *Guidelines for developing legislation for the protection of biological knowledge and practices based on the Traditional Biological Knowledge Innovations and Practices Model Law* (2010) 6. <[http://www.spc.int/hdp/index2.php?option=com\\_docman&task=doc\\_view&gid=256&Itemid=4](http://www.spc.int/hdp/index2.php?option=com_docman&task=doc_view&gid=256&Itemid=4)> (Accessed 9/02/2015).

<sup>132</sup> SPREP Model Law, cl. 4.

<sup>133</sup> Ibid, cl. 4, "Own" in relation to knowledge, innovations and practices, includes own as a trustee; as a custodian; or as a steward; and its meaning in any particular context is to be determined according to the history, traditions, customs and usages of the social group which claims ownership over that knowledge, innovation or practice.

innovation and practices already in the public domain.<sup>134</sup> This extension of intellectual property rights to properties in the public domain is based on the experiences in France, Japan and United States where they have extended intellectual property protection to information and knowledge in the public domain or the system known as the *domaine public payant*.<sup>135</sup> The *domaine public payant* system is a system where a fee is charged for the use of artistic material in the public domain. The money collected is dedicated to supporting and encouraging the arts.<sup>136</sup>

6.26 The SPREP Model Law promotes the establishment of a Competent National Authority<sup>137</sup> which plays an important role as intermediary in the consent process, ensuring that prior informed consent of the owners of knowledge, innovation or practice is first obtained to use their knowledge, innovation or practice for a commercial purpose.<sup>138</sup> The Competent National Authority also plays a role in supervising negotiations between a potential user and the owner of a knowledge, innovation or practice. If consensus is reached by the parties, this is then reflected by the Competent National Authority in an Access and Benefit Sharing Agreement.<sup>139</sup>

6.27 In the case of a disagreement arising as to ownership of an item of knowledge, an innovation or a practice, the Competent National Authority is expected to play a vital role in the ownership enquiry<sup>140</sup>, and in resolving a dispute that may arise, acting as a mediator.<sup>141</sup> In the event that a consensual decision is not reached during mediation, one of the parties may request the Competent National Authority to convene a Traditional Ownership Tribunal to adjudicate the dispute and make available all documents in its possession or control pertaining to the dispute.<sup>142</sup>

#### *Limitations of the SPREP Model Law approach*

6.28 The retrospective application of the SPREP Model Law could open a floodgate of claims by parties claiming moral rights that could challenge even the rights of legitimate owners of traditional biological knowledge, innovation and practices currently enjoying such rights.

6.29 The SPREP Model Law provides for the establishment of a database of traditional biological knowledge, innovations and practices. This information can assist in determining who prior informed consent should be sought from and also who should receive economic benefit from the use of such traditional biological knowledge, innovations and practices by third parties. However, lack of proper controls over the access and use of information on such a database could render traditional biological knowledge, innovations and practices vulnerable to abuse.

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<sup>134</sup> Ibid, Refer to relevant explanatory notes.

<sup>135</sup> C Mouchet, *Problems of the Domaine Public Payant*, 8 Colum.-VLA Art & L. (1983-1984) 137.

<sup>136</sup> Ibid.

<sup>137</sup> SPREP Model Law, cl. 5.

<sup>138</sup> Ibid, cl. 10.

<sup>139</sup> Ibid, cl. 11.

<sup>140</sup> Ibid, cl. 12.

<sup>141</sup> Ibid, cl. 12(4).

<sup>142</sup> SPREP Model Law, cl. 13 and 15.

6.30 Whilst the SPREP model does not specifically provide an exception for customary uses, any new legislation created on the basis of the SPREP model may be adapted to include such specific exceptions appropriate for Samoa's needs.

## 7. VIEWS AND RECOMMENDATIONS OF THE COMMISSION

7.1 The Commission's recommendations are made in light of the purpose of the *Law Reform Commission Act 2008* to review, reform and develop laws of Samoa to promote Samoan customs and traditions, enhance the social, cultural, economic and commercial development of Samoa, and ensure that the laws are modern and meet the needs of Government and the community.

7.2 Samoa's TK has intrinsic cultural and spiritual value for Samoan people. It is important evidence of Samoa's national, social, cultural and historical identity, and is therefore vital for the sustenance and continued survival of traditional communities and lifestyle. This is likely to be compromised by loss of Samoa's TK.

7.3 Having analysed the existing legal framework of contemporary intellectual property laws in Samoa, namely the *Copyright Act* and the *Intellectual Property Act*, the Commission is of the view that such laws do not provide adequate protection of Samoa's TK, nor does it meet the expectations of traditional communities as to an appropriate level of protection. The Commission concludes that Samoa's TK should be protected through a *sui generis* legislation specially designed to provide adequate protection of TK, consistent with the expectations of traditional communities in Samoa.

7.4 The Commission however also recognises that not all of Samoa's TK can be afforded protection by the proposed *sui generis* legislation without further in-depth research and analysis identifying the particular TK and the level of protection it requires.

7.5 The Commission has also considered the SPC Model Law and SPREP Model Law discussed in Part 6 of this Report which supports the view that *sui generis* legislation for the protection of TK should be developed. These models may be extremely useful as a platform for such *sui generis* legislation, and may be adapted as appropriate for Samoa's needs

**Recommendation 1:** The Commission considers that a new *sui generis* legislation, for the protection of Samoa's TK against misuse and misappropriation (**New Legal framework**) should be developed.

**Recommendation 2:** The SPC Model Law and SPREP Model Law may be used as a platform for the development of the New Legal Framework for the protection of Samoa's TK.

### What is traditional knowledge?

7.6 It is evident from research, consultations and submissions that the term 'traditional knowledge' can mean different things to different people and communities. The Commission considers that TK should be carefully defined in the New Legal Framework.

7.7 Following lengthy research which included comparisons of legislation from comparable Pacific Island countries, reviewing model laws in the region, consultations and submissions of stakeholders and the public, the Commission considers that a suitable definition of Samoa's TK is one similar to that of the SPC Model Law. Such definition of TK should include knowledge that is or has been created, acquired or developed for traditional economic, spiritual, ritual, narrative, environmental, healing, artistic, decorative or recreational purposes; and

- i. is or has been transmitted from generation to generation; and
- ii. is regarded as collectively originated and held; and
- iii. pertaining to a 'traditional community' in Samoa as an adequate expression of its cultural and social identity, standards and values.

7.8 A traditional community in Samoa (**traditional community**) would mean a traditional family or families in Samoa (*aiga*), traditional village or villages in Samoa, or Samoan traditional community as a whole.

7.9 Given the very broad nature and meaning of TK, the Commission considers that broad or blanket protection of all Samoa's TK is not feasible at this stage, and without further research and analysis could reduce the strength or effectiveness of any protection provided.

7.10 It is widely accepted that Samoa's TK is preserved and transmitted from generation to generation very often by oral means (such as non physical learning knowledge) and is not generally written down. Therefore, the fixation of TK in material form should not be a requirement for protection under the New Legal Framework. The Commission considers that the New Legal Framework should protect TK in both its tangible and intangible forms, and should recognise that TK can have both tangible and intangible components.

7.11 It is evident from the stakeholder and public consultations that there is a general acceptance that TCE and traditional biological knowledge are both part of Samoa's TK, and may often be largely intertwined as manifestations of the same identity and cultural heritage of the traditional communities in Samoa.

7.12 The Commission considers that TCE should be defined in the New Legal Framework, consistent with the meaning of TCE currently set out in the *Copyright Act*.<sup>143</sup>

7.13 The Commission considers that 'traditional biological knowledge' should be defined in the New Legal Framework, similarly to the meaning set out in the SPREP Model Law. Such definition of 'traditional biological knowledge' includes tradition based knowledge, belonging to a traditional community in Samoa, gained from their experience and adaptation to the environment, regarding:

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<sup>143</sup> SPREP Model Law, cl. 4.

- i. living things, their spiritual significance, constituent parts, life cycles, behaviour and functions, and their effects on and interactions with other living things, including humans, and with the physical environment; or
- ii. the physical environment; or
- iii. obtaining and utilising living or non-living things for the purpose of maintaining or improving human, animal or plant health or life.

7.14 Legal protection of TCE and traditional biological knowledge both raise different policy issues. For example, the protection of TCE involves legal doctrines more closely related to copyright law and appears more aligned with policy issues related to the safeguarding, preservation and promotion of cultural heritage and creativity, together with respect for freedom of expression. On the other hand, traditional biological knowledge involves legal doctrines more closely related to patent law, and appears more aligned to policy issues concerning conservation of environment and biodiversity, promotion of agriculture and health.<sup>144</sup> Therefore what may be appropriate legal requirements proposed for the protection of TCE, may not necessarily be appropriate for the protection of traditional biological knowledge.

7.15 For clarity, the Commission considers that the protection of TCE and the protection of traditional biological knowledge are addressed separately in the New Legal Framework.<sup>145</sup> An advantage of this approach is that it would ensure the use of the most relevant and effective legal tools for the protection of both TCE and traditional biological knowledge, respectively, rather than taking a ‘one size fits all’.

**Recommendation 3:** ‘Samoa’s traditional knowledge’ should be carefully defined in the New Legal Framework. The meaning of Samoa’s TK should include any knowledge whether embodied in tangible or intangible form as an adequate expression of its cultural and social identity, standards and values, that:

- i. is or has been created, acquired or developed for traditional economic, spiritual, ritual, narrative, environmental, healing, artistic, decorative or recreational purposes;
- ii. is or has been transmitted from generation to generation;
- iii. is regarded as collectively originated and held; and
- iv. pertaining to a particular traditional community in Samoa;

**Recommendation 4:** The New Legal Framework should clarify that Samoa’s TK includes both ‘traditional cultural expressions’ and ‘traditional biological knowledge’.

‘Traditional cultural expressions should be defined in the New Legal Framework, consistent with the meaning of traditional cultural expressions currently set out in the *Copyright Act*.

‘Traditional biological knowledge’ should be defined to include tradition based knowledge, belonging to a traditional community in Samoa, gained from their

<sup>144</sup> “Integrating the TBKIP Model Law and the Pacific Model Law”, prepared by the Pacific Islands Forum Secretariat & Secretariat of the Pacific Regional Environment Programme.

