KO AOTEAROA TĒNEI

A Report into Claims Concerning
New Zealand Law and Policy Affecting
Māori Culture and Identity

Te Taumata Tuatahi

WAI 262

WAITANGI TRIBUNAL REPORT 2011

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Auē e te mate kei hea tāu wero, auē e te reinga kei hea tōu wikitōria?
Engari anō te kai atua, purea ka ora, tēnā ko tēnei mea ko te aroha
Ka tū tonu ka tū tonu i roto rā i te whatumanawa
Nā ia kua whakaurupā te aroha ki a koutou katoa
I roto i tēnā i tēnā makiu makiu
E koro mā e kui mā i te pō ahakoa kua mate e kōrero tonu ana koutou
Ko ō koutou tinana kua maroke ko ā koutou kupu ia ka mau tonu
Tae noa atu ki ngā reanga o ngā rau tau ka tū mai.

Mō tēnei momo i a koutou he whārangi rau angiangi tā ēnei reanga
Hei whakanakonako i te pūtea kupu tuku ki tō koutou
I tō te ikeike kano i tō te rangiahua nui
Heoi e kui e koro mā, kua oti te whatu i te kākahu hei tāwharau
I tō koutou reo i whakarere iho ai, i ā koutou whakaratonga
Ki te ao i tukua iho ai ki ā koutou e ō koutou atua
Okioki i tō koutou moenga roa.

Oh death, where is your sting; grave, where is your victory?
The vigilant can deflect the evil intentions rife in the everyday world of people.
But we know no remedy for the emptiness that remains after death's grim harvest;
For its pain is etched on our hearts, and its memory is a curse to be borne by the living.
Aroha turns the wise words you leave behind to gravestones around which the people will gather to mourn and remember.

Thus, although you, our elders, may pass into the night, your flesh to corrupt and fade,
Yet you speak still.
And we cling to your sacred teachings, generation upon living generation,
These few feeble words too thin to convey our love and gratitude for the legacy you have bequeathed us, your living faces.
Let what follows be a cloak that keeps warm your voices and safe your contributions to this troubled world.
Rest now, in peace.




Clockwise from top left:
Hema Nui a Tawhaki Witana, Te Witi McMath, Tama Poata, John Hippolite, Te Kapunga Matemoana Dewes, Apera Clark, and Hohepa Kereopa.



We have lost so many of the valued contributors to the Wai 262 inquiry. Of the original named claimants we have lost Hema Nui a Tawhaki Witana (Te Rarawa, also known as Del Wihongi), Te Witi McMath (Ngāti Wai), Tama Poata (Ngāti Porou), and John Hippolite (Ngāti Koata); only Haana Murray QSM CNZM (Ngāti Kurī) remains. Many of the kaumātua and kuia who appeared before us have also passed away, including three who became claimants later in the inquiry: Te Kapunga Matemoana Dewes LITD (Ngāti Porou), Apera Clark (Ngāti Kahungunu), and Hohepa Kereopa (Tūhoe).

Our first presiding officer, the energetic and caring Judge Richard Kearney, died in 2005 after a long illness. We acknowledge with respect and gratitude the unstinting







Clockwise from top left: Judge Richard Kearney, the Right Reverend Bishop Manuhuia Bennett, Rangitihi John Tahuparae, Martin Dawson, Gina Rudland, David Jenkins, and Jolene Patuawa-Tuilave.

support given by his wife, Betty Kearney, through difficult times. Two esteemed Tribunal members assisting the panel as kaumātua advisers also died in the course of the inquiry: the Right Reverend Bishop Manuhuia Bennett CMG ONZ (in December 2001), a man of wisdom and compassion, and Rangitihi John Tahuparae MNZM (in October 2008), a renowned tohunga and teacher.

We also lost four counsel during the course of the inquiry: Martin Dawson (appearing for Ngāti Koata), Gina Rudland and David Jenkins (appearing for Ngāti Porou), and Jolene Patuawa-Tuilave (appearing for several Crown research institutes). All taken at a young age, all powerful advocates and respected colleagues.

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We also wish to acknowledge all Waitangi Tribunal staff and contractors, past and present, who assisted us in the preparation and running of the inquiry and the organisation and management of the report-writing effort. They include in the long-running first phase of the inquiry (up to 2005) Evaan Aramakutu, Rose Daamen, Robert McClean, Moana Murray, Grant Phillipson, Andrew Robb, Georgina Roberts, Turei Thompson, and Pam Wiki; and in the second phase Imeleta Ioane, Huia Lloyd, Sonja Mitchell, Richard Moorsom, Jamie Morris, Jenny Syme, and, especially, Charles Dawson.

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Kia puta ki te whai ao, ki te mārama

The Honourable Dr Pita Sharples
Minister of Māori Affairs

and

The Right Honourable John Key
Prime Minister

and

The ministers listed at the end of this letter

Parliament Buildings

WELLINGTON

28 June 2011

E ngā Minita e noho mai nā i runga i tērā taumata tiketike, e mihi whakaiti ana mātou ki a koutou katoa.

We enclose in accordance with section 6(5) of the Treaty of Waitangi Act 1975 a sealed copy of our report on the Wai 262 claim relating to New Zealand's law and policy affecting Māori culture and identity. We have called this report *Ko Aotearoa Tēnei* – meaning either 'This is Aotearoa' or 'This is New Zealand', or both. The ambiguity is intentional: a reminder, if one is needed, that Aotearoa and New Zealand must be able to co-exist in the same space.

New Zealand sits poised at a crossroads both in race relations and on our long quest for a mature sense of national identity. These issues are not just important in themselves; they impact on wider questions of economic growth and social cohesion. We are propelled here by many factors: the enormous progress that has been made toward the settlement of historical Treaty claims and the resulting reincarnation of tribes as serious players in our economic, political, social, and cultural fabric; continuing growth in the Māori population and the seemingly intractable social and economic disparity between that community and the rest of New Zealand; the

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Māori cultural 'renaissance' and the rise of Māori creativity in the arts, music, and literature contrasted with ongoing cultural loss; and the extraordinary increase in wider cultural diversity in New Zealand through immigration over the last 30 years.

A crossroads in history offers choices. The Wai 262 claimants really asked which of the many possible paths into the future New Zealand should now choose, and in this report we provide an answer based on the principles of the Treaty of Waitangi.

It is clear to us, as it will be to anyone who cares to think about the subject, that a future marked by interracial rancour must be emphatically rejected. We say that not just because to choose a path of conflict is morally wrong, nor even just because it is the antithesis of the Treaty's vision. We say this because it would be economically and socially destructive for the country. Demographers tell us that to assure the economic well-being of New Zealand in the next generation, the growing Māori workforce and Māori capital must move from the margins to the core of our economy, and quickly. It is obvious that law and policy must be developed with the express and urgent objective of capturing – not squandering – Māori potential. Our collective future will depend on that objective being achieved. This choice is not about pandering to the Māori grievance industry or preying on Pākehā guilt, as the detractors would have it. It is about gearing up to meet the challenges of a future that our grandparents could not have predicted.

It follows that despite great progress in some areas, a do-more-of-the-same choice is simply untenable. It still risks bequeathing to our collective future an uncomfortably large, poor, and underproductive cohort of working age Māori. In this dystopia the Treaty of Waitangi will remain, stubbornly, a locus for Māori anger and non-Māori resentment – a site of discontent for all.

In this report, we say it needn't be this way. We pose, perhaps for the first time, the possibility of a Treaty relationship *after* grievance. A normalised, fully functional relationship where conflict between the Crown and Māori is not a given. While many of the challenges posed by the need to capture Māori potential are outside the scope of our inquiry and expertise, law and policy relating to Māori culture and identity were our focus and there is much to be addressed in that frame. What we saw and heard in sittings over many years left us in no doubt that unless it is accepted that New Zealand has two founding cultures, not one; unless Māori culture and identity are valued in everything government says and does; and unless they are welcomed into the very centre of the way we do things in this country, nothing will change. Māori will continue to be perceived, and know they are perceived, as an alien and resented minority, a problem to be managed with a seemingly endless stream of taxpayer-funded programmes, but never solved.

We adjure those with the power to look to the Treaty of Waitangi for the guidance and vision necessary to avoid this path of failure. It is in the fact that the agreement at Waitangi took the form of a treaty that we see mutual respect for each other's mana, and it is in the Treaty's words that we find the promise that this respect will

last forever. That is the essential element of the Treaty partnership confirmed time and again in the courts and in this Tribunal. There are many reasons to take this partnership principle and build it into all of our national institutions. It gives us our sense of right and place, grounding us in the traditions of the Pacific and the West at the same time. It provides the centre of gravity around which our multicultural nation can coalesce. It is essentially optimistic in outlook and it relieves both Māori and Pākehā of the burden of a troubled past. It is the precondition for unlocking Māori potential for the benefit of the country as a whole. It is the core of our national identity. And it is unique.

It will be seen that our inquiry was wide-ranging. The nature of the claims brought to our attention made that necessary. We were told it was the first whole-of-government inquiry by this Tribunal. This has forced us to think in more general and interconnected terms about law and Crown policy in relation to Māori identity and culture, both now and in the future.

Viewed from this broader perspective, it seems strange that the law provides for no particular recognition of the interests of iwi and hapū communities in their traditional knowledge and artistic works, or of the relationship between those communities and their culturally significant species of flora and fauna. We feel that if the Crown really wishes to follow the Treaty's guidance in the administration of the conservation estate and in environmental regulation, much more can be done to respect Māori culture and identity. Similarly we feel very strongly that urgent steps need to be taken to address the policy failures of the last 20 years if the Crown is to demonstrate, in concrete terms, its commitment to the survival of te reo Māori. We find it impossible to divorce policy relating to traditional Māori healing or rongoā from the more general needs of Māori health and feel that policies supporting rongoā can only enhance Māori health more generally. We suggest an analytical framework around which Crown agencies can address Treaty requirements where those agencies have custody or control of taonga Māori or traditional knowledge. Some agencies have performed well against these standards and others have more work to do. And finally we assess the way in which New Zealand demonstrates respect for Māori culture and identity when entering into its international commitments.

In all areas of our inquiry common threads showed through: the need to properly understand the nature of the interest claimed by kaitiaki or guardian communities; the fact there will often be other competing interests arguing for protection (but crucially, not always); the need to isolate those areas of conflict and to build mechanisms capable of balancing them in a principled and transparent way. And above all, we saw the absolute necessity of valuing rather than ignoring or avoiding the Māori interest in that process. In some areas, particularly intellectual property, we saw that these claims presented New Zealand with an opportunity to be first mover in international law reform, with all of its attendant advantages to national interest. International frameworks for the protection of traditional knowledge and

'traditional cultural expressions' – what we in New Zealand would call mātauranga Māori and taonga works – are currently being negotiated. It would be far better for New Zealand to lead that debate than simply receive its result for compulsory implementation.

You will see that the reforms we propose are wide-ranging and detailed. They need to be, to address the problems we have uncovered. But, more importantly, they are the building blocks of a big and audacious vision, a perspective on a country of the future whose founding cultures have made a lasting kind of peace, where they have given one another the room each needs to grow and, with new confidence, made space also for the later migrants to join this unique project. We are ambitious but not unrealistic. After all, *this is Aotearoa*, built on a Treaty partnership that we may yet perfect.

Heoi anō.

Justice J V Williams
Presiding Officer

The Honourable Bill English
Deputy Prime Minister

The Honourable Gerry Brownlee
Minister for Economic Development
Minister of Energy and Resources

The Honourable Simon Power
Minister of Commerce

The Honourable Tony Ryall
Minister of Health
Minister for State Owned Enterprises

The Honourable Dr Nick Smith
Minister for the Environment

The Honourable Anne Tolley
Minister of Education

The Honourable Christopher Finlayson
Attorney-General
Minister for Treaty of Waitangi Negotiations
Minister for Arts, Culture and Heritage

The Honourable David Carter
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The Honourable Murray McCully
Minister of Foreign Affairs

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Minister of Broadcasting

The Honourable Kate Wilkinson
Minister of Conservation

The Honourable Nathan Guy
Minister of Internal Affairs
Minister Responsible for the National Library
Minister Responsible for Archives New Zealand

The Honourable Rodney Hide
Minister of Local Government
Minister for Regulatory Reform

This report concerns one of the most complex and far-reaching claims ever to come before the Waitangi Tribunal. Wai 262, as it is prosaically called, is most often referred to as the indigenous flora and fauna claim, or the Māori cultural intellectual property claim. It is both of those things, but it is also much more.

As readers will discover, the Wai 262 claim is really a claim about mātauranga Māori – that is, the unique Māori way of viewing the world, encompassing both traditional knowledge and culture. The claimants, in other words, are seeking to preserve their culture and identity, and the relationships that culture and identity derive from.

Their concern is that control has been taken from them, by laws and policies that have allowed, for example, the haka to be used in foreign television advertisements; tā moko being used to sell high fashion in Paris; private companies using traditional knowledge about the properties and uses of indigenous plants and animals without acknowledgement or consent; the dialects of individual iwi to fall into decline through lack of official support or protection; and iwi and hapū to be denied a say in the management of fauna that they see themselves as guardians of, and denied access to the last surviving remnants of the environment in which their culture evolved.

Seen this way, the claim has a reach that extends far beyond the direct relationship between pā and Parliament. It has the potential to touch the lives of all New Zealanders.

It is for that reason that we have taken the unusual step of reporting on two levels. This level, *Te Taumata Tuatahi*, tells – in abridged form – the story of the Wai 262 claim. It explains the key themes of our inquiry – the claimants' concerns, the Crown's responses, the views we have formed, and the main recommendations we have made. But it does so in a form that, we hope, will make it accessible to a wide range of New Zealanders – and, again we hope, contains something of the essence of the mātauranga that the claimants wish to save.

The other level is the two-volume report *Te Taumata Tuarua*, which explains in much greater detail the claimant and Crown arguments, our reasoning, and our recommendations for reform.

At its heart, the Treaty is about relationships. That, no more and no less, is our concern throughout this report. We begin, therefore, with the stories of our two founding cultures: those of Kupe's people, and Cook's.

ABBREVIATIONS

ABS	access and benefit-sharing
AIP	agreement in principle
ANZTPA	Australia New Zealand Therapeutic Products Authority
APEC	Asia-Pacific Economic Cooperation
app	appendix
CA	Court of Appeal
CBD	Convention on Biological Diversity
CE	common era
ch	chapter
CEO	chief executive officer
CFR	Crop and Food Research
CGP	Conservation General Policy
CHE	Crown Health Enterprise
cl	clause
CMRI	Crown–Māori relationship instrument
COP	Conference of the Parties
CRI	Crown Research Institute
DHB	District Health Board
DINZ	Designers Institute of New Zealand
DNA	deoxyribo-nucleic acid
doc	document
DOC	Department of Conservation
DRIP	Declaration on the Rights of Indigenous Peoples
DSIR	Department of Scientific and Industrial Research
ed	edition, editor, edited by
EEZ	exclusive economic zone
EIA	Environmental impact assessment
EPA	Environmental Protection Authority
ERMA	Environmental Risk Management Authority
ERO	Education Review Office
EU	European Union
FAO	United Nations Food and Agriculture Organization
FOMA	Federation of Māori Authorities
FTTE	full-time teacher equivalent
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GM	genetic modification
GMO	genetically modified organism
GNS	Institute of Geological and Nuclear Sciences
HFA	Health Funding Authority
HPA	Heritage Protection Authority
HRC	Health Research Council

HSNO	Hazardous Substances and New Organisms Act 1996
IBSC	Institutional biological safety committee
ILO	International Labour Organization
IP	intellectual property
IPONZ	Intellectual Property Office of New Zealand
IRMP	iwi resource management plan
J	Justice (when used after a surname)
JMA	joint management agreement
LIAC	Library and Information Advisory Commission
ltd	limited
MAF	Ministry of Agriculture and Forestry
MED	Ministry of Economic Development
Medsafe	Medicines and Medical Devices Safety Authority
MES	Māori Engagement Strategy
MFAT	Ministry of Foreign Affairs and Trade
MFE	Ministry for the Environment
MKDOE	'Māori Knowledge and Development' output expense
MLS	Māori Language Strategy (Te Rautaki Reo Māori)
MORST	Ministry of Research, Science and Technology
MOU	memorandum of understanding
MPDS	Māori Provider Development Scheme
MPF	Māori Potential Fund
MQS	Māori Qualification Services
MS	manuscript
MSI	Ministry of Science and Innovation
MTS	Māori Television Service
NFU	National Film Unit
NGIA	Nursery and Garden Industry Association of New Zealand
NGO	non-governmental organisation
NIA	National Interest Analysis
NIWA	National Institute for Water and Atmospheric Research
NQF	National Qualifications Framework
NZBS	New Zealand Biodiversity Strategy
NZCA	New Zealand Conservation Authority
NZCA	*New Zealand Court of Appeal*
NZCER	New Zealand Council for Educational Research
NZEI	New Zealand Educational Institute
NZIPA	New Zealand Institute of Patent Attorneys
NZLR	*New Zealand Law Reports*
NZPD	*New Zealand Parliamentary Debates*
NZQA	New Zealand Qualifications Authority
OAG	Office of the Auditor General
OECD	Organisation for Economic Co-operation and Development
p, pp	page, pages

P	president of the Court of Appeal (when used after a surname)
PC	Privy Council
PCE	Parliamentary Commissioner for the Environment
PCT	Patent Cooperation Treaty
PHO	Public Health Organisation
PIC	prior informed consent
PVR	plant variety right
QC	Queen's Counsel
RHA	Regional Health Authority
RMA	Resource Management Act 1991
RMLR	Resource Management Law Reform project
RNA	ribo-nucleic acid
RS&T	research, science, and technology
RSNZ	Royal Society of New Zealand
s, ss	section, sections (of an Act of Parliament)
SCR	Supreme Court Reports
sec	section (of a book or report)
SOI	statement of issues
TCE	traditional cultural expression
TEC	Tertiary Education Commission
TK	traditional knowledge
TRIPS	Trade Related Aspects of Intellectual Property Rights Agreement
TSA	Tohunga Suppression Act 1907
TTIF	Transition Toi Iho Foundation
TVNZ	Television New Zealand
UMF	Unique Mānuka Factor
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	*United States Reports*
UPOV	International Union for the Protection of New Varieties of Plants
v	and
VMAG	Vision Mātauranga Advisory Group
WIPO	World Intellectual Property Organization
WIPO-IGC	World Intellectual Property Organization Intergovernmental Committee
WTO	World Trade Organization

'Wai' is a prefix used with Waitangi Tribunal claim numbers.

Unless otherwise stated, footnote references to claims, papers, and documents are to the Wai 262 record of inquiry, a full copy of which is available on request from the Waitangi Tribunal.

E kore e monehunehu te pūmahara
Mo ngā momo rangatira o neherā
Nā rātou i toro te nukuroa o te Moananui a Kiwa me Papa-tū-ā-nuku
Ko ngā tohu ō rātou tapuwae
I kakahutia i runga i te mata o te whenua
He taonga he tapu, he taonga he tapu, he taonga he tapu.

We cannot forget
the noble ones of times long past
who explored the unimaginable expanse of Kiwa's ocean
and settled her many lands.
For their footprints clothe these islands of ours
and their teachings are etched in the soil.
A sacred legacy, a treasured inheritance

IN.1 KUPE'S PEOPLE

Some say Kupe discovered these islands while hunting down an octopus belonging to his enemy Muturangi. He chased the octopus all the way from Hawaiki and cornered it at the top of the southern island. The fatal blow was delivered off the coast of Whakatū (Nelson) and the evidence of the titanic struggle between them is the 13-kilometre-long boulder bank encasing part of the Nelson coastline. Other traditions hold that his voyage was a deliberate search for islands to the south that had long been spoken of in Hawaiki, his homeland. As is the way of Polynesian traditions, these narratives have long since merged to provide a single memorable story combining high drama and valuable data. All traditions agree that Kupe sailed on a waka called *Matawhaorua* that he had built for the trip with the help of his nephew Hoturapa. The tree was felled and adzed at the base of a mountain called Hikurangi next to Awanuiarangi, a river in Hawaiki.[1]

Kupe did not travel alone. We know that his wife Kuramarotini and son Tuputupuwhenua travelled with him.[2] We also know Matiu and Makaro, who were Kupe and Kuramarotini's daughters (or nieces depending on which tradition is followed), were on board together with 15 others from his village of Hawaiki-rangi. But a larger crew was needed because *Matawhaorua* was a classical Polynesian open-ocean catamaran capable of carrying a complement of 25 people under sail or paddle, fully provisioned. It is said that at first Kupe had some difficulty filling the waka but he eventually found the remaining crew at Pikopikoiwhiti, a village in Hawaiki renowned for its ready supply of adventurers. Seven more were added from there. Some traditions say he travelled with a second canoe, *Tawhirirangi*, under the captainship of Te Ngake.[3]

Kupe may have left Hawaiki[4] around the time the pīpīwharauroa (shining cuckoo) make their annual flight south from the Polynesian tropics to lay their eggs in the nests of unsuspecting riroriro (grey warblers) in the New Zealand spring. It is more likely that he sailed a little later, in what we now call November, when the humpbacks, new calves in tow, pass both the Cooks and Tonga, and then travel down New Zealand's long western coast on their way to Antarctica for the annual summer krill feast. The stories hint that he followed these annual migrations for two reasons: first, because the pīpīwharauroa were clearly heading for land somewhere in the south – they are land birds and do not have webbed feet; and secondly, because the humpbacks were going in the same direction, and at a speed well within the chase capability of *Matawhaorua*. She could likely make 15 knots under sail, while the humpbacks cruised at three to four knots, regularly surfacing for air, and often breaking the surface in spectacular fashion. In Kupe's day, 500 years before the advent of European whaling, these enormous animals must have migrated in their thousands, perhaps tens of thousands. They would have been hard to miss.[5] The question was: where were they headed? And how far south?

Although *Matawhaorua* left from Pikopikoiwhiti, it is very unlikely that Kupe tacked south immediately. He would first have sailed to Rarotonga, his father's home island, and reprovisioned there for the final push south. The last leg of Kupe's voyage would have taken about three weeks, assuming (as we do) that it began in Rarotonga and there was

▲◄ Taranaki (Mt Egmont) and waka taua (war canoe), by George French Angas, 1846. The sea was considered an ancestor deity by Kupe's people.

◄ Humpback whale, Hawai'i. Kupe and other Polynesian navigators knew of the migratory patterns of whales.

no stopover in the Kermadecs. He would have steered a sou'west course, sailing across the face of the westerly that blows so consistently at that time of year between 30 and 40 degrees of latitude. This was the safest option because it ensured *Matawhaorua* would not be stranded in the southern land. She could return to Hawaiki on the same wind in due course if need be.

The waka first sighted land on the east coast of the northern island. Northern traditions say it was in the Tai Tokerau and the eastern tribes say it was in the Wairarapa. Tribal traditions can sometimes be a little parochial. Kuramarotini was the first to see the tell-tale stationary dull white convection cloud cover known to all Polynesians as the sign of a large forested land mass. The clouds would have been visible from 150 kilometres or more on a clear day in the open expanse of the South Pacific. Their height and length would have been greater than anything she had seen – ever. She famously cried out to the crew: 'He ao! He ao! He Ao-tea-roa!'(A cloud! A cloud! A long white cloud!) And this, as we know, would in time become the name of the new land – Aotearoa – although just when this adoption took place is a matter of ongoing controversy.[6]

Pīpīwharauroa (shining cuckoo). Pīpīwharauroa fly annually from Polynesia to New Zealand to lay their eggs. Bird movements over water were important to Polynesian ocean-going navigation.

Before long, Kupe, Kuramarotini, and the crew of *Matawhaorua* had named half the coastline of the

Timing of Polynesian Arrival

There is considerable debate about when the first Polynesians arrived on the shores of Aotearoa, who they were, and where they came from. Many, but not all, tribes say Kupe was the first. In truth there were probably many Kupes from a number of the islands in eastern Polynesia.

Tohunga (scholars) of te ao Māori – the traditional Māori world – also disagree about how many generations ago the first explorers arrived. They recite and debate the relevant whakapapa, weaving the tātai (genealogy) back and forth until the family lines come to resemble the structure of the DNA that they are designed to convey. Those who belong to the west coast tradition tend to argue that the first explorer was Kupe, while those of the east coast tradition more often argue that it was Whātonga and his grandfather Toi Te Huatahi. Even within those traditions, one can discern some albeit fainter voices that maintain there were already Polynesians in residence when both Kupe and Whatonga arrived, irrespective of who was first.

The anthropologists and archaeologists take a different view again. They say the first arrival occurred somewhere between AD 800 and 1300, when people came from somewhere in eastern Polynesia – probably the Cook Islands or French Polynesia. These Polynesians had been resident in the Pacific for around 6,000 years, and had explored and 'charted' the Pacific's vast expanse completely. Anthropologist Jared Diamond describes the Polynesian exploration of the Pacific as one of humanity's greatest feats. The long journey south to the temperate thirty-ninth parallel must surely have been the most challenging leg of all. The supreme difficulty of the voyage would have been mitigated only by the relative size of the target – at least compared to any other Polynesian land mass. But the perspective of anthropology is not the focus here. The sciences can tell us much, but they cannot convey the human drama of the Polynesian migration in quite the personal way that Māori tradition does.

The Legend of the Voyage to New Zealand, by Kennet Watkins, 1912. The title refers to the legend of the Tainui and Arawa canoes, both of which reached Aotearoa when the pōhutukawa was in bloom.

northern island and much of the north coast of the southern island. The names stuck – names that commemorate Kupe's pursuit of Muturangi's octopus such as Te Mana o Kupe (Mana Island), Matiu and Makaro (Somes and Ward islands), Te Tangihanga a Kupe (Barrett's Reef), as well as names that refer to his northern explorations: Kohukohu, Pouahi, Maungataniwha, and so on. The islands themselves came to be called Te Ika ā Māui[7] for the north and Te Waipounamu[8] for the south, though these names cannot be definitively attributed to Kupe. They probably came later.

After staying for perhaps 20 years, Kupe's thoughts turned to home. But before departing from the great river harbour on the north-west of the northern island, Kupe sought to express his commitment to this new land. As required by his teachings, he did this by making a father's sacrifice to ensure that the mauri (life essence) of his whakapapa (descent line) would remain in Aotearoa even though he would not. Kupe pushed his son Tuputupuwhenua into a large freshwater spring called Te Puna-o-te-ao-mārama – the spring of enlightenment – on the north side of the harbour, where he was drowned. Tuputupuwhenua became the guardian spirit of the spring and remains there to this day, according to northern tradition.

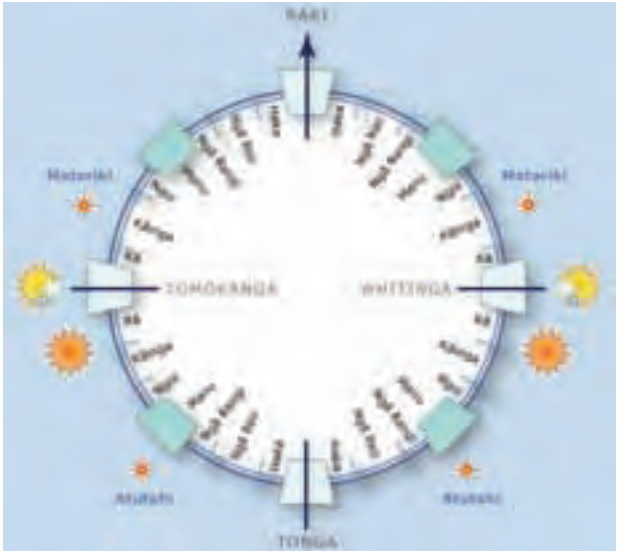
In his final farewell to Aotearoa, Kupe proclaimed:

> *Hei konei rā, e Te Puna-o-te-ao-mārama, ka hokianga nui ake nei tēnei, e kore anō e hokianga nui mai.*
>
> *Farewell Spring of Enlightenment, I make the great return journey now to my homeland, and there shall be no great returning to this new land for me.*

And the harbour has been called Hokianga ever since.

Although Kupe was never to return to Aotearoa, we know that he and *Matawhaorua* arrived safely back in Hawaiki, because *Matawhaorua* made at least one repeat trip to the new land. Some years later, *Matawhaorua* was re-adzed and refitted under the leadership of Nukutawhiti, Kupe's grandson. She was renamed *Ngātokimatawhaorua* – literally the re-adzed *Matawhaorua*. But for

▶ Te kapehu whetū (the Māori star compass) uses different whare (houses) to identify the areas within an ocean-going waka's radius. These reflect the rising and setting of the sun, moon, and stars, enabling the navigator to set and maintain a course.



▼ The pōhutukawa Karewa at Kāwhia, 1920. Said to be the tree to which the waka *Tainui* was tied on reaching its final destination. Following Kupe, *Tainui* was one of a number of ocean-going waka that journeyed from the tropics to New Zealand.

Nukutawhiti, the trip was no longer burdened with undue risk and guesswork. He now had the star path for the journey memorised by Kupe on his first voyage and handed down intact. This time Nukutawhiti travelled for the express purpose of settling Kupe's islands, so he remodelled *Ngātokimatawhaorua* to take more passengers.

In the years that followed, more than 20 waka would make the journey, bringing hundreds of migrants from the tropics to the very different climate of these islands set right at the hinge of the southern hemisphere's oceanic weather systems. These are the familiar waka names of modern Māori culture: *Tainui* under the leadership of Hoturoa; *Te Arawa* under Tamatekapua; *Mātaatua* under Toroa; *Tākitimu* under Tamateaarikinui; and so on. They brought kūmara, taro, yams and gourds, kiore (Pacific rat), and kurī (Polynesian dog). But it was not just Hawaikian plants and animals that came with them. These people brought their Hawaikian culture, science, and systems of knowledge.

This was a culture at home on land or sea. Its defining principle, and its life blood, was kinship – the value through which the Hawaikians expressed relationships with the elements of the physical world, the spiritual world, and each other. The sea was not an impersonal thing, but an ancestor deity. The dots of land on which the people lived were a manifestation of the constant tension between the deities, or, to some, deities in their own right. Kinship was the revolving door between the human, physical, and spiritual realms. This culture had its own creation theories, its own science and technology, its own bodies of sacred and profane knowledge. These people had their own ways of producing and distributing wealth, and of maintaining social order. They emphasised individual responsibility to the collective at the expense of individual rights, yet they greatly valued individual reputation and standing. They enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) they also emphasised human responsibility to nurture and care for it (known in te ao Māori as kaitiakitanga).

All of these ideas, and much more besides, the Hawaikians imported to this new land of unparalleled abundance. Hawaikian ways would have a profound impact on the land, and its flora and fauna. The rapid extinction of megafauna such as the moa and the equally rapid loss of forest cover in the early years of settlement are irrefutable evidence that not all impacts were positive.

At some point, Hawaikian culture became Māori culture. It is impossible now, looking back through a lens 40 generations thick, to identify the transition point with any precision. But as the whakapapa on the new whenua (land) lengthened, the deep values of Hawaiki came to be expressed in Aotearoa terms. Old technologies were adapted to local conditions and new ones were invented. For example, new ways had to be found to grow and store the canoe crops, kūmara and taro, because the cooler

The koru of the kaponga (silver tree fern) unfurling.

climate meant only one crop could be harvested each year and then only with careful husbandry. The Hawaikian culture of obsessive cultivation changed – in fact to some extent retro-evolved into a partial and seasonally enforced hunter-gatherer culture. New names were found for plants and animals so unfamiliar that the old names from Hawaiki were no longer appropriate – kiwi, tūī, pōhutukawa, kōwhai, and so on. New explanations were needed for why each species had its own unique characteristics and how, through the kinship principle, they related to each other and their human observers. In the creative arts, the great forests gave birth to the highly distinctive design forms of the new Māori culture. Intricately carved ancestral houses and war canoes were made possible by the height of the tōtara tree and the beauty of its wood for carving; the dramatic shift to the unique Māori spiral design in painting, carving, sculpting, and tattooing was inspired by the pītau or koru of the ubiquitous fern.

Even the gods changed subtly, with Papa-tū-ā-nuku – the female Earth – taking a much stronger role. Likewise, her son Tāne-māhuta – the male personification of the primordial forest ecosystem – assumed the senior position among his siblings in most tribes. These changes reflected the migration from small islands to the new, larger ones in which land and forest had a much more powerful presence. Slowly, generation upon generation, as the people reacted to their new environment and the environment responded to its new residents, something distinctive began to take shape in the space between them. This we have come to know as 'mātauranga Māori' – the unique Māori way of viewing themselves and the world, which encompasses (among other things) Māori traditional knowledge and culture. Perhaps it was when the people and the environment reached a point of equilibrium that the former felt truly justified in calling themselves tāngata whenua (people of the land) and their mātauranga could credibly be called Māori. Or, to put this another way, it was through interaction with the environment that Hawaikian culture became Māori culture.

◀ Te Toki a Tāpiri. This taurapa (canoe sternpost) is carved in the pītau (spiral) style. The development of Māori arts was greatly influenced by the new flora and fauna of Aotearoa.

All of this happened in the blink of an anthropological eye. Polynesian culture was already new in human history, at probably 6,000 years. Māori culture, created on the last of the world's habitable land masses to be settled, is the newest of the new – probably no more than 600 years old as at today. The speed with which the Hawaikians adapted to Aotearoa, and the depth and beauty of the mātauranga Māori system that their Māori descendants evolved, were quite extraordinary.

The Wai 262 claims are about mātauranga Māori. More specifically, they are about the relationship between the mātauranga Māori of Kupe's people and the Western world view of the second people who arrived 500 years after them.

IN.2 Cook's People

The second people also 'discovered' and settled these islands in more than one wave. Their stories of discovery and settlement are more widely known in modern New Zealand, partly because they belonged to a culture that delighted in creating a permanent written record of events as their authors saw them, but also because these second people eventually displaced those who had arrived before. Physical displacement carried with it the subrogation of the first people's own narratives of discovery and settlement: history, as they say, is written by the victors.

Perhaps the difference between the Hawaikians and the Europeans can best be seen in the way that each approached the task of finding Aotearoa. For the former, their method was to embed their navigational system in the natural rhythms around them – the rise and fall of the stars, the run of the ocean, the prevailing winds, the patterns of marine fauna. The Europeans, however, favoured the careful calculation of abstract lines on a paper representation of the globe. For them, the answer lay in transcending the natural rhythms of the planet. Both systems worked.

In 1642, Abel Janszoon Tasman, a master of the Dutch East India Company, set sail with an expedition of two ships – the *Heemskerck* and *Zeehaen* – from Batavia, the main administrative centre of the Netherlands East Indies that we know today as Jakarta in Indonesia. Tasman's instructions were to find the unknown southern land, Terra Australis Incognita, presumed to exist as a counterbalance to the great land mass of the Northern Hemisphere. Between them, his ships carried 110 men and 12 months' food, water, and equipment. The expedition sailed for Mauritius on 14 August and, after reprovisioning there, struck out on a south-east heading on 8 October. When the weather became too rough at 49 degrees south, Tasman headed north to 44 degrees and then struck east again. This put him on a collision course with two large land masses. The first, at 147 degrees of longitude east, would eventually be called Tasmania, although Tasman himself preferred Anthonij Van Diemens Landt. He stopped there briefly on 25 November before maintaining his easterly course. Some 2,100 kilometres further on, at 167 degrees of longitude east, was Te Waipounamu – the second land mass. The long coastline

Abel Tasman's ships the *Zeehaen* and the *Heemskerck*, close to the Three Kings Islands in December 1642. Tasman encountered Tasmania and New Zealand after setting out to find the large southern landmass that was presumed to balance the great continents of the Northern Hemisphere.

of this island stretched from 47 degrees of latitude south to 41 degrees south – a length of about 800 kilometres.

On 13 December 1642, the expedition sighted land somewhere near Punakaiki on the western coast of Te Waipounamu, and followed the coastline north. At Mohua (now known as Golden Bay), the expedition came into contact with Ngāti Tūmatakōkiri. The Dutch attempted to trade goods, but the Māori obviously interpreted the Europeans' presence or actions as a threat. A canoe carrying 13 men rammed a cockboat from the *Zeehaen*, and the quartermaster was thrown overboard. In the ensuing fracas three sailors were killed and a fourth mortally wounded. The Dutch fired on the Ngāti Tūmatakōkiri canoes with cannon and musket, hitting one man at least, though it is not known whether he was killed. Tasman remained in Mohua just long enough to name the place Murderers' Bay as a reminder of this 'detestable deed' of its inhabitants.[9]

The expedition weighed anchor and sailed east-north-east, exploring Cook Strait for a week and naming various places along the western coast of the northern island known to Māori as Te Ika ā Māui. They then came into contact with another warlike group of Māori men (probably Ngāti Kurī) at the islands of Manawatāwhi offshore from Cape Reinga. Tasman named these islands the Three Kings. There, a boat was dispatched to find fresh water, but it was showered with rocks from the cliffs above by well-armed fighting men. The boat retreated and the search was abandoned. On 5 January 1643, 23 days after first sighting the coast of Te Waipounamu, the *Heemskerck* and *Zeehaen* struck east again into the Pacific.

Assuming that he had discovered a single land mass, Tasman dubbed these beautiful islands with their angry inhabitants Staten Landt. The name Nieuw-Zeeland (in Latin, Zeelandia Nova, after the Dutch province of Zeeland), was introduced by Dutch cartographers at a later date. It was intended as a twin for Hollandia Nova – better known as Australia. 'New Holland' didn't take, but 'New Zealand' did.

It would be another 127 years before the next visit from Europe. In the intervening years, the Netherlands' maritime ascendancy waned to be replaced by that of the British empire. British primacy in the eighteenth and nineteenth centuries was founded on maritime trade and the world's mightiest navy. Terra Australis, and the potential wealth, power, and empire that its exploration and settlement might bring, beckoned the British as it had the Dutch before them. The example of the vast wealth found in the Americas no doubt loomed large. So did the enthusiasm with which the French pushed into the Pacific in 1768 in a bid to forget their humiliating defeat at the hands of the British in the Seven Years' War. But the thirst was not just for these material and geopolitical ends. There was also the call of science.

Lieutenant James Cook, a highly experienced naval mariner, would lead the first British expedition to the south and Terra Australis. To highlight its twin geopolitical and scientific aims, the expedition would be a joint venture between the Royal Society and the Royal Navy, and Cook's purpose would be to refind, re-explore, and claim the continent found by Tasman for the British Crown. According to his secret instructions, he would be diverted on his way south to perform a supplementary task in the cause of science. The expedition would pause at the equator to observe the transit of Venus across the face of the sun – an event expected to occur on 3 June 1769. By triangulation with measurements made at the previous transit in 1761, Cook's observation would permit the first reasonably accurate calculation of the distance between the earth and the sun.

Cook was given command of the *Endeavour*, a sturdy three-masted square-rigged collier of modest size, with a bluff bow and flat bottom. This design made her slow – a top speed of four knots – but it maximised the volume of her hold and she could be run aground without risk. These attributes suited her new role as an exploratory vessel perfectly. On board was an extraordinary company of contemporary British scientists: Joseph Banks, a botanist and fellow of the Royal Society whose money helped fund the adventure; Daniel Solander, a Swedish naturalist and also fellow of the Society; Charles Green, an astronomer and former assistant to the Astronomer Royal; Sydney Parkinson, who had once been Banks's botanical

▶ Attack on Abel Tasman's ships in Tasman Bay in 1642, by Isaac Gilsemans. The waka in the foreground and the two sailing ships behind are surrounded by other waka, one with a triangular sail.

Captain James Cook, circa 1779. Cook voyaged to the Pacific with a group of scientists to track the transit of Venus at Tahiti in 1769 before heading further south to New Zealand.

draughtsman; and Herman Sporing, a watchmaker turned naturalist. Together with Cook, these men would construct a meticulous scientific record of the expedition.

On 6 October 1769, having travelled halfway around the globe, the *Endeavour* appeared on the horizon 32 kilometres off the coast of Tūranganui-a-Kiwa, the fertile lands on the east coast of the northern island that, ironically, Cook called Poverty Bay. The vessel may have been slow by Polynesian standards, but she was bigger and more complex than anything local Māori had seen. They thought she must be a floating island. On board the *Endeavour*, celebrations broke out. The chalky headland known to the local iwi as Te Kurī-a-Paoa was renamed Young Nick's Head to commemorate its first sighting by the surgeon's assistant. Nicholas Young's prize was a gallon of rum.

It seems trite to say now, at seven generations' remove, that nothing would ever be the same again in Aotearoa. But it is a powerful truth nonetheless.

As with the Hawaikians, who travelled with six millennia of tradition, these Britons brought their culture, science, and knowledge systems to Aotearoa. With Cook came the single omnipotent God of protestant Christianity and the extraordinary theological idea of everlasting life through personal redemption. Most importantly, the words of this God came in a book – a physical record of prayers, songs, and stories handed by Him to the English! In this way, the English God brought literacy, and in time this God and His Book would spread throughout Aotearoa like a forest fire. But there were philosophical ideas beyond the religious: the democratic ideals of the classical Greeks; the Justinian code of the Romans; and the Enlightenment concepts of empirical science and deductive reasoning. The English brought their own home-grown legal system: the common law, individual property rights, the prerogatives of the sovereign, and the separate rights of the ordinary citizen. Cook also brought, in the very existence of the *Endeavour*, the navigational science and the shipbuilding technology employed by the greatest maritime power in the world. He brought the science and technology of the first phase of the industrial revolution that enabled the mass production of commodities for the first time in human history. He brought iron and textiles – and used them from the outset in commerce with Kupe's people. He brought weapons of unimaginable destructive force – which were deployed almost immediately on the Māori of Tūranganui-a-Kiwa. And he probably brought disease.

There can be no denying that Cook was the ambassador of a culture that felt it had a manifest destiny. It had a duty to bring God and civilisation to the unenlightened. In the process, those who belonged to the civilising culture were entitled to reap the rich personal rewards of their mission. In the ensuing century, during which British colonisation engulfed and displaced Kupe's people, this twin sense of duty and right intensified with the rise in the empire's fortunes. But it would be quite wrong to suggest that Cook's

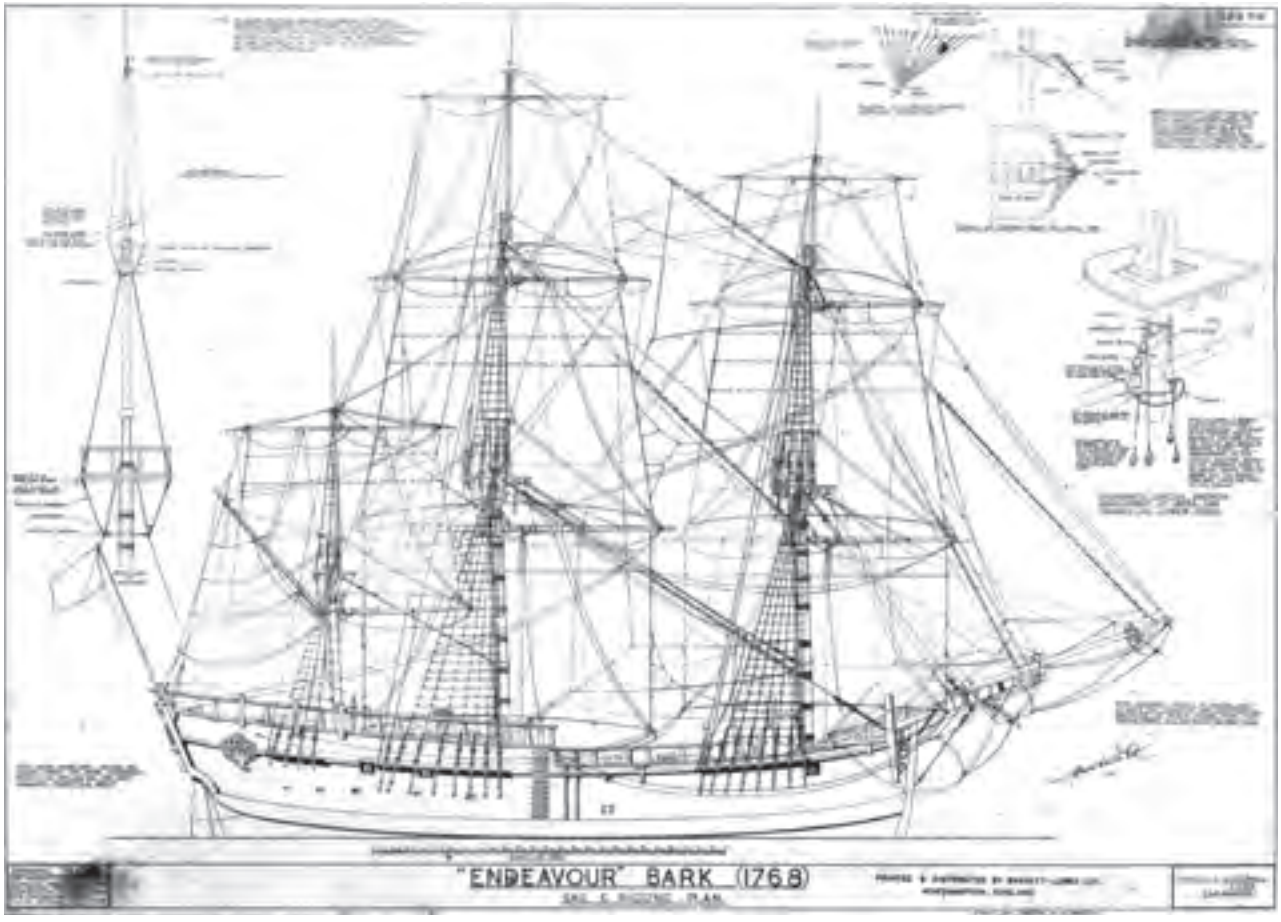
Tuki's map, 1793. This is a copy of the oldest known Māori map, drawn in chalk on the floor of Government House by the rangatira Tuki Tahua whilst a 'guest' of Lieutenant-Governor King on Norfolk Island. The map's purpose is not the rigorous spatial accuracy of the charts of New Zealand made by Captain Cook 20 years earlier. Rather, it captures a rich tapestry of information based on whanaungatanga (relationships) from the perspective of Māori from the north of New Zealand.

Franz Visscher's chart of the lands encountered by Abel Tasman during his voyages in the south-west Pacific from 1642 to 1644. They include part of the coast of 'Nova Zeelandia', which at the time Tasman and his Dutch East India Company masters believed could be part of the hypothetical great southern land. It marks the first European naming of the New Zealand landscape.

voyage was undertaken for purely self-serving motives. The record is clear that the British were acutely aware of the risks to aboriginal peoples in the growth of empire. James Douglas, Earl of Morton and president of the Royal Society, made the point eloquently in his instructions to Cook. Indigenous peoples, he said, were 'human creatures, the work of the same omnipotent Author, equally under his care with the most polished European . . . No European nation has the right to occupy any part of their country . . . without their voluntary consent.'[10]

This strain of moral enlightenment, the same strain that fuelled William Wilberforce and the Abolitionists, was powerfully present in the British colonisation of these islands. It is reflected in the great influence of the Church Missionary Society in Aotearoa up until 1840. But it can be seen most clearly in the Treaty of Waitangi itself – in the language of royal protection in its preamble, and in the explicit guarantees of Māori authority and property in its articles.

The British who followed Cook wanted Aotearoa to



Plan of the *Endeavour*, 1768. When the *Endeavour* arrived in Tūranga (Poverty Bay) in 1769, it gave local Māori a first glimpse of the technologies which would in time transform many aspects of their lives.

be a 'Britain of the South'. And they set about replicating the economy, institutions, and place names of 'home' in this new place. The colony became a sheep farm; its government a scale model of Westminster; its highest court remained at 14 Downing Street; and what became its largest city was named after Lord Auckland, Governor-General of India. Māori remained in the picture – but only just. Despite the possibilities of the Treaty, by the close of the nineteenth century Māori were living almost entirely at the margins. Official statistics recorded that by 1896 the Māori population had fallen from around 100,000 when Cook arrived to 42,000, and in 1910 only 12.2 per cent of the land remained in Māori hands. Along with the unruly and unproductive indigenous bush, they were not expected to survive much past the turn of the twentieth century. Aotearoa became 'New Zealand' – even for Māori.

But Cook's people did not stay British. They succumbed to the whenua's slow seduction just as surely as Kupe's people had. The transplanted British institutions and ideas took root in the soil, but the soil changed them. The 'tyranny of distance' from British influence and the unique character of the land changed them. Perhaps the resilience of the environment and the stubborn refusal

Details of waka from Tolaga and Bream Bays, 1833. As well as the advanced navigational knowledge inherited from the Hawaikians who first arrived in New Zealand, Māori were skilled boat-builders. No waka were as large as European ships such as the *Endeavour*, but they may have been faster and more agile.

Captain Cook landing in the Bay of Islands, by LJ Steel and Kennett Watkins, 1890. Cook brought with him new ideas and technology. In this painting, Cook is shown explaining to a Māori chief the difference between small shot for shooting birds and bullets for shooting people.

A young Māori man standing inside a church, a bible in his right hand, by Richard Taylor, 1840s. Māori participated actively in the early spread of the new Christian religion brought by the missionaries.

of Kupe's people to lie down and die also contributed. Certainly their rejection of Europe's stifling social stratification did. Whatever the multiple causes, it is clear that slowly the British became Pākehā, native sons and daughters of these soils in their own right – a distinct people. And though comfortingly familiar, the British, their ideas, and their institutions eventually became 'other'.

While mātauranga Pākehā evolved and thrived, mātauranga Māori survived outside of the growing national consciousness, out of sight of official disapproval. Māori would be admitted to the Pākehā house, but only if they left their mātauranga at the door. It was almost the end of the twentieth century before those old attitudes would be formally rejected by the State. Much of incalculable value was lost, and it is a tribute to the caretakers of mātauranga Māori over the generations since Cook that it survived in any form at all.

IN.2.1 A crossroads?

So where do we go from here? Even after all this time, relations between Māori and non-Māori New Zealanders continue to test our collective comfort zones. We still

Missionary meeting, Kaitaia, 1856. A white-haired Māori chief places a coin in a collection basket while the Reverend William Puckey and the Reverend Joseph Matthews look on. The Church Missionary Society was influential in Aotearoa before 1840 and in the early colonial period.

seem to bear the burden of mutually felt attitudes from our colonial past. Pākehā, and now other New Zealanders, fear that Māori will acquire undeserved privileges at their expense. Some (though by no means all) would prefer that law and policy was completely blind to any culture that did not reflect the Western liberal values that travelled here with Cook.

Māori New Zealanders, on the other hand, are fearful that their unique place as first people will not be respected by other New Zealanders. They fear that the majority would prefer Māori were simply assimilated into an imagined utopian 'mainstream'. Some Māori (though again, by no means all) argue for an entirely separate Māori future in which the non-Māori majority no longer has a veto over their aspirations.

We sometimes forget that between these two poles there is in fact a much greater degree of goodwill than New Zealanders give themselves credit for. Most non-Māori New Zealanders like the fact that Māori identity and culture is now a vital aspect of New Zealand identity and culture. In this way, we reject the old colonial label of Little Britain in the South Pacific and express our unique heritage. And most Māori New Zealanders accept (perhaps even celebrate) the fact that their separate identity is now respected and expressed within New Zealand's mainstream public institutions, rather than remaining in separate wholly Māori institutions sitting at the margins of national life. Such a large area of common ground can only have arisen from a solid basis of mutual respect.

This respect between Māori and Pākehā made possible the watershed Treaty settlements process of the last 25 years. That process has been both a cause and a symptom of deep changes in our national make-up. It has been less than perfect in places and it remains to be seen whether

Treaty negotiator and leader Sir Ngatata Love (left) and Prime Minister John Key hongi at a ceremony on 30 June 2009, after Parliament passed legislation settling the historical Treaty claims of Taranaki Whanui ki te Upoko o te Ika in the Wellington region.

settlements will be big enough and adaptable enough to deliver the same optimism in the time of our mokopuna as it has for this current generation. It has, after all, been a very human experiment and it would be strange indeed if we did not feel a measure of fear for its future success. Yet the national consensus over the need to address the wounds of the past is so strong that few would say the risk has not been worth taking.

Nation building is nothing if not a constant work in progress and after a generation of hard work, New Zealand is beginning yet another transition. New Zealanders are unconsciously and organically building a new and unique national identity. It will, we suggest, come to be based on two things: the extraordinary natural beauty and wealth of these islands, and the partnership between our two founding cultures. The first basis needs no explanation. The second basis is the human dimension of our identity. Māori culture locates us in the Pacific and gives us our deep roots here. Pākehā culture locates us at the same time in the West and gives us our right to the West's heritage even though, in physical terms at least, the West could hardly be further away. Bicultural fusion gives our vibrant multicultural reality a solid core with enough gravity to pull later immigrant cultures into orbit around its vision, values, and expectations. A nation cannot sustain itself without that solid core.

Whether that transition succeeds will depend partly on another development. Over the next decade or so, the Crown–Māori relationship, still currently fixed on Māori grievances, must shift to a less negative and more future-focused relationship at all levels. This change is expected and intended. It will reflect growing Māori confidence, driven from continued demographic change and settlement-based tribal economic renewal. It will also provide a more positive platform for jointly addressing current Māori social problems.

Will it be possible to normalise Crown–Māori relations as the architects of the Treaty settlement process intended? What, for that matter, might 'normal' look like?

New Zealand is unique among the post-colonial countries (like Australia, Canada, and the United States) with which we are most often compared in that our Parliament, our courts, and the Waitangi Tribunal conceptualise the relationship between the Crown (as proxy for the State)

and Māori as a partnership.[11] Other countries emphasise the great power of the State and the relative powerlessness of their indigenous peoples by placing state fiduciary[12] or trust[13] obligations at the centre of domestic indigenous rights law. Not so New Zealand. Here we emphasise, through the partnership symbol, that our indigenous law is built on an original Treaty consensus between formal equals. We do of course have our own protective principles that acknowledge the power asymmetry between Māori and the British empire in 1840[14] and between Māori and the post-colonial State today.[15] But, while protecting the interests of a less powerful group is an objective of our Treaty law, it is not the framework. Partnership is New Zealand's framework because of our history since 1840 and the important role Māori play in contemporary national life. There is no sign that this role will diminish. On the contrary, the signs are that it will grow and the partnership framework will endure. It is evolving as New Zealand evolves. There are signs it is changing from the familiar late-twentieth century partnership built on the notion that the perpetrator's successor must pay the victim's successor for the original colonial sin, into a twenty-first century relationship of mutual advantage in which, through joint and agreed action, both sides end up better off than they were before they started. This is the Treaty of Waitangi beyond grievance.

Are we ready yet to begin work on this new more normalised relationship? Are we ready yet to perfect this Treaty partnership? Stripped of all its baggage, that is the real challenge posed by the Wai 262 claim.

The Treaty of Waitangi Act 1975. The Act established the Waitangi Tribunal and empowered it to inquire into claims of Treaty breach and to make recommendations to the Crown on the practical application of the Treaty.

IN.2.2 Wai 262

The Wai 262 claim is a label under which certain claims of six iwi are brought. The iwi are Ngāti Wai of the Whangārei area; Ngāti Kurī of the Parengarenga and Te Rerenga Wairua areas; Te Rarawa of North Hokianga; Ngāti Porou of the East Coast; Ngāti Kahungunu of Hawke's Bay and Wairarapa; and Ngāti Koata of the northern South Island.

The Wai 262 claims are not the orthodox territorial claims in which iwi negotiate with the Crown to reach full and final settlements. Rather, these claims ask novel questions about who owns or controls three things:

- mātauranga Māori (which, as we said earlier, refers to the Māori world view, including traditional culture and knowledge);
- the tangible products of mātauranga Māori – traditional artistic and cultural expressions that we will call taonga works; and
- the things that are important contributors to mātauranga Māori such as the unique characteristics of indigenous flora and fauna – what we call taonga species – and the natural environment of this country more generally.

In essence, the Wai 262 claim is really about who (if anyone) owns or controls Māori culture and identity. The claimants fear that in complex, modern, and globalised New Zealand, the taonga that they say are integral to Māori culture and identity are subject to too many outsider rights and too few Māori rights. They say their language, symbols, stories, songs, and dances have been commodified by people who have no traditional claim to them. They say the native flora and fauna upon which their culture and identity are built have been controlled, modified, and privatised by people, companies, or government agencies who have no affinity with those things, and they complain that Māori now must seek Crown permission even to gain access to or use them for cultural

Haana Murray (right) and her daughter, Merereina Uruamo, at a Tribunal site visit to Parengarenga Harbour, June 1998.

purposes. The claimants say they have no control over the physical and spiritual well-being of the lands and waters in their traditional territories. They say that their traditional healing practices were actively suppressed by the Tohunga Suppression Act and the Crown still offers them no real support. They say the Crown has taken direct ownership and control of mātauranga Māori through its various agencies, and Māori have been excluded.

It will be appreciated therefore that our inquiry was not just novel but very broad. It covered areas of government and private sector activity from intellectual property rights, including gene-based patents, to bioprospecting, genetic modification, the administration of the conservation estate, local government and environmental regulation, traditional Māori systems of health and healing, and te reo Māori. The inquiry also covered all government activity in which the Crown controlled mātauranga Māori. Within this rubric were agencies operating in the areas of arts, culture, heritage, broadcasting, education, and science. And it even explored the role Māori should play in the process by which New Zealand enters into international treaty commitments.

Thus, although there were six claimant iwi, in truth all iwi have an interest in the Wai 262 claim, and it is important that the claim be seen as brought by the six claimant iwi for themselves and for all other iwi.

The Crown was, of course, the respondent in all claims, but as the foregoing list indicates, we did not hear only from core Crown agencies. We heard also from independent Crown agencies such as the New Zealand Qualifications Authority, the Museum of New Zealand Te Papa Tongarewa (Te Papa), and the like; Crown-owned companies such as Television New Zealand, Crown research institutes (all but one of them, as it turned out), and representatives of the university system.

In fact, ours was the Waitangi Tribunal's first whole-of-government inquiry. This reminded us that the claimants' issue categories did not match the work boundaries separating government or government-related agencies. For example, the claimants' concerns in respect of the protection of their traditional artistic or taonga works cross mandate demarcation lines between the Ministry of Economic Development and the Intellectual Property Office of New Zealand, the Ministry of Culture and Heritage, Archives New Zealand, Te Papa, private and state-owned broadcasters, the Ministry of Education, Creative New Zealand, and Te Puni Kōkiri. If the Crown is to make useful policy responses to these concerns there will need to be co-ordination between agencies that do not often work together. We will address this co-ordination theme in chapters 2, 6, and 7.

The breadth and novelty of the claim also gave rise to extensive individual and private sector involvement. We heard from scientists, teachers, and artists, and such varied organisations as Horticulture New Zealand, the Nursery and Garden Industry Association, the Institute of Patent Attorneys, Genesis Research and Development, the Designers' Institute of New Zealand, the Federation of Māori Authorities, and many more.

Engagement from so many private sector interests confirmed that this claim affects all New Zealanders, and that there are other rights and interests to be borne in mind beyond those contained within the Crown–Māori partnership. Being so mindful, we have tried wherever

possible to find ways to avoid conflict between Māori and other interests. And if avoidance has not been possible, then we have looked for mechanisms to manage the conflict transparently, honestly, and efficiently. Our recommendations in chapters 1, 2, and 3 particularly reflect these objectives.

If claimant argument had a consistent theme, it was that they felt frozen out of the contest for consideration of their needs at times when, in their view, legal or policy decisions threatened their taonga. They said the interests of kaitiaki were either invisible to those with the power, or so diluted that they were easily overpowered by other considerations. Thus, the claimants said when copyright owners published taonga works, they could disregard any kaitiaki concerns, and when patent owners developed products using mātauranga Māori or taonga species, kaitiaki had no ability to intervene. Similarly, the claimants argued, conservation trumped kaitiakitanga in the administration of the conservation estate and orthodox medicine trumped rongoā in Māori health strategies.

As will be seen in the chapters to follow, we do not always agree with the way the claimants framed this problem, but where we do, we look for ways in which the priorities of kaitiaki can be relocated from the margins of legal or policy discourse to the centre, where they can be properly and transparently weighed against other considerations. Sometimes our recommendations are procedural – a simple requirement on the Crown to notify or consult with kaitiaki; sometimes we recommend that new substantive standards be introduced – for example, positive obligations on Crown agencies to explore partnership opportunities with kaitiaki; and sometimes we recommend statutory decision-makers should change – whether by vesting power directly in kaitiaki in some cases or by the creation of new partnership mechanisms.

In all cases, the innovations we recommend are designed to express the new generation of Treaty partnership in which Māori have a meaningful voice in the ongoing fate of their taonga, and the partnership itself is not static but is being constantly rebalanced.

That brings us to what this report is not. It is not a review of New Zealand's current constitutional arrangements or the place of the Treaty of Waitangi in those arrangements. Some of our recommendations will, if taken up, lead to greater Māori decision-making power or influence over mātauranga Māori issues. That is their point. But we do not see it as our role to consider issues beyond those put on the table by the claimants either expressly or by necessary implication. The broader question of constitutional arrangements is for another forum at another time.