<sup>145</sup> This approach is also recommended in “Integrating the TBKIP Model Law and the Pacific Model Law” and in “Guidelines for developing national legislation for the protection of traditional knowledge and expression of culture based on the Pacific Model Law” prepared by the Secretariat of the Pacific Community.

This approach is not unusual in Samoan legislation; for example the *Intellectual Property Act 2011* contains different chapters for patents, industrial designs, trademarks, plant breeder’s rights, geographical indications and layout-designs of integrated circuits.



experience and adaptation to the environment, regarding:

- i. living things, their spiritual significance, constituent parts, life cycles, behaviour and functions, and their effects on and interactions with other living things, including humans, and with the physical environment; or
- ii. the physical environment; or
- iii. obtaining and utilising living or non-living things for the purpose of maintaining or improving human, animal or plant health or life.

**Recommendation 5:** For the purposes of the New Legal Framework, ‘traditional community’ in Samoa should mean a traditional family (*aiga*) or families in Samoa, traditional village or villages in Samoa, or Samoan traditional community as a whole.

**Recommendation 6:** For purposes of clarity, the protection of traditional cultural expressions and traditional biological knowledge should be addressed separately within the New Legal Framework.

### Policy objective and policy principles

7.16 The Commission considers that the objectives of the New Legal Framework should be to protect the rights of the traditional custodians against the misuse and misappropriation of their TK. The public and stakeholder consultations in 2010 revealed that most traditional communities are interested to deriving an income from the commercial use of TK. However, it also revealed a common concern about sharing TK with third parties without receiving any economic benefit, along with use by third parties of TK without the prior consent of traditional custodians, or recognition of the origin or source of the TK.

7.17 The Commission considers that the key objectives of the New Legal Framework should be to protect the rights of the traditional custodians against the misuse and misappropriation of their TK. However, it should also be guided by the following principles and objectives, and seek:

- i. to regulate access and utilisation of Samoa’s TK by third parties (users of TK);
- ii. to respect and create awareness about Samoa’s TK;
- iii. to encourage the use of customary laws and practices, the *Matai* and *Village Fono* systems as traditional regimes of governance and decision-making;
- iv. not to interfere with the continued use, exchange and transmission of TK within traditional communities in the customary context according to customary laws and practices;
- v. to ensure that enforcement and alternative dispute-resolution mechanisms are appropriate and accessible to traditional communities in case of breach of protection of Samoa’s TK;
- vi. to ensure that appropriate remedies are provided;

- vii. to promote the role of the public authorities in the protection of Samoa's TK, in particular providing assistance to the traditional communities in the identification, management and enforcement of their rights;

7.18 The Commission also considers that the New Legal Framework for the protection of Samoa's TK should be complementary to and not prejudice any protection of TK currently available under contemporary intellectual property laws in Samoa, and should be consistent with Samoa's international obligations.

**Recommendation 7:** The key objectives of the New Legal Framework should be to protect the rights of the traditional custodians against the misuse and misappropriation of their TK.

**Recommendation 8:** The development of the New Legal Framework should also be guided by the following principles and objectives, and seek:

- i. to regulate access and utilisation of Samoa's TK by third parties (users of TK);
- ii. to respect and create awareness about Samoa's TK;
- iii. to encourage the use of customary laws and practices, the Matai and Village Fono systems as traditional regimes of governance and decision-making;
- iv. not to interfere with the continued use, exchange and transmission of Samoa's TK within traditional communities in the customary context according to customary laws and practices;
- v. to ensure that enforcement and alternative dispute-resolution mechanisms are appropriate and accessible to traditional communities in case of breach of protection of Samoa's TK;
- vi. to ensure that appropriate remedies are provided;
- vii. to promote the role of the public authorities in the protection of Samoa's TK, in particular providing assistance to the traditional communities in the identification, management and enforcement of their rights;

**Recommendation 9:** The New Legal Framework for the protection of Samoa's TK should be complementary to, and not prejudice any protection of TK currently available under existing contemporary intellectual property laws in Samoa, and should also be consistent with Samoa's international obligations.

### **Application of the New Legal Framework**

7.19 The Commission considers that due to the wide scope of what is captured by Samoa's TK, protection of all Samoa's TK is currently not feasible as it would assume that all TK (tangible and intangible) have been identified. Furthermore, not all TK need to be protected. The types of TK or specific aspects of TK that the New Legal Framework will apply to should be clearly stipulated in the New Legal Framework, which should also provide the substantive criteria that the TK should have in order to be protected. For avoidance of doubt, the types or aspects of TK that the New Legal Framework would not apply to should also be clarified as much as practicable.

7.20 In the following recommendations in this report, reference to TK should mean TK that the New Legal Framework will apply to.

**Recommendation 10:** Due to the broad meaning of TK, the New Legal Framework should clearly specify those types or aspects of Samoa’s TK that it will apply to. The types of TK or specific aspects of TK that the New Legal Framework will apply to should be clearly stipulated in the New Legal Framework, which should provide the substantive criteria that the TK should have in order to be protected. The types of TK that the New Legal Framework will not apply to should also be clarified as much as possible.

## Beneficiaries of the Protection

7.21 In Samoa, TK is collectively held by traditional communities through the *Matai* and *Village Fono* systems under the practice of customary law. Furthermore, in consultations traditional communities expressed the expectations that they should be the beneficiaries of TK protection.

7.22 The Commission agrees that traditional communities should be the beneficiaries of protection of TK under the New Legal Framework, and recommends the adoption of the term ‘traditional custodians’ to reflect beneficiaries of protection. The Commission considers that ‘traditional custodians’ indicates a special relationship between a traditional community and its TK, which in accordance with customary law and practises is a relationship inclined towards custodianship or stewardship, rather than ownership. For example *Alii and Faipule* may be the traditional custodians on behalf of their village.

**Recommendation 11:** Under the New Legal Framework, the term ‘traditional custodians’ should be used to indicate the beneficiaries of the protection. A traditional custodian should represent the relevant traditional community in whom the custody of the TK is entrusted in accordance with customary law and practices. (Note: for the purposes of this report, ‘traditional community’ means a traditional family or families in Samoa, traditional village or villages in Samoa, or Samoan traditional community as a whole).

## Scope of Protection

### *Automatic Protection*

7.23 The Commission considers that the protection of TK should not be onerous for traditional custodians. A means of ensuring this would be to grant automatic protection of TK without a formal system of registration or notification.

**Recommendation 12:** The New Legal Framework should grant automatic protection of TK. Such protection may extend to some types or aspects of TK that existed before the New Legal Framework came into force, however such aspects should be clearly set out in the New Legal Framework.

### *Moral Rights and Economic Rights*

7.24 The Commission considers that protection under the New Legal Framework should include any or all of the following forms of protection, which must vest in traditional custodians:

- i. the provision of moral rights to traditional custodians of TK, for non customary use of TK whether or not for a commercial purpose;
- ii. the provision of economic rights to the traditional custodians to authorize third parties to undertake certain uses of TK in a non-customary context, and where used for a commercial purpose includes fair and equitable benefit sharing between the user of the TK and the traditional custodians.

7.25 The Commission considers that moral rights similar to that proposed in the SPC Model Law and SPREP Model Law should attach to the use of Samoa's traditional TK for non-customary purposes. Such moral rights should vest in the traditional custodian, and should include:

- i. the right of attribution of the source of TK;
- ii. the right not to have the authorship of the TK falsely attributed;
- iii. the right to protection of TK against insulting, derogatory, or offensive treatment.

7.26 The 'right of attribution' is referred to extensively in the *Haka Ka Mate Attribution Act 2014* of New Zealand<sup>146</sup>, providing a right of attribution to Ngati Toa Rangitira<sup>147</sup> in relation to *Ka Mate* – setting out the acts to which the right of attribution applies. Such acts include any publication for commercial purposes, communication of *Ka Mate* to the public, and any film that includes *Ka Mate* and is shown in public or is issued to the public.<sup>148</sup> It also sets out the acts to which it does not apply such as when used for educational purposes; anything made for the purpose of criticism, review, or reporting current events; or any communication to the public of any performance or of criticism, review, or reporting current events, or for a purpose that is not commercial.<sup>149</sup> The statement of attribution must be clear and reasonably prominent; and likely to bring Te Rauparaha's identity, as the composer of *Ka Mate* and a chief of Ngati Toa Rangitira, to the attention of a viewer or listener.<sup>150</sup> The right of attribution is however subject to any written waiver given, or written agreement entered into, by the rights representative.<sup>151</sup>

7.27 The Commission considers that the New Legal Framework should similarly also provide direction as to which acts the right of attribution would apply which should include commercial purposes, and those to which it would not apply, which may include educational purposes. Furthermore, if the right of attribution applies, the New Legal Framework should require such statement to be clear and reasonably prominent. However, the Commission considers that traditional custodians should not be able to waive or modify moral rights over their TK.

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<sup>146</sup> *Haka Ka Mate Attribution Act 2014* (New Zealand), s. 3. The purpose of the Act is to give effect to certain provisions of the deed of settlement that settles historical claims of Ngati Toa Rangitira relating to the haka Ka Mate.

<sup>147</sup> *Ibid*, s. 7. Ngati Toa Rangitira means a collective group descended from Toa Rangitira and other recognised ancestor of Toa Rangitira.

<sup>148</sup> *Ibid*, s. 10(1).

<sup>149</sup> *Ibid*, s. 10(2).

<sup>150</sup> *Ibid*, s. 9(4).

<sup>151</sup> *Ibid*, s. 9(5).

7.28 Economic rights are the rights which enable traditional custodians to authorize third parties to undertake certain uses of TK in a non-customary context, whether or not of a commercial nature.

7.29 The Commission considers specific uses of Samoa's TK in a non customary context must require prior informed consent of traditional custodians.