In our introduction to *Te Taumata Tuarua*, we describe in some detail the history of the claim, the proceedings of our inquiry, and some methodological issues relating to the report. That account is absent from *Te Taumata Tuatahi*, but otherwise the two levels of the report proceed in the following order.

In chapter 1, we consider the question of the Māori interest in taonga works – the unique artistic and intellectual expressions of te ao Māori that include the work of weavers, carvers, tohunga tā moko, writers, musicians, and others – and their associated mātauranga Māori. We also explore the development and nature of New Zealand's intellectual property law – particularly copyright and trade marks – and consider whether the system accommodates the interests of kaitiaki of taonga works and mātauranga Māori. We discuss how conflicts between the interests of kaitiaki and of others can be balanced and resolved, and recommend a set of reforms designed to strengthen protections for kaitiaki in accordance with the principles of the Treaty of Waitangi without unduly interfering in the interests of other right holders.

In chapter 2, we turn to the Māori interest in the genetic and biological resources of taonga species – the flora and fauna with which Māori have developed intimate and multifaceted relationships over 40 or so generations. These species, and their associated mātauranga Māori, are now of increasing interest to scientists and researchers in New Zealand and elsewhere, and the claimants were concerned that their relationships with the species would be damaged or undermined, or just treated as irrelevant. The chapter focuses on three related subject areas – bioprospecting, genetic modification, and intellectual property (particularly patents and plant variety rights) – and we recommend a set of reforms applicable to each of them. As for taonga works, these reforms are designed to balance the interests of kaitiaki with other right holders in accordance with the principles of the Treaty.

Kōwhaiwhai and painted wood figures on the rafters and ridge pole of Tamatekapua meeting house at Ōhinemutu. Chapter 1 of this report examines the Māori interest in taonga works such as kōwhaiwhai.

Henry the tuatara, Southland Museum, Invercargill. Henry is 111 years old. Chapter 2 considers the Māori interest in the genetic and biological resources of taonga species.

In chapters 3 and 4, we consider Māori interests in the environment. These, of course, centre around relationships between kaitiaki and the various taonga – landforms, waterways, plants, wildlife, and so on – among which Māori culture evolved. Chapter 3 concerns those aspects of the environment that are controlled by the Resource Management Act. There, we recommend reforms that aim to better protect kaitiaki interests in accordance with the Treaty, while also acknowledging that those interests must be appropriately balanced alongside others as part of any decision-making process.

In chapter 4, our focus is on those aspects of the environment that the Department of Conservation manages for conservation purposes – including land, flora and fauna, and marine reserves. In this chapter, we also recommend reforms aimed at better protecting kaitiaki interests. In doing so, we acknowledge that the overriding interests are those of the environment.

In chapter 5, in response to claimant concern principally about the vitality of tribal dialects, we consider government support for te reo Māori generally. We particularly examine the work of agencies mainly responsible for the Crown's Māori Language Strategy, Te Puni Kōkiri, and the Ministry of Education. In carrying out this assessment we necessarily first consider the current health of te reo. We recommend far-reaching reforms that reflect the near-crisis we identify in the language's fortunes.[16] These recommendations are provisional only, for reasons that we explain in a preface to the chapter.

In chapter 6, we consider the performance of a range of agencies which hold, fund, or control mātauranga Māori as a core part of their business and, as such, are practically in the de facto role of kaitiaki. The activities of these dozen or so agencies range across the areas of arts, culture, heritage, broadcasting, education, and science. We recommend the steps these agencies need to take both to establish effective working partnerships with Māori in decision-making over their areas of mātauranga and to align work programmes better amongst themselves to ensure sector-wide co-ordination.

In chapter 7, we consider the Government's support for rongoā Māori, or Māori traditional healing. We first

Tūī in a kōwhai tree. This report considers Māori kaitiaki relationships with indigenous flora, fauna, and the environment in the context of resource management (chapter 3) and conservation (chapter 4).

Māori language session, Wellington, 1981. Chapter 5 discusses government support for te reo Māori.

A korowai (cloak) held in Te Papa's collection. Chapter 6 examines the activities of government agencies which hold, fund, or control mātauranga Māori.

Mānuka, an important medicinal plant for Māori health practitioners. In chapter 7, we examine the government's support for rongoā Māori.

Key Concepts

Throughout this report, readers will encounter certain concepts that are fundamental to the Māori culture. We introduce those concepts here. This is not intended to be an academic analysis, nor an attempt at formal definition. Where definitions are needed, we have provided them in the body of the report where fuller explanations can be provided in their proper context. What we provide here is a primer aimed at introducing readers who may not have previously encountered these concepts.

The Wai 262 claim is about *mātauranga Māori*, but what is that? 'Mātauranga' derives from 'mātau', the verb 'to know'. 'Mātauranga' can be literally translated as 'knowing' or 'knowledge'. But 'mātauranga' encompasses not only *what* is known but also *how* it is known – that is, the way of perceiving and understanding the world, and the values or systems of thought that underpin those perceptions. 'Mātauranga Māori' therefore refers not only to Māori knowledge, but also to the Māori way of knowing. This, as we will explain below, differs in fundamental ways from the Western systems of thought that underpin much of the law and policy that concerned the claimants.

We have explained elsewhere in this introduction how mātauranga Māori was a product of the interaction between the culture of settlers from Hawaiki and the environment of Aotearoa. Mātauranga Māori incorporates language, whakapapa, technology, systems of law and social control, systems of property and value exchange, forms of expression, and much more. It includes, for example, traditional technology relating to food cultivation, storage, hunting and gathering. It includes knowledge of the various uses of plants and wildlife for food, medicine, ritual, fibre, and building, and of the characteristics and properties of plants, such as habitats, growth cycles, and sensitivity to environmental change. It includes systems for controlling the relationships between people and the environment. And it includes arts such as carving, weaving, tā moko (facial and body tattooing), the many performance arts such as haka (ceremonial dance), waiata (song), whaikōrero (formal speechmaking), karanga (ceremonial calling or chanting), and various rituals and ceremonies such as tangihanga, tohi (baptism), and pure (rites of cleansing).

We address different types of mātauranga in different parts of this report. Chapter 1, for example, concerns what we call taonga works – that is, all of the technologies and arts associated with traditional Māori life. Specifically, this chapter considers the adequacy of New Zealand's intellectual property framework for protecting Māori interests in these taonga. Chapter 2 concerns knowledge of plants and wildlife, including taxonomy, and the genesis and special characteristics of each species. Chapters 3 and 4 concern Māori systems of environmental and cultural landscape management. Chapter 5 concerns te reo Māori, including tribal dialects. Chapter 6 is about agencies with core responsibilities towards mātauranga Māori, including museums and archives, libraries, broadcasters, and agencies with responsibilities for education, science, and arts and culture. It therefore considers the full wide range of mātauranga Māori. Chapter 7 concerns rongoā (traditional healing).

But none of these aspects of mātauranga can be understood in the deep way that this claim requires unless there is

examine the only historical issue covered in the report, the passage and subsequent impact on rongoā of the Tohunga Suppression Act 1907. Having done so, and found that the legislation breached the Treaty but could not suppress the practice of rongoā, we then turn to the Government's current support. We suggest that the narrow-minded scepticism that saw no value in Māori cultural attitudes to health, and which led to the Tohunga Suppression Act, may still influence decisions today. That is because there is no urgency to develop rongoā services, despite the benefits they are likely to bring in the prevailing contemporary Māori health crisis. We recommend ways in which the Crown can rectify this.

In chapter 8, we consider the Crown's policies and processes for engagement with Māori over entering into international instruments, both binding and non-binding, on New Zealand laws and policies that affect mātauranga Māori. Substantive issues relating to international instruments and their effects are considered in the relevant chapters (such as chapters 1 and 2). In chapter 8, we ask

also understanding of the values or principles that encompass them. Of these, the defining principle is *whanaungatanga*, or kinship. In te ao Māori, all of the myriad elements of creation – the living and the dead, the animate and inanimate – are seen as alive and inter-related. All are infused with mauri (that is, a living essence or spirit) and all are related through whakapapa. Thus, the sea is not an impersonal thing but the ancestor-god Tangaroa, and from him all fish and reptiles are descended. The plants of Aotearoa are descendants of Tāne-mahuta, who also formed and breathed life into the first woman, and his brother Haumia-tiketike. The people of a place are related to its mountains, rivers and species of plant and animal, and regard them in personal terms. Every species, every place, every type of rock and stone, every person (living or dead), every god, and every other element of creation is united through this web of common descent, which has its origins in the primordial parents Ranginui (the sky) and Papa-tu-ā-nuku (the earth).

This system of thought provides intricate descriptions of the many parts of the environment and how they relate to each other. It asserts hierarchies of right and obligation among them: humankind, for example, has dominion over plants because whakapapa tells of the victory of Tū-mata-uenga over his brother Tāne-mahuta. These rights and obligations are encompassed in another core value – *kaitiakitanga*. Kaitiakitanga is the obligation, arising from the kin relationship, to nurture or care for a person or thing. It has a spiritual aspect, encompassing not only an obligation to care for and nurture not only physical well-being but also mauri.

Kaitiaki can be spiritual guardians existing in non-human form. They can include particular species that are said to care for a place or a community, warn of impending dangers and so on. Every forest and swamp, every bay and reef, every tribe and village – indeed, everything of any importance at all in te ao Māori – has these spiritual kaitiaki. But people can (indeed, must) also be kaitiaki. In the human realm, those who have *mana* (or, to use Treaty terminology, *rangatiratanga*) must exercise it in accordance with the values of kaitiakitanga – to act unselfishly, with right mind and heart, and with proper procedure. Mana and kaitiakitanga go together as right and responsibility, and that kaitiakitanga responsibility can be understood not only as a cultural principle but as a system of law.

Finally, where kaitiaki obligations exist, they do so in relation to *taonga* – that is, to anything that is treasured. Taonga include tangible things such as land, waters, plants, wildlife and cultural works; and intangible things such as language, identity, and culture, including mātauranga Māori itself. In each chapter of this report, we refer to kaitiaki obligations and the taonga they relate to. In chapter 1, for example, we refer to specific taonga works such as haka, mōteatea (song poetry), moko, and place names. All of these are distinct products of mātauranga Māori, and all have kaitiaki whose lineage or calling creates an obligation to safeguard the taonga and the mātauranga that underlies it. In chapters 2 to 4, we refer to kaitiaki obligations towards taonga species such as tuatara, harakeke, kererū, and kūmara. And so on.

These, then, are the key concepts that readers will encounter in this report, and the core values that the claimants wish to protect, preserve, exercise, and have acknowledged.

whether Māori have been consulted sufficiently on international agreements that affected their interests in taonga, and whether there are circumstances that so affect the interests protected by the Treaty that they justify a level of engagement that goes beyond consultation. Having considered these matters, we recommend reforms.

If there is a consistent theme in both our analysis and recommendations for reform across such a wide area of government and private sector activity, it concerns the fundamental exchange of rights and obligations embodied in the Treaty. As we explained earlier, the Crown, to put it simply, won the right to govern, but with that right came obligations – to act reasonably and in good faith, and to actively protect the Māori interests in taonga. This exchange is encompassed in the overarching Treaty principle of partnership. Throughout this report, the essential questions that arise are about the nature of that partnership, and about where the power lies within it. In our modern democracy, can the Crown's right to govern co-exist with 'Māori control of taonga in a Māori way',[17]

where that is justified? Can we as a nation find a place in our laws, policies, and institutions for those core Māori concepts – whanaungatanga and kaitiakitanga? Can the Treaty relationship evolve from one that is dominated by grievance to one in which both founding cultures are able to move forward, secure in their identities and certain that each has a place in the land they call home?

In this report, we acknowledge that policy setting and law making is the right – indeed the obligation – of the duly elected Government of the day. That proposition has been accepted time and again by the courts, as well as by this Tribunal. It could hardly be otherwise in New Zealand's robust democracy. But it is vital to remember that the promises made to Māori in exchange for their acceptance of British government are of the utmost importance. They are constitutional promises solemnly made in this country's pre-eminent constitutional document. Like any constitutional rights, they cannot be set aside except after careful consideration and as a last resort. They were intended to fetter British and later settler sovereignty.

The most important of the Treaty promises in the context of this claim was the promise to protect the tino rangatiratanga of iwi and hapū over their 'taonga katoa' – that is, the highest chieftainship over all their treasured things. Most speakers of Māori would render this phrase, tino rangatiratanga, in its Treaty context as a right to autonomy or self-government. Thus, as this Tribunal has often said, the sovereignty of the Crown was intended to be qualified by the Crown obligation to actively protect Māori rangatiratanga.[18]

It is no longer possible to deliver tino rangatiratanga as full autonomy in all cases in which taonga Māori are 'in play', as it were. After 170 years during which Māori have been socially, culturally, and economically swamped, it will no longer be possible to deliver tino rangatiratanga in the sense of full authority over all taonga Māori. Yet it will still be possible to deliver full authority in *some* areas. That will be either because the absolute importance of the taonga interest in question means other interests must take second place or, conversely, because competing interests are not sufficiently important to outweigh the constitutionally protected taonga interest.

Even where 'full authority' tino rangatiratanga is no longer practicable, lesser options may be. Shared decision-making in the form of partnerships may still be possible in many, if not most, areas covered by this claim. Partnerships can themselves be seen as a form of tino rangatiratanga in some circumstances. And in the few cases where even shared decision-making is no longer possible, it must *always* be open to Māori to influence the decisions of others where those decisions affect their taonga. This can be done through, for example, formal consultation mechanisms.

Just what tino rangatiratanga can or should entail must now depend on the particular circumstances of the case. As long as law and policy makers keep firmly in mind the crucial point that the tino rangatiratanga guarantee is a constitutional guarantee of the highest order, and not lightly to be diluted or put to one side, we accept that flexibility in approach is both a necessary and a good thing in today's circumstances.

The conceptual framework within which these issues are to be resolved is the Treaty principle of partnership between the Crown and Māori. It is in this partnership frame that the Treaty's essential message of hope is to be found – a message whose time, we believe, has well and truly arrived. It reminds us that this country began in consensus as two peoples, and that now, as many peoples, must continue on that path. It reminds us also that Kupe's people are at the core of New Zealand's unique identity as a nation. To acknowledge the importance of Māori culture and identity to Māori is to acknowledge the importance of this culture and identity to the nation as a whole. If we are ready to accept this simple fact, we are ready to perfect the partnership.

Text notes

1. Some say two waka were in fact built as a contest between Kupe and Turi for the affections of the two daughters of Toto – Kuramarotini and Rongorongo.
2. Some traditions, such as those of Ngāti Kahungunu, say his wife was Hine-te-Aparangi but we will use, hopefully without causing offence, the northern tradition with which we are more familiar.
3. Also known as Te Ngahue.

4. Most evidence points to Kupe's 'Hawaiki' being somewhere in the Society Islands of French Polynesia. Pikopikoiwhiti is on the island of Tahitinui.

5. Strong Māori traditions in which whales figure as guides and guardians (kaitiaki) for almost all of the migrating waka are explicable for this reason.

6. Michael King's view is that New Zealand was certainly not known to Māori as 'Aotearoa' in pre-European times, even if today it certainly is: King, *The Penguin History of New Zealand* (Auckland: Penguin Books, 2003), p 42. The publication in 1898 of William Pember Reeves's general history, *The Long White Cloud: Ao Tea Roa* (London: Horace Marshall and Son, 1898), served in particular to popularise the notion of it as the traditional Māori name for New Zealand. We conclude that Aotearoa had always been a name for the North Island along with Te Ika ā Māui, even if it did not attach to all islands until well after European contact.

7. 'Te Ika ā Māui' means 'Māui's fish' – a Hawaikian reference to the story of Māui fishing up the island, a story that is repeated with local variations throughout Polynesia.

8. 'Te Waipounamu' means 'greenstone water' – a reference to the fact that its West Coast rivers are the source of the precious nephrite jade, although some say it should be Te Wahipounamu (the place of greenstone). Almost as popular are the two variations – Te Waka a Māui and Te Waka o Aoraki. Just which of these four options is correct is the subject of constant and mostly good-natured debate among Māori.

9. Anne Salmond identifies the place as Taitapu, but the present-day tangata whenua say that Taitapu was further south and the true name for the point of first Māori/European contact was and is Mohua: Salmond, *Two Worlds: First Meetings between Māori and Europeans, 1642–1772* (Auckland: Viking, 1991), pp 8, 73–75.

10. Morton to Cook et al, 'Hints offered to the consideration of Captain Cooke, Mr Bankes, Doctor Solander, and the other Gentlemen who go upon the Expedition on Board the Endeavour', 10 August 1768, MS, Commonwealth National Library, Canberra (reproduced in J C Beaglehole, ed, *The Journals of Captain Cook on his Voyages of Discovery* (Cambridge: Cambridge University Press for the Hakluyt Society, 1955), vol 1, pp 514–519)

11. See, for example, section 4(2A)(a) of the Treaty of Waitangi Act 1975, which sets out that in making appointments to the Waitangi Tribunal the Minister of Māori Affairs 'shall have regard to the partnership between the 2 parties to the Treaty'. See also *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (the *Lands* case); Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Government Printer, 1985), pp 69–70); Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Waitangi Tribunal, 1987), p 210.

12. *Guerin v the Queen* [1984] 2 SCR 335

13. *United States v Kagama* 118 US 375, 384 (1886); *Choctaw Nation v United States* 119 US 1, 28 (1886); Felix S Cohen, *Handbook of Federal Indian Law* (Florida: Five Rings Corporation, 1986), pp xxv, 172

14. See, for example, the preamble to the Treaty, which refers to Queen Victoria being both:

> anxious to protect [the tribes'] just Rights and Property . . . [given] the great number of Her Majesty's subjects who have already settled in New Zealand' and 'desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects.

15. The following examples of cases and reports contain the idea of active protection: *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (the *Lands* case); *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 (PC) (the *Broadcasting Assets* case); Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 53; Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, pp 830–840; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 4th ed (Wellington: GP Publications, 1996), p 49

16. We released this chapter in pre-publication format in October 2010.

17. Document s4 (Counsel for Ngāti Koata, closing submissions, 18 April 2007), p 22

18. Waitangi Tribunal, *The Ngai Tahu Report*, p 237

The great and chief end, therefore, of men's uniting into common-wealths, and putting themselves under government, is the preservation of their property.

—John Locke

Me tīmata mai i te auahatanga a Tāne,
i auahatia ai e ia ki te whenua e takoto nei, ko Tiki.

Behold what originates from the creative force of Tane,
who created and sculpted Tiki from the earth itself.

1

TAONGA WORKS AND INTELLECTUAL PROPERTY

CHAPTER 1

TAONGA WORKS AND INTELLECTUAL PROPERTY

1.1 Introduction

1.1.1 Kōrero tuku iho

Tamatea Pokaiwhenua was one of Aotearoa's most famous navigators and discoverers in the generations that followed the great canoe migrations. He travelled most of the coastline of these islands, naming as he went. On his way down the east coast he stopped at the long stretch of sandy beach now known as Porangahau in central Hawke's Bay, probably because it was one of the few good landing-places along that coast. The story goes that he, his brother Uhenga-Ariki, and the crew of his waka became embroiled in a conflict with those who already lived in that place, and Uhenga-Ariki was killed. In his grief, Tamatea climbed to the top of a nearby peak and played a lament to his brother on his nose flute. The tune was so haunting and Tamatea's grief so complete that the peak from that moment on came to be known as Te Taumatawhakatangihangakoauauotamateaurehaeaturipukakapikimaungahoronukupokaiwhenuakitanatahu in memory of the event.[1] That name is now famous as the longest place name in the world.

Tamatea's descendant, Ross Scott, told us of his concern about misuse of that name, not just in New Zealand but around the world. He seeks protection for it.

Mataora lived in Te Ao Kohatu – the time beyond memory. He ill-treated his wife, Niwareka, who was the daughter of Uetonga, a great leader of the spirit world – a place where right forms of behaviour and good values were given great emphasis, and where people wore on their faces and bodies images that did not wash off. Niwareka fled in fear and shame to her father's realm. Mataora, too, travelled to the spirit world to plead with Uetonga for forgiveness, and to ask that Niwareka be to allowed return with him. Mataora made Uetonga a promise. He said, 'If you mark me with the sign of Uetonga it will show the world that I will live by the values and right behaviours of the spirit people, and my promise will be as permanent as Uetonga's mark.' This is the mark we have come to know as tā moko – the distinctive Māori art form of body tattooing. It is so revered in Māori culture that some of the chiefs who signed the Treaty of Waitangi in 1840 signed with their tā moko.

Mark Kopua, a modern tohunga tā moko, spoke to us of his fears about misuse of the mātauranga and tikanga of tā moko, not just in New Zealand but around the world. He told us that tā moko expresses the wearer's whakapapa and tribal identity, and said it is inappropriate for people who do not have these things to wear tā moko.

Te Rauparaha, leader of Ngāti Toa Rangatira,[2] was one of the greatest political leaders and military tacticians this country has produced. But in the early 1800s he was running for his life. He and his people were being chased through the central North Island by Ngāti Te Aho, and he sought the protection of his distant relative, Te Heuheu

◀ *Papatuanuku* by Robyn Kahukiwa, 1984. Whakapapa, the bond of kinship between people and the environment, is central to Māori identity: the land and whakapapa form and sustain mātauranga Māori. Kahukiwa's depiction of Papatū-ā-nuku reminds us that the underpinnings of Māori tradition derive from the land itself.

Signpost for Te Taumatawhakatangihangakoauauotamateaurehaeaturipukakapikimaungahoronukupokaiwhenuakitanatahu (the signpost uses a variant spelling). The sign of the country's longest place name and its history have made it on to Wikipedia. Ngāti Kere, who are kaitiaki of the name, have tried to use intellectual property law to prevent commercial use of the name by non-kaitiaki.

of Ngāti Tūwharetoa. Te Heuheu sent Te Rauparaha to Lake Rotoaira, the home of a chief named Whārerangi. With Ngāti Te Aho fast approaching, Whārerangi hid Te Rauparaha in a kūmara pit, then had his wife, Te Rangikoaea, straddle the pit to conceal him. Te Rauparaha lay quietly in the pit beneath the kuia while Ngāti Te Aho searched the village. It must be understood that to place a woman's genitals above the head of a senior chief was normally unthinkable, but this action saved Te Rauparaha's life. When Ngāti Te Aho had passed through Rotoaira without finding him, Te Rauparaha burst from the pit and performed the now famous ngeri, which he composed and exuberantly rendered on the spot in the traditional Māori way.[3] The last stanza of his piece is as follows:

Ka mate! Ka mate!
Ka ora! Ka ora!
Ka mate! Ka mate!
Ka ora! Ka ora!
Tēnei te tangata pūhuruhuru
Nāna i tiki mai whakawhiti te rā
A, hūpane, kaupane
Hūpane, kaupane, whiti te rā!
It is death! It is death!
It is life! It is life!
It is death! It is death!
It is life! It is life!
Here is this hairy person
Who has made the sun shine upon me!
One step up, another step up
One step up, another step up, the sun shines![4]

Te Ariki Kawhe Wineera told us of his concerns about misuse and commercial exploitation of his ancestor's composition, both in New Zealand and overseas, without the consent of Ngāti Toa.

1.1.2 What is a taonga work?

Whether it is a story in a name, a visual art form, or a performance piece, each of these examples is a taonga work. By that we mean it is two things – first, it is a creation of the pre-existing and distinctive body of knowledge, values, and insights we call mātauranga Māori. Secondly, it is a result of the effort and creativity of actual people whether in modern times or the distant past. Each taonga work has kaitiaki – those whose lineage or calling

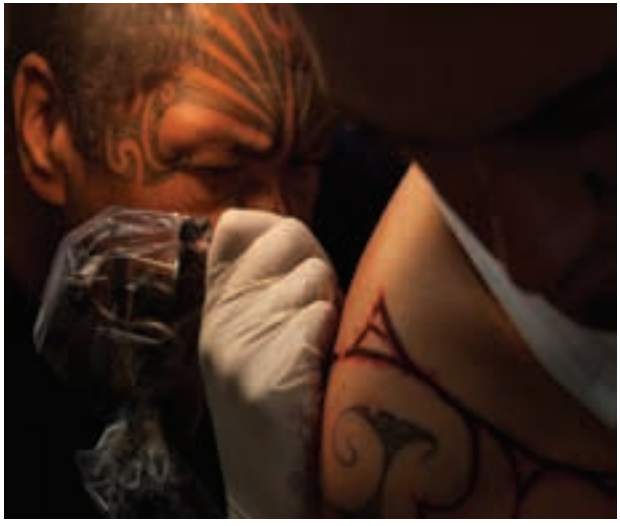
creates an obligation to safeguard the taonga itself and the mātauranga that underlies it. In the case of the name telling the story of Tamatea's grief, the kaitiaki are the Ngāti Kere hapū of Porangahau. In the case of *Ka Mate*, it is Ngāti Toa. For the traditional art of tā moko, the tohunga themselves are the primary kaitiaki of the mātauranga, although once the tā moko is done, responsibility transfers to the wearer just as it did for Mataora.

There are countless examples of these taonga works. They include mōteatea in their many forms, pātere and karakia, carving, weaving, painting, constructions such as waka or wharenui and other crafts, stories, and dramatic and musical works. In Māori thinking, they are the physical or intellectual products of mātauranga Māori made possible through the medium of human industry and creativity. As such they usually depend, in the case of physical taonga works, on access to the traditional resources necessary to produce them, and on the retention by Māori of the mātauranga in their heads. Similarly, in the case of written, spoken, or performed taonga works, they depend on the well-being of the language that is their vehicle – te reo Māori.

Some taonga works are ancient, others not. But those who are responsible for safeguarding them, whether or not they are the original creators of the works, have a very particular relationship with them. We call this the kaitiaki relationship. The claimants in this inquiry say that these relationships must be protected, and that New Zealand's intellectual property (IP) law, founded on Western notions of individual ownership and private property rights, is inadequate to protect them.

1.1.3 What are intellectual property rights?

The broad term 'intellectual property rights' refers to a group of exclusive rights which the law grants in respect of specific creations of the human mind. Such creations include everything from an inventive activity that has industrial or commercial application, to a work of art or literature, a symbol, or a design.[5] IP rights do not relate to the physical machine, painting, book, or logo. Rather they confer certain rights over use of the invention or expressions reflected in those physical things. The law imposes important limitations over both the nature of those rights and the kinds of creations to be protected.



Tohunga tā moko Mark Kopua at work. Mr Kopua advised that the decision to receive or create tā moko is not made lightly, and involves careful consideration of the recipient's whakapapa and relevant tribal traditions and designs. He noted these designs differ from the kirituhi or skin etchings that draw on Māori traditions but do not express identity and tribal culture in the same profound way.

The New Zealand Maoris team perform a haka prior to a match against the British Lions at Athletic Park in Wellington in 1930. Today, Te Rauparaha's *Ka Mate* is linked with the All Blacks through sustained performance and marketing. While Ngāti Toa are proud of their ancestor's work and its place in national life, the iwi has long claimed that its kaitiakitanga in respect of *Ka Mate* should be recognised in law.

Maori Battalion members who had fought in Greece perform a haka for the King of Greece at Helwan, Egypt, on 24 June 1941. On both the battlefield and the sporting field, the haka has come to symbolise Māori martial prowess, New Zealand identity, and team unity.

Broadly speaking, IP rights were designed to reward creativity and innovation in science, technology, and the arts, and to encourage the creator to share his or her knowledge with the wider community. In return, the creator receives a bundle of exclusive rights to exploit the creation or invention for a limited period of time. IP rights reward the individual effort of the creator or the inventor and the investment of those who finance such works. Generally, then, IP law rests on the theory that creativity and innovation will suffer without this system of incentive and reward.

The word 'property' automatically evokes certain understandings in Western legal systems. It means that the owner exclusively controls the use of the respective property by excluding others from using it. This is very different from the principle of kaitiakitanga, which tikanga Māori bestows on kaitiaki who have rights and obligations in respect of taonga works and/or the underlying mātauranga.

However, IP rights are never absolute. A balance is constantly being struck between the interests of the creator or inventor in receiving a fair reward for their creative efforts, and the interests of the wider community in access to and use of knowledge. This balance is maintained by a series of limitations on and exceptions to IP rights (for example, the limited duration of rights, limitations as to subject matter, and uses of IP-protected materials that are statutorily permitted).

Both sides of the equation are recognised in the Universal Declaration of Human Rights, which provides that 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' But it also provides that 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.' We will return to this crucial balancing process below.

1.1.4 What are the issues?

At heart, our discussion in this chapter focuses on the 'fit' between the obligations of kaitiaki in respect of taonga works and mātauranga Māori on the one hand, and the requirements of New Zealand's IP laws on the other. One of the fundamental questions the claimants raised was

Te Winika, a treasured Tainui waka, which was gifted to the city of Hamilton by Te Arikinui Dame Te Atairangikaahu, the Māori Queen, as a symbol of partnership and goodwill. The waka taua or war canoe demanded technical mastery in the arts of carving and handling. Like whare tupuna, they represent and extend a community's mana.

whether the IP system should recognise kaitiakitanga in respect of taonga works and mātauranga Māori. They were concerned that aspects of IP such as copyright and trade marks are not equipped to cater for the protection of the kaitiaki relationship with taonga works and mātauranga Māori. That, they said, is particularly apparent when those works are used in a culturally offensive way by non-kaitiaki, or when non-kaitiaki claim IP rights over particular taonga works and derive commercial benefit from them. The question that arises in the latter case is whether kaitiaki should be involved in this process and, if so, to what extent. And what, too, of the participation of kaitiaki themselves in the exploitation of taonga works and mātauranga Māori?

The Crown, for its part, acknowledged that Māori have longstanding and special associations with taonga works and their associated mātauranga Māori, but argued that most of the current settings of New Zealand's IP law accommodate the Māori interest sufficiently. The Crown argued that to provide special protection for the Māori interest in taonga works would stifle innovation and deprive others of access to the knowledge and ideas which underpin or inspire the creation of new works.

We acknowledge that for all their differences in perspective, there was a great deal of good-will among the parties. Perhaps that is because all of them recognised that both IP law and tikanga Māori share a common interest in the growth of culture and identity. The guiding principles of kaitiakitanga on the one hand and property on the other can be seen as different ways of thinking about the same issue. In this context, they are the ways in which two cultures decide the rights and obligations of communities in their created works. Kaitiakitanga focuses on obligations and relationships (arising from kinship); property focuses on the rights of owners. Central to this chapter, therefore, is the question of whether and how the interests

of kaitiaki in taonga works and mātauranga Māori might be protected within or alongside the IP framework.

1.1.5 The internationalisation of IP law

Historically, international law has influenced the development of domestic IP regimes, and New Zealand is no exception. The international IP agreements that are most relevant to taonga works and mātauranga Māori are the Paris Convention for the Protection of Industrial Property (1883), the Berne Convention for the Protection of Literary and Artistic Works (1886), and the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

The TRIPS Agreement provides the most extensive global regulation of IP rights. It establishes minimum standards of protection in several areas such as copyrights, trade marks, geographical indications, industrial designs, patents, and plant variety rights that all members of the World Trade Organization must comply with. However, it allows member states to provide protections that are greater than or additional to those minimum standards. Consequently, it is said that the TRIPS Agreement imposes a floor, not a ceiling, on IP law.

The TRIPS Agreement is administered by the World Trade Organization TRIPS Council. Each World Trade Organization member State (there are currently 153, representing more than 95 per cent of total world trade) has to bring its national law in line with the TRIPS standards. For our purposes it is important to understand that the TRIPS Agreement provides the basic framework for New Zealand's domestic IP law. We will return to it, and to other elements of the international debate around the protection of indigenous interests, in section 1.5.5. Meantime, we will summarise some of the major elements of New Zealand's domestic IP regime as they relate to the protection of taonga works and mātauranga Māori.

1.2 Copyright, Trade Marks, and Related Rights in New Zealand

1.2.1 Copyright

Copyright relates to literary works (for example, novels, poems, plays, computer programs, databases, films, musical compositions) and artistic works (for example, paintings, drawings, photographs, sculpture, and architecture). Copyright does not have to be registered. Rather, it vests in an author as soon as a work is created, provided that work:

- falls within one of the categories of copyright work listed in section 14 of the Copyright Act 1994;
- is original; and
- is written, recorded or fixed in some material form.

Provided these criteria are satisfied, rights to exploit the work will vest in the copyright owner for a limited period.[6] Copyright law protects the expression of facts and ideas, not the ideas and facts themselves. Hence, copyright does not preclude others from using the underlying ideas or information contained or expressed in the copyrighted work.

The Copyright Act confers economic rights and moral rights. Economic rights allow the copyright owner to exclude others and thereby control almost all uses, particularly publishing and copying, of the copyright work. This enables copyright owners to exploit the value of the work (for example, by selling, licensing, or assigning the copyright in full or in part). Moral rights protect the integrity of the relationship between the author and his or her work. They include, for example, rights of attribution and protection against derogatory treatment.[7] Unlike economic rights, these rights cannot be sold or licensed, but they can be (and frequently are) waived in commercial transactions.

Even if a work qualifies for copyright protection, rights are limited because of the general public's need to access and use knowledge and information.

The Copyright Act allows a considerable number of permitted uses of copyrighted works – for example, for research or private study, or for criticism, review, or various educational purposes. Another exception allows publication of images of buildings or three-dimensional artistic works (such as a building or sculpture) that are permanently fixed in a public place. This exception therefore applies to some whare whakairo and other publicly displayed copyrighted taonga works. Taonga works that are displayed in a public place but not protected by copyright can be freely copied anyway.

As we have said, all of these permitted uses are the result of a balancing process between the interests of the work's creator in being rewarded for his or her creative endeavours, and the public interest in free access to and use of such materials.

1.2.2 Other copyright-related rights

(1) *Performers' rights*

The Copyright Act provides independent rights to the performers of copyrighted works. Performances include dramatic performances, musical performances, readings and recitations of literary works, and performances of a variety act. The Act provides performers with certain limited rights to control the public use of their performance. Performers' rights are infringed if a performance, or a substantial part of it, is recorded or played in public for non-private purposes without the performer's permission. As with copyright, performers' rights are not absolute, and certain acts in relation to a particular performance are allowed, for the sake of the public interest, without the performer's consent. These include, for example, the playing of a sound recording or film for educational purposes.

Performers' rights subsist until 50 years from the end of the calendar year in which the performance takes place. Performers' rights recognise only the interests of the individual performer. Collectively held or communal performers' rights are not recognised, and performers in New Zealand are not awarded moral rights in their performance.

(2) *Registered design rights*

Under the Designs Act 1953, designs that are registered at the Intellectual Property Office are specifically protected for a period of 15 years. For a finished product to qualify for a registered design right, it must have features of shape, configuration, pattern, or ornament applied to an article through an industrial process. It also must 'appeal to the eye' and it must be new or original.[8] For example, Lego bricks, the shape of furniture, or the way in which a chocolate bar is wrapped and presented can qualify for a registered design right. Registration confers 'the exclusive right in New Zealand to make or import for sale or for use for the purposes of any trade or business, or to sell, hire, or offer for sale or hire, any article in respect of which the design is registered'.[9]

1.2.3 Trade marks, geographic indications, and other protections

(1) *Trade marks*

Trade marks are called signs in trade mark law. They can be words, logos, symbols, or even shapes. When such signs identify the source of products or services, so that consumers can distinguish products or services from different providers, the sign can be registered as a trade mark.

Taonga works have been used by private businesses as trade marks for some time. Variations of taonga works are particularly common trade marks in modern New Zealand commerce. The Air New Zealand representation of the traditional pītau or koru in its livery is perhaps the most celebrated example of this, but there are countless others.

Trade mark protection prevents people and businesses from freeloading on the reputation of others. It also protects consumers from being deceived into thinking a product is genuine when it is not, or comes from a particular place when it does not. Unlike the limited life of copyright, once a trade mark is registered under the Trade Marks Act, it can remain registered indefinitely.

The Commissioner of Trade Marks[10] must refuse an application for registration of a trade mark if:

- its use would be likely to deceive or cause confusion; or
- its use is contrary to New Zealand law; or
- its use or registration would, in the opinion of the commissioner, be likely to offend a significant section of the community, including Māori.

All trade mark applications that involve a Māori word, image, or text ('Maori sign') are referred to the Māori trade marks advisory committee established under section 177 of the Act. The committee's function is to advise the Commissioner of Trade Marks whether the proposed use or registration of a Māori sign is, or is likely to be, offensive to Māori.[11] The advice of the committee is not binding on the commissioner.

There is a category of trade marks which owners can

An Air New Zealand Boeing 777 with Bernard Roundhill's koru on its tail. Roundhill's design is one of the country's best-known trade marks. The Māori Trade Marks Advisory Committee assesses the use of Māori imagery in commerce at the request of the Commissioner of Trade Marks.

use to protect quality and authenticity for more than one trader. The matter of authenticity arises in the sale, manufacture, and representation of poor copies of Māori carvings or adornments, among them copies of taonga works that are made in China and shipped to New Zealand for sale in souvenir shops. In order to recognise and promote authentic Māori art and artists, the Toi Iho 'Māori-made' mark is available to some 215 Māori artists.[12]

(2) *Geographical indications*

Geographical indication systems register a geographical name for use in relation to a particular product, because the place has over time developed a reputation in respect of the quality of the product. Geographical indications (names connected to a place, in lay language) do not usually qualify for trade mark protection because they do not distinguish one trader's goods from another, but may be used by any producer of a product from a particular geographical area.

In 2006, legislation was passed to create the basis for registering geographical indications limited to wines and spirits where a given quality, or reputation, or other characteristic of the wine or spirit is attributable to its geographical origin.[13] The law of 'passing off', which may prevent a person who is not associated with a geographical area from representing that their products come from that area, potentially provides protection for geographical indications in some circumstances. For example, the Court of Appeal has held under the law of passing off that sparkling wine that does not come from the area of France known as Champagne, and is not made according to the champagne method, cannot be labelled champagne.[14]



Ipu (bowls) by Manos Nathan. Nathan, an established artist whose work is held around the world, is registered under the Toi Iho scheme for the promotion of authentic Māori art and artists. Nathan draws both on the design and symbolism in the customary Māori art forms of carving, tā moko, tā niko, and tukutuku and on the allegory and metaphor found in pakiwaitara, pūrākau, and pēpeha (folklore, myths and legends, and proverbs) in the creation of his clayworks.

The claimants seek protection for Māori geographical names, particularly where the name has all the attributes of a taonga work. The system for registered geographical names would not provide this protection.

(3) *The protection of flags, emblems, and names*

Under the Flags, Emblems, and Names Protection Act 1981, certain names and symbols are absolutely and perpetually protected, either to prevent the impersonation of those exercising public authority or, more relevantly, because the names and symbols are national cultural icons. These include the flag of New Zealand, various emblems, insignia, and governmental names. A range of purpose-made statutes also protect certain names against misuse. Examples include a prohibition on the use of 'Te Papa Tongarewa' for registration, incorporation, and commerce in section 23 of the Museum of New Zealand Te Papa Tongarewa Act 1992.

(4) *Images of people*

IP law generally does not provide protection for use of images of people unless, coincidentally, those images are copyright works or trade marks themselves. A photograph may be a copyright work, but any rights in the photograph are owned by the copyright owner, who is often not the person in the image. The Copyright Act does provide a limited privacy-style right to people whose images are in commissioned photographs, but this does not apply to photographs taken in public, photographs taken before the 1994 Act came into force, or photographs that are out of copyright. So if, for example, a person's image is used because of its 'Māoriness', the law does not prevent this – although we note that if an image is offensive it may not be registered as a trade mark (see discussion above).

Several claimants told us of their concern about photographs of Māori being used in a commercial context without permission. In one instance, we were told of portraits of tūpuna for sale in an antiques shop; in another instance, a claimant had seen such a portrait used on a biscuit tin. The association of taonga and food is highly offensive.

1.2.4 The public domain

In order to safeguard the flow of ideas and to ensure that new works can be created, the IP system aims to ensure that information and knowledge are available for anyone to use even when that information or knowledge is conveyed through, for example, a copyright work. This is why copyright has permitted acts, and trade marks can be used in non-commercial ways by third parties. The IP system also aims to ensure that the specific expressions of knowledge and information which it protects are at some stage available for others to incorporate into new creations.

This free zone is often referred to as the commons or the public domain. It is generally defined as encompassing that vast body of information, knowledge, and creative or

inventive works that has never been or is no longer protected by IP rights. It is freely available for the public to use as they wish. The public domain is the flip-side of the private rights created in the system of IP law, and its existence is essential to the proper functioning of that system.

1.2.5 Summary: the intellectual property system and the kaitiaki interest

The boundaries of IP law are the result of a balancing process based on policy choices and priorities about what to give property rights over and what to allow free use of.

There is a wide gap between the protections kaitiaki seek in respect of taonga works and mātauranga Māori, and those that are offered by copyright and trade mark law – though it should be noted that we have by no means given a complete picture of the full range of those laws' requirements. For example, kaitiaki have perpetual relationships with taonga works. By contrast, IP rights are granted only for a limited period of time. A copyright holder controls a copyright work only for one or two generations. Oral traditions, including whakapapa, traditional kōrero, or mōteatea (song-poems), will not qualify for copyright because they will fail the requirement that they must be fixed in material form. Importantly, the IP system does not provide kaitiaki with the means to prevent uses of taonga works that are culturally offensive.

The Trade Marks Act does not address the kaitiaki relationship with taonga works and mātauranga Māori either. The Māori trade marks advisory committee provides advice to the commissioner as to the offensiveness of a specific sign, but this advice is non-binding. Protection in respect of geographical indications is also limited. If the 2006 Act comes into force it will be limited to the use of place names in the sale of wines and spirits. Place names that are descriptive or generic in nature cannot be registered as trade marks because they are not distinctive.

Most importantly, IP law provides no protection for ideas. It protects only the fixed products of those ideas. For example, the content of a book and the way it is expressed attracts copyright, but the ideas contained in it do not – the ideas can be taken up and used or developed without the consent of the original author. Kaitiaki, however, are as concerned about the integrity of the mātauranga Māori underlying the work as they are about the work itself. They want to control the use of both the taonga work and the mātauranga Māori that created it. They consider it their role to prevent misuse of the mātauranga Māori as well.

In summary, IP law protects the kaitiaki interest in mātauranga Māori or taonga works only to a limited extent. It does so only when those things fall within and meet specific requirements of certain categories of IP law, and even then sometimes only for a limited period of time. Specifically, taonga works and mātauranga Māori are left without protection because the law does not recognise the perpetual nature of the kaitiaki relationship with them. Nor does IP law support kaitiaki in their role as the guardians of mātauranga Māori – a role that carries particular responsibilities and obligations to safeguard and protect the integrity of their taonga. Notably, IP law does not protect taonga works and mātauranga Māori from inappropriate or offensive use by third parties.

1.3 Claimant, Crown, and Interested Parties' Concerns

1.3.1 The claimants' concerns

The claimants expressed concern about a range of issues that can be broadly characterised as relating to the misuse and misappropriation of taonga works and mātauranga Māori by non-kaitiaki, and to the inability of kaitiaki to benefit commercially from the use of their own cultural creations when they wish to do so in accordance with their tikanga.

Kaitiaki want to protect the integrity of their taonga works and mātauranga Māori, and argued for a legal regime that prohibits the offensive treatment of them – for example, as illustrations on food packaging, tea towels, and cooking utensils. The Crown, they argued, has already gone some way to accepting this by establishing the trade marks advisory committee to advise the Commissioner of Trade Marks whether a proposed trade mark application is offensive to Māori. Kaitiaki want this kind of protection to be strengthened and broadened to cover all taonga works and mātauranga Māori.

The second matter of concern to the claimants was that non-kaitiaki are able to acquire rights in taonga works and mātauranga Māori without the consent of, or any benefit

to, kaitiaki. Using the republication of the anthropological works of Elsdon Best as an example, they pointed out that third parties can use works and knowledge that are the creations of Māori culture, and acquire private property rights in them. These new right holders may even be able to exclude kaitiaki from using those works without permission.[15]

The claimants accepted that all cultures, including Māori culture, must grow and develop to survive. There is much to be gained from encouraging Māori to develop new taonga works and use mātauranga Māori for the benefit of both the individual creators and Māori culture generally. But, they argued, the existence of mātauranga Māori and taonga works in the public domain does not entitle others to use those works or that mātauranga in any way they wish. The evidence of musician and songwriter Moana Maniapoto addressed this point. She spoke of how she had copyright protection in her musical works, but that protection did not extend to the mātauranga Māori in her songs. She regarded such protection as vital for her people because the mātauranga Māori could otherwise be inappropriately used.[16]

Ms Maniapoto stressed that this is not about trying to hermetically seal Māori culture and prevent others from enjoying what it has to offer. Rather, it is about recognising the ongoing nature of the kaitiaki interest in taonga works and mātauranga Māori. This means preventing others from free-riding on Māori culture by acquiring private rights in it; and giving kaitiaki control over the use of taonga works and mātauranga Māori and receiving benefits from any commercial use. That might involve an acknowledgement of the source of the taonga work and embodied mātauranga Māori, or a financial benefit, or both.

1.3.2 The Crown's concerns

For its part, the Crown raised concerns about whether taonga works can be effectively protected as the claimants wish them to be. The Crown noted the existence of potentially conflicting interests that are also entitled to protection, despite the desire of kaitiaki. In particular, the Crown questioned whether these conflicting interests could be contained within the same existing framework of IP law without undermining creativity, economic development, or even the framework itself.

The Crown emphasised the role of IP law in encouraging economic development. It was particularly concerned that protecting taonga works and mātauranga Māori might undermine creativity and deter businesses from investing in New Zealand. It also stressed the importance of New Zealand's membership of the World Trade Organization, and noted that any measures put in place to protect the claimants' interests in taonga works and mātauranga Māori must comply with the minimum-standards-setting TRIPS Agreement (see section 1.5.5).

The essence of the Crown's argument was that IP law has never provided the protections sought by kaitiaki, and it is simply too late to impose them. A vast store of taonga works and associated mātauranga Māori has already entered the public domain to be freely accessed by all. Indeed, the Crown argued, 'One of the notable aspects of this claim has been the wealth of evidence of publication by, or with the assistance, approval or endorsement of Māori, of material which would fall within the claimants' definition of mātauranga Māori'.[17] Because kaitiaki were responsible for making such knowledge publicly available, they must have anticipated it would be used by anyone who wished to do so. The Crown argued that it is impractical to impose retrospective controls on that material. In any case, counsel questioned whether it is even possible to control access to or repatriate such intangible things as 'ideas' and 'knowledge' in a free and democratic society. The Crown said the claimants' IP-based claims in respect of taonga works were in the end utterly unrealistic in the contemporary world.

1.3.3 The concerns of interested parties

An unprecedented number of third parties showed interest in the Wai 262 claim, including in the area of taonga works and IP. Several of them spoke to us about the ways in which traditional Māori designs and symbols are incorporated into contemporary New Zealand art, design, and architecture. Michael Smythe, speaking for his own company, Creationz Consultants, as well as for the Design Institute of New Zealand Incorporated, explained that Māori imagery is often used by artists and designers as an

inspiring starting point in the creative process. He argued this can be seen as a tribute to the country's cultural and artistic heritage rather than a blunt form of misappropriation. He provided us with numerous examples of such works.

Other parties took a rather different view, emphasising the possibility of offensive outcomes. Victoria Campbell, a graphic designer and lecturer of Ngāti Haua and Whanganui, raised concerns about Māori designs such as the koru being used for commercial products including underwear and toilet paper. How, she asked, can such offensive uses be prevented?

The boundaries around what might be called appropriate cultural mixing and offensive misappropriation of Māori designs are not always easy to pin down. For example, while some would see a cheap plastic tiki stamped 'Made in China' as culturally offensive, Mr Smythe showed us examples of the ways in which designers have used tiki on a range of high-fashion goods from shoulder bags to tee-shirts, cushion covers, and contemporary jewellery. He asked: 'Is this offensive appropriation or celebratory iconography? Is it okay if it is done by Maori designers and not okay if it is done by non Maori?'[18] Rather than seeing such work as misappropriation of Māori culture, he described it as 'an eloquent representation of an integrated bi-cultural nation'. He saw no benefit in denying Pākehā designers the freedom to use Māori imagery in their work, because this 'will lead to mono-cultural representations of New Zealand in areas such as social services, tourism and popular culture'.[19]

Similarly, Jacob Scott, a tutor in Visual Arts and Design at the Faculty of Arts and Social Sciences at the Eastern Institute of Technology, appearing as a witness for Ngāti Kahungunu, told us how the free flow of ideas contributes to the development of national culture and identity, and that both are subject to a constant process of evolution. All artists, he suggested, use, adapt, and develop the ideas and works of others. He therefore saw no merit in excluding Pākehā from using and adapting Māori images and designs.

However, neither Mr Smythe nor Mr Scott wished to suggest that those wanting to incorporate elements of traditional Māori design into their work should ride roughshod over the values that underpin those traditions. But, said Mr Smythe, 'I do believe that "treading on eggshells" is as counter-productive as "wading in with hobnail boots"'.[20] He emphasised the importance of recognising and respecting the place of traditional Māori design

Logos by Michael Smythe: (*from left*) Ngā Kaupapa Here Aho Fibre Interface; Pacific Enzymes; PrimeHealth; and Designarc. Smythe considers that 'biculturalism requires clarity about its components rather than blending'. In regard to the PrimeHealth logo, he consulted the Māori Language Commission and obtained the views of various iwi. Tangata whenua strongly supported the Māori elements in the design.

in contemporary art, design, and architecture, but urged that these elements not be constrained by an overly protective regulatory regime.

These and other witnesses stressed the need for guidance in this area. Some suggested establishing an accessible consultation body to advise on offensive and inappropriate uses of taonga works and mātauranga Māori. Practical guidelines to assist the many designers and artists uncertain about whether and from whom they should obtain consent to use traditional Māori designs and motifs would also be welcomed.[21] In the same vein, the Design Institute of New Zealand confirmed 'the necessity and value of entering consultative processes with kaitiaki at the point of initiation or conception – in order to honour the role of kaitiaki in allowing them to determine the extent and nature of any relationship or involvement they may seek'.[22]

Attendees watch a briefing on 25 May 2006 by the Secretariat of the United Nations Permanent Forum on Indigenous Issues. The Secretariat's engagement contributed to the eventual passage of the Declaration on the Rights of Indigenous Peoples.

1.4 International Proposals for the Protection of Indigenous Interests

The issues that arose during our hearings are not unique to New Zealand. There is vigorous international debate around them. Internationally, the nature and value of traditional cultural expressions – what we call taonga works – have been recognised,[23] and various international forums have produced proposals for the protection of traditional knowledge – what we call mātauranga Māori. The most advanced of these are the draft principles of the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, and the Declaration on the Rights of Indigenous Peoples, which the New Zealand Government endorsed in April 2010. (The Convention on Biological Diversity is also highly relevant to the protection of indigenous knowledge, but we deal with this in chapter 2 on the genetic and biological resources of taonga species.)

The Intergovernmental Committee has developed draft principles and objectives for the protection of traditional cultural expressions and traditional knowledge – for instance, stories, songs, instrumental music, dances, plays, rituals, drawings, paintings, sculptures, textiles, pottery, handicrafts, and architectural forms. They are considered to be:

> integral to the cultural and social identities of indigenous and local communities, they embody know-how and skills, and they transmit core values and beliefs. Their protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage.[24]

The draft objectives proceed on the basis that traditional cultural expressions and traditional knowledge have 'intrinsic value' not only to indigenous communities but also to 'all humanity'. According to the draft principles, the following uses of traditional cultural expressions by parties other than the traditional owners would be allowed only with the prior informed consent of the relevant community:

- the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;

- any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;
- any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and
- the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof.[25]

Having said that the draft objectives and principles provide a framework for implementation of national laws, we note they are not intended to be a prescription – they are intended to be sufficiently flexible for national laws to be designed to meet local needs as well.

The Intergovernmental Committee's mandate is to submit to the 2011 General Assembly of the World Intellectual Property Organization the text of an international legal instrument (or instruments) which will ensure the effective protection of traditional knowledge and traditional cultural expressions, as well as genetic resources. Whether any treaty will emerge, and exactly what it will contain, remain to be seen. The work is controversial and there is of course no guarantee that any draft will be accepted, but obviously much progress has been made.

In the context of protection for taonga works and mātauranga Māori, article 31(1) of the Declaration on the Rights of Indigenous Peoples is of particular relevance, since it acknowledges that:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

The Declaration also addresses indigenous peoples' individual and collective rights in respect of their culture, identity, language, employment, health, education, and other issues. These principles speak directly to the issues at the heart of this claim. They provide valuable guidance on those issues and reflect in many ways the spirit of the principles of the Treaty of Waitangi.

1.5 The Rights of Kaitiaki in Taonga Works and Mātauranga Māori

1.5.1 The words of the Treaty of Waitangi

As we have said, one of the essential questions for us is whether the gap between IP law and taonga works, including mātauranga Māori, should and can be bridged. That is, should the current parameters of the law be expanded to meet some or all of the desires of the kaitiaki of taonga works and mātauranga Māori? To answer this question, we start with the Treaty of Waitangi.

There are two basic promises made to Māori in article 2 of the Treaty. In the English text, the promise is to protect Māori in the exclusive and undisturbed possession of their properties. In the Māori text, the guarantee is of 'te tino rangatiratanga o ratou taonga katoa' – Māori authority and control over all of their treasured things.

The English text contains the familiar language of property rights. But it does not sit well with the subject matter or the modern context. Mātauranga Māori cannot be exclusively 'possessed' except perhaps where, for some special reason, kaitiaki deem it necessary to keep the mātauranga secret. It is a core characteristic of almost all knowledge that it is shared. It is the sharing of mātauranga Māori – indeed of knowledge generally – that makes it valuable. Perhaps this is because mātauranga and knowledge are both aspects of culture. The same is true of the individual manifestations of mātauranga Māori contained in the works themselves. Their value is not in excluding others from sharing them – whether they be mōteatea, haka, whakairo, tā moko, traditional stories, or any other kind of taonga work. Their value, indeed their point, is that they be performed, displayed, or shared in some way. Mātauranga Māori and taonga works are not like land or other physical resources. They are products of the hearts

Sir Apirana Turupa Ngata (1874–1950) (Ngāti Porou). Among his many achievements, Ngata spent four decades compiling and recording an acclaimed collection of mōteatea, or ancient Māori song-poems. The latest edition of *Ngā Mōteatea* spans four volumes, each with a CD of key mōteatea, and has become crucial in the preservation and dissemination of this unique form of taonga work.

and minds of the communities who have created them and – except for the tiny proportion of mātauranga and taonga that are so tapu they must be kept secret – the value in these things is not in exclusively possessing them, but rather in sharing them.

The promise in the Māori text of authority and control over all of their treasured things seems to us much more appropriate. There is no doubt that mātauranga Māori and taonga works are treasured things. This wording fits with both the subject matter and an approach consistent with Māori custom. It allows for mātauranga Māori and taonga works to be shared, provided the kaitiaki retain an appropriate level of authority and control over the sharing. This allows kaitiaki to protect the integrity of the mātauranga or taonga work. It also allows them, in appropriate situations, to control at least in some measure the use and development of these things.

We begin then with two propositions. First, taonga works are covered by the Treaty reference to taonga. Secondly, in this area the Treaty speaks in the Māori text of authority but not necessarily exclusivity. That is, all things being equal, the legal framework should deliver a reasonable measure of kaitiaki control over the use of taonga works and mātauranga Māori. The more difficult question is how far that rangatiratanga authority should go in today's world and what a reasonable measure of control means in this complex area. Is it now too late, as the Crown argues, for any more than the limited protections already in place; or, as the claimants say, should the law go further? We think that requires a careful assessment of the relationship between the kaitiaki and the taonga as an initial step, and then a balancing of the interests inherent in that relationship against other countervailing interests. We turn now to make those assessments.

1.5.2 A question of relationship

(1) *Taonga works*

In the introduction to this chapter, we referred to the longest place name and its kaitiaki, Ngāti Kere; the discipline of tā moko and the tohunga who are its kaitiaki; and Te Rauparaha's haka *Ka Mate* and its kaitiaki Ngāti Toa. In our hearings we heard evidence of many other taonga works – for example, Te Hau ki Tūranga, the famous carved ancestral house held at Te Papa, and its kaitiaki, the iwi of Rongowhakaata; and *Ngā Mōteatea*, the revered collection of mōteatea or song-poems compiled by Sir Apirana Ngata in which each of the 500 mōteatea has its own living kaitiaki.[26] Most examples are taonga works; some, like *Ngā Mōteatea*, contain taonga works; a few, like Te Hau ki Tūranga, encompass both. All are products of mātauranga Māori.

All have certain key characteristics in common. The obvious one is they have kaitiaki – and they do so for very important reasons. First, they all have whakapapa. That is, their existence brings ancestors to life. The ancestors may be the composers or artists who created the works, or, as with Te Hau ki Tūranga, the ancestors may be embedded in the work. Secondly, these ancestors are brought to life in a context – that is, the taonga work tells an important story or teaches an important lesson using the ancestor as its fulcrum. In Māori terms, taonga works have kōrero. It is these characteristics that cause Māori to say that taonga works have mauri – they live – and that the primary obligation of kaitiaki is to protect the mauri of the taonga work.

It is important to note that while all of the taonga works we have mentioned are old, age is not a precondition. Modern taonga works are constantly being created – for example, in the composition of modern mōteatea or haka, or in the work of living tohunga whakairo and tohunga tā moko. It is not age that gives a work mauri – although that can intensify it – it is the invocation of ancestors and the embedding of kōrero. For example, in our view Rongomaraeroa, the very modern marae space

▲ Artist Rangi Kipa at work.

▶ Ngāti Tarawhai tohunga whakairo (master carver) Tene Waitere at work. Many regard Waitere as the most groundbreaking Māori carver of the late nineteenth century and responsible for communicating pan-tribal Māori legends to a wider audience.

▶ Hei tiki by Rangi Kipa. Like many contemporary Māori artists, Kipa makes mātauranga Māori speak through new materials. He says the plastic he uses for his hei tiki 'opens the way a little bit and means that maybe people other than Māori choose to wear them – a lot of Pākehā people are attracted to them as well.'

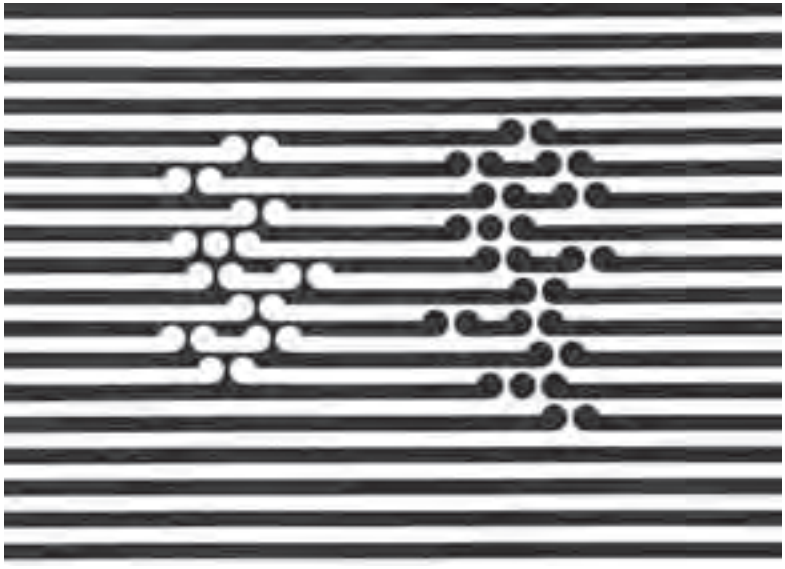
on the fourth floor at Te Papa, has mauri, even though the materials used in its construction are new and its styles are innovative.[27]

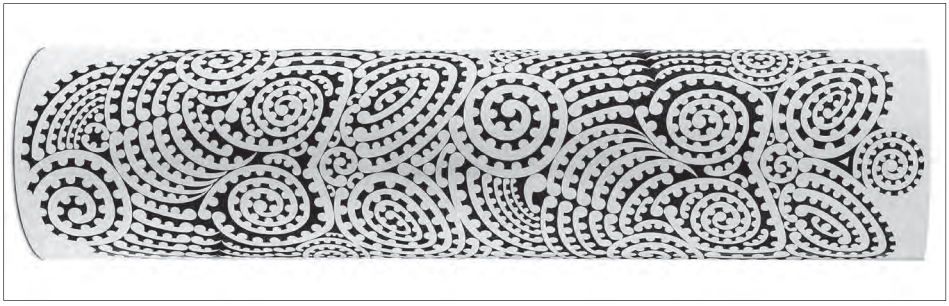
Whether the taonga is ancient or new, it follows that the language of the Treaty requires that kaitiaki have enough authority and control to enable them to protect its mauri. And as we have implied, this extends to the mātauranga Māori behind the taonga, because it is the mātauranga that makes the taonga live.