7.30 The Commission considers that in the case of TCE, prior informed consent must be required for particular uses, similar to that proposed in the SPC Model Law<sup>152</sup>:

- i. to reproduce the traditional cultural expressions;
- ii. to publish the traditional cultural expressions;
- iii. to perform or display the traditional cultural expressions in public;
- iv. to broadcast the traditional cultural expressions to the public by radio, television, satellite, cable or any other means of communication;
- v. to translate, adapt, arrange, transform or modify the traditional cultural expressions;
- vi. to fixate the traditional cultural expressions through any process such as making a photograph, film or sound recording;
- vii. to make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional cultural expressions;
- viii. to create derivative works;
- ix. to manufacture, offer for sale, sell, stock, import or export traditional cultural expressions or products derived there from;
- x. to use the traditional cultural expressions in any other material form, beyond the customary context.

7.31 The Commission considers that in the case of traditional biological knowledge, prior informed consent must be required, similarly to that proposed in the SPREP Model Law<sup>153</sup>:

- i. to manufacture, offer for sale, sell, stock, import or export a product that is a direct result of the use of traditional biological knowledge.
- ii. to use traditional biological knowledge for scientific research;
- iii. to use the traditional biological knowledge in any other material form, beyond the customary context.

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<sup>152</sup> SPC Model Law, cl. 7.

<sup>153</sup> SPREP Model Law, cl. 10.

**Recommendation 13:** Protection of TK provided under the New Legal Framework should include any or all of the following forms of protection:

- i. provision of moral rights to traditional custodians of TK, for non customary use by third parties, whether or not for commercial purposes;
- ii. provision of economic rights to traditional custodians of TK to authorise third parties to undertake certain uses of TK in a non-customary context, so that prior informed consent of the traditional custodians is first obtained, and where used for commercial purposes to require benefit sharing between the user of the TK and the traditional custodians.

**Recommendation 14:** The New Legal Framework for the protection of Samoa's TK must vest moral rights and economic rights in the traditional custodians.

**Recommendation 15:** The following moral rights must be granted to the traditional custodians:

- i. The right of attribution of the source of TK (for example by formally identifying the traditional custodian and where appropriate the geographic location from which the TK originated);
- ii. The right not to have the authorship of the TK falsely attributed;
- iii. The right not to have TK subjected to insulting, derogatory, or offensive treatment.

**Recommendation 16:** The New Legal Framework should identify which uses the right of attribution would apply such as for commercial purposes, and the uses to which it would not apply which may include educational purposes. Furthermore, the statement of attribution must be clear and reasonably prominent.

**Recommendation 17:** Traditional custodians should not be able to waive or modify their moral rights in relation to their TK.

**Recommendation 18:** The use of TK for non customary purposes must require prior informed consent of traditional custodians (with some specific exceptions), before third parties can undertake certain uses of TK.

In the context of Samoa's traditional cultural expressions, prior informed consent of traditional custodians would be required:

- i. to reproduce;
- ii. to publish;
- iii. to perform or display in public;
- iv. to broadcast to the public by radio, television, satellite, cable or by any other means of communication;
- v. to translate, adapt, arrange, transform or modify ;
- vi. to fixate through any process such as making a photograph, film or sound recording;
- vii. to make available online or electronically transmit to the public (whether over a path or a combination of paths, or both);
- viii. to create derivative works;
- ix. to manufacture, offer for sale, sell, stock, import or export or products derived from it;
- x. to use in any other material form beyond the customary context.

In the context of Samoa’s traditional biological knowledge, prior informed consent of traditional custodians would be required:

- i. to manufacture, offer for sale, sell, stock, import or export a product that is a result of the use of traditional biological knowledge.
- ii. to use traditional biological knowledge for scientific research;
- iii. to use traditional biological knowledge in any other form beyond the customary context.

#### *Authorised User Agreements and Benefit Sharing Agreements*

7.32 The Commission considers that prior informed consent of traditional custodians should be set out in an agreement between the proposed user and traditional custodian (**Authorised User Agreement**).

7.33 If however TK is to be used for commercial purposes and the prior informed consent of traditional custodians has been obtained, the Commission considers that there should be an agreement for the sharing of benefits between the proposed user and the New Authority<sup>154</sup> as trustee for and on behalf of the traditional custodian<sup>155</sup> (**Benefit Sharing Agreement**). This approach would be similar to that for the lease of customary land under the *Alienation of Customary Land Act 1965*. Under the *Alienation of Customary Land Act* all leases of customary lands are entered into by the Minister as trustee for and on behalf of the beneficial landowners, however the beneficial owners must however first agree to the lease of customary land before a formal lease is executed by the Minister.<sup>156</sup>

7.34 The New Legal Framework should create or definitively set out the protection of rights of traditional custodians – so that traditional custodians and interests will be guaranteed by the “trustee” relationship with the New Authority, and by the process for negotiating a Benefit Sharing Agreement, which will be made on behalf of and in consultation with traditional custodians, but not necessarily by them. Appropriate provisions to define and protect the interests of traditional custodians should be included in the New Legal Framework, and not just assumed.

7.35 The Benefit Sharing Agreement should cover the sharing of economic benefits, or in the case of deferred economic benefits the deemed economic benefits of the commercial use of the TK, and should also provide for monetary and or non-monetary compensation for the traditional custodians.

7.36 The Commission considers that where agreement is not reached between the proposed user and New Authority as to benefit sharing or compensation, the traditional custodians would be deemed not to have consented to the proposed use.

7.37 The New Legal Framework should set out minimum terms and conditions for the commercial use of TK, and address issues such as the sharing of financial benefits,

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<sup>154</sup> New Authority is discussed in paragraphs 7.51-7.59.

<sup>155</sup>All leases of customary lands are executed by the Minister as trustee for and on behalf of the beneficial landowners, but in certain cases the landowners will have authority to grant rights of access to and use of customary lands under licenses granted by them.

<sup>156</sup> *Alienation of Customary Land Act 1965* (Samoa), ss. 4 and 5.

non-monetary compensation, whether the use will be exclusive or non exclusive, maintaining of intellectual property rights (if any) arising from the use of TK, and imposing restrictions on transfers to third parties. The Commission proposes that the New Legal Framework should set out minimum requirements of an Authorised User Agreement in relation to these issues in order to minimize the risk that such agreements are entered into to the detriment of traditional custodians, unfair, and do not offer adequate protection.

7.38 Notwithstanding common law principles relating to the inability of parties to contract out of their statutory and common law obligations, the Commission considers that a provision in the New Legal Framework should be included to prohibit Authorised User Agreements or Benefit Sharing Agreements that seek to avoid such statutory or common law obligations.

7.39 In order to ensure the protection of economic rights of traditional custodians, the Commission considers that the New Legal Framework should enable regulations to be made to add terms and conditions for commercial use of TK, and to protect the economic and other interests of traditional custodians. As regulations are a sub-delegation of legislative authority of Parliament, regulations should not amend or supersede any minimum requirements that are expressly set out in the New Legal Framework.

7.40 The Commission considers that Traditional Custodians should also be given powers under the New Legal Framework to recover payments due under the Benefit Sharing Agreement, irrespective of the doctrine of privity of contract.

7.41 The Commission also notes that more than 1 traditional community may share the same or very similar TCE, which is an aspect the New Legal Framework should recognise as it is very important for the purposes of benefit sharing.

**Recommendation 19:** Prior informed consent of traditional custodians for use of their TK in a non customary context should be set out in an agreement between the proposed user and traditional custodian (**Authorised User Agreement**).

**Recommendation 20:** If TK is to be used for commercial purposes and the prior informed consent of the traditional custodian has been obtained, there should be a Benefit Sharing Agreement between the proposed user and the New Authority as trustee for and on behalf of traditional custodians in relation to sharing economic benefits, or in the case of deferred economic benefits, deemed economic benefits of its commercial use. The Benefit Sharing Agreement should also provide for monetary and or non-monetary compensation for the traditional custodians.

**Recommendation 21:** Where TK is used for commercial purposes and economic benefits are to be shared with the traditional custodian according to the Benefit Sharing Agreement, consideration should be given whether a Trust Fund<sup>157</sup> should be established for the traditional custodian in which all financial proceeds received shall be paid into.

**Recommendation 22:** The New Legal Framework should recognise that more than 1

<sup>157</sup> Public Finance Management Act 2001, s 61 and 62.



traditional community may be the traditional custodian of TK, and be entitled to any benefits received for the commercial use of the TK.

**Recommendation 23:** The New Legal Framework should create or definitively set out the protection of rights of traditional custodians – so that traditional custodians and interests will be guaranteed by the “trustee” relationship with the New Authority, and by the process for negotiating a Benefit Sharing Agreement. Appropriate provisions to define and protect the interests of traditional custodians should be included in the New Legal Framework.

**Recommendation 24:** The New Legal Framework should set out minimum terms and conditions for the commercial use of TK, and address issues such as the sharing of financial benefits, non-monetary compensation, whether the use will be exclusive or non exclusive, maintaining of intellectual property rights (if any) arising from the use of TK, and imposing restrictions on transfers to third parties. The New Legal Framework should set out minimum requirements of an Authorised User Agreement in relation to these issues in order to minimize the risk that such agreements are entered into to the detriment of traditional custodians.

**Recommendation 25:** The New Legal Framework should enable regulations to be made that add terms and or complement minimum requirements for the commercial use of TK to protect the economic and other interests of traditional custodians. Regulations should not amend or supersede any minimum requirements that are expressly set out in the New Legal Framework.

**Recommendation 26:** The New Legal Framework should include a provision to prohibit Authorised User Agreements or Benefit Sharing Agreements that seek to avoid statutory or common law obligations.

**Recommendation 27:** Traditional Custodians should also be given powers under the New Legal Framework to recover payments due under the Benefit Sharing Agreement, irrespective of the doctrine of privity of contract.

## Exceptions and Limitations

7.42 The Commission recognises that in certain cases the protection of TK under the New Legal Framework should be subject to limitations or exceptions.

7.43 Traditional communities raised concerns about the possibility that any new legislation may interfere with the use of TK by the traditional communities within the customary context. Therefore, the New Legal Framework must ensure that the continued use, exchange, transmission and development of TK within the traditional communities is not impeded or restricted.

**Recommendation 28:** The use, exchange, transmission and development of TK within the traditional communities must be able to continue unrestricted and without interference under the New Legal Framework for the protection of Samoa’s TK.

7.44 The Commission recognises that certain uses of TK must be permitted and exempted from the requirements of prior informed consent. The rationale for such

exceptions includes the development of culture and innovation, enhancement of the greater public interest, and to avoid issues of impractical enforcement.