As a starting point, this suggests that consideration should be given to establishing a framework that allows kaitiaki to prevent offensive and derogatory public uses of taonga works and their associated mātauranga. But there is more to it than that. These taonga works exist now in a modern Western world. They sit at the interface between the traditional world from which they came and the contemporary world of commerce in which they may have prominent roles. Yet many are exploited commercially without the consent of, or even consultation with, kaitiaki. This does not seem right to us. It is certainly inconsistent

▲ Kōwhaiwhai on the rafters of Tamatekapua meeting house at Ohinemutu. Painted taonga works of this kind illustrate the rapid Māori adoption of new technologies to express and communicate their mātauranga.

▶ *Painting No 1*, by Gordon Walters, 1965. Witness Michael Smythe argued that Walters 'was honouring the artistic heritage of the country he was working from' in his paintings. 'By using Maori imagery as his starting point, rather than directly copying, he was "being inspired by" rather than plagiarising.'





Tinakori, a sculpture by Ngataiharuru Taepa. For Taepa, kōwhaiwhai is 'an expression of the way our ancestors saw the world in their time . . . it's achieving excellence through simplicity'.

with the Treaty promises we have discussed. In our view, the kaitiaki relationship ought to apply to the entire life of the taonga work, and kaitiaki should be able to derive benefits from that relationship. The benefits could range from the simple satisfaction of being acknowledged, to direct economic benefits where kaitiaki feel this is appropriate. In this way, the mauri of a taonga work is not just a thing to be protected against mistreatment. It can also be a positive force in the life and well-being of the communities who are its kaitiaki. As in traditional times, it would allow the mauri of the work to contribute to the mauri of the people, and vice versa.

The examples we have given above are emblematic of many others. Although we have still to address difficult issues of conflict between the expectations of kaitiaki and other interests, it is at least clear that the language of the Treaty speaks directly to the relationship between mātauranga Māori, taonga works, and their kaitiaki.

(2) *Taonga-derived works*

There is another, more amorphous category of works. These are works that have a Māori element to them, but those elements are generalised or adapted, and other non-Māori influences may also be present in the work. Designer Michael Smythe provided us with a number of examples of such works. One of the most celebrated was Gordon Walters' *Painting No 1*, 1965. Another well-known image Smythe discussed was the stylised koru created for Air New Zealand by Bernard Roundhill Studios in 1965 as a way of blending Māori culture, the sternpost of a canoe, and modern jet-age travel in a single design.

Works like these are inspired either by taonga works or by the mātauranga Māori underlying those works, but the connection to mātauranga Māori is far more tenuous than in the case of taonga works themselves. We call these taonga-derived works. We put them into a different category because they are so generic or derivative that they have no whakapapa, no kōrero, and no kaitiaki. That is not to say these works lack significance, have no stories of their own, and no one who feels close to them. All creative works have these things in differing measure, whatever their cultural base. The point is that taonga-derived works tend to evoke modern personalities rather than ancestors, tell contemporary stories rather than ancient ones, and attract new communities of followers rather than the ancient hapū and iwi of te ao Māori. However powerful and influential they may be in the modern world, taonga-derived works have not been infused with the mauri that comes from ancestors and ancestral stories, and which is the distinguishing feature of works sourced entirely in mātauranga Māori.

In our view, the protections available to taonga-derived works ought to be more limited. There is often a sufficiently Māori element in these works for there to be a clear need to prevent derogatory or offensive public use. Māori should be able to prevent derivative but obviously Māori designs being painted on toilet bowls, for example. But the absence of a kaitiaki in taonga-derived works suggests to us that the protection should stop there. If there are no ancestors and no kōrero, then there is no basis upon which anybody can say, 'I have responsibility for this and you may not use it without my consent'. To insert such authority would require the law to create a kaitiaki where one does not exist naturally. We think that would go too far. Apart from this inherent problem of artificiality, such a control might also suppress the

natural tendency to innovate at the edge between Māori and Pākehā approaches to design. We do not think that should be risked without a very good reason.

(3) *Summary*

In a nutshell, therefore, we have reached three conclusions:

- Whether the work in question is a taonga work or a taonga-derived work, Māori are entitled to prevent offensive and derogatory public uses of it.
- If the work in question is a taonga work, then the kaitiakitanga relationship that comes with it justifies more extensive rights in Treaty terms. These would include the right to be consulted and, where appropriate, to give consent to the commercial use of such works.
- Māori are also entitled to prevent offensive and derogatory public uses of mātauranga Māori.

We would reiterate that the rights we have set out here are Treaty rights derived from the rangatiratanga guarantee in article 2. They are in their nature constitutional rights, and the Crown must take all reasonable steps to accommodate them within the framework of IP law. But the Crown's obligation is not absolute. The Crown must do what is reasonable in the circumstances. The reasonableness line is to be drawn after careful consideration of the impact such rights might have on the rights and interests of others.

We turn now to consider whether other relevant non-Treaty interests would lead us to modify or limit the rights as we have initially described them.

1.5.3 A question of balance

In the area of taonga works and mātauranga Māori, there are two categories of non-Treaty interest. The first comprises IP rights. Right holders include authors who hold copyright in books containing taonga works or mātauranga Māori, publishers who reproduce images of taonga works, businesses that incorporate taonga works into their registered trade marks, and so forth. They have legally enforceable rights guaranteed by statute. The second category is the important but less well-defined interest of the public in the area of free access called the public domain. Anyone who has used Google knows how vast that domain now is.

(1) *Offensive and derogatory public uses*

We do not think that the ownership of private IP rights should entitle an owner to use taonga works, taonga-derived works, or mātauranga Māori in a derogatory or offensive public manner. Just what is derogatory or offensive use is probably best determined through adjudication of actual examples by authorities invested with appropriate jurisdiction under any new system of protections. We suggest, however, that kaitiaki would probably take offence at the placing of a chief's tā moko on toilet seats, or the broadcast of a hapū mōteatea interspersed with English expletives. And Ngāti Toa might not think it appropriate for the words of *Ka Mate* to be reproduced on a dinner plate, given the general aversion in Māori culture to placing things with mauri close to food. Whether such uses should be prohibited in any particular case will be for a properly constituted body to consider in light of all arguments and evidence. What is important is that there should be a forum to which kaitiaki can bring their concerns and seek redress.

Similarly, we do not think the existence of a taonga work or mātauranga Māori in the public domain entitles the general public to use it in an offensive or derogatory

Tiki salad servers. It may not be widely known that such an association of taonga Māori with food would risk offending many Māori.

Naïve or offensive exploitation of Māori imagery for commercial gain is not new. The reproductions here are of some of the older examples known in New Zealand. *Clockwise from left:* Loyal's cigarettes, 1931; Maori Chief butter, 1893; Native Brand Worcester sauce, pickles, and chutney, 1927; Willis playing cards, 1920s.

manner. It is clear to us that it is reasonable for the Crown to establish a system that enables Māori to prevent offensive or derogatory public use in all circumstances. We also think this ought to be retrospective. That is, Māori should be entitled to take steps to prevent offensive or derogatory treatment even in existing published works and current registered trade marks. Of course, whether a treatment is offensive or derogatory in context will be a matter of debate; and whether, even if it is found to be so, the powerful sanction of removing the use entirely should be meted out will also be a matter for debate. There will be some treatments, for example, that are deeply offensive today but were not seen so hundreds of years ago. Historical renditions of old attitudes may not be appropriate candidates for removal. What is important is that any new regime must give Māori an opportunity to raise the issue and have their concerns taken into account, along with all of the other interests involved in an independent adjudicatory process.

(2) *Other uses*

What, then, of the non-derogatory use of taonga works and taonga-derived works? Is it reasonable to impose any limitations on IP rights and the public domain to meet the needs of kaitiaki?

We begin with the use of taonga-derived works. As we have said, we do not think that a limitation on the non-derogatory and non-offensive use of taonga-derived works in order to protect Māori interests is reasonable. A distinguishing feature of these derivative works is that they have no kaitiaki, so there is no specific relationship to protect. Rather, the relationship between the work and mātauranga Māori is highly abstract, more generalised, and less easily pinned down. We think the imposition of a control on the use of taonga-derived works risks stifling creativity without any justification.

The second potential category of controls relates to pre-existing uses of taonga works in publications, reproductions, graphic designs, performances, and so on. Again, we do not think that a limitation on non-derogatory pre-existing uses is reasonable. Works have been produced, reproduced, performed, or exhibited in good faith in accordance with IP rights under the existing legal framework. We do not think that confiscating those rights can

Ring by Jane Vile. Vile's painstaking reconfiguration of an old halfpenny coin is one of a variety of hybrid works that incorporate found Māori imagery within other artistic traditions to create something unique.

be justified, even to protect Treaty interests. Nor do we think that the legal framework should retrospectively curtail pre-existing uses of taonga works drawn from the public domain. Again, users have relied upon the existing framework and should not now be penalised for doing so.

We do not take the same view, however, in respect of future non-derogatory commercial use of taonga works or closely held mātauranga Māori for which kaitiaki can be identified. This is because in a future category there are no pre-existing IP rights to counterbalance the interests of kaitiaki. As long as those seeking to use taonga works or mātauranga Māori in the future are given fair warning of the legal protections for kaitiaki, there can be no claim of prejudice arising out of a new legal duty to consult with and, in appropriate circumstances, obtain the consent of kaitiaki. We accept that there remains the public interest in free access to material that is publicly available or otherwise in the public domain, but in our view that interest ought, to some extent at least, to be subject to Treaty requirements. The right of kaitiaki should prevail over that interest where the circumstances justify it. At the very least, there should be no ability to commercially exploit closely held mātauranga Māori or taonga works without engaging with kaitiaki over that intention through a process of consultation.

For completeness, we note that the kaitiaki interest should prevail in respect of derogatory or offensive public use of taonga works, but private and non-commercial use should remain unaffected. If a reasonableness line is to be drawn, it ought to be drawn outside the sphere of private, non-commercial activity. We say this for practical reasons. A law applying to individual action at that level would be largely unenforceable, and would, we think, be resented as an unjustifiable interference in personal choice. Equally, the reasonableness line should be drawn outside the sphere of public non-commercial activity. Neither we nor the claimants wish to prevent, for example, the performance of haka and waiata in schools. The Māori concern has always been around derogatory or offensive public use and commercial exploitation of mātauranga Māori and taonga works, and this is the area on which the law should focus.

1.5.4 Summary – the Treaty, taonga works, and the intellectual property regime

These issues are complex, so we think it appropriate to summarise our conclusions before outlining our recommendations.

We concluded first that the Treaty is relevant to the question of protection of taonga works. We found that the framework for analysing the issues is to be found in the article 2 guarantee of tino rangatiratanga – authority and control – over taonga. Within that framework, we concluded the relationship between kaitiaki and their taonga works should be protected if reasonably possible, but that a lesser degree of protection should apply to taonga-derived works.

We also concluded that the Treaty does not provide for exclusive ownership of mātauranga Māori or the intangible aspects of taonga works. However, where some forms of mātauranga Māori – for example, a tribal story or other forms of tikanga Māori – have identifiable kaitiaki, they are entitled to a reasonable degree of protection.

We then balanced the importance of that relationship against the interests of private right holders and general access to the public domain. We did this to determine what level of protection for kaitiaki was reasonable in all of the circumstances. We concluded that taonga works, taonga-derived works, and mātauranga Māori are entitled

The Maoris postcard, one of the 'Living Races of the World' series, early 1900s. Images of Māori have, in various ways, continued to be used to promote New Zealand as a tourist destination.

to protection from offensive and derogatory public use in all circumstances. We also concluded that while it is inappropriate to interfere in pre-existing vested rights, any future use of taonga works for commercial purposes should occur only after consulting with and, where appropriate, obtaining the consent of kaitiaki. We think a legal framework that gives effect to these principles would strike a fair balance between the Treaty rights of kaitiaki, the property rights of IP owners, and the interests of the public in access to the public domain.

What we recommend is a simple but important adjustment in New Zealand's IP framework: an acceptance that there will be circumstances where the relationship between kaitiaki and their taonga works and mātauranga Māori should be actively protected by the law. That would create, for the first time in New Zealand's history, a legal environment conducive to the long-term survival of mātauranga Māori and the kaitiaki relationship. If this were the only advantage, it would be amply justified. In truth, the benefits gained by kaitiaki will also accrue to the country as a whole. Taonga works are not just about Māori identity – they are about New Zealand identity, and a regime that delivers kaitiaki control of taonga works will also deliver New Zealand control of its unique identity. That is an outcome with which none can argue, for it is the legal foundation of the cultural partnership the Treaty itself foresaw.

1.5.5 New Zealand's intellectual property regime and the international context

We recognise that it is not enough for us to identify reforms to make the IP framework Treaty compliant. IP law is, as we have said, subject to extensive international obligations imposed by multilateral treaties.

Is there anything in the TRIPS Agreement that might prevent New Zealand from instituting the protections for taonga works and mātauranga Māori that we have sketched out in this section? In our view, there is not. The TRIPS Agreement is a floor, not a ceiling. Extra protections can be added because they do not have the effect of breaching the minimum standards.

We are satisfied therefore that our recommendations do not fall foul of New Zealand's international obligations.

Having said that, the existence of the TRIPS Agreement underscores the idea that IP law is international law because ideas travel. It is all very well to have a domestic regime that is consistent with the Treaty of Waitangi, but mātauranga Māori is able to be accessed anywhere in the world and a great deal of the misuse of taonga works and taonga-derived works now occurs offshore. New Zealand is obviously unable to impose Treaty-compliant standards on the international community, and its ability to persuade other countries to adopt reforms is very limited indeed. But New Zealand is not entirely without

influence. It is our perception that New Zealand is seen (and sees itself) as a small, independent-minded Western country with a deep commitment to multilateralism. It has led the international community in human rights, environmental standards, nuclear issues, and trade liberalisation, and in models for indigenous–settler reconciliation over historical wrongs. While this must not be overstated, this country is generally seen as more influential than its population, GDP, and geographical position would warrant.

We are not so naïve as to think that the introduction of a Treaty-compliant domestic regime would solve all the problems for taonga works and mātauranga Māori. On the other hand, New Zealand's limited international influence should not deter it from taking any action. In our view New Zealand should have a dual strategy: first, to introduce a regime to protect mātauranga Māori and taonga works; and secondly, to advocate for the broad uptake of minimum standards of protection in the international community, whether in large multilateral or smaller free trade agreements. We are under no illusion about the difficulty of the second strategy, but the alternative – do nothing – has no merit whatsoever. In fact, New Zealand has persisted in arguing for, and secured, Treaty of Waitangi exception clauses in some of its most recent free trade agreements, so already has a track record in this regard.[28]

1.6 Reforms

Whatever mechanism is used to protect the kaitiaki interest in taonga works and mātauranga Māori, it must speak to the existing IP framework. It must be able to affect how copyright arises, and to affect whether trade marks or registered design rights can be granted or enforced. It must therefore be seen as both additional to, and separate from, the IP system, yet able to impact upon the rights within that system in appropriate circumstances. Rather than adopting a system for the protection of mātauranga Māori and taonga works which is either entirely with the orthodox IP framework or entirely *sui generis* (stand-alone), it might be best to think of what we recommend as a series of protections that are beyond the current parameters of IP law, but which work together with that system so as to resolve any conflict.

We think two practical changes are needed. The first is a general change to the law so as to require consultation with, or the consent of, kaitiaki in the commercial use of taonga works and mātauranga Māori; and to prohibit the offensive or derogatory public use of taonga works, taonga-derived works, and mātauranga Māori. The second is to establish a commission whose job it will be to administer the new protections, maintain a register of kaitiaki, and publish best-practice guidelines for the use, care, protection, and custody of taonga works, taonga-derived works, and mātauranga Māori.

We turn now to describe these reforms in more detail.

1.6.1 New general standards

The primary reform ought to be to prohibit the offensive or derogatory public use of taonga works, taonga-derived works, and mātauranga Māori so as to establish new standards of behaviour. Sanctions should be available in the usual way for breach of this prohibition. In addition, there should be a general statutory requirement that those proposing to use taonga works and/or mātauranga Māori for commercial purposes must consult with and, in appropriate cases, secure the consent of kaitiaki before doing so.

These broad propositions raise a number of questions. For example, how is a taonga work to be defined? How is it to be distinguished from a taonga-derived work? How are kaitiaki to be identified? In what circumstances will kaitiaki consent be necessary, rather than the lesser standard of consultation? Where do kaitiaki and third parties go for guidance, or to protect their interests? These are the questions to be confronted by the commission we have recommended.

1.6.2 The commission

The introduction of new standards will not make any difference unless there is a body to interpret and enforce them. There is a strong argument that these tasks are for experts, rather than the general courts. The general courts lack the expertise to make the judgments based on tikanga Māori that the proposed system will require. A

commission needs to be established with specific adjudicative, facilitative, and administrative functions.

The adjudicative functions will be its most challenging. The commission should be empowered to receive complaints from anyone alleging offensive or derogatory public use of taonga works, taonga-derived works, or mātauranga Māori. The commission will need to decide what steps must be taken to remedy the situation. This will cover a wide range of possibilities. It should also be empowered to receive complaints from kaitiaki about the commercial use of taonga works and mātauranga Māori without their involvement. If the commission considers that the thing in question is a taonga work or mātauranga Māori for which the kaitiaki has an obligation of kaitiakitanga, it will need to decide whether consultation between the kaitiaki and user is sufficient, or whether consent must precede any further use. And if the object in question is a work, the commission will be required to determine whether it is a taonga work, a taonga-derived work, or neither.

It can be seen that our recommendation allows only kaitiaki to take steps over non-derogatory commercial uses of taonga works. The commission will therefore need to determine who is a kaitiaki. We see this as a partly adjudicative and partly administrative function. We explain our recommendations in respect of a kaitiaki register below. In contrast, we think anybody should be able to apply to prevent offensive or derogatory public use. It is in the public interest for the law to provide general mechanisms discouraging or preventing offensive or derogatory public use of taonga works and taonga-derived works.

The adjudicative tasks we have outlined here for the commission must operate alongside the existing adjudicative powers vested in the Commissioner of Trade Marks and the High Court, but they must also have their own independent enforceability. By this we mean that, in the case of taonga works and taonga-derived works, rights vested in users by virtue of the ordinary law of trade marks or copyright must not derogate from any rights found by the commission to be vested in kaitiaki or in the objects themselves. Accordingly, for example, an owner of copyright in a reproduction of a taonga work would not be able to use that reproduction without either consultation with or consent of the kaitiaki. The fact that the user owns some form of copyright would not avoid the need for consultation or consent because protections for taonga works and mātauranga Māori are intended to be additional to those provided by the framework of orthodox IP law.

Finally, the commission should replace the trade marks advisory committee currently operating within the Intellectual Property Office. We envisage a reform whereby the Commissioner of Trade Marks would be required to refer any trade mark application containing some aspect of mātauranga Māori to the commission. The commission would consider whether the proposed trade mark contained any offensive or derogatory use of a taonga work or taonga-derived work. The commission's view would be final and would bind the Commissioner of Trade Marks. This would have the effect of shifting the offensive or derogatory use decision prior to trade mark registration from the Commissioner of Trade Marks, where it currently resides, to the new commission.

The commission's facilitative function would be more proactive than complaint oriented. It would be helpful for the commission to establish best-practice guidelines for the use, care, protection, and custody of taonga works and taonga-derived works. They would be developed to assist those dealing with such works to understand their significance and the mātauranga Māori behind them. The guidelines would help users with culturally appropriate practices if they wish to adopt them, and explain why the practices are followed. They would be designed to assist rather than direct.

We feel that the commission would quickly become the natural first port of call for those seeking guidance in respect of the use of taonga works and taonga-derived works. The evidence we heard from interested parties suggests strongly that there would be a demand for such assistance from the public and private sectors, both locally and internationally. Indeed, it is possible that such facilitation would come to dominate the commission's work. We hope so. A small secretariat would be necessary to perform this function well.

Finally, the commission would have an important administrative role. Apart from the works themselves,

the key ingredient in this framework is the kaitiaki. How can they be identified? We recommend that the commission operate a register of kaitiaki in respect of particular taonga works. For example, kaitiaki would be empowered to apply to be recorded on the register for particular haka, mōteatea, carvings, and so forth. Applicants might be iwi, hapū, whānau, or individuals. We envisage a public notification process to allow for any objections. If there are objections, then the commission will have to resolve them. If there are no objections, then the kaitiaki will be registered as of right for the taonga work. Registration should be free.

We have come to the view that a public register is the only workable mechanism after much careful thought. We are aware that some mātauranga Māori and some taonga works are, to all intents and purposes, secret. We would not wish to encourage the registration of such works and mātauranga, and their kaitiaki. Secrecy is usually their best protection. The register, on the other hand, is really aimed at works that have – rightly or wrongly – come into the public domain. In these instances, formal registration is a practical way of affording them some protection. That said, kaitiaki should always have a right to object to commercial use, including proposed commercial use, of a taonga work or mātauranga Māori, irrespective of whether they have registered their interest. This will ensure that those who prefer not to publish their mātauranga or relationships are not disadvantaged by their decision.

For the commission to perform the multiple functions we propose here, it would need to be multi-disciplinary. It should have expertise at commission level in mātauranga Māori, IP, law, commerce, science, and stewardship of taonga works and documents. It would also need a number of these disciplines within the ranks of its secretariat. If this recommendation finds favour, size, structure, and budget will be for Ministers and officials to work through.

1.6.3 New definitions and principles

We have left two significant questions for consideration at the end of this chapter because they are the most difficult and because it seems to us important to sketch our overall recommendations before dealing with them. The first question underlies the entire chapter: what are workable definitions for taonga works and taonga-derived works? The second question follows from the first: once the commission has determined that the work in question is a taonga work, what principles should it use to decide whether consent rather than mere consultation is necessary?

In section 1.5.2(1)we identified the core characteristics of taonga works. They are sourced in mātauranga Māori; they relate to or invoke ancestors – that is, they have whakapapa; they contain or reflect traditional narrative or stories; they have their own mauri; and each taonga work has a living kaitiaki. We would suggest, therefore, a working definition as follows:

> A taonga work is a work, whether or not it has been fixed, that is in its entirety an expression of mātauranga Māori; it will relate to or invoke ancestral connections, and contain or reflect traditional narratives or stories. A taonga work will possess mauri and have living kaitiaki in accordance with tikanga Māori.

In section 1.5.2(2), we also identified the core characteristics of taonga-derived works. These are works that have a Māori 'feel' but carry other characteristics as well. Crucially, they do not invoke ancestors or traditional narratives in any direct way. As a result, they lack mauri and have no obvious kaitiaki. Accordingly, a working definition for them is as follows:

> A taonga-derived work is a work that derives its inspiration from mātauranga Māori or a taonga work, but does not relate to or invoke ancestral connections, nor contain or reflect traditional narratives or stories, in any direct way. A taonga-derived work is identifiably Māori in nature, but has neither mauri nor living kaitiaki in accordance with tikanga Māori.

It will be for the commission to draw the line between the two categories in any particular case.

Once a work is determined to be a taonga work, the involvement of kaitiaki in its future commercial use becomes compulsory. We have intentionally left open whether that involvement means consultation or the giving of consent – it will be for the commission to decide

which option is applicable in any given case. Just as we balanced competing interests in concluding that only taonga works should have the benefit of the future protection we propose, the commission will need to strike a balance in choosing between consultation and consent. It will need to consider the nature of the proposed use: for example, consultation may well be sufficient for a relatively minor use such as a one-off public exhibition, whereas placing the taonga work on postcards or stamps may require consent. The effect on the user will also be relevant. Where the proposed use has significant commercial implications for a user, the commission may want to encourage consultation as a first step, in the hope that dialogue produces compromise.

In choosing between the options of consultation or consent, the commission should seek to balance the impact on the kaitiaki against the impact on the user and on other interests, particularly scholarship and the advancement of knowledge, and encourage compromise where possible. This is the balance between vested private property rights and enduring cultural obligations. As in all cases of competing interests, the law must provide for the balance to be struck as best it can.

1.7 Conclusion

We began this chapter with a brief explanation of why the Māori approach to rights and obligations in respect of their cultural heritage is different from that contained in the orthodox Western system of IP. We pointed to some examples we heard in evidence, all of which demonstrate the dissonance between the kaitiakitanga of Māori communities and the Pākehā system of IP rights. Yet, we have said, the cultural relationships between kaitiaki and taonga are clearly precious to Māori people and central to Māori identity, and the Treaty specifically acknowledges this. Few would argue that these relationships should not be affirmed in law in some way.

We then described some elements of the IP regime that make it clear that IP law protects the kaitiaki interest in taonga works and mātauranga Māori only to a very limited extent. It does so only when those things fall within and meet the specific requirements of certain categories of IP law. We looked too at the international context in respect of IP and concluded that New Zealand is not constrained by international law to protect the kaitiaki interest.

We also described international efforts aimed at protecting traditional cultural expressions and traditional knowledge. The issue is live in international trade diplomacy because making genuine attempts to reconcile cultural interests with IP rights is increasingly seen as best business practice in the commercial sector. It removes both potential bitterness in indigenous communities and commercial uncertainty for companies wanting to utilise traditional knowledge or traditional cultural expressions in their business. For example, member States within the World Intellectual Property Organization are currently working towards a treaty to protect them, and the UN's aspirational Declaration on the Rights of Indigenous Peoples makes direct reference to them.

And then, after reviewing the terms and principles of the Treaty of Waitangi, we offered an analytical framework for determining how the interests of kaitiaki might be recognised in law and how the relative strength of those interests might be balanced in the event of conflict with other interests. We recommended a general prohibition on offensive or derogatory public use of taonga works, taonga-derived works, and mātauranga Māori, and an objection-based case-by-case system of inquiry for commercial uses of taonga works and mātauranga Māori. A case-by-case approach will allow all stakeholders to find answers relevant to their own situations, as long as the principles are clear and the process is transparent.

We think New Zealand should take a leading role in developing a domestic framework for the protection of taonga works and mātauranga Māori. This would have both immediate and long-term benefits. New Zealand would not only be setting its own standard, but it might also reap the potential economic benefits of exporting the local framework. This would take time, but it could well improve prospects for investment in New Zealand and also for Māori overseas.

New Zealand may be one of the first Western countries to address these issues directly in domestic law, but then it has often led the world in the area of indigenous rights. This is probably partly because of the crucial role Māori culture plays in New Zealand's national identity, which in

turn reflects, among other things, a unique history of conflict and cooperation, and the relative size of the Māori population. Whatever the reason, New Zealand is in a unique position to develop its own practical IP standards relevant to its own national context, and to assist, perhaps lead, the world in doing so.

It is no longer realistic to adopt a do-nothing approach, because that will lead to events overtaking us. Indeed, it can be argued that resolving the dissonance between kaitiakitanga and IP in New Zealand may well attract investment. The commercial value to IP-based companies of bringing order and certainty through a balanced statutory certification process should not be underestimated.

Underpinning our entire discussion of this subject is this proposition: it is necessary to protect Māori culture and identity because that is how we protect New Zealand culture and identity. The two are becoming increasingly difficult to separate. New Zealand's law should make room for the relationships between kaitiaki and their taonga works and mātauranga Māori to flourish as a matter of national interest. If those relationships are strong, then Māori culture and identity are strong; and if Māori culture and identity are strong, then New Zealand culture and identity are strong. It is time for New Zealand law to reflect that fact.

1.8 Summary of Recommendations

Taonga works and mātauranga Maori should be legally protected. In certain circumstances, taonga-derived works should also receive some protection. The benefits of doing so will be felt not only by kaitiaki but by the country as a whole, in both the short and long term. Taonga works are not just about Māori identity – they are about New Zealand identity, and a regime that delivers kaitiaki control of taonga works will also deliver New Zealand control of its unique identity. Moreover, international law does not constrain New Zealand from protecting the kaitiaki interest.

We define taonga and taonga-derived works as follows:

- A taonga work is a work, whether or not it has been fixed, that is in its entirety an expression of mātauranga Māori; it will relate to or invoke ancestral connections (whakapapa), and contain or reflect traditional narratives or stories. A taonga work will possess mauri and have living kaitiaki in accordance with tikanga Māori.
- A taonga-derived work is a work that derives its inspiration from mātauranga Māori or a taonga work, but does not relate to or invoke ancestral connections (whakapapa), nor contain or reflect traditional narratives or stories, in any direct way. A taonga-derived work is identifiably Māori in nature, but has neither mauri nor living kaitiaki in accordance with tikanga Māori.

The key reforms we recommend for achieving the goal of protecting taonga works and mātauranga Māori are:

- New standards of legal protection governing the use of taonga works, taonga-derived works, and mātauranga Māori.

  We recommend that the law be amended to provide for two new mechanisms:

  - A general objection mechanism to prohibit the derogatory or offensive public use of taonga works, taonga-derived works, and mātauranga Māori.
  - A mechanism by which kaitiaki can prevent any commercial exploitation of taonga works or mātauranga Māori (but not taonga-derived works) unless and until there has been consultation and, where found appropriate, kaitiaki consent.
- An expert commission to have wider functions in relation to taonga works, taonga-derived works, and mātauranga Māori.

  We recommend a commission be established. It should have multi-disciplinary expertise (encompassing mātauranga Māori, IP law, commerce, science, and stewardship of taonga works and documents) at both commissioner and secretariat levels. It would replace the Trade marks advisory committee currently operating within the Intellectual Property Office.

  The commission's functions would fall into three broad areas.

  Adjudicative functions would include:

  - Hearing complaints from anyone alleging offensive or derogatory public use of taonga

works, taonga-derived works, or mātauranga Māori, and deciding what steps must be taken to remedy the situation.

- Hearing complaints from kaitiaki about the commercial use of taonga works and mātauranga Māori without their involvement. If the commission considers that the thing in question is a taonga work or mātauranga Māori for which the kaitiaki has an obligation of kaitiakitanga, it will need to decide whether consultation between the kaitiaki and user is sufficient, or whether consent must precede any further use.
- Determining whether, if the object in question is a work, it is a taonga work, a taonga-derived work, or neither.
- Determining who is a kaitiaki (this is both an adjudicative and an administrative function). Our recommendations in respect of a kaitiaki register are referred to below.

The commission's decisions would be binding.

The commission's main *facilitative* function would be to establish best-practice guidelines for the use, care, protection, and custody of taonga works and taonga-derived works. These would assist (rather than direct) those dealing with such works to understand their significance and the mātauranga Māori and kaitiaki obligations behind them. They would help users with applying culturally appropriate practices if they wished to adopt them, and explain why the practices are followed. The commission would need a small secretariat to perform this function well.