7.45 The *Copyright Act* provides exemptions whereby for certain uses, the authorisation of the author or owner of copyright of a work, is not required. The Commission considers that similarly there should be uses in respect of which the requirement of prior informed consent is exempted (**exempted uses**), in relation to the use of TK for particular purposes, such as:

- i. private production for personal purposes;
- ii. reproduction for teaching;
- iii. reproduction by libraries and archives;
- iv. reproduction or broadcasting to the public for information purposes where not of a commercial nature.

7.46 The Commission considers that the New Legal Framework should enable regulations to be made to include additional exempted uses (but not to amend or remove any exemption expressly set out in the New Legal Framework) provided criteria is developed that must be considered before further exempted uses can be added by way of regulation.

7.47 The Commission recognises that there are traditional cultural expressions which have already been in the public domain and exploited for extensive periods of time, such as *elei* prints which are abundant on the market and even printed overseas. It would be unreasonable to expect that the printing of an *elei* print for the purpose of sale should cease unless or until ownership or the origin of each design is determined. Furthermore, it is likely that in many instances it may be difficult, if not impossible, to establish ownership of a print without further costly and prolonged dispute. The Commission considers that in such instances, such TK should be attributed to Samoa as a whole.

7.48 A further example could be Samoan traditional stories or myths, many of which would generally be attributed to Samoa as a whole. If a film production company such as Walt Disney Pictures wanted to make a film based on a Samoan traditional story or myth, it may be expected that the story or myth should be attributed to Samoa as a whole, which should benefit from any proceeds derived by the film company from the use of the traditional story or myth.

**Recommendation 29:** The New Legal Framework should provide that uses of TK for the following purposes are exempted from the requirement of prior informed consent (**exempted uses**) :

- i. private production for personal purposes;
- ii. reproduction for teaching;
- iii. reproduction by libraries and archives;
- iv. reproduction or broadcasting to the public for information purposes and not for commercial purposes.

**Recommendation 30:** The New Legal Framework should enable regulations to be made adding exempted uses, provided criteria is developed that must be considered

before further exempted uses can be one made by way of regulation.

**Recommendation 31:** Exempted uses should be subject to the condition that the user must attribute the source of the TK (as the traditional custodians continue to have moral rights).

**Recommendation 32:** Where TK such as traditional cultural expressions have been in the public domain and exploited for extensive periods of time such as *elei* fabric prints or Samoan traditional stories, myths and legends, where ownership cannot or is highly unlikely to be attributable to traditional custodians of a particular family or village, or where ownership is associated with Samoa as a nation, the Samoan traditional community should be benefited.

## Management of Rights

7.49 The management of the traditional custodian's rights must be shaped on the principle that traditional communities in Samoa are the custodians of Samoa's TK, and should be the holders of rights and decision-makers as to the use of their TK. Therefore, traditional custodians should be able to decide the accessibility to TK by third parties in a non-customary context.

7.50 On the other hand, the Commission is aware that traditional communities are often likely to face capacity and resource constraints which can hamper the appropriate and adequate management of their rights over their TK. For this reason, the Commission proposes that the Government of Samoa should play a central role in the management of rights of traditional custodians in their TK by providing assistance to the traditional custodians through the establishment of a new authority (**New Authority**), under the New Legal Framework.

## New Authority

7.51 The Commission considers there are various forms appropriate for the establishment of the New Authority, including the following options:

- i. Option 1: a standalone statutory body;<sup>158</sup>
- ii. Option 2: a new division within the existing government structures;<sup>159</sup> or
- iii. Option 3: option 2 combined with the Samoan Heritage Authority,<sup>160</sup> if one is established.

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<sup>158</sup> For example the Samoa Law Reform Commission which is established as a fully independent statutory body under the *Law Reform Commission Act 2008*.

<sup>159</sup> For example the Planning and Urban Management Agency established under the *Planning and Urban Management Act 2004*, comprising an Assistant Chief Executive officer as administrative head, and a Planning and Urban Management Board chaired by the responsible Minister and 10 Board members comprising 5 Government and 5 community representatives appointed by the Head of State, acting on the advice of Cabinet.

<sup>160</sup> *National Heritage Board Report 13/13 (2013)*, Law Reform Commission, Recommendation 1: A new Body, known as Samoa Heritage Authority should be established under legislation dedicated to the protection of Samoa's national heritage. Recommendation 29: The Heritage Authority should be established as a division of the Ministry of Education Sports and Culture and should consist of a Board with the responsibility to make decisions under the legislation and staff lead by a division head to assist the Board perform its functions.

The National Heritage Board Report 13/13 can be found on the Commission's website at [www.samoalawreform.gov.ws](http://www.samoalawreform.gov.ws).

- 7.52 The Commission considers Option 2 is viable – that a New Authority should be established within an existing department, which would consist of a Board with responsibility to make decisions under the New Legal Framework and staff led by a divisional head to assist the Board perform its functions. The Commission considers Option 3 may also be viable however it would depend on a separate decision by the Government to implement the Commission’s recommendations for the establishment of a Samoan Heritage Authority.<sup>161</sup>
- 7.53 The following discussion relates to Option 2, but would still be relevant in relation to Option 3, with some adjustments.
- 7.54 As regards the composition of the New Authority, the Commission considers that it should comprise an Assistant Chief Executive officer as administrative head, and a Board chaired by the responsible Minister or Associate Minister. Members of the Board should comprise an equal number of representatives from both Government and the community. It is common practice or requirement that members from the community are appointed by the Head of State, acting on the advice of Cabinet. Representatives of public authorities should be selected from Government agencies whose functions are directly relevant to the protection, innovation or creation of TK.<sup>162</sup> Representatives from the community should include experts in the relevant field.
- 7.55 The New Legal Framework could provide a minimum number of Board members (for example 4) and the maximum number (for example 10). Board members should collectively have knowledge of and experience in relation to matters relevant to the functions of the Board.
- 7.56 The New Legal Framework could also require the Board to consult with Ministers responsible for particular Government agencies before making certain decisions.
- 7.57 The New Authority would be entrusted with the protection of the interests of the traditional custodians and perform various functions, including acting as trustee for and on behalf of traditional custodians in relation to Benefit Sharing Agreements, acting as a nominal traditional custodian in certain circumstances in relation to Authorised User Agreements and Benefit Sharing Agreements where traditional custodians cannot be determined; being the contact point for potential users of TK; receiving applications for authorisation to use the TK; ensuring ongoing protection and acknowledgment in respect of TK; hosting or keeping a database of TK, and other functions ancillary to those functions. The New Authority should also act on behalf of the Samoan traditional community in relation to TK attributed to Samoa as a whole.
- 7.58 Ancillary functions of the New Authority may include the provision of technical assistance to traditional communities through capacity building, training and education programmes; maintaining relationships with relevant authorities vested

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<sup>161</sup> National Heritage Board Report 13/13 (2013), Law Reform Commission.

<sup>162</sup> For example, the Ministry of Education, Sports and Culture; Ministry of Commerce, Industry and Labour; Ministry of Natural Resources and Environment; Ministry of Agriculture and Fisheries; Ministry of Women, Community and Social Development; Scientific Research Organization of Samoa; and National University of Samoa (Centre for Samoan Studies)

with power and responsibility for the protection of TK in other countries; and undertaking education programs within the industry, education and public sectors with a view to development of ethical awareness through such measures as codes of conduct and ethics , and conducting public awareness campaigns and cultural sensitivity activities.

**Recommendation 33:** An independent body (**New Authority**) should be established under the New Legal Framework, which will be entrusted with the protection of the interests of the traditional custodians in relation to TK.

**Recommendation 34:** The New Authority should consist of a Board with responsibility to make decisions under the New Legal Framework chaired by the responsible Minister or Associate Minister and staff, led by a division head to assist the Board perform its functions.

**Recommendation 35:** The New Legal Framework should provide a minimum and maximum number of Board members, which should comprise an equal number of representatives from both Government and the community. Representatives of public authorities should be selected from Government agencies whose functions are directly relevant to the protection, innovation or creation of TK and representatives from the community should include experts in the relevant field. Board members must collectively have knowledge of and experience in relation to matters relevant to the functions of the Board.

**Recommendation 36:** The New Authority's functions should include:

- i. acting as a trustee for and on behalf of the traditional custodian in relation to Benefit Sharing Agreements;
- ii. Where appropriate asserting ownership on behalf of the Samoan traditional community or Samoa as a whole;
- iii. being a contact point for potential users of Samoa's TK;
- iv. receiving applications from potential users (applicants) for authorisation (i.e. prior informed consent) for non customary use of TK;
- v. acting as nominal traditional custodian where a traditional custodian cannot be determined in certain circumstances;
- vi. facilitating negotiations between traditional custodians and applicants, ensuring ongoing protection, reward sharing and acknowledgment in respect of TK.
- vii. keeping a register of Authorised User Agreements;
- viii. keeping a database of Samoa's TK;
- ix. any other functions ancillary to the above functions in line with the purpose of the New Legal Framework.

**Recommendation 37:** Ancillary functions of the New Authority may include:

- i. the provision of technical assistance to traditional communities through capacity building, training and education programs;
- ii. maintaining relationships with relevant authorities in other countries with responsibilities for the protection of TK;
- iii. advising traditional communities as and when renewals of trademarks fall due;
- iv. assisting with the implementation of cultural awareness programs within industrial and manufacturing sectors, and generally such as developing a code of

conduct and ethics.

**Recommendation 38:** Where the New Authority asserts ownership on behalf of the Samoan traditional community and derives financial benefits, such benefits should be used for purposes related to the protection, promotion, innovation, creation and raising awareness of TK of Samoa.

### Database of Samoa's Traditional Knowledge

7.59 The Commission considers that a database of Samoa's TK, that would host information relating to traditional cultural expressions and traditional biological knowledge for which an Authorised User Agreement or Benefit Sharing Agreement exists, would assist in the documentation of Samoa's TK, and could also contribute to its preservation. The establishment of such a database would require resources for ongoing requirements associated with data management, training, updating and reporting.

7.60 The Commission considers that a register of Authorised User Agreements and Benefit Sharing Agreements (**Agreements Register**) between traditional custodians or the New Authority<sup>163</sup> and third parties, should also be kept by the New Authority as part of the database.