The commission's *administrative* function would primarily involve operating a register of kaitiaki in respect of particular taonga works. Registration would be free, and iwi, hapū, whānau, or individuals could seek registration. We envisage a public notification process to allow for any objections, which the commission would have to resolve. If there are no objections, then the kaitiaki will be registered for the taonga work.

We recognise that some mātauranga Māori and taonga works are essentially secret: we would not wish to encourage their registration, nor that of their kaitiaki. The register is aimed at works that have become publicly available. In these instances, formal registration is a practical way of affording them some protection.

- New principles on which to base decisions about the nature of kaitiaki involvement in the commercial use of taonga works.

Once a work has been determined by the commission to be a taonga work, we recommend that the involvement of kaitiaki be made compulsory in any future commercial use of it. There are two possibilities – the right to be consulted or the necessity for consent. It will be for the commission to decide which option is applicable in any given case, taking into account factors such as the nature of the proposed use and the effect on the user. The important principle is that the choice between consultation and consent is about balancing the impact on the kaitiaki against that on the user and on other interests, particularly scholarship and the advancement of knowledge, and encouraging compromise where possible. This is the balance between the pursuit of IP rights and enduring cultural obligations. As in all cases of competing interests, the law must provide for the balance to be struck as best it can.

Text notes

1. Rerekoho Ahiahi Robertson translated the name for us as 'The hill on which Tamatea with his big knees who roamed the country played his lament on his flute to the memory of his brother': doc I13 (Robertson, brief of evidence on behalf of Ngāti Kahungunu, 2000), p 2. Piri Sciascia noted that longer versions of the name had been used by his elders: doc I18 (Sciascia, brief of evidence on behalf of Ngāti Kahungunu, 2000), pp 2–3. We also acknowledge that there are other translations in use.
2. Ngāti Toa Rangatira are also known as Ngāti Toa. We will use this shorter form hereafter.
3. We note that some describe *Ka Mate* as a pōkeka rather than a ngeri.
4. In *Ka Mate ka Ora*, Hēni Collins provides a slightly different translation of *Ka Mate*; there are many subtle variations in translations of ancient song forms: see Collins, *Ka Mate ka Ora: The Spirit of Te Rauparaha* (Wellington: Steele Roberts, 2010), pp 24–26.

5. There is no official definition of the term 'IP'. Article 2(viii) of the Convention Establishing the World Intellectual Property Organization Convention Establishing the World Intellectual Property Organization, 14 July 1967, 21 UST 1749, 848 UNTS 3, states that:

   'intellectual property' shall include the rights relating to:
   - literary, artistic and scientific works;
   - performances of performing artists, phonograms, and broadcasts;
   - inventions in all fields of human endeavor;
   - scientific discoveries;
   - industrial designs;
   - trademarks, service marks, and commercial names and designations;
   - protection against unfair competition; and
   - all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

6. Copyright Act 1994, ss 22, 23, 24, 25. Section 26 applies to Crown copyright. The duration varies depending on the type of copyright work. In New Zealand, copyright lasts for the life of the author plus 50 years for literary, dramatic, musical, and artistic works. For films and sound recordings, copyright lasts for 50 years from when the work is made.

7. Moral rights cannot be transferred during the creator's lifetime but they can be waived and inherited: see the Copyright Act 1994, ss 118–119.

8. Designs Act 1953, ss 2, 5(2)

9. Designs Act 1953, s 11(1)

10. There is one Commissioner of Patents, Trade Marks and Designs, and a separate Commissioner of Plant Variety Rights (discussed in chapter 2). For simplicity, we refer to the roles separately in their particular statutory contexts.

11. Trade Marks Act 2002, s 178

12. In October 2009, Creative New Zealand announced that it would no longer invest in and manage Toi Iho because allegedly it had not delivered the predicted economic benefits to Māori artists. In May 2010, agreement was reached between interim Transition Toi Iho Foundation trustees and representatives of Te Waka Toi that the Toi Iho trade marks and all associated IP rights would be transferred to the foundation as trustee for a new legal entity.

13. The Geographical Indications (Wines and Spirits) Registration Act 2006 has been passed by Parliament but not yet brought into force by Order in Council. The only part of the Act in force is section 62, which repeals the Geographical Indications Act 1994.

14. *Wineworths Group Ltd v Comité Interprofessionel du Vin de Champagne* [1992] 2 NZLR 327 (CA)

15. Document S2 (counsel for Ngāti Kahungunu, closing submissions: volume 2 – issues analysis, 16 April 2007), pp 11–12

16. Moana Maniapoto, under cross-examination by Crown counsel, 18th hearing, 25 September 2006 (transcript 4.1.18, pp 37–38, 40–41)

17. Document T1 (Crown counsel, closing submissions, 21 May 2007), p 50

18. Document Q7 (Michael Smythe, submission on behalf of the Designers' Institute of New Zealand Inc, 15 September 2006), p 17

19. Document Q8 (Creationz Consultants, interested party submission, 13 September 2006), p 9

20. Document Q8, p 9

21. Document Q1 (Victoria Campbell, interested party submission, 4 September 2006), pp 3–4

22. Document Q7(a) (Karl Wixon, 'Case Study: Te Ao Mahina, Nocturnal House, Wellington Zoo', undated), p 3

23. This recognition extends to 'social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values': World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore, 'The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles', secretariat document, WIPO/GRTKF/IC/16/4, 22 January 2010, annex, p 3.

24. World Intellectual Property Organization, 'Traditional Cultural Expressions (Folklore)', World Intellectual Property Organization, www.wipo.int/tk/en/folklore (accessed 1 February 2011)

25. World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore, 'The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles', secretariat document, WIPO/GRTKF/IC/9/4, 9 January 2006, annex, p 19

26. Apirana Ngata, *Ngā Mōteatea* (Auckland: Polynesian Society, 2004)

27. The presence of mauri in Rongomaraeroa raises the interesting question of who are its kaitiaki in accordance with tikanga Māori. We were advised by the then kaihautū of Te Papa, Te Taru White, that over the past decade various iwi have been invited to sponsor special exhibits of taonga works relating to them. As each exhibiting iwi departs to be replaced by a new iwi sponsor, a ceremony is held that transfers the mauri of Rongomaraeroa from one to the other. As is the case with all marae, the iwi that holds the mauri has control of protocols at the Te Papa marae. It is clear, therefore, that in the special case of this national marae the kaitiaki change, depending on which iwi has custody of its mauri.

28. See, for example, the Trans-Pacific Strategic Economic Partnership Agreement (opened for signature 18 July 2005, entered into force 28 May – 8 November 2006), art 19.5.

Whakataukī notes

Page 26 (top): John Locke, *Second Treatise of Government*, ed Crawford B Macpherson (Indianapolis: Hackett Publishing Company, 1980), p 66

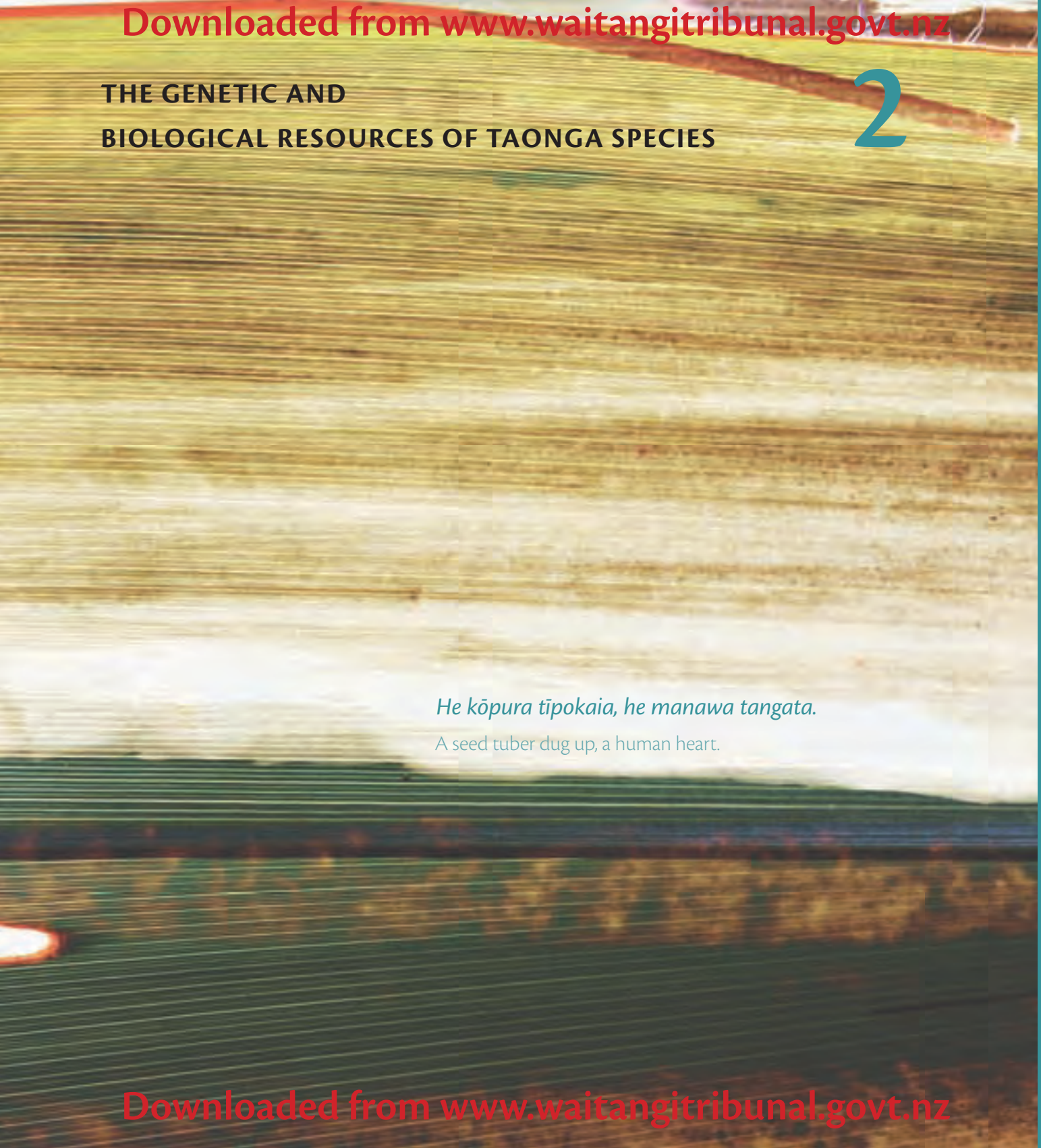
Page 26 (bottom): Herbert W Williams, *Dictionary of the Maori Language*, 7th ed (Wellington: GP Print, 1997), p 21

Science is not a body of facts. Science is a state of mind. It is a way of viewing the world, of facing reality square on but taking nothing on its face.

—Natalie Angier, 2008

2

THE GENETIC AND BIOLOGICAL RESOURCES OF TAONGA SPECIES



He kōpura tīpokaia, he manawa tangata.

A seed tuber dug up, a human heart.

CHAPTER 2

THE GENETIC AND BIOLOGICAL RESOURCES OF TAONGA SPECIES

2.1 Introduction

New Zealand is a nation with unique flora and fauna. Thanks to millions of years of evolution in relative isolation, the country has an estimated 80,000 indigenous species, ranging from New Zealand icons such as the kiwi and tuatara to humble worms and microbes. An extraordinary number of these indigenous species are endemic, which means they are found nowhere else on Earth.[1] Māori, as the first human colonisers of these islands 40 or so generations ago, have developed intimate relationships with this flora and fauna; and, in the years since Pākehā arrived, these species have become a source of national identity and pride for all New Zealanders. Increasingly, they have also become a source of profit in the growing industry of biotechnology.

Biotechnology is the use, by science, of living organisms to create new products, services, or knowledge. These are used in medicine and health care, cosmetics and skin care, and provide, for example, materials for new industrial processes, and new genetic traits for existing organisms. Worldwide, the industry generates annual revenue of tens of billions of dollars. In New Zealand, it generated $351 million in annual income during 2008 and 2009.[2]

The claimants say that they are kaitiaki of many of this country's indigenous species; some would say all these species. They argue that their kaitiaki relationships, and the mātauranga Māori associated with species they say are taonga to them, should be recognised in New Zealand law, and should take priority over the interests of research science and commerce. They say kaitiaki should have a veto over commercial and scientific exploitation of species that are taonga.

The Crown accepts that Māori have special cultural associations with some species of flora and fauna but says that these associations do not give Māori ownership of the genetic or biological material of those species. The Crown rejects any notion that Māori should be entitled to veto scientific research or commercial exploitation of these species by reason of cultural association. Most interested parties who gave evidence in this claim tended to support the Crown's position, though as we shall see, they were by no means unanimous on that point.

Through the rest of this chapter, we examine how the interests of science, commerce, and kaitiaki in taonga species intersect and conflict, and how that intersection should be managed. In broad terms, we conclude that existing law provides some protection at the margins, but fails to recognise or understand the power of kaitiakitanga and fails

Tane Mahuta's Triumph by Jane Crisp, 2007. This painting was inspired by the scale of Māori legends and mythology. It evokes the saying, 'I te whai ao, ki te ao mārama' (Into the world of light).

therefore to accord it the protection it deserves. It is possible to respect kaitiakitanga in the law without unduly interfering in the interests of science, commerce, or the wider community. We propose a set of reforms to do that. On the other hand, we reject the notion that Māori have, or should be given, any special proprietorial rights over the genetic and biological resources of taonga species.

In reaching these conclusions, we examine the nature of the relationship that has developed between kaitiaki and their taonga species over the generations since Kupe. We also consider, in very general terms, some of the drivers in Western history that produced modern research science and industrial intellectual property such as patents. Understanding the intersection between kaitiakitanga, science, and commerce is, after all, an exploration of comparative culture and values expressed through law.

Before proceeding, some concepts require definition. When we refer to 'genetic resources' of taonga species, we mean the genetic information encoded in the DNA sequence which is located in a cell's nucleus. When we refer to the 'biological resources' of taonga species, we mean the physical material that makes up the micro-organism, plant, or animal.[3] When we refer to 'taonga species', we mean species over which whānau, hapū, or iwi claim kaitiaki obligations. We do not mean generic obligations that can be easily claimed without the need for proof. We mean obligations whose basis, history, and content are set out in mātauranga Māori – that is, in inherited traditional knowledge, the credibility of which can be tested by experts in the subject.

2.2 Te Ao Māori and Taonga Species

2.2.1 The formation of te ao Māori

In the introduction we talked about how new arrivals from Hawaiki landed in Aotearoa and, over the course of generations, changed the environment and were in turn changed by it. In very simple terms, those first arrivals saw the world through a lens of kinship. Everything was related – people (living and dead), land, sea, flora and fauna, and the spiritual world. Land, sea, wind, and other environmental elements were ancestor-gods, linked to the living through whakapapa. A person's well-being was intimately linked to the well-being of all others (human and non-human) to whom he or she was related.

In this new land, new kinship bonds were formed. New ways were found to grow and store the Hawaiki crops that could survive here. New food sources were found. Names were coined for thousands of species that were not present in Hawaiki, such as kauri, kiwi, and tūī. These names were the beginnings of what we now call te reo Māori. New kōrero explained the characteristics of unfamiliar plants, animals, and landforms. New art-forms emerged, such as carving of ancestral houses and great single-hulled canoes (made possible by the height of tōtara and the ease with which their wood could be adzed

or carved). Even the gods subtly realigned, some coming to matter less, while others – such as Papa-tū-ā-nuku and her son Tāne-mahuta – grew in status to reflect the new scale and climate of Aotearoa.

At some point, Hawaiki language became Māori language, and Hawaiki culture became the Māori culture that exists in modified form to this day. In this sense, Māori culture is a creation of its environment. It retains aspects of its Hawaikian roots, but the elements that make it distinctive in the world can be seen as both a reflection of and response to this particular place.

Throughout this evolution, the Hawaikian concept of kinship – known in te reo Māori as whanaungatanga – remained the core defining force. In keeping with whanaungatanga, the new culture was also defined by relationships between people, land, water, flora, fauna, and inhabitants of the spiritual world – all bound together in a web of mutual responsibility. The most important of these responsibilities is known in te reo Māori as kaitiakitanga – the obligation of kinsfolk to nurture or care for their relations. In the human realm, those who have mana (authority) must exercise it in accordance with the values of kaitiakitanga – acting unselfishly, with right mind and heart, and using correct procedure. Kaitiakitanga is an obligation not just of individuals but of the community as well.

That is not to say that the Māori world view requires humans to treat the environment as pristine and untouchable. Nor does it suggest that good kaitiakitanga has invariably been practised by Māori leaders and communities throughout history. On the contrary, Māori – like all human communities – survived by exploiting the resources around them, and in doing so, they occasionally caused significant damage. That was certainly the case when the Hawaikians began to grapple with both megafauna in great abundance and a heavily forested environment that was a barrier to familiar modes of cultivation. The Hawaikians certainly did not live up to their own values in the early days of colonisation, but with time and experience they seem to have found a system of knowledge and technology that produced a kind of equilibrium between themselves and the environment that was more consistent with those values. Kaitiakitanga is the word, the ideal, that expresses that equilibrium. It is a way of thinking and acting that seeks to express and enhance whanaungatanga with taonga in the natural environment.

2.2.2 Taonga species

As we have said, taonga species are the species of flora and fauna for which an iwi, hapū, or whānau says it has kaitiaki responsibilities. These kaitiaki–taonga species relationships are complex and varied. The purpose of the relationship is defined in mātauranga Māori (the tribe's traditional knowledge about the species), in whakapapa, waiata and other performance arts, and in kōrero or story. No two iwi, hapū, or whānau will have the same mātauranga or the same kōrero about a particular taonga species. Rather, relationships will be unique and jealously protected.

The evidence we heard reflected this wide range of relationships. We learned of species such as whales and tuatara who acted as spiritual guardians for certain iwi. We heard kōrero that explained the characteristics of particular species – for example, pōhutukawa, whose red flowers are said, in one account, to be the blood of the warrior Tāwhaki, fallen from heaven. We heard whakapapa of species such as harakeke and koromiko, and were told of the responsibilities iwi members felt towards taonga species – such as the anger felt by a Ngāti Koata man towards his son, who stole a tuatara egg. We were told, too, of the ceremonial and symbolic uses of taonga species such as koromiko, which is used to accompany karakia to cure or prevent illness, and kawakawa, a symbol of mourning.

Most of all, we were told of practical relationships, developed over 40 generations, between iwi and taonga species used for food (such as kūmara and tuna or eels), for rongoā Māori (such as kawakawa, koromiko, kūmara, and harakeke), for weaving (harakeke, kiekie, and raupō), for carving and canoe building, and for various ceremonial purposes. Claimants spoke at length on the uses of plants and treatment methodologies, while others spoke of the life cycles and characteristics of these species.

Though many taonga species were valued for their practical benefits, they were not viewed simply as resources. Rather, the efficacy of a plant or animal depended on its mauri – its physical and spiritual well-being – and the person using it was responsible for that mauri. This kaitiaki obligation was expressed through karakia and rituals

Here Mokena Pahoe of Waipiro Bay in front of kūmara pits, circa 1905. Māori became expert at adapting Polynesian horticultural methods to Aotearoa's colder climate.

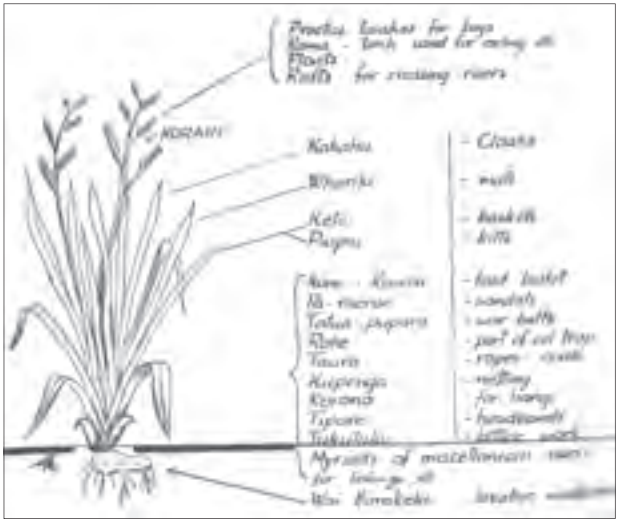
associated with gathering and use. As Robert McGowan, a Pākehā rongoā expert, told us:

> Traditional healers attest to the spiritual force, the *mauri*, within all manner of objects, plants included, and the ability of particular people to communicate with them. This is particularly apposite to *rongoa Maori*. The *mauri* within a plant can reach out to the *mauri* of the healer, and share the gift of healing that it carries.[4]

In discussing taonga species, claimants expressed concern about threats to or interference with their kaitiaki relationships. They were concerned about research and commercial exploitation of taonga species and related mātauranga Māori that takes place without their knowledge, involvement, or authorisation – often in situations that mean others profit from mātauranga Māori while the kaitiaki themselves receive no benefits. They were concerned, too, about the potential for interference with the whakapapa of taonga species through genetic modification, and about use of the intellectual property regime to assert rights that exclude kaitiaki and undermine the kaitiaki–species relationship. The following three examples show these concerns in more detail:

- *Harakeke* (*New Zealand flax*): It is difficult to think of a plant more important to mātauranga Māori, or to traditional Māori life, than harakeke. Indeed, it is told that when the first Pākehā settlers explained that there was no harakeke in England, Māori were astonished. 'How is it possible to live there without it?' they asked.[5] According to tradition, harakeke is a grandchild of Rangi and Papa; along with other low-growing species such as fern, harakeke clothes its grandmother. In practical terms, harakeke provides garments, shelter, fibre for weaving, and medicines for a multitude of ailments. It is also a metaphor for the growth and life of the whānau, with its young centre – the rito – symbolising the vulnerable new generation, protected by the mother leaf and, in turn, by the father and older generations. Tribal weavers, in particular, regard harakeke with reverence and see themselves as responsible for its physical and spiritual well-being – a responsibility that is reflected in the use of karakia and special rituals when the plant is gathered and disposed of.

Medicinal and other uses of harakeke (flax plant). Harakeke was held in such high esteem that some chiefs marvelled at how the English could survive without it. Today, many rare varieties are cared for at Landcare's Rene Orchiston Flax Collection, from which plants are available free to marae for planting in rongoā and weaving gardens.



Today, harakeke is commercially exploited as an ingredient in skincare products and as a popular garden plant. It has also been investigated for its potential as a clothing fabric. Patents have been granted in the United States and New Zealand in respect of harakeke varieties, genes, and processing methods. Weavers fear their plants will be misused by non-kaitiaki who do not understand their significance and special properties. They complain that they have no ability to affect commercial exploitation, and they are even more concerned about the effect harakeke patents may have on their own kaitiakitanga.

- *Mānuka:* One of New Zealand's most common trees, mānuka has long been used as a source of timber for weapons, tukutuku panels, fish hooks, and so on, because it is extremely hard. But it is best known, both traditionally and today, for its health and medicinal properties. Hirini Clarke of Ngāti Porou, for example, told us about some traditional uses:

> The manuka was used in different ways. The leaves for example were used for oral infections, infections of the gums, toothache. It was sometimes used with other types of native plants, put into a liquid form and taken internally for upset tummies . . . the bark was pulped and mixed in with other rongoa and applied to open wounds . . . It was mixed with certain other native plants and made into medicines to cure hakihaki [sores] and other skin infections.[6]

Mānuka, Wharekopae River. In one Ngāti Whatua pepeha, groves of mānuka trees stand as a metaphor for the weapons made from its hardy wood: 'Ko te whare o mānuka' (The armoury of spears).

Due to its antihistamine, antibacterial, and antifungal effects, mānuka is increasingly being exploited for commercial gain both in New Zealand and elsewhere, with uses including cosmetics, treatments for skin conditions, and post-surgical treatments, as well as sales of mānuka honey. In 2008, German researchers claimed to have isolated the main active compound, without acknowledging any debt to mātauranga Māori.[7] In New Zealand and internationally, patents have been granted for products and processes that include mānuka honey, mānuka as an ale ingredient, and mānuka extracts used for a range of health and medicinal purposes. Claimants say it is unfair that companies with no prior relationship with mānuka are able to obtain private property rights in its genetic and biological make-up while there is no recognition at all for their own prior Māori relationship with the plant or their prior knowledge of its properties.

- *Tuatara:* Almost unchanged since the dinosaur era, New Zealand's two species of tuatara are 'living fossils' – the only surviving members of the order *Sphenodontia* that flourished more than 200 million years ago. They are unique to New Zealand. They also occupy a unique place in te ao Māori. Descendants of Tangaroa, the sea god, they symbolise the wisdom that comes with age, and are said to be able to see into the spiritual world through a

A tuatara. Fifty per cent of the world's tuatara now live on Takapourewa/Stephens Island in the rohe of Ngāti Koata, and we heard evidence that they are revered as a taonga by Ngāti Koata, Ngāti Wai, and Ngāti Porou.

'third eye' granted to them by Tangaroa. Tuatara are often given a role as kaitiaki of special places such as urupā (burial sites) and places where great misfortune has occurred.

Fifty per cent of the remaining tuatara population now lives on Takapourewa/Stephens Island in Cook Strait, which is administered by the Department of Conservation (DOC). The relationship between Ngāti Koata and the tuatara is deep and intimate, and the iwi are acknowledged as kaitiaki of the tuatara on Takapourewa and elsewhere within their rohe. This obligation is a matter of pride and identity for members of the iwi; one described tuatara as being 'almost like our tupuna'.[8] Ngāti Koata have a 'joint management' agreement with DOC in respect of the island. They acknowledge the need for scientific research, but stress the need for proper controls from a mātauranga Māori perspective and express concern about the risk of tuatara DNA being isolated and misused. They are opposed to tuatara research and management by DOC that has not been sanctioned by the tribe.

These are but a few of the many examples of taonga species we were told about. We also heard many other accounts of the way claimants felt their relationships with taonga species were jeopardised, and mātauranga Māori stolen or abused by research and commercial exploitation of genetic material. Poroporo, for example, has medicinal properties; it was exported more than a century ago and has been a commercial crop in Russia and Eastern Europe. Kōwhai ngutukākā (kaka beak) was taken from Ngāti Porou lands in the 1980s on condition, a witness said, that plants be returned and not used commercially. Ngāti Porou contend that neither condition was honoured.[9] Many other species, such as koromiko, pōhutukawa, and puawānanga, are now widely sold, in New Zealand and elsewhere, as garden plants, and kaitiaki say they see none of the benefits of this commercial exploitation.

The claimants argued that the law must recognise the importance of kaitiaki–taonga species relationships. They said that the law should allow kaitiaki a decisive say in research and the commercial use of taonga species to prevent what they consider to be abuses. Some, though not all, also said that kaitiaki should participate in the benefits of commercial exploitation of taonga species where this is consistent with tikanga Māori.

We heard some evidence from both claimants and third parties about informal relationships that had developed between kaitiaki and researchers or commercial interests in relation to particular projects. These relationships allowed kaitiaki to become involved in decision-making over the use of taonga species to a greater or lesser extent. Several Crown research institutes, among them the Institute of Geological and Nuclear Sciences (now GNS Science), Crop and Food (now Plant and Food Research), and the National Institute of Water and Atmospheric

◄◄ Flax plant *Phormium cookianum* Le Jolis, which Joseph Banks and Daniel Solander collected in 1769. Some 30 years later, numerous plants from after Cook's first voyage were still being propagated in the Royal Botanic Gardens at Kew.

◄ Puawānanga (native clematis). The focus of commercial interest in puawānanga has been its value as an ornamental plant. Efforts are ongoing to develop shrub-like forms suitable for home gardening.

► *Kōwhai ngutukākā* (kaka beak).

◄ Pōhutukawa showing leaves, flowers, buds, and capsules. Māori sayings about pōhutukawa stretch back to the first peopling of these islands. Low-growing cultivars of pōhutukawa and its close relative the rātā are popular garden plants both in New Zealand and overseas.

► Poroporo. This hardy native plant, favoured by Māori and early Pākehā settlers for its edible berries, was widely propagated in eastern European countries for the steroid industry in the 1960s and1970s. Later attempts to replicate that enterprise in New Zealand failed.

►► White mānuka in flower and seed. Mānuka was widely used by Māori for weaponry, building, and firewood. Today, mānuka oil and mānuka honey are the basis of a multi-million dollar industry in which Māori are increasingly important players.

Research have developed particularly strong business and research relationships with Māori, even including, in the case of Geological and Nuclear Sciences, access and benefit sharing-style arrangements with Māori landowners. As matters stand, however, such arrangements are exceptional. They arise because the relevant scientists or entrepreneurs see such arrangements as good business or good ethics. There is no legal requirement for them.

2.3 Te Ao Pākehā, Research Science, and Intellectual Property

Having described the perspectives that kaitiaki and practitioners of mātauranga Māori bring to taonga species, it is necessary now to explore the perspectives of the researchers, scientists, and entrepreneurs who are also deeply interested in these species. Their relationships with taonga species can be said to operate within te ao Pākehā and in accordance with its prescriptions. The genius of mātauranga Pākehā, or the Western approach to knowledge, is its capacity to abstract from the multitude of particular things the universal principles which govern existence, at least as it is understood today.

2.3.1 Research science

'Science' originally meant knowledge in any form and, at least until the nineteenth century, was generally taken to mean any particular branch of knowledge or study. In this sense, 'science' could be said to have been practised by all cultures, including Māori, for hundreds if not thousands of years.

In recent centuries, 'science' has acquired a more specialised meaning, associated with a particular method used to examine and explain the physical universe. Under the 'scientific method', a hypothesis is tested and confirmed through experimentation and observation until rival explanations are discredited. Over time, the term 'science' has come to encompass much more than this, and to encapsulate in a single idea not only this method, but also the knowledge it produces and the culture of methodical research that drives it.

The scientific method is empirical, which is to say it relies on evidence that can be directly observed or sensed. It is not concerned with non-physical worlds, and has little or no place for received knowledge that cannot be directly tested. To give one example, there is nothing in the scientific method that requires a DNA researcher to consider the mauri or whakapapa of a tuatara.

In general, the scientific method is also reductive. It seeks to understand each object or phenomenon in the physical universe by breaking it down into its component parts and identifying underlying properties or laws. It categorises plants and animals principally according to genus and species based on underlying characteristics, rather than – for example – focusing principally on their relationships to other creatures within their particular environmental context. Just as plants and animals have their taxonomies, so chemistry has its periodic table, geology its aeons and eras, and physics its laws. This means that the efficacy of mānuka, for example, is not considered holistically as a reflection of its mauri; rather, science seeks to isolate its active compounds, and further isolate and identify the genetic and environmental factors that determine the concentration of those compounds within the plant.

In all of these ways, the scientific method can be distinguished from – and is to some extent at odds with – te ao Māori and its more holistic and relational world view, based on mauri and whanaungatanga.