7.61 During the consultation in 2010, traditional communities raised concerns that if such a database was established, and TK on the database was accessible by the public, it would potentially increase the risk of unauthorised commercial use by third parties, with little or no economic benefits for traditional custodians. The Commission considers that this risk could be minimised if requests for information on the database was limited to requests by Samoan citizens or permanent residents, body corporates incorporated in Samoa, or incorporated outside Samoa but with a registered place of business in Samoa.<sup>164</sup> The risk could also be further minimised if approval of traditional custodians was required before the New Authority could release particular information on the database.

7.62 As Authorised User Agreements and Benefit Sharing Agreements could potentially contain confidential or commercially sensitive information, consideration would need to be given as to appropriate access by interested persons of the Agreements Register. The Commission considers that similar consideration should be as to information held in any database of TK that is established.

7.63 The New Legal Framework should require the New Authority to withhold particular information from being released on certain grounds. For example, if the release or making available of information:

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<sup>163</sup> Where the new Authority acts on behalf of the Samoan traditional community, or where no traditional custodian can be determined.

<sup>164</sup> This is similar to s. 12 of the *Official Information Act 1982* (New Zealand) (**OIA**). The OIA (amongst other things) makes information held by a Government agency more freely available, and protects such information to the extent consistent with public interest.

- i. would be likely to prejudice any confidential information entrusted to the Government of Samoa by the Government of another country or any agency of such Government, or any international organisation;<sup>165</sup>
- ii. would be likely to disclose a trade secret or would be likely to prejudice the commercial position or economic interests of the traditional custodians of the TK, New Authority, or Government;<sup>166</sup> or
- iii. would be likely to prejudice or disadvantage the traditional custodians, New Authority, or Government from carrying out commercial activities, or from negotiations (including commercial negotiations); <sup>167</sup>or
- iv. is for improper gain or improper purpose or advantage.<sup>168</sup>

7.64 Should such a database be established, information on the database indicating ownership of TK or identifying traditional custodians of TK should not be taken as determinative of ownership.

**Recommendation 39:** The Legal Framework should enable the New Authority to establish a database of Samoa's TK for which an Authorised User Agreement or Benefit Sharing Agreement exists. An Agreements Register should also be kept as part of the database.

**Recommendation 40:** Should such a database be established, information on the database indicating the ownership of TK or traditional custodians of TK should not be taken as determinative of ownership.

**Recommendation 41:** Requests for information on the database should be limited to requests by Samoan citizens or permanent residents, body corporates incorporated in Samoa, or incorporated outside Samoa but with a registered place of business in Samoa.

**Recommendation 42:** In regards requests for information on the database, or Agreements Register, the New Authority should withhold the information, if the release or making available of information:

- i. would be likely to prejudice any confidential information entrusted to the Government of Samoa by the Government of another country or any agency of such Government, or any international organisation;
- ii. would be likely to disclose a trade secret or would be likely to prejudice the commercial position or economic interests of the traditional custodians of the TK, New Authority, or Government of Samoa; or
- iii. would be likely to prejudice or disadvantage the traditional custodians, New Authority, or Government from carrying out commercial activities, or from negotiations (including commercial negotiations); or
- iv. is for improper gain or improper purpose or advantage.

**Recommendation 43:** Information that is not withheld on the grounds in the preceding recommendation may be released by the New Authority.

<sup>165</sup> Similar to *Official Information Act 1982 (New Zealand)*, s. 9(1).

<sup>166</sup> *Ibid*, s. 9(2)(b)(i)-(ii).

<sup>167</sup> *Ibid*, s. 9(2)(i) and (j).

<sup>168</sup> *Ibid*, s. 9(2)(k).

## Disputes

7.65 The use of customary laws and practices and the *Matai* and *Village Fono* systems as traditional mechanisms to identify the traditional custodians of Samoa's TK should be promoted wherever possible.

7.66 In the event of a dispute between members of the traditional community as to the ownership of TK, genuine efforts to resolve the dispute by the relevant parties should be made by means of Samoan conciliation, which should be provided for under the New Legal Framework. Under the *Lands and Titles Act 1981* 'Samoan conciliation' means the process by which the parties to a dispute, with the assistance of the Registrar and in accordance with Samoan custom and usage, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement and in which the Registrar may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with Samoan custom and usage and the requirements of that Act. The Commission considers however that the role of the Registrar should be replaced by the New Authority.

7.67 Should Samoan conciliation be unsuccessful, disputing parties should be required to use alternative dispute resolution mechanisms under the *Alternative Dispute Resolution Act 2007*. Alternative dispute resolution mechanisms are likely to be quicker, more economical, and less adversarial than court trials.<sup>169</sup> This would help to maintain the stability of relationships within the Samoan community, between traditional families, or villages.

7.68 The Land and Titles Court established under the *Lands and Titles Act 1981* has exclusive jurisdiction in matters relating to Samoan names, titles and customary land. The Lands and Titles Court have been known to have a significant backlog of matters, particularly in regards appeals.

7.69 The Commission considers that there may be merit in extending the Lands and Titles Court's jurisdiction to hear disputes relating to ownership of TK. However, an in-depth review of this option would be required. To extend the Court's jurisdiction would require an amendment to the *Lands and Titles Act* to expand the functions of the court and may contribute to the increase of any backlog of matters before the court. Similarly any extension of this jurisdiction is likely to result in additional resource constraints and operational burdens on that court.

7.70 The Commission considers that the establishment of a Special Tribunal in the New Legal Framework as an expert forum for hearing and resolving disputes over ownership or traditional custodianship of TK may be appropriate.<sup>170</sup> The New Legal

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<sup>169</sup> For example in case of mediation services, the fees are about half day/\$600SAT whole day, equally divided between the parties

<sup>170</sup> See for example Planning and Urban Management Act 2004, Part VII, which establishes a Planning Tribunal consisting of a judge nominated by the Chief Justice and 2 persons appointed by the Head of State acting on the advice of Cabinet, which may be assisted by assessors of a specialised nature who in the Tribunal's opinion has expert knowledge in the area; Broadcasting Act 2010, Part III which establishes a Broadcasting Tribunal consisting of a Judge or lawyers qualified to be a judge appointed by the Chief Justice and 2 other members appointed by the Head of State acting on the advice of Cabinet that have particular qualifications or experience; Remuneration Tribunal Act 2003 that establishes the Remuneration Tribunal consisting 3 members



Framework would need to include the functions, powers and the extent of authority or jurisdiction of such a tribunal, and other matters including requirements for the appointment of members, whether assessors may be necessary, and its procedures and processes.

7.71 The Commission considers that in some circumstances, the New Authority should be able to provide consent to use of TK for a commercial purpose and to proceed with a Benefit Sharing Agreement on behalf of the rightful traditional custodians, including where disputes relating to that TK remain unresolved. This process should be available in cases where disputing parties agree in writing, and the New Authority is satisfied that to do so is in the best interests of the public. Further criteria for such intervention should be developed and be set out in the New Legal Framework.

7.72 In such cases, the New Authority should be able to proceed with an Authorised User Agreement and Benefit Sharing Agreement on behalf of the traditional owners, and hold any economic benefits or potential economic benefits in trust on behalf of the rightful traditional custodians. This would reduce the risk that potential economic benefits to the Samoan community of its TK would not be lost or hindered by delays in dispute resolution for any reason, including claims that are found to be frivolous, unsubstantiated or without merit.

**Recommendation 44:** In order to identify the rightful traditional custodians of TK, the New Legal Framework should promote the use of customary laws and practices and *Matai* and *Village Fono* systems.

**Recommendation 45:** In disputes between parties about the ownership of TK, genuine efforts to resolve the dispute by the relevant parties should be made by means of Samoan conciliation. Samoan conciliation means the process by which the parties to the dispute, with the assistance of the New Authority and in accordance with Samoan custom and usage, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement in which the New Authority may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with Samoan custom and usage and requirements of the New Legal Framework.

**Recommendation 46:** Should Samoan conciliation be unsuccessful in resolving the dispute, disputing parties should be required to use alternative dispute resolution mechanisms within the framework of the *Alternative Dispute Resolution Act 2007*.

**Recommendation 47:** In the event both Samoan conciliation and alternative dispute resolution mechanisms are not successful in resolving the dispute, if the New Authority is satisfied that it is in the best interests of the public, and provided disputing traditional communities agree in writing, and other criteria in the New Legal Framework (if any) are met, the New Authority:

- i. May provide consent on behalf of the rightful traditional custodians for the commercial use of TK by the proposed user (applicant);

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appointed by the Head of State on the advice of Cabinet, each with different relevant experience and expertise.

- ii. Should take all reasonable steps to ensure benefit sharing between the New Authority on behalf of the rightful traditional custodian and the applicant, of monetary and non-monetary benefits that would be received by the applicant for its commercial use of the TK;
- iii. Should hold in trust for the rightful traditional custodians any benefits received for the use of the TK for such period as the New Authority deems appropriate and in the best interests of the parties concerned (or alternatively for a time period that could be set out in the New Legal Framework);
- iv. May apply the proceeds towards initiatives that are for the betterment of traditional communities concerned.

**Recommendation 48:** To carry out an in-depth review of the feasibility of the Land and Titles Court to adjudicate over disputes relating to the determination of traditional custodianship of TK, or alternatively the establishment of a special tribunal to do so.

### Term of protection

7.73 During the public and stakeholders consultations in 2010, traditional communities expressed strong concern about the limited term of protection of TK under the conventional intellectual property laws. In this context they expressed a strong desire for protection for Samoa's TK to continue indefinitely, particularly given the unique nature of TK which is passed down from generation to generation and owned communally.

7.74 The Commission shares these concerns and recommends that the traditional custodians' right to protection of their TK continue indefinitely, unless it can be proven that such TK no longer remains an adequate expression of the traditional community's cultural and social identity, standards and values. The standard of cultural expression, social identity, standards and values should remain to be determined by the New Authority. Some key considerations or criteria should also be included in the New Legal Framework by way of guidance. In addition, to reduce the risk that this is used as an "out" for potential commercial users, the presumption should be that the TK remains an adequate expression of the traditional community's cultural and social identity standards and values, unless it can be proven otherwise to the satisfaction of the New Authority. This should be a decision, reviewable by the Supreme Court, who should be able to afford it a greater degree of examination than the Authority.

**Recommendation 49:** The protection of the Samoa's TK under the New Legal Framework should continue in perpetuity, provided that it is maintained by the traditional community as an adequate expression of its cultural and social identity, standards and values. The presumption should be that the TK remains an adequate expression of the traditional community's central and social identity standards and values, unless it can be proven otherwise, to the satisfaction of the New Authority. This decision should be able to be reviewed by the Supreme Court.

### Legal proceedings

7.75 The Commission suggests that under the New Legal Framework both civil and criminal proceedings should be available when the rights of traditional custodians

have been breached. Moreover, the New Authority should have the power to institute both civil and criminal proceedings

7.76 Criminal proceedings should be able to be instituted in the following circumstances:

- i. Where a person exports or uses TK for non customary purposes without obtaining prior informed consent of the traditional custodians or the New Authority where no traditional custodian has been able to be established.
- ii. Where a person either acts in a way or makes an omission that is inconsistent with the moral rights of traditional custodians in relation to TK.
- iii. Where a person imports an article or thing that relates to TK, and the person knew or ought to have known the item would have contravened the moral or economic rights of the traditional custodians, had it been created in Samoa.
- iv. Where a person exports TK for non customary purposes without the prior informed consent of traditional custodians.
- v. Where a person knowingly provides false information in support of an application, or for entry into the proposed database of TK.

7.77 In relation to criminal proceedings, the sanctions should be consistent with the sanctions provided for under the *Intellectual Property Act*.

7.78 Traditional custodians should have legal standing to institute civil proceedings against any person who has infringed their economic or moral rights, including:

- i. A person who uses the TK for non customary purposes, without prior informed consent;
- ii. A person performs any act or makes an omission in relation to TK that is inconsistent with the moral rights of traditional custodians.

7.79 In relation to civil proceedings, it is recommended that appropriate remedies (similarly to those under the *Intellectual Property Act* and *Copyright Act*) include:

- i. injunctive relief;
- ii. damages for loss resulting from unauthorised use;
- iii. a declaration that the TK of the traditional custodians has been contravened;
- iv. an order that the defendant make public apology for the contravention;
- v. an order that any false attribution of ownership, or derogatory treatment, of the TK cease or be reversed;
- vi. an order recognising the appropriate ownership of the TK;
- vii. an order for an account for profits;
- viii. an order for the seizure of any object made, imported or exported contrary to rights of the traditional custodians; and
- ix. such other order or orders as the Court considers appropriate in the circumstances.

**Recommendation 50:** Civil and criminal proceedings should be available under new legal framework for the protection of Samoa's TK in the following circumstances. In the context of Criminal proceedings, it should be able to be instituted in the following circumstances:

- i. Where a person uses TK for non customary purposes without prior informed consent of the traditional custodians.
- ii. Where a person either acts or makes an omission that is inconsistent with the moral rights of traditional custodians in relation to TK.
- iii. Where a person imports an article of thing that relates to TK, and the person knew or ought to have known the item would have contravened the moral or economic rights of the traditional custodians, had it been created in Samoa.
- iv. Where a person exports TK for non customary purposes without the prior informed consent of traditional custodians.
- v. Where a person knowingly provides false information for entry into the proposed database of TK.

**Recommendation 51:** In the context of civil proceedings, traditional custodians should have legal standing to institute civil proceedings against any person who has infringed their economic rights or moral rights, including proceedings against:

- i. A person who uses the TK for non customary purposes, without prior informed consent;
- ii. A person who performs an act or makes an omission in relation to TK that is inconsistent with the moral rights of traditional custodians.

**Recommendation 52:** In relation to criminal sanctions, any person who, wilfully or by gross negligence, commits an act which constitutes an infringement of the economic rights or moral rights of the traditional custodians, should be liable to a fine not exceeding 1000 penalty units or to imprisonment not exceeding 5 years or both.

**Recommendation 53:** In relation to civil proceedings, appropriate remedies should include :

- i. Injunctive relief;
- ii. damages for loss resulting from unauthorised use;
- iii. a declaration that the TK of the traditional custodians has been contravened;
- iv. an order that the defendant make public apology for the contravention;
- v. an order that any false attribution of ownership, or derogatory treatment, of the TK cease or be reversed;
- vi. an order recognising the appropriate ownership of the TK;
- vii. an order for an account for profits;
- viii. an order for the seizure of any object made, imported or exported contrary to rights of the traditional custodians; and
- ix. such other order or orders as the Court considers appropriate in the circumstances.

**Recommendation 54:** The New Authority should have the power to institute both civil and criminal proceedings. Consideration should be given whether the approval of the Attorney general should be a prerequisite to initiating proceedings.

**Recommendation 55:** The New Legal Framework should contain processes for proceedings to be instituted against any person who it is claimed has infringed the economic or moral rights of traditional custodians, or a group or person on their behalf, or on behalf of the proposed Authority.

### Complementary Measures

7.80 The Commission remarks that the New Legal Framework mainly provides for positive protection of TK in Samoa, to prevent its misuse and misappropriation, to recognise its origins and sources, and to allow commercial use of TK in such a way that benefits derived from such use are fairly shared with traditional custodians. The New Legal Framework may also facilitate the preservation of Samoa's TK for future generations. The Commission acknowledges that legal protection of TK should be complemented with other measures such as preservation policies, customary laws and practices, education and public awareness programmes designed to build capacity in communities and traditional custodians, and other non-legislative tools.

7.81 In this respect, the Commission recognises the initiatives of the Samoa Qualification Authority in developing a TK qualification, the Ministry of Women Community and Social Development, the Ministry of Natural Resources and Environment, the Ministry of Commerce Industries and Labour and the Samoa Tourism Authority in establishing community and sector development programmes, the Samoa Umbrella for Non Government Organisations for the community work carried out by those organisations, the Ministry of Education Sports and Culture, and the National University of Samoa Centre of Samoan Studies for developing various relevant education programmes.

**Recommendation 56:** The protection of Samoa's TK requires complementary measures that may include preservation policies, customary laws and practises, education and public awareness programmes designed to build capacity, along with other non-legal tools.

**Recommendation 57:** The New Legal Framework should include a mandatory review by the responsible Ministry of its effectiveness in the protection of traditional knowledge, no later than 5 years following enactment.

### Consequential amendments

7.82 The New Legal Framework for the protection of TK of Samoa should be complementary to existing legislation in Samoa including the *Copyright Act* and *Intellectual Property Act*, and should be consistent with Samoa's international obligations. It is not intended to prejudice, or conflict with the acquisition of rights under existing legislation.

7.83 The *Copyright Act*, Part IV provides for the protection of Traditional Cultural Expressions. As the New Legal Framework will provide for protection of TK, it is proposed that Part VI of the *Copyright Act* is revoked.

**Recommendation 58:** Part IV of the *Copyright Act* in relation to Traditional Cultural Expressions should be revoked and included in the New Legal framework.

## LIST OF RECOMMENDATIONS

**Recommendation 1:** The Commission considers that a new *sui generis* legislation, for the protection of Samoa's TK against misuse and misappropriation (**New Legal framework**) should be developed.

**Recommendation 2:** The SPC Model Law and SPREP Model Law may be used as a platform for the development of the New Legal Framework for the protection of Samoa's TK.

**Recommendation 3:** 'Samoa's traditional knowledge' should be carefully defined in the New Legal Framework. The meaning of Samoa's TK should include any knowledge whether embodied in tangible or intangible form as an adequate expression of its cultural and social identity, standards and values, that:

- i. is or has been created, acquired or developed for traditional economic, spiritual, ritual, narrative, environmental, healing, artistic, decorative or recreational purposes;
- ii. is or has been transmitted from generation to generation;
- iii. is regarded as collectively originated and held; and
- iv. pertaining to a particular traditional community in Samoa;

**Recommendation 4:** The New Legal Framework should clarify that Samoa's TK includes both 'traditional cultural expressions' and 'traditional biological knowledge'.

'Traditional cultural expressions should be defined in the New Legal Framework, consistent with the meaning of traditional cultural expressions currently set out in the *Copyright Act*.

'Traditional biological knowledge' should be defined to include tradition based knowledge, belonging to a traditional community in Samoa, gained from their experience and adaptation to the environment, regarding:

- i. living things, their spiritual significance, constituent parts, life cycles, behaviour and functions, and their effects on and interactions with other living things, including humans, and with the physical environment; or
- ii. the physical environment; or
- iii. obtaining and utilising living or non-living things for the purpose of maintaining or improving human, animal or plant health or life.

**Recommendation 5:** For the purposes of the New Legal Framework, 'traditional community' in Samoa should mean a traditional family (*aiga*) or families in Samoa, traditional village or villages in Samoa, or Samoan traditional community as a whole.

**Recommendation 6:** For purposes of clarity, the protection of traditional cultural expressions and traditional biological knowledge should be addressed separately within the New Legal Framework.

**Recommendation 7:** The key objectives of the New Legal Framework should be to protect the rights of the traditional custodians against the misuse and misappropriation of their TK.

**Recommendation 8:** The development of the New Legal Framework should also be guided by the following principles and objectives, and seek:

- i. to regulate access and utilisation of Samoa's TK by third parties (users of TK);

- ii. to respect and create awareness about Samoa's TK;
- iii. to encourage the use of customary laws and practices, the Matai and Village Fono systems as traditional regimes of governance and decision-making;
- iv. not to interfere with the continued use, exchange and transmission of Samoa's TK within traditional communities in the customary context according to customary laws and practices;
- v. to ensure that enforcement and alternative dispute-resolution mechanisms are appropriate and accessible to traditional communities in case of breach of protection of Samoa's TK;
- vi. to ensure that appropriate remedies are provided;
- vii. to promote the role of the public authorities in the protection of Samoa's TK, in particular providing assistance to the traditional communities in the identification, management and enforcement of their rights;

**Recommendation 9:** The New Legal Framework for the protection of Samoa's TK should be complementary to, and not prejudice any protection of TK currently available under existing contemporary intellectual property laws in Samoa, and should also be consistent with Samoa's international obligations.