2.3.2 Patents and plant variety rights

In chapter 1, we briefly introduced the Western concept of intellectual property (IP) rights as they relate to copyright and trade marks. This chapter focuses largely on patents, the legal framework for which developed in the wake of the industrial revolution when innovation and knowledge (acquired through science and technology) became significant sources of profit. In essence, patents are a form of IP right which provides temporary property rights over new inventions based on scientific and technological innovation.

The first patents granted property rights to the 'true and first Inventor' of 'any manner of new Manufactures.'[10] While patents have undergone several iterations since they were first created, it is sufficient for present purposes to note that today New Zealand's patent law grants a patent owner exclusive rights over the invention to which the patent relates for a period of 20 years. Those rights entitle the patentee to prevent others from exploiting the invention in New Zealand without permission. The term of the patent is based on internationally agreed minimum standards.[11] In return for those rights, the owner must put a written explanation of the invention onto a publicly available patent register. That explanation is called a patent specification. Along with the patent specification, the owner must outline the invention's uses. The extent

of the patent grant is defined in what is known as 'the claims'.[12]

This is the way inventors receive their due, and it is for this reason that patents have, since the later part of the twentieth century, come to be portrayed as a necessary incentive for investment both in research and development and in the commercialisation of innovation. At the same time, in theory at least, the patent specification makes the detail of the invention available to other innovators who might want to carry the idea forward or modify it without breaching the original patent. The limited term of the patent ensures that the scientific or technological advance contained in the invention will eventually be made available for others to copy or exploit.[13]

Alongside patents, a new form of right called the plant variety right (PVR) was introduced in New Zealand in 1987 to provide exclusive rights over the reproductive material of new plant varieties which are created through selective breeding. A PVR gives its owner an exclusive right to sell the reproductive material of a new plant variety. As there is for patents, there is a PVR register. And, again as for patents, PVR protection is thought to be a necessary incentive for the creation of new varieties of plants. In New Zealand, PVRs are mostly used in the large ornamental plant industry (which, as we have said, includes species like koromiko, puawānanga, and kōwhai ngutukākā, as well as varieties of pōhutukawa), but they are also used to protect commercial interests in food and forestry plants.

2.3.3 The public domain

As with copyright and related rights, there is also a public domain associated with patents. The public domain refers to the vast body of information, knowledge, and creative or inventive works that has never been or is no longer protected by IP rights. Such information or knowledge can be freely used by the wider public because there are no (or are no longer) private property rights attached to it.

The public domain is the flip-side of the private rights created in the system of IP law, and its existence is essential to the proper functioning of the IP system. By protecting IP, society both acknowledges the benefits that IP contributes and provides an incentive for people to invest time and resources to foster innovation and expand knowledge.

While patents and PVRs are said to encourage innovation and creativity, all innovation also leverages off information that is freely available in the public domain. Both, therefore, are important for technological advancement. Correctly balancing the need to stimulate innovation and creativity with other policy objectives remains the delicate task of today's policy makers.

Commercial interest in taonga species and mātauranga Māori has raised questions about the ownership and control of such resources previously assumed to be in the public domain. The claimants say that the existing system of IP rights strikes the wrong balance between commercial interests and the interests of kaitiaki in those resources.

2.3.4 The challenge ahead

By the end of the twentieth century, patents and PVRs had extended to cover not only the creation of new varieties of plant but also the isolated genetic or biological elements of existing species, and the extractive or analytical processes that produced them. Most rights have taken the form of patents. Examples include patents over isolated gene sequences, as well as the extraction and synthesis of active therapeutic ingredients in plants.

These developments have created a point of potential tension between those who wish to profit from private property rights in the genetic and biological resources of plants and animals, and kaitiaki who either have very different priorities or who feel unable to affect the way in which exploitation occurs. There is also tension between Māori and Pākehā approaches to access to knowledge. Pākehā culture places great value on unrestricted access to knowledge and ideas, except, as we have said, where restrictions are deemed necessary to encourage innovation through commercial reward. Māori culture, on the other hand, sees protecting mātauranga Māori as the priority, because it is said to have mauri, tapu, and whakapapa. Māori culture would say that those who wish to use mātauranga Māori must earn the right to do so.

These tensions go to the heart of the ways in which this country generates and imports knowledge and wealth.

The central question is whether New Zealand's current system can accommodate the interests of kaitiaki communities and individuals who do not always share the values upon which that system was built. That, indeed, is the question we attempt to answer in this chapter.

As the foregoing suggests, there are three key areas in which this tension is regularly played out:

- Bioprospecting, in which researchers, whether for scientific or commercial purposes (or both), 'prospect' living organisms, including taonga species, to create usable products such as pharmaceuticals or cosmetics. Kaitiaki say they have no legal platform from which to influence or control the way this prospecting occurs or what is done with its results. They say their relationships with taonga species are too important for the law to fail to recognise and protect them in bioprospecting.
- Genetic modification, in which researchers modify the genetic make-up of living organisms, including taonga species, in order to produce new characteristics that are considered to be more useful or valuable to humans. Kaitiaki fear that such modification will undermine their relationships with taonga species by interfering in the whakapapa of that species. They say that shared whakapapa is the thing that creates the kaitiakitanga relationship. Once again, they wish to influence and control whether genetic modification is allowed to proceed – and, if so, how.
- The creation of private IP rights, such as patents and PVRs, to protect research results that may be commercially exploited. The claimants say this effectively excludes taonga species in whole or in part from their kaitiakitanga, and therefore undermines their interests.

In the following section, we will explore whether and how the current regimes around bioprospecting, genetic modification, and IP rights take account of the kaitiaki interest. It is important to stress at the outset that these three areas represent points along a single continuum, beginning with research and ending with commercial exploitation. Although for the sake of clarity it is necessary to explain them separately, it is important to bear in mind that they are closely related and form part of a single big picture. That is why our analysis and suggestions for reform are contained in single sections (sections 2.5 and 2.6) that apply to all three subject areas.

2.4 Bioprospecting, Genetic Modification, and Intellectual Property

2.4.1 Bioprospecting

Technically speaking, bioprospecting is the search for, and extraction and examination of, biological material or its molecular, biochemical, or genetic content (whether *in situ* – within its natural habitat – or *ex situ* – outside its natural habitat) for the purpose of determining its potential to yield a commercial product. Such products include pharmaceuticals, cosmetics, pesticides, other agricultural products, and new varieties of organisms. In some cases, bioprospecting results in the development of a commercial product based on the extraction of active compounds from the organism itself.

Traditional knowledge – in our case, mātauranga Māori – which has been built up over generations can provide researchers with valuable information about the biological characteristics of an organism. Access to such knowledge reduces both the randomness and cost of the bioprospecting process.

(1) *Bioprospecting in New Zealand*

New Zealand's unique indigenous biodiversity is potentially an attractive target for bioprospectors. But access to it is regulated in myriad disparate policies and laws. There is no single legal and policy framework that deals with all bioprospecting activities, wherever they occur. In some instances, access to certain genetic resources, especially in the marine environment, is not regulated at all.

Prospecting on private land is governed either by common law or by statutes that control the proprietary rights in relation to plant and animal specimens. In most cases, the landowner controls all rights in respect of the target specimen, and the landowner's consent is all the bioprospector needs. The exception is where special legislation has been enacted that effectively confers ownership on the Crown, so that it can either prohibit the taking of particular species or require Crown consent prior to harvest.[14]

Numerous Crown agencies are responsible for the administration of access to biological resources owned

Harakeke growing in a typical coastal site. Plants growing in their natural habitat are said to be *in situ*.

Plants at Makaurau Marae Nursery, Mangere. Plants grown outside their natural habitat for research and devleopment are said to be *ex situ*.

or controlled by the Crown. However, processes for gaining access to those resources vary, and there is no coordination between departments as to how to deal with bioprospecting.

DOC specifically addresses the issue of bioprospecting.[15] Where bioprospecting is undertaken in the conservation estate or in national parks, section 12 of DOC's Conservation General Policy and section 11 of the department's General Policy on National Parks combine to provide an avenue for significant Māori involvement. Both policies are subject to section 4 of the Conservation Act 1987, which provides that effect shall be given to the principles of the Treaty of Waitangi.

Section 12 of the Conservation General Policy gives detailed guidance on the issuing of concessions for research on public conservation lands and waters. The policy differentiates between access to public conservation lands for research and monitoring purposes, and access for the purpose of collecting material, whether for commercial or non-commercial use. It contains a specific requirement to recognise the Māori interest: 'Mātauranga Māori and tangata whenua interests in research and monitoring on public conservation lands and waters, species and resources should be recognised and may be supported by cooperative arrangements.'[16]

The level of detail in the policy and the strength of the Treaty clause in the Conservation Act (section 4) allow for some iwi involvement, and iwi perspectives can be taken into account. However, we were not advised of how these provisions work in practice, so we cannot say whether DOC actively invites engagement with kaitiaki in respect of bioprospecting.

We note that DOC uses Māori committees (pātaka komiti) to manage iwi access to plants and animals for cultural harvest purposes.[17] These komiti are made up of representatives of local iwi who consider applications regarding cultural harvest and make recommendations to the regional conservator, who subsequently makes the formal decision. A similar system is not used in the context of bioprospecting by non-Māori.

In 2007, the Crown released proposals for reform of the rules around bioprospecting. But mātauranga Māori was expressly excluded from the scope of the reform, so there is no provision for kaitiaki to control any use or commercial exploitation of that mātauranga. Nor do the proposals offer any protection to the kaitiaki relationship itself with taonga species. Significantly, too, the focus is only on commercial bioprospecting. Early-stage research that is not explicitly commercial is therefore not covered, even though most commercial exploitation begins in this way.

Kawakawa. This plant is highly regarded by Māori for its medicinal properties and is probably second only to harakeke for its broad utility. The leaves, bark, and fruit have numerous traditional applications.

In the last two decades, the interests of indigenous people in respect of biodiversity and associated traditional knowledge have been the subject of intense debate in several international forums. We address those developments below, but note here that none of the Crown's current reform proposals attempt to address the issues or proposals being discussed internationally.

(2) *The claimants' arguments*

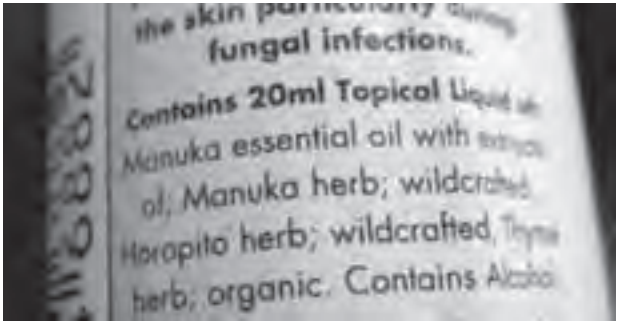
The claimants' concerns about bioprospecting are wide ranging, and go beyond specific policy and procedural issues. These concerns can be broadly characterised at four levels.

First, some claimants argued that bioprospectors should not use the mātauranga Māori associated with taonga species without the consent of the kaitiaki. Secondly, claimants said bioprospectors must not use taonga species if such use is inconsistent with tikanga Māori and thus will damage kaitiaki relationships with those species. These kaitiaki claim a right of veto over use in order to protect that relationship. At a third level, some claimants said the kaitiaki relationship with taonga species is so all-encompassing it amounts to ownership of the genetic resources of that species. The result, these claimants said, is that no exploitation of those resources is allowed without kaitiaki consent. Lastly, in exceptional cases, some claimants said the kaitiaki relationship is so special it extends to both the genetic and biological resources of the taonga species. These kaitiaki may therefore claim ownership or control of each living example of that species within their traditional territory. The intimate cultural and spiritual relationship between Ngāti Koata and the tuatara of Takapourewa is one such example.

(3) *The international influence on New Zealand's bioprospecting regime*

In 1993, New Zealand became party to the Convention on Biological Diversity, which established an international framework for the conservation and utilisation of the world's genetic and biological resources. One of the issues in the negotiation was the longstanding asymmetry between technology-rich but diversity-poor Western countries (particularly European and North American countries) and technology-poor but diversity-rich countries (in, for example, South America and Africa). The latter grouping argued that rich countries were exploiting remaining biodiversity in poor countries without any benefits flowing back to those countries. Article 15 of the convention introduced a mechanism to address these issues. It would provide for access to biodiversity for those wishing to exploit it, but require that the benefits of

A tuatara. Witnesses such as Whetu Marama MacGregor of Ngāti Wai and Alfred Elkington of Ngāti Koata described their regular contact with tuatara and their efforts to boost its population.



Ingredients label from one of a number of popular mānuka-derived products. The director of the natural therapeutics company Kiwiherb, who gave evidence on behalf of Ngāti Kahungunu, said Māori participation in the industry had been lacking and should be encouraged and welcomed.

such exploitation be shared with the host country. This, it was hoped, would stop what technology-poor countries viewed as the misappropriation of their genetic resources by wealthy Western biotechnology companies.

The convention therefore requires that access to those resources be 'subject to mutually agreed terms' and the 'prior informed consent' of the provider state.[18] In addition, such access should be subject to the 'fair and equitable sharing of benefits arising out of the utilisation of genetic resources' ('Access and Benefit Sharing').[19] The convention accepts that benefits may be monetary or non-monetary.

Article 8(j) of the convention addresses the specific concerns of indigenous peoples. It provides that state parties shall:

> respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

Article 8(j) underlines the vital role of traditional knowledge, innovation, and practices in the conservation of biodiversity. It is directly linked to the access and benefit sharing mechanism to ensure that traditional knowledge holders receive a fair share of the benefits derived under article 15 where bioprospecting has relied in some way on indigenous traditional knowledge, innovations, or practices.[20]

The concepts of access and benefit sharing and prior informed consent laid down in the convention are useful, but as yet have limited practical effect because they are unenforceable and subordinated to the international IP regime – and, in particular, to the TRIPS Agreement.[21] Moreover, the TRIPS Agreement requires that countries provide in their national laws for the granting of patents for inventions that use genetic resources without requiring that those national laws respect the provisions of the convention in relation to prior informed consent and benefit sharing. Nor does the TRIPS Agreement expressly require that national laws require patent applicants to disclose in their applications whether traditional knowledge or genetic resources have contributed in any way to the invention. In fact, the convention and the TRIPS Agreement serve two very different purposes. While the convention fosters the conservation and sustainable use of biodiversity, the TRIPS Agreement provides incentives for the commercial exploitation of biodiversity.

Not surprisingly, there is ongoing debate about how the competing interests of the convention and the TRIPS Agreement might be reconciled. There is, for example, significant debate in the World Trade Organization TRIPS Council about whether it should be mandatory to require patent applicants to disclose any traditional knowledge or genetic resources used in research that led to the patent application. Many countries argue that such a disclosure requirement would, in turn, trigger access and benefit sharing negotiations between the researchers or bioprospectors and the traditional owners.

(4) *Summary*

New Zealand's laws and policies affecting bioprospecting raise important issues that are still to be confronted. The regime is inconsistent. There are some areas, particularly within DOC's jurisdiction, where room potentially is, or could at least be made, for the Māori interest in bioprospecting. Elsewhere, law and policy is silent on

the issue. Sitting above all this are developments in international forums. New Zealand will need to confront the challenges of those developments sooner rather than later. We return to these matters in our analysis (section 2.5).

2.4.2 Genetic modification

Genetic modification refers to the science by which genes are deleted, changed, or moved within an organism or transferred between different organisms. This produces what is known as a genetically modified (GM) organism. GM technology brings great potential benefits and significant risks to the well-being of the environment, and to human health and safety. The state of scientific knowledge is such that some of the risks are uncertain and unpredictable.

(1) *Genetic modification in New Zealand*

The area of genetic modification is tightly regulated and managed in New Zealand. The claimants were critical of several aspects of this system – in particular, the way in which Māori values are given a low priority when decisions are made about GM organisms. We outline the claimants' concerns below, but first briefly outline aspects of the regime as it currently applies.

Genetic modifications are controlled under the Hazardous Substances and New Organisms Act 1996 (HSNO Act), the Act's 'Methodology Order',[22] and various regulations and protocols.[23] The Act is administered by the Environmental Risk Management Authority (ERMA), soon to become the Environmental Protection Authority.[24] ERMA comprises three formal elements – the Authority, the Agency (which provides administrative support to the Authority), and the independent Māori advisory committee, Ngā Kaihautū Tikanga Taiao.[25] Any person wishing to import, develop, field-test, or release a GM organism requires the Authority's approval.

The HSNO Act sets out a hierarchy of relevant purposes, principles, and considerations in descending order of importance and weight. This hierarchical structure mirrors that of the Resource Management Act 1991 (RMA).

The apex of the hierarchy is the HSNO Act's purpose – the protection of 'the environment and health and safety of people and communities' from the adverse effects of hazardous substances and new organisms. All decisions of the Authority must be consistent with that purpose. Below that purpose are the Act's principles. These require the Authority to recognise and provide for:

> (a) The safeguarding of the life-supporting capacity of air, water, soil, and ecosystems:
> (b) The maintenance and enhancement of the capacity of people and communities to provide for their own economic, social, and cultural wellbeing and for the reasonably foreseeable needs of future generations.[26]

Below these principles is a mix of considerations that must also be taken into account. The list of considerations specifically mentions Māori relationships with flora and fauna. Section 6 provides for:

> (a) The sustainability of all native and valued introduced flora and fauna:
> (b) The intrinsic value of ecosystems:
> (c) Public health:
> (d) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga:
> (e) The economic and related benefits and costs of using a particular hazardous substance or new organism:
> (f) New Zealand's international obligations.

There is no statutory guidance as to the relative weight to be given to each of these considerations. Weighting is for the Authority to determine. Section 7 adds a requirement to take account of the 'precautionary approach' in making decisions under the Act. Section 8 requires the principles of the Treaty of Waitangi be 'taken into account' as well.

Decisions by the Authority must comply not only with these specific requirements but also with the orders, regulations,[27] and protocols[28] made under the Act. The Methodology Order is of particular importance here. It sets out precisely how these multi-disciplinary risk assessments will be carried out.[29] In effect, the Methodology Order drives the entire decision-making process.

GM organism applications to the Authority under part 5 of the HSNO Act are generally divided into low-risk and non-low-risk genetic modification. Low-risk genetic

GM organism applications to the Authority under part 5 of the HSNO Act are generally divided into low-risk and non-low-risk GM categories. Low-risk GM organism research is performed within contained laboratories.

Field trials of GM crops remain controversial. Applications to release a GM organism from containment, including field testing, are subject to public notification and a full public submission process.

modification refers to GM organism research within contained laboratories. The Authority may delegate its decision-making power for low-risk genetic modification to either the chief executive of ERMA or, more usually, to one of the Institutional Biological Safety Committees located within a university or Crown Research Institute. Each committee has a minimum of five members with the requisite knowledge and expertise to assess and evaluate the applications. At least one member of each committee must be Māori, appointed on 'the nomination of the hapū or iwi with mana whenua in the locality covered by an application'.[30]

Applicants are obliged to consult with the Māori community prior to lodging an application to the Authority whenever the work involves 'DNA from native flora and fauna', 'human DNA . . . of Maori origin', or 'embryonic stem cells'. An application that does not comply with these requirements will either be declined or returned to the applicant with an instruction to resubmit once the requirements are met.[31]

By contrast, applications relating to non-low-risk genetic modification must be decided by the Authority and cannot be delegated. Applications to import a GM organism for release, or to release a GM organism from containment, including field-testing,[32] are subject to public notification and a full public submission process.[33] A proposal may also be publicly notified if the Authority considers it to be of significant public interest. As a result, non-low-risk applications can be expensive, and the process time consuming. Low-risk application costs, on the other hand, are negligible and the process is quick. There are many more low-risk applications than there are non-low-risk ones.

Ngā Kaihautū is independent of the Authority but has no decision-making powers. Its role is to advise and make recommendations to the Authority in respect of applications before the Authority when requested to do so. Ngā Kaihautū members are appointed by the Authority. There is, in addition, a Māori unit called the Kaupapa Kura Taiao Unit, which provides internal advice on Māori issues.

(2) *The claimants' arguments*

The claimants' major concern was that Western scientific considerations take precedence over Māori values when it comes to decisions about GM organisms. They argued that key aspects of ERMA's statutory mandate, internal structures, and decision-making processes effectively combine to subordinate Māori values to the interests of science. They said Māori considerations which are not scientifically assessable are given low priority and are not seen as important enough to carry the day. The claimants pointed

in particular to the science bias of the HSNO Act and the Methodology Order.

The claimants also argued that the dominating role of science in the assessment process does not allow Māori to protect the integrity of the kaitiaki relationship with mātauranga Māori and the relevant species or biological resource. They said that the Māori relationship with the physical and cultural environment and the principles of the Treaty of Waitangi are relegated to 'take into account' considerations in the decision-making process. They are easy to avoid if inconvenient. The claimants also noted the absence of any reference to the core Māori value of kaitiakitanga in the decision-making framework of the HSNO Act.

Turning to the Methodology Order, the claimants said that clauses 25 and 26 effectively negate the already weak Māori provisions of the HSNO Act. These provisions require the Authority to start its assessment with scientific evidence. Other matters, such as cultural values, are considered only if the evidence raises them. Moreover, where the GM proposal poses negligible risks to the environment and to human health and safety, the Authority can approve the project as long as the benefits outweigh the costs.

In institutional terms, the claimants pointed out that Ngā Kaihautū has no real influence on the decision-making process. They said that in no instance has an application been rejected on the basis of Ngā Kaihautū's advice alone. The claimants acknowledged the requirement for Māori membership of Institutional Biological Safety Committees, but claimed that Māori representatives do not necessarily represent mana whenua. Additionally, a single Māori representative can be routinely outvoted by the other members.

More generally, the claimants' opinions on the benefits and risks of genetic modification were divided. A number of claimants expressed abhorrence at the whole idea of transferring genetic material from a member of one species to another, whether or not that species is indigenous. They said this corrupted the whakapapa of those species and destroyed their mauri. This might be seen as a strict tikanga-based approach. Other claimants took a more flexible view, at least for projects that provided medical benefits and did not involve crossing species boundaries.

Many of these concerns were discussed in the first appeal to the High Court from an ERMA decision in *Bleakley v Environmental Risk Management Authority*. This appeal challenged ERMA's decision to allow the field-testing of cattle whose genetic make-up had been altered by the insertion of gene sequences from a human myelin basic protein gene. It was hoped this work would assist research into multiple sclerosis.[34] We will pick up aspects of this decision later (see section 2.5.1(2)).

We have no doubt that the Crown is committed to taking Māori concerns seriously when it comes to the difficult topic of genetic modification. ERMA has set up a variety of policies, strategies, and consultation documents to ensure that Māori perspectives are at the table when decisions about GM proposals are being made. Applicants have to consult with mana whenua prior to lodging an application that involves indigenous flora and fauna, DNA of Māori origin, or embryonic stem cells. Institutionally, the Māori position has been strengthened through the establishment of Ngā Kaihautū and the compulsory Māori membership in the Institutional Biological Safety Committees.

The claimants' concerns about the importance accorded to kaitiaki interests in the actual decision-making process are justified, however. There is a real issue about whether the balance between the interests of kaitiaki and of science is struck appropriately. There appears to be an issue around the inherent science bias of the Methodology Order, the structure of the statute, and the importance they accord to the kaitiaki interest. The problem seems to be intensified by the fact that Ngā Kaihautū provides recommendations only at the request of the Authority.

We will return to consider these issues further in our analysis section.

2.4.3 Intellectual property

(1) *Patents*

IP rights and patents, in particular, are both the culmination of part of a research process and the starting point for commercial exploitation of valuable biological material. They are assets used to obtain finance to continue research, to develop saleable commodities, and to give the developer priority over others engaged in a similar line of research. A patent might also be the means by which

Mānuka flower, Te Paki, Northland, 1992. In New Zealand, patents have been granted for a number of mānuka-based products and processes.

the financial investment for research and development can begin to be recouped and pecuniary rewards reaped. Hence, patents have considerable relevance for and impact on the commercialisation of research.

As we have said earlier, a patent confers on the owner of the patent (the patentee) rights to exclude others from manufacturing, using, selling, and importing[35] the described invention in New Zealand for 20 years.

A patent will only be granted if the inventor discloses key information about the invention to the authority that grants patents. That body places the information in a public register. Disclosing the invention ensures that the detail of the invention is available to other innovators who might want to carry the idea forward or modify it without infringing the patentee's exclusive rights. Once the term of protection has ended, the patented invention enters the public domain.

In New Zealand, the Intellectual Property Office (IPONZ) examines every application to determine whether the claimed invention should be granted a patent. Under the Patents Act 1953, IPONZ does not undertake a full examination of patent applications. Rather, the patent applicant is given the 'benefit of the doubt' that the invention applied for is patentable unless it clearly is not. Certain aspects relating to obviousness and usefulness, in particular, are left to opposition or revocation processes. There are a number of reasons for this 'benefit of the doubt' approach – one of which is that a full examination would consume considerable resources.

Even though not all patentability criteria are examined at application stage, an invention must meet certain requirements to be a legally valid patent. It must be:

- a manner of manufacture within the meaning of section 6 of the Statute of Monopolies;
- new (that is, novel);
- not obvious but rather involve an inventive step; and
- useful.

Mere discovery is not patentable. That is, a patent cannot be obtained over naturally occurring things – such as an animal, plant, or micro-organism – unless it has been modified in some way. A degree of human intervention or modification is required. We pick up this issue in the next section.

The requirement that an invention be a 'manner of manufacture' has a long history and there is much case law on the meaning of that phrase and its development over time. Broadly, for an invention to satisfy this requirement, it must be in the form of a product or process (or even a combination of the two) capable of being used in some kind of industry.

An invention is considered to be new if it is not already known, used, patented, or published in New Zealand before the application is made. As a result, products or processes already known to mātauranga Māori cannot meet the newness requirement because, by definition, the Māori section of the wider community already knows about them.

The invention must not be obvious to a person skilled in the relevant art – that is, an expert in the field. For example, if a patent application relates to the process of isolating an active ingredient (say, from mānuka), a court or IPONZ will want to know if the described process for isolating the active ingredient is obvious to an expert in a field relevant to that species.[36]

Lack of utility is a ground for revoking a patent. However, usefulness is of particular relevance for the patentability of genetic material, particularly genes and gene sequences. We address the issue of patentability of life forms below. However, as far as utility is concerned, isolation of genetic material alone does not prove that it is useful. Something more is required.[37]

Even when an invention meets all patentability requirements, the Commissioner of Patents can still refuse to grant a patent if the use of the invention would be contrary to morality.[38] The morality exclusion in section 17 of the Patents Act has been the basis on which human and human-related material has been excluded from patentability. IPONZ guidelines provide:

> As a general guide, claims to the following subject matter are likely to attract an objection under s 17(1): human beings, processes which give rise to human beings and biological processes for their production; methods of cloning human beings; human embryos and processes requiring their use; transformed host cells within a human and other cells and tissues within a human.[39]

IPONZ's initial guidelines regarding the scope of section 17(1) explicitly accepted that Māori views of what might be contrary to morality are relevant to the operation of that section. These guidelines stated that 'where it appears that the use of the invention would be contrary to morality for New Zealand society as a whole or for a significant section of the community, including Maori', the patent officer may refuse a patent application on the basis that the use of the invention would be contrary to morality.[40] However, in May 2009, the specific reference 'including Maori' was taken out because, according to IPONZ, it had 'caused some confusion with respect to the nature of what would and would not be objectionable under section 17(1) of the Patents Act 1953'.[41]

The structure of DNA. The interwoven form of the DNA structure is well known today. Claimant witness Mana Cracknell spoke of te ruatau, a dual helix formation, sometimes seen in kōwhaiwhai patterns, that represents the interwoven nature of different forms of knowledge.

(2) *Patents for life forms*

It is now possible to patent life forms, or parts of life forms. This development has given rise to a great deal of argument about where discovery stops and invention begins.

Genetically modified animals or plants are able to be patented. Numerous patents relating to genetically modified plants have been granted in New Zealand, and GM micro-organisms are also patentable in New Zealand.

Modern biotechnology also makes it possible to isolate and purify biological materials that are identical or largely identical to such materials as they exist in nature. Such materials are merely extracted from their natural environment. They are arguably discovered, not invented. However, patents are now being granted not just for the technology used in the isolation and purification process (which is clearly an invention), but also for the isolated gene sequence itself.[42]

Those who support the patenting of life forms say the cost and sophistication of the isolation process is so great that the result should be treated as an invention and granted a patent, no matter that the genetic material existed before isolation. They argue that research will simply not occur unless patents can be granted for this work. Opponents of such rights say that isolating aspects of life forms is not invention but merely discovery. They say that the work will not stop just because it remains in the public domain. Indeed, they argue that privatising this research obstructs progress by putting whole areas of inquiry off limits, and increases the cost of access to the benefits of the research.

Kōwhai ngutukākā (kaka beak). This plant is propagated and widely sold in commercial nurseries, while its existence in the wild is precarious.

New Zealand law favours the patentability of isolated aspects of life forms, but the debate continues worldwide and it is clear that domestic law will be affected by any resolution of it.

(3) *Plant variety rights*

Plant variety rights are, as we have said, exclusive rights afforded for a limited period of time to breeders of new plant varieties.[43] PVRs protect a breeder from unauthorised use of protected plant varieties by third parties. Such protection is deemed to be necessary because the breeder has invested time, money, and effort in breeding activities. In exchange for these efforts, the breeder obtains an exclusive right to commercially exploit the propagating material of the new variety and thus has an opportunity to recoup the cost of investment.

PVRs provide the breeder only with control over commercial propagation of the variety and its product. They do not confer rights to prevent the non-commercial propagation or harvest of the variety's products. This allows other breeders to create new varieties, which in turn might qualify for PVRs.

New Zealand is a member of the 1978 Convention of the International Union for the Protection of New Varieties of Plants, which sets uniform standards for national plant protection laws while allowing flexibility for national legislation. Under the Plant Variety Rights Act 1987, a PVR can be granted over a variety that is new, distinct, uniform, and stable. A variety is not new if a part of it has already been offered for sale in New Zealand within a year of the date of the PVR application. Nor, in the case of woody plants, will it be new if it has been sold overseas within six years of the application date. The period for non-woody plants is four years.[44]

Plants that are not new varieties but have existed in the New Zealand environment for some time will not meet the newness requirement for a PVR. Kōwhai ngutukākā, or kaka beak, is an example of this. Tate Pewhairangi of Ngāti Porou told us that kōwhai ngutukākā is available for sale in plant nurseries, but because the plant has not been hybridised it does not meet the PVR criteria. Mr Pewhairangi questioned where the sellers of the plants obtained the propagating material from, but this is not an issue that is considered in the process of granting a PVR.