**Recommendation 10:** Due to the broad meaning of TK, the New Legal Framework should clearly specify those types or aspects of Samoa's TK that it will apply to. The types of TK or specific aspects of TK that the New Legal Framework will apply to should be clearly stipulated in the New Legal Framework, which should provide the substantive criteria that the TK should have in order to be protected. The types of TK that the New Legal Framework will not apply to should also be clarified as much as possible.

**Recommendation 11:** Under the New Legal Framework, the term 'traditional custodians' should be used to indicate the beneficiaries of the protection. A traditional custodian should represent the relevant traditional community in whom the custody of the TK is entrusted in accordance with customary law and practices. (Note: for the purposes of this report, 'traditional community' means a traditional family or families in Samoa, traditional village or villages in Samoa, or Samoan traditional community as a whole).

**Recommendation 12:** The New Legal Framework should grant automatic protection of TK. Such protection may extend to some types or aspects of TK that existed before the New Legal Framework came into force, however such aspects should be clearly set out in the New Legal Framework.

**Recommendation 13:** Protection of TK provided under the New Legal Framework should include any or all of the following forms of protection:

- i. provision of moral rights to traditional custodians of TK, for non customary use by third parties, whether or not for commercial purposes;
- ii. provision of economic rights to traditional custodians of TK to authorise third parties to undertake certain uses of TK in a non-customary context, so that prior informed consent of the traditional custodians is first obtained, and where used for commercial purposes to require benefit sharing between the user of the TK and the traditional custodians.

**Recommendation 14:** The New Legal Framework for the protection of Samoa's TK must vest moral rights and economic rights in the traditional custodians.

**Recommendation 15:** The following moral rights must be granted to the traditional custodians:

- i. The right of attribution of the source of TK (for example by formally identifying the traditional custodian and where appropriate the geographic location from which the TK originated);
- ii. The right not to have the authorship of the TK falsely attributed;
- iii. The right not to have TK subjected to insulting, derogatory, or offensive treatment.

**Recommendation 16:** The New Legal Framework should identify which uses the right of attribution would apply such as for commercial purposes, and the uses to which it would not apply which may include educational purposes. Furthermore, the statement of attribution must be clear and reasonably prominent.

**Recommendation 17:** Traditional custodians should not be able to waive or modify their moral rights in relation to their TK.

**Recommendation 18:** The use of TK for non customary purposes must require prior informed consent of traditional custodians (with some specific exceptions), before third parties can undertake certain uses of TK.

In the context of Samoa's traditional cultural expressions, prior informed consent of traditional custodians would be required:

- i. to reproduce;
- ii. to publish;
- iii. to perform or display in public;
- iv. to broadcast to the public by radio, television, satellite, cable or by any other means of communication;
- v. to translate, adapt, arrange, transform or modify ;
- vi. to fixate through any process such as making a photograph, film or sound recording;
- vii. to make available online or electronically transmit to the public (whether over a path or a combination of paths, or both);
- viii. to create derivative works;
- ix. to manufacture, offer for sale, sell, stock, import or export or products derived from it;
- x. to use in any other material form beyond the customary context.

In the context of Samoa's traditional biological knowledge, prior informed consent of traditional custodians would be required:

- i. to manufacture, offer for sale, sell, stock, import or export a product that is a result of the use of traditional biological knowledge.
- ii. to use traditional biological knowledge for scientific research;
- iii. to use traditional biological knowledge in any other form beyond the customary context.



**Recommendation 19:** Prior informed consent of traditional custodians for use of their TK in a non customary context should be set out in an agreement between the proposed user and traditional custodian (**Authorised User Agreement**).

**Recommendation 20:** If TK is to be used for commercial purposes and the prior informed consent of the traditional custodian has been obtained, there should be a Benefit Sharing Agreement between the proposed user and the New Authority as trustee for and on behalf of traditional custodians in relation to sharing economic benefits, or in the case of deferred economic benefits, deemed economic benefits of its commercial use. The Benefit Sharing Agreement should also provide for monetary and or non-monetary compensation for the traditional custodians.

**Recommendation 21:** Where TK is used for commercial purposes and economic benefits are to be shared with the traditional custodian according to the Benefit Sharing Agreement, consideration should be given whether a Trust Fund<sup>171</sup> should be established for the traditional custodian in which all financial proceeds received shall be paid into.

**Recommendation 22:** The New Legal Framework should recognise that more than 1 traditional community may be the traditional custodian of TK, and be entitled to any benefits received for the commercial use of the TK.

**Recommendation 23:** The New Legal Framework should create or definitively set out the protection of rights of traditional custodians – so that traditional custodians and interests will be guaranteed by the “trustee” relationship with the New Authority, and by the process for negotiating a Benefit Sharing Agreement. Appropriate provisions to define and protect the interests of traditional custodians should be included in the New Legal Framework.

**Recommendation 24:** The New Legal Framework should set out minimum terms and conditions for the commercial use of TK, and address issues such as the sharing of financial benefits, non-monetary compensation, whether the use will be exclusive or non exclusive, maintaining of intellectual property rights (if any) arising from the use of TK, and imposing restrictions on transfers to third parties. The New Legal Framework should set out minimum requirements of an Authorised User Agreement in relation to these issues in order to minimize the risk that such agreements are entered into to the detriment of traditional custodians.

**Recommendation 25:** The New Legal Framework should enable regulations to be made that add terms and or complement minimum requirements for the commercial use of TK to protect the economic and other interests of traditional custodians. Regulations should not amend or supersede any minimum requirements that are expressly set out in the New Legal Framework.

**Recommendation 26:** The New Legal Framework should include a provision to prohibit Authorised User Agreements or Benefit Sharing Agreements that seek to avoid statutory or common law obligations.

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<sup>171</sup> *Public Finance Management Act 2001*, s 61 and 62.

**Recommendation 27:** Traditional Custodians should also be given powers under the New Legal Framework to recover payments due under the Benefit Sharing Agreement, irrespective of the doctrine of privity of contract.

**Recommendation 28:** The use, exchange, transmission and development of TK within the traditional communities must be able to continue unrestricted and without interference under the New Legal Framework for the protection of Samoa's TK.

**Recommendation 29:** The New Legal Framework should provide that uses of TK for the following purposes are exempted from the requirement of prior informed consent (**exempted uses**) :

- i. private production for personal purposes;
- ii. reproduction for teaching;
- iii. reproduction by libraries and archives;
- iv. reproduction or broadcasting to the public for information purposes and not for commercial purposes.

**Recommendation 30:** The New Legal Framework should enable regulations to be made adding exempted uses, provided criteria is developed that must be considered before further exempted uses can be one made by way of regulation.

**Recommendation 31:** Exempted uses should be subject to the condition that the user must attribute the source of the TK (as the traditional custodians continue to have moral rights).

**Recommendation 32:** Where TK such as traditional cultural expressions have been in the public domain and exploited for extensive periods of time such as *elei* fabric prints or Samoan traditional stories, myths and legends, where ownership cannot or is highly unlikely to be attributable to traditional custodians of a particular family or village, or where ownership is associated with Samoa as a nation, the Samoan traditional community should be benefited.

**Recommendation 33:** An independent body (**New Authority**) should be established under the New Legal Framework, which will be entrusted with the protection of the interests of the traditional custodians in relation to TK.

**Recommendation 34:** The New Authority should consist of a Board with responsibility to make decisions under the New Legal Framework chaired by the responsible Minister or Associate Minister and staff, led by a division head to assist the Board perform its functions.

**Recommendation 35:** The New Legal Framework should provide a minimum and maximum number of Board members, which should comprise an equal number of representatives from both Government and the community. Representatives of public authorities should be selected from Government agencies whose functions are directly relevant to the protection, innovation or creation of TK and representatives from the community should include experts in the relevant field. Board members must collectively have knowledge of and experience in relation to matters relevant to the functions of the Board.

**Recommendation 36:** The New Authority's functions should include:

- i. acting as a trustee for and on behalf of the traditional custodian in relation to Benefit Sharing Agreements;
- ii. Where appropriate asserting ownership on behalf of the Samoan traditional community or Samoa as a whole;
- iii. being a contact point for potential users of Samoa's TK;
- iv. receiving applications from potential users (applicants) for authorisation (i.e. prior informed consent) for non customary use of TK;
- v. acting as nominal traditional custodian where a traditional custodian cannot be determined in certain circumstances;
- vi. facilitating negotiations between traditional custodians and applicants, ensuring ongoing protection, reward sharing and acknowledgment in respect of TK;
- vii. keeping a register of Authorised User Agreements;
- viii. keeping a database of Samoa's TK;
- ix. any other functions ancillary to the above functions in line with the purpose of the New Legal Framework.

**Recommendation 37:** Ancillary functions of the New Authority may include:

- i. the provision of technical assistance to traditional communities through capacity building, training and education programs;
- ii. maintaining relationships with relevant authorities in other countries with responsibilities for the protection of TK;
- iii. advising traditional communities as and when renewals of trademarks fall due;
- iv. assisting with the implementation of cultural awareness programs within industrial and manufacturing sectors, and generally such as developing a code of conduct and ethics.

**Recommendation 38:** Where the New Authority asserts ownership on behalf of the Samoan traditional community and derives financial benefits, such benefits should be used for purposes related to the protection, promotion, innovation, creation and raising awareness of TK of Samoa.

**Recommendation 39:** The Legal Framework should enable the New Authority to establish a database of Samoa's TK for which an Authorised User Agreement or Benefit Sharing Agreement exists. An Agreements Register should also be kept as part of the database.

**Recommendation 40:** Should such a database be established, information on the database indicating the ownership of TK or traditional custodians of TK should not be taken as determinative of ownership.

**Recommendation 41:** Requests for information on the database should be limited to requests by Samoan citizens or permanent residents, body corporates incorporated in Samoa, or incorporated outside Samoa but with a registered place of business in Samoa:

**Recommendation 42:** In regards requests for information on the database, or Agreements Register, the New Authority should withhold the information, if the release or making available of information:

- i. would be likely to prejudice any confidential information entrusted to the Government of Samoa by the Government of another country or any agency of such Government, or any international organisation;
- ii. would be likely to disclose a trade secret or would be likely to prejudice the commercial position or economic interests of the traditional custodians of the TK, New Authority, or Government of Samoa; or
- iii. would be likely to prejudice or disadvantage the traditional custodians, New Authority, or Government from carrying out commercial activities, or from negotiations (including commercial negotiations); or
- iv. is for improper gain or improper purpose or advantage.

**Recommendation 43:** Information that is not withheld on the grounds in the preceding recommendation may be released by the New Authority.

**Recommendation 44:** In order to identify the rightful traditional custodians of TK, the New Legal Framework should promote the use of customary laws and practices and *Matai* and *Village Fono* systems.

**Recommendation 45:** In disputes between parties about the ownership of TK, genuine efforts to resolve the dispute by the relevant parties should be made by means of Samoan conciliation. Samoan conciliation means the process by which the parties to the dispute, with the assistance of the New Authority and in accordance with Samoan custom and usage, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement in which the New Authority may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with Samoan custom and usage and requirements of the New Legal Framework.

**Recommendation 46:** Should Samoan conciliation be unsuccessful in resolving the dispute, disputing parties should be required to use alternative dispute resolution mechanisms within the framework of the *Alternative Dispute Resolution Act 2007*.

**Recommendation 47:** In the event both Samoan conciliation and alternative dispute resolution mechanisms are not successful in resolving the dispute, if the New Authority is satisfied that it is in the best interests of the public, and provided disputing traditional

communities agree in writing, and other criteria in the New Legal Framework (if any) are met, the New Authority:

- i. May provide consent on behalf of the rightful traditional custodians for the commercial use of TK by the proposed user (applicant);
- ii. Should take all reasonable steps to ensure benefit sharing between the New Authority on behalf of the rightful traditional custodian and the applicant, of monetary and non- monetary benefits that would be received by the applicant for its commercial use of the TK;
- iii. Should hold in trust for the rightful traditional custodians any benefits received for the use of the TK for such period as the New Authority deems appropriate and in the best interests of the parties concerned (or alternatively for a time period that could be set out in the New Legal Framework);
- iv. May apply the proceeds towards initiatives that are for the betterment of traditional communities concerned.

**Recommendation 48:** To carry out an in-depth review of the feasibility of the Land and Titles Court to adjudicate over disputes relating to the determination of traditional custodianship of TK, or alternatively the establishment of a special tribunal to do so.

**Recommendation 49:** The protection of the Samoa's TK under the New Legal Framework should continue in perpetuity, provided that it is maintained by the traditional community as an adequate expression of its cultural and social identity, standards and values. The presumption should be that the TK remains an adequate expression of the traditional community's central and social identity standards and values, unless it can be proven otherwise, to the satisfaction of the New Authority. This decision should be able to be reviewed by the Supreme Court.

**Recommendation 50:** Civil and criminal proceedings should be available under new legal framework for the protection of Samoa's TK in the following circumstances. In the context of Criminal proceedings, it should be able to be instituted in the following circumstances:

- i. Where a person uses TK for non customary purposes without prior informed consent of the traditional custodians.
- ii. Where a person either acts or makes an omission that is inconsistent with the moral rights of traditional custodians in relation to TK.
- iii. Where a person imports an article of thing that relates to TK, and the person knew or ought to have known the item would have contravened the moral or economic rights of the traditional custodians, had it been created in Samoa.
- iv. Where a person exports TK for non customary purposes without the prior informed consent of traditional custodians.
- v. Where a person knowingly provides false information for entry into the proposed database of TK.

**Recommendation 51:** In the context of civil proceedings, traditional custodians should have legal standing to institute civil proceedings against any person who has infringed their economic rights or moral rights, including proceedings against:

- i. A person who uses the TK for non customary purposes, without prior informed consent;
- ii. A person who performs an act or makes an omission in relation to TK that is inconsistent with the moral rights of traditional custodians.

**Recommendation 52:** In relation to criminal sanctions, any person who, wilfully or by gross negligence, commits an act which constitutes an infringement of the economic rights or moral rights of the traditional custodians, should be liable to a fine not exceeding 1000 penalty units or to imprisonment not exceeding 5 years or both.

**Recommendation 53:** In relation to civil proceedings, appropriate remedies should include :

- i. Injunctive relief;
- ii. damages for loss resulting from unauthorised use;
- iii. a declaration that the TK of the traditional custodians has been contravened;
- iv. an order that the defendant make public apology for the contravention;
- v. an order that any false attribution of ownership, or derogatory treatment, of the TK cease or be reversed;
- vi. an order recognising the appropriate ownership of the TK;
- vii. an order for an account for profits;
- viii. an order for the seizure of any object made, imported or exported contrary to rights of the traditional custodians; and
- ix. such other order or orders as the Court considers appropriate in the circumstances.

**Recommendation 54:** The New Authority should have the power to institute both civil and criminal proceedings. Consideration should be given whether the approval of the Attorney general should be a prerequisite to initiating proceedings.

**Recommendation 55:** The New Legal Framework should contain processes for proceedings to be instituted against any person who it is claimed has infringed the economic or moral rights of traditional custodians, or a group or person on their behalf, or on behalf of the proposed Authority.

**Recommendation 56:** The protection of Samoa's TK requires complementary measures that may include preservation policies, customary laws and practises, education and public awareness programmes designed to build capacity, along with other non-legal tools.

**Recommendation 57:** The New Legal Framework should include a mandatory review by the responsible Ministry of its effectiveness in the protection of traditional knowledge, no later than 5 years following enactment.

**Recommendation 58:** Part IV of the *Copyright Act* in relation to Traditional Cultural Expressions should be revoked and included in the New Legal framework.

## Appendix A

1. **Convention on Biological Diversity (CBD)**,<sup>172</sup> Article 8 (j) refers to *“knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.”*
  2. **Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization**,<sup>173</sup> refers to *“traditional knowledge associated with genetic resources.”*
  3. **The Convention for the Safeguarding of the Intangible Cultural Heritage of United Nations Educational, Scientific and Cultural Organization**<sup>174</sup> refers to intangible cultural heritage which is defined in Article 2(1) as *“the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.”*
  4. The preamble of **UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions**<sup>175</sup> recognizes *“the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion”.*
  5. **The International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agricultural Organization (FAO)**<sup>176</sup> deals with the protection of TK relevant to plant genetic resources for food and agriculture.<sup>177</sup>
- Also several regional and national laws deal with the protection of TK:

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<sup>172</sup> The CBD is an international legally-binding treaty with three main goals: conservation of biodiversity; sustainable use of biodiversity; and the fair and equitable sharing of the benefits arising from the use of genetic resources. Its overall objective is to encourage actions which will lead to a sustainable future. The Convention on Biological Diversity was entered into force on 29 December 1993. See [www.cbd.int](http://www.cbd.int).

<sup>173</sup> The Nagoya Protocol is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way, thereby contributing to the conservation and sustainable use of biodiversity. The Nagoya Protocol was adopted at the tenth Conference of the Parties of CBD, held in Nagoya, Japan, in October 2010. See [www.cbd.int/abs](http://www.cbd.int/abs).

<sup>174</sup> The Convention for the Safeguarding of Intangible Cultural Heritage was adopted by the UNESCO General Conference held in 2003. The Convention is aimed at safeguarding the uses, representations, expressions, knowledge and techniques that community, groups and, in some cases, individuals, recognise as an integral part of their cultural heritage.

[http://portal.unesco.org/en/ev.php-URL\\_ID=17716&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html)).

<sup>175</sup> The Convention on the Protection and Promotion of the Diversity of Cultural Expressions was adopted by the UNESCO General Conference at its 33rd session on 20 October 2005. It was adopted because the international community signaled the urgency for the implementation of international law that would recognize the distinctive nature of cultural goods, services and activities as vehicles of identity, values and meaning; that while cultural goods, services and activities have important economic value, they are not mere commodities or consumer goods that can only be regarded as objects of trade.

<sup>176</sup> The International Treaty on Plant Genetic Resources for Food and Agriculture was adopted by the XXXI session of the FAO conference on 3 November 2001. The Treaty provides for the conservation and sustainable use of plant genetic resources for food and agriculture.

G Moore and W Tymowski, *Explanatory Guide to the International Treaty on Plant Generic Resources for Food and Agriculture*, IUCN Environmental Policy and Law Paper No. 57 (2005) <http://data.iucn.org/dbtw-wpd/edocs/EPLP-057.pdf> (Accessed 10/02/2015).

<sup>177</sup> Ibid, Article 9.2.



1. **The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore** within the Framework of the African Regional Intellectual Property Organization (ARIPO) refers to traditional knowledge as *“any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another. The term shall not be limited to a specific technical field, and may include agriculture, environmental or medical knowledge, and knowledge associated with genetic resources.”*<sup>178</sup>
2. **Law No. 20 of June 26, 2000 of Panama on Special System for the Collective Intellectual Property Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge** deal with the protection of *“the collective rights of intellectual property and traditional knowledge of the indigenous communities upon their creations such as inventions, models, drawings and designs, innovations contained in the pictures, figures, symbols, illustrations, old carved stones and others; likewise, the cultural elements of their history, music, art and traditional artistic expressions, capable of commercial use, through a special registration system, promotion, commercialization of their rights in order to stand out the value of the indigenous cultures and to apply social justice.”*<sup>179</sup>
3. **Law No. 27811 of 24 July 2002 of Peru, introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources** defines *“collective knowledge”* as *“the accumulated, transgenerational knowledge evolved by indigenous peoples and communities concerning the properties, uses and characteristics of biological diversity.”*<sup>180</sup>
4. **The World Intellectual Property Organization (WIPO)** in a fact-finding mission report<sup>181</sup> uses the term *“traditional knowledge”* to refer to *“tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. “Tradition-based” refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment.”*

Traditional knowledge is defined by WIPO as *“knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.”*<sup>182</sup>

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<sup>178</sup> Article 2.1.

<sup>179</sup> Article 1.

<sup>180</sup> Article 2.

<sup>181</sup> WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge*, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) 25.

<sup>182</sup> WIPO, *Traditional Knowledge* (n) <<http://www.wipo.int/tk/en/tk/>> (Accessed 18/02/2015).