A plant is distinct if it is different from all commonly known varieties in at least one way, such as shape, colour, and disease resistance.[45] The other requirements of uniformity and stability are related. They are designed to ensure that the plant is a genuine variety and remains true to its characteristics after propagation.

(4) *Patents and plant variety rights in international treaties*

New Zealand's IP law has to comply with the *minimum* IP standards set out in the TRIPS Agreement. These minimum standards require patents to be available under national law for any invention, whether product or

process, in all fields of technology, provided it is new, non-obvious, and useful. Patents must be provided without discrimination as to the place of invention, the field of technology, and whether products are imported or locally produced.[46] Patents must be granted for at least 20 years.[47] New Zealand's Patents Act 1953 and IPONZ practice arguably comply with these requirements.

The TRIPS Agreement requires that members protect plant varieties either by patents or by a *sui generis* (standalone) system. New Zealand has opted for the *sui generis* PVR system that conforms to the 1978 Convention of the International Union for the Protection of New Varieties of Plants, mentioned above.

It is important to note that because TRIPS is a minimum standards agreement, it allows its members to enact 'more extensive protection' in their domestic law than is prescribed by the Agreement, as long as such protection does not run counter to its provisions.[48] *Sui generis* laws which are outside the scope of the TRIPS Agreement are not governed by the parameters of that Agreement. However, where patents and PVRs are involved, the TRIPS Agreement allows each member state the flexibility to fine-tune its law according to its particular economic, cultural, and social interests.

The TRIPS Agreement explicitly allows members to exclude some things from patentability. These include:

- 'diagnostic, therapeutic and surgical methods for the treatment of humans and animals';
- plants and animals, with some important exceptions; and
- inventions where prevention of their commercial exploitation is 'necessary to protect *ordre public* or morality'.[49]

(5) *Ordre public and morality*

The scope and meaning of the *ordre public* and morality exceptions are crucial to whether the concerns raised by the claimants can be addressed by the Crown within the constraints of New Zealand's international obligations. Outside these two exceptions, the TRIPS Agreement allows New Zealand's domestic patent law very little flexibility to provide for the kaitiaki interest in respect of taonga species.[50]

The terms *ordre public* and morality are not defined in the TRIPS Agreement and their meaning has never been tested in a World Trade Organization dispute. The phrase *ordre public* is French. It does not have the same meaning as public order – at least not in the narrow sense of relating to public safety.

Expert commentator on the TRIPS Agreement Daniel Gervais has provided useful definitions of the two terms. He explains the meaning of *ordre public* in this way: 'While public order may be defined as the maintenance of public safety, *ordre public* concerns the fundaments from which one cannot derogate without endangering the institution of a given society.'[51] It expresses, he says, 'concerns about matters threatening the social structures which tie a society together, ie, matters that threaten the structure of civil society as such.'[52]

Gervais describes the term 'morality' as '"the degree of conformity to moral principles (especially good)". The concept of morality is relative to the values prevailing in a society. Such values are not the same in different cultures and countries, and change over time.'[53]

Section 17 of New Zealand's Patents Act refers only to morality, and this has been the basis on which human and human-related material has been excluded from patentability in New Zealand.[54] As we have said, there is clearly some discussion within IPONZ about the relevance of Māori interests to the operation of that section. We are satisfied that, where exclusions are necessary to protect kaitiaki interests, the morality and *ordre public* exclusions in the TRIPS Agreement are wide enough to accommodate the kaitiaki interest in the genetic and biological resources of taonga species and mātauranga Māori. After all, the Treaty of Waitangi is the founding document of our bicultural nation, and that very biculturalism is fundamental to our civil society. We are also satisfied that the TRIPS Agreement does not need to inhibit New Zealand's ability to respond to its Treaty of Waitangi obligations. We will return to this issue when we look to the way ahead (section 2.6).

(6) *Claimant, Crown, and interested parties' arguments*

As with bioprospecting and GM, claimants raised concerns about IP issues on four levels.

First, some claimants expressed unease about patents or PVRs being granted to researchers who rely on mātauranga Māori without prior consent. They said that consent and appropriate acknowledgement is required when mātauranga Māori has been used, whether or not the mātauranga is in the public domain. The fact that a great deal of mātauranga Māori is already in the public domain does not undermine the responsibilities kaitiaki have towards the mātauranga.

Secondly, some claimants argued that the acquisition and exploitation of IP rights can sometimes conflict with the longstanding values underpinning kaitiaki relationships with taonga species. In such cases, the exploitation of such rights might damage or even destroy this relationship. These claimants argued that within the IP system the kaitiaki relationship is never seen as strong enough to override or even limit patents or PVRs in taonga species.

At a third level, claimants said that the kaitiaki relationship with some taonga species is so all-encompassing it is akin to modern concepts of ownership in the biochemical or genetic characteristics of the species. Thus, no exploitation should be allowed without kaitiaki consent.

The fourth level of claimant concern focused on exceptional cases. Here, claimants said, the kaitiaki relationship with a taonga species is of such intimate and spiritual significance that it transcends the genetic or molecular level, and applies to each living example of a species within the kaitiaki's traditional territory.

The Crown emphasised that the patent and PVR regimes were never designed to protect kaitiaki interests, and that they are in fact ill-suited to fulfil this task. The Crown was concerned that the recognition of Māori interests as sought by the claimants would stifle research and development. It argued that such protection would effectively undermine the very purpose of the IP system, and stifle scientific and technological innovation and investment. The Crown stressed the importance of research as a driver of economic growth in New Zealand.

The Crown also argued that once mātauranga Māori is in the public domain it is difficult to control its use. The Crown submitted that there is neither a practical way nor any need to protect mātauranga Māori once it is published in this way. Indeed, it is the responsibility of Māori to keep mātauranga Māori out of the public domain. Further, the Crown stressed that New Zealand is bound by its international obligations to provide for minimum IP standards and that a fundamental revamp of domestic patent and PVR law is not possible.

However, the Crown did accept that some degree of protection for mātauranga Māori and cultural relationships with taonga species is justified. It pointed to its current proposals for reform of the patent and PVR regimes, including a proposal to introduce a new Māori committee to advise the Commissioner of Patents whether an 'invention' is derived from Māori traditional knowledge or from indigenous plants or animals, and whether the granting of a patent would be likely to be contrary to Māori values.

Representatives of several native plant nurseries gave evidence before us. They were concerned that if Māori were granted exclusive rights over native plants it would impede the development of an important commercial industry. The Nursery and Garden Industry Association and Black Bridge Nurseries, for example, were opposed to recognising that Māori hold any perpetual exclusive rights in flora and fauna. They contended that granting Māori proprietary rights over flora and fauna on the basis of cultural association would negate the time, money, and effort nurseries had spent in researching, developing, and promoting native plants.[55] Looking more widely, the association relied on articles 15 and 8(j) of the Convention on Biological Diversity to urge that a distinction should be drawn between the bare genetic resources and any traditional knowledge in respect of those resources. The association accepted that while it might be appropriate to recognise rights in traditional knowledge, there could be no justification for recognising direct rights in the resources themselves. While Māori may have created the knowledge, they did not create the species.[56]

The Federation of Māori Authorities took a different view. It argued that mātauranga Māori should be protected in perpetuity and that commercial exploitation of flora and fauna from Crown estates should be subject to benefit sharing in favour of Māori.[57]

A number of Crown research institutes gave evidence as interested parties. They were concerned to ensure that changes to protect the Māori interest in the genetic and

biological resources of taonga species would not unduly increase the uncertainty or time involved in doing business in the research and development sector. But they also acknowledged the potential upside in bringing Māori interests into the research and development mainstream. They saw this as a natural extension of the growth of their existing Māori portfolios.[58]

All Crown research institutes have business and research relationships with Māori, and in some cases these are very extensive. All the institutes employ at least one Māori portfolio manager, while some (such as the National Institute of Water and Atmospheric Research) have a specialist Māori development unit that identifies research projects with relevance to Māori interests and ensures correct protocols. It appreciates the need to establish working relationships as early as possible and to use these for capacity-building within communities. We heard of projects involving Ngāi Tahu with research into tītī (muttonbirds), and ventures with other iwi in aquaculture and medicinal product research. Crop and Food Research (now Plant and Food Research) is active both in bioprospecting and in genetic modification. We heard in the inquiry how it developed its own framework for engagement with Māori, the two main planks of which were 'prior informed agreement' and 'integrity'. Crop and Food Research's consultation framework was particularly strong. It provided:

a) There will be full disclosure of intent (in writing), including a research and development proposal and benefits that Māori will accrue;
b) All business/research scenarios will be explored with the aim of delivering maximum benefit to Māori;
c) There will be sufficient time given to consider the proposal;
d) There will be sufficient time for Māori to gain an independent assessment of the project/proposal.[59]

New Zealand Forest Research Limited (Scion) has taken a different approach to engaging with iwi and Māori landowners. It has introduced a stand-alone Māori advisory committee called Te Aroturuki, similar to ERMA's Ngā Kaihautū. Its main objectives are to enhance relationships between scientists and Māori, develop better research outcomes, and ensure that areas of concern to Māori around plant gene technologies are recognised, discussed, and addressed.[60]

Engagement between GNS Science and Māori landowners has been even more far-reaching; they have entered into access and benefit-sharing style arrangements.[61]

Turning to those involved in education and research and development, the need for guidelines emerged as a common theme. In the education area, there were questions about how mātauranga Māori should be included in the science curriculum. In the research and development sector, the question of who to consult with, and how, was a particular issue.

Issues around reform of the IP system were brought before us by the New Zealand Institute of Patent Attorneys. It argued in favour of a *sui generis* regime for meeting the claimants' concerns on the grounds that this would not undermine the very purpose of the existing IP framework. But it also stressed that the system should protect only mātauranga Māori, and not the species themselves.[62]

(7) *Summary*

The issues the claimants raised in respect of their rights in the genetic and biological resources of taonga species are wide ranging. At one end of the spectrum, they said they should have some rights to control all mātauranga Māori relating to those resources, even if that mātauranga is effectively in the public domain. At the other end of the spectrum, there was acceptance that, in some instances at least, consultation and involvement in decision-making might achieve protection of their interests. As with bioprospecting and GM, the common element in these arguments was the desire to maintain the relationship of kaitiaki with the mātauranga Māori and the relevant species or biological resource.

Both the Crown and the interested parties who gave evidence before us emphasised that any recognition of Māori rights should not have a chilling effect on research and consequently on IP rights. Although the Crown research institutes, in particular, seem to have good working relationships with Māori and have demonstrated best practices for including Māori as advisers in the research process, this on its own does not meet claimant concerns.

The New Zealand Institute of Patent Attorneys argued that any additional legal protections of mātauranga Māori should not undermine the basic tenets of existing IP law. The Crown, too, stressed that New Zealand must comply with its international obligations, particularly the TRIPS Agreement.

But the heart of the problem is this. The primary purpose of the patent and PVR systems is to enable exploitation; it was never intended to accommodate mātauranga Māori or indeed to respond to the interests of kaitiaki. For example, within the examination process, patents and PVRs are granted to the party who first expresses knowledge in Western scientific terms. IP examiners are often trained in Western science but not in tikanga Māori. If they consult scientific databases to research publicly available information that might be relevant to an applicant's claims of novelty,[63] they are unlikely to find any reference to mātauranga Māori, because it is barely documented in such databases. Further, the legal framework is inadequate in many ways for protecting the kaitiaki interest. For example, after the expiry of a patent, the patented invention becomes available for others to use – a concept that may run counter to the responsibilities of kaitiakitanga.

In sum, everyone appears to accept that many aspects of the IP system as it affects the genetic and biological resources of taonga species fail to meet the needs of the claimants, because it was never designed to do so.

2.5 The Rights of Kaitiaki in Taonga Species and Mātauranga Māori

We have said from the outset that bioprospecting, genetic modification, and IP are not isolated issues. They all take place in the context of research, and each occupies a place along the road from exploration and discovery to exploitation of commercially valuable biological material.

In this section, we bring the three subject areas back together to analyse the nature of the Māori interest in them. First, we ask whether and, if so, how existing law and policy in the three areas protect the interests of kaitiaki in mātauranga Māori, and in the genetic and biological resources of taonga species. We then ask whether the principles of the Treaty of Waitangi are relevant to the Māori interest in these things. Although we do not go as far as the claimants would wish, we certainly accept that the law must provide better protection than it currently does. We say that while the Treaty does not provide for Māori ownership of either the genetic or biological resources of taonga species, or their associated mātauranga Māori, kaitiaki unquestionably have a right to protect their relationships with taonga species and a right to a reasonable level of control over their mātauranga Māori. We say that these are legitimate interests entitled to a reasonable degree of protection. We conclude that the level of protection can only be decided after a proper balancing of all competing interests and on a case-by-case basis. Our recommendations for reform (see section 2.6) are predicated on these conclusions.

2.5.1 Does the regime protect the interests of kaitiaki in taonga species and mātauranga Māori?

(1) *Bioprospecting*

Both the current rules around bioprospecting and the Crown's proposed bioprospecting policy lack cohesion. Neither the current nor the proposed regime protects the kaitiaki interest in taonga species and mātauranga Māori. In particular, the regimes fail to protect the kaitiaki relationship with taonga species, and fail to give kaitiaki an effective voice when decisions are being made about bioprospectors' use of either the species themselves or the associated mātauranga Māori.

An important exception to that exclusion is where bioprospecting occurs in the conservation estate or in national parks. In those instances, section 4 of the Conservation Act, together with section 12 of DOC's Conservation General Policy or section 11 of the General Policy for National Parks, provide avenues for potentially significant Māori involvement. The question remains whether DOC actively invites engagement with kaitiaki, or whether it takes an approach consistent with access and benefit sharing or prior informed consent (see also chapter 4.7). We heard no evidence in that respect. All that can be concluded is that the legal and policy platforms available within the conservation estate and DOC jurisdiction make proper recognition of kaitiaki interests in relation to taonga species and mātauranga Māori a real possibility. It remains to be seen whether that possibility bears fruit.

Finally, as we have mentioned, significant advances are being made in international forums on such issues as access and benefit sharing, and prior informed consent. There is no evidence that the ideas and proposals coming out of that international engagement are producing change in New Zealand's approach to bioprospecting.

(2) *Genetic modification*

The hazardous substances and new organisms (HSNO) regime gives greater and certainly wider protection to Māori interests than is evident in the area of bioprospecting. The HSNO Act contains provisions designed to ensure that Māori views are taken into account when decisions are made about GM organisms. Within ERMA itself, both the independent advisory committee, Ngā Kaihautū Tikanga Taiao, and the Māori unit, Kaupapa Kura Taiao, have a role in articulating the Māori perspective. ERMA also requires that Institutional Biological Safety Committees – local committees authorised to decide low-risk applications – must have at least one Māori member.

However, it is clear that key aspects of ERMA's statutory mandate, internal structures, and decision-making processes ensure that Māori values are always subordinated to the perspectives of science. This science bias is evident in the Methodology Order. We were given to understand that there has been no occasion on which the views of Ngā Kaihautū, or Māori cultural values generally, have prevailed in the absence of independent science-based considerations. We have reason to doubt whether the views of Ngā Kaihautū will ever carry the day unless they are backed up by science and align with ERMA's science culture. If the Māori interest was accorded appropriate weight in the law, and within ERMA's structures and processes, there will be circumstances in which that interest alone should prevail. In *Bleakley v Environmental Risk Management Authority*, Justice Goddard noted that the words 'culture and tradition' were included in the HSNO Act both to underscore the special nature of the relationship of Māori (as opposed to any other group) to the matters listed in the provision and to 'ensure that the relationship of Maori with taonga is not read down, dissipated or minimised by those charged with exercising functions, powers and duties under the Act'.[64] We do not think ERMA has yet reached the point where its systems, policies, and modes of operation achieve the standard articulated by Justice Goddard.

We conclude that the law and policy in respect of GM organisms does not sufficiently protect the interests of kaitiaki in mātauranga Māori or in the genetic and biological resources of taonga species.

(3) *Intellectual property: the patent and plant variety right systems*

Current IP law allows researchers to use mātauranga Māori without kaitiaki consent, and allows non-kaitiaki to claim exclusive legal rights in the genetic and biological resources of taonga species. The law neither recognises that kaitiaki can have any positive rights in these things, nor enables kaitiaki to prevent others from acquiring IP rights in them – especially when much of the mātauranga Māori that underpins the kaitiaki relationship is already in the public domain.

We say that to give proper legal recognition to the kaitiaki interest would benefit Māori development and guard against exploitation that is contrary to Māori values. But we have also noted that the IP system was never designed to achieve such things. Indeed, the Crown and some interested parties told us that to grant such protection would undermine the system and stifle innovation and investment. These, we say, are important considerations.

The Crown proposes to introduce into the patent system a new Māori advisory committee whose task will be to advise the Commissioner of Patents whether an 'invention' is derived from mātauranga Māori or from indigenous species, and if it is likely to be contrary to Māori values. The committee may also assist when the commissioner decides whether an invention is patentable.[65] In the area of PVRS, a draft amendment Bill released for consultation in 2005 proposes that the Commissioner of PVRS should not approve a name for a plant variety if the name is likely to offend a significant section of the community, including Māori.[66] The draft Bill also outlines changes to the definition of 'owner' so that plant varieties must be specifically bred to quality for a PVR. 'Discovered' varieties will no longer qualify.[67]

These are all positive developments, but they fall short of providing appropriate Treaty-consistent protection both of mātauranga Māori and of cultural relationships

with taonga species. This is particularly disappointing in the light of dynamic international developments in this area.

2.5.2 Are the principles of the Treaty relevant to the Māori interest in taonga species?

In chapter 1, we said it is inappropriate to speak of exclusive possession of taonga works and mātauranga Māori, as guaranteed in article 2 of the Treaty's English text. As we also explained, kaitiakitanga and ownership are ways in which two different cultures decide rights and obligations in respect of the resources they value. Kaitiakitanga focuses on obligations and relationships, while property ownership is focused on the rights of the human owners. When the two cultures met, kaitiaki sometimes became legal owners. But the relationships and obligations of kaitiaki persist, whether they or others own the resource, or even if no one owns it.

As we see it, it is even less appropriate to apply the concept of exclusive ownership to the genetic and biological resources of taonga species. A general case for exclusive proprietorial rights in these resources cannot be justified by reason only of cultural association. While we have not inquired into the historical facts, we do not think that cultural association alone is necessarily sufficient to translate into proprietorial rights in the Pākehā legal paradigm. We have, however, noted that there will be some rare species, such as tuatara, for which the cultural relationship is so transcendent that rights and obligations in respect of every living example of the taonga species can be justified, but even then it is quite inappropriate to think in terms of exclusive ownership. The rights and obligations contemplated in those instances must be seen as very much an exceptional response to exceptional circumstances.

As with taonga works, the issue is not the exclusive ownership of the Treaty's English text, but the tino rangatiratanga of the Māori text. Taonga species are unquestionably treasured things – taonga within the meaning of the Māori text of article 2. They hold important places in the whakapapa of creation; they have kōrero or stories reflecting their use, role, and mana; there are tikanga or laws governing the relationship between people and species, and all of these things are handed down in kōrero tuku iho. In the context of bioprospecting, GM organisms, and IP rights, the principle of tino rangatiratanga should allow kaitiaki enough control over the use of genetic and biological resources of taonga species to enable them to protect their relationship with those species to a reasonable degree.

What is reasonable control will depend very much on context. Kaitiaki relationships with their taonga species vary in light of kaitiaki priorities, the nature of the taonga species, and the history of the relationship. The degree of protection will therefore vary too. It is also important to remember that the relationship between kaitiaki and taonga species is multi-faceted. Different species have different (and sometimes multiple) roles in particular contexts. They may also be differently perceived by different iwi and hapū. The precise significance of the relationship varies considerably from community to community.

This plurality has important implications for the protection of kaitiaki relationships with taonga species. It means the needs of the relationship must be defined case by case. Each species is different, and particular contexts and kaitiaki will determine priorities. Different uses may also have different effects. Generally, the greater the effects of the proposed research or use upon the kaitiaki relationship, the greater the right of involvement. Indeed, where the proposed use is so invasive it threatens to undermine the relationship completely, kaitiaki consent will invariably be necessary.

The important point is that the trigger for a substantive Māori role in decision-making is the need to protect the relationship between kaitiaki and taonga species wherever proposals to exploit those species might affect it. It is the relationship that is entitled to protection, not any property right in genetic and biological resources per se.

2.5.3 Are the principles of the Treaty relevant to the protection of mātauranga Māori?

Mātauranga Māori in respect of taonga species is so obviously a creation of Māori communities it seems to us fair that the relevant community should hold some rights in it. As with taonga species, though, the concept of exclusive ownership as guaranteed in article 2 of the English text of the Treaty is inappropriate. Much mātauranga Māori about taonga species is already published and in the public domain for researchers and scholars to use. It

cannot be 'un-known' or returned to some kind of exclusive protection.

What can be justified are three rights. First, the right of kaitiaki to be acknowledged as the source of such knowledge. Secondly, their right to have a reasonable degree of control over their mātauranga Māori. Thirdly, there will be a need for some form of substantive recognition of the kaitiaki interest. We do not go so far as to say that kaitiaki consent will be required whenever mātauranga Māori is used in any way. The extent of recognition must very much depend on what the mātauranga Māori is and how it is used, particularly in terms of its importance in the research or exploitation envisaged. There may also need to be consideration of wider public interests – for example, the implications of the research, product, or process for public health and the like. Sometimes a consent requirement will be appropriate – for example, where the mātauranga Māori can be clearly provenanced and its role has been central in product or process development. Sometimes disclosure or consultation will suffice – for example, where the mātauranga Māori utilised has been somewhat peripheral to the final result. The extent of that proper recognition will depend on a decision-making process in which the nature and role of the mātauranga and the importance of the kaitiaki relationship are weighed alongside other interests on a case-by-case basis.

Even without the Treaty, the rationale for protecting kaitiaki relationships with taonga species and mātauranga Māori to a reasonable degree is powerful. These relationships do not benefit Māori alone. Protecting the kaitiaki relationship with taonga species and mātauranga Māori has important implications for protecting New Zealand's natural environment, and vice versa. (We discuss the kaitiaki role in environmental management in more detail in chapters 3 and 4.)

These conclusions are only reinforced by the perspectives put forward in international forums such as the World Intellectual Property Organization, where the protection of indigenous interests is said to recognise 'social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values'.[68] Article 31(1) of the United Nations Declaration of the Rights of Indigenous Peoples goes even further in acknowledging that:

> Indigenous peoples have the right to maintain, control, protect and develop . . . their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, [and] knowledge of the properties of fauna and flora.

We conclude, therefore, that where there is a risk that bioprospecting, GM, or IP rights will affect kaitiaki relationships with taonga species or mātauranga Māori, article 2 of the Treaty of Waitangi accords those relationships a reasonable degree of protection. International developments in the protection of indigenous rights add weight to this conclusion. Indeed, the principles we apply provide for kaitiaki to protect their mātauranga Māori and taonga species relationships where protection is necessary, as well as facilitating access in exchange for benefit sharing where this is appropriate. Having said that, the Māori interest is not absolute. The degree of protection must be decided on a case-by-case basis, and may be overridden in appropriate circumstances following a proper balancing of kaitiaki and competing interests. There may be some circumstances in which access and benefit sharing arrangements cannot be justified even where mātauranga Māori is used.

2.5.4 How to weigh the interests of kaitiaki and others

Once the kaitiaki relationship and the effects of the proposed use of a taonga species and/or mātauranga Māori are fully understood, the next step is to identify the interests of the wider community and to weigh them against the kaitiaki interest.

There are two key issues to consider here. The first relates to the level of protection needed to keep the kaitiaki–taonga species relationship safe and healthy. The second concerns the nature of other valid interests in those species (for example, the research and development sector, and IP right holders). Protecting those interests might sometimes require the kaitiaki relationship to be given a lesser priority. If conflict between competing and valid interests cannot be avoided, then those interests must be weighed fairly and transparently. Certainly, the kaitiaki relationship is important and protections must be real, but neither it nor any other interest should be a trump card. Decisions about priority must be made after, not before, the balancing process.

The most obvious category of other interests is those who have or who wish to apply for property rights so that they might exploit that property commercially. They include holders of patents in relation to taonga species and those with PVRs for varieties of those species.

Property rights are powerful, and will often be given high priority. But they are not absolute. Most forms of property are subject to some extent to wider interests. In the IP area, trade marks can be revoked if they are offensive to a section of the community, including Māori, and the Commissioner of Patents can refuse to grant a patent if the invention is contrary to morality. If kaitiaki interests are considered during the application stage and before any property right vests, issues such as these might not arise so sharply. Even so, patent applicants and commercial investors require a system in which decision-making processes are transparent, certain, and efficient.

There are also valid non-property interests to be considered. As we have said, a great deal of science and technology exists in the public domain and is the source of much modern innovation. It is in no one's interest to discourage this 'public good' research and development. The Ministry of Research, Science, and Technology's then chief executive, Helen Anderson, stressed this when she told us that that subjecting research and development to additional consultation requirements, mandatory consents, and research constraints could hamper or reduce research into indigenous flora and fauna, increase the costs, and reduce the benefits of research and development.[69]

Quite apart from the practical utility of 'public good' research and development, it can be argued that knowledge is a distinct value in itself. Advancing knowledge about taonga species is thus a valid interest to weigh in the balance alongside others. The interests of the species themselves are also a valid consideration. Kaitiaki and researchers might have different perspectives on this. For example, research and development aimed at preserving or increasing a threatened population of taonga species seems, on the face of it, uncontroversial, but it might be unacceptable to kaitiaki when it involves genetic modification. Both perspectives will need to be weighed, but the species themselves have important and independent interests to be considered too.

Yet another value that may be worthy of consideration is national identity. Some species, and the environments they live in, reflect our sense of ourselves as New Zealanders. The most obvious of these is the kiwi, whose very name is synonymous with being of this place. Other species such as pōhutukawa (the 'Kiwi Christmas tree'), mānuka, harakeke, fern (with its distinctive koru), tuatara, and birds such as tūī and kea are also distinctly 'New Zealand' and have meaning for many New Zealanders, Māori and non-Māori. The well-being of these species is a matter for all New Zealanders.

These are all powerful interests, but it is possible to articulate some fundamental principles about how they might be reconciled if and when they are in conflict. First, the kaitiaki relationship with taonga species is important to Māori identity and entitled to respect. Secondly, provisions put in place to protect that relationship must be meaningful. Thirdly, the interests of IP holders, the public good in research and development, knowledge itself, broader interests such as national identity, and the interests of the species are also important. It follows therefore that any new system capable of taking appropriate account of kaitiaki relationships with taonga species must hinge upon a mechanism for balancing that interest against all others. If that mechanism is unable to accommodate those interests to the satisfaction of all, it must be empowered to decide which of the interests is to have priority, and to do so in a principled, transparent, and timely way.

This task cannot be performed generically. Each case will be argued on its merits and each balancing process will be unique. A genuine case-by-case analysis is the only sound approach to reconciling the needs of the relationship with those of other stakeholders. This is in line with the finding of Justice Goddard that: 'No blueprint for spiritual values can be developed for slavish application in every case.'[70]

2.6 Reforms

Having laid out the basic principles for determining and weighing the rights of kaitiaki in the genetic and biological resources of taonga species and in mātauranga Māori, we now recommend ways in which these principles can

be put into practice. Significantly, we do not see the need to build entirely new systems from the ground up – within all three of our subject areas there are frameworks and policies in place that can be built on to deliver reasonable protection of the kaitiaki interest.

2.6.1 Bioprospecting

The Department of Conservation is in a strong position to lead the development of a national Treaty-compliant bioprospecting regime that is both applicable within the conservation estate and relevant to Crown land outside it. There are several reasons for this. DOC has considerable experience in complying with section 4 of the Conservation Act 1987. It is also a significant potential target for bioprospectors – its estate is large (covering one-third of New Zealand) and it includes the bulk of the country's indigenous flora and fauna. Moreover, in its pātaka komiti for cultural harvest, it already has in place a system with the potential to deliver meaningful Māori involvement in the consideration of bioprospecting applications. If the regional conservator and the pātaka komiti were to make the decision jointly, this seems to us to offer a genuine avenue for protecting the kaitiaki interest in bioprospecting. These komiti, acting in concert with the conservator, are well suited to adopting the case-by-case approach to decision-making that we have said is appropriate when balancing the kaitiaki interest against the interests of others.

We therefore recommend that the pātaka komiti's role should be expanded and applied to scientific or commercial bioprospecting applications within the conservation estate. We also see value in pātaka komiti being involved in developing guidelines and protocols to streamline the application and engagement process. The system would need an adjustment, however, to change the komiti's role from advisory to one of joint decision-making with the regional conservator.

There is a significant international context for the development of a domestic bioprospecting policy that takes account of the Māori interest.[71] Article 15 of the Convention on Biological Diversity is of particular relevance here, but we do not support the idea that access and benefit sharing on the basis of prior informed consent is needed whenever a bioprospecting application is made. Not every application will involve mātauranga Māori or impact on the kaitiaki relationship with taonga species. A blanket approach would give unwarranted automatic priority to kaitiaki. Again, we see the expanded pātaka komiti, acting with the conservator, as the place in which to reconcile the needs of all stakeholders according to the merits of the particular case.

We envisage these protections operating alongside the changes we will propose to GM organism, patent, and PVR decisions. Thus, the entire research process from discovery to exploitation will be covered, giving all stakeholders the opportunity to engage in discussion early in the process. Researchers and investors alike need to know how and when to engage with kaitiaki so that all parties understand and are satisfied with the way the research will be conducted.

We do not think that we need to be more prescriptive. Section 4 of the Conservation Act 1987 requires DOC's bioprospecting regime to align as much as possible with the principles of the Treaty of Waitangi, and we have explained in the previous section how these principles relate to the kaitiaki interest in taonga species and mātauranga Māori. The practical recommendations that we make in *Ko Aotearoa Tēnei: Te Taumata Tuarua* about building successful partnerships might be useful for those implementing the new regime,[72] and we outline below some ways of identifying relevant kaitiaki. Beyond that, it will be for DOC, in consultation with Māori, to design Treaty-compliant policies and decision-making processes.

In the next two sections, we recommend broad-based changes for GM and IP that require decision-makers to identify and give reasonable protection to kaitiaki relationships with taonga species and mātauranga Māori. If implemented, these changes would make it unnecessary to alter the law in relation to bioprospecting on private land or in private *ex situ* collections at this stage. The downstream changes we recommend will create a wash-back effect into private land bioprospecting in relation to research and product development in New Zealand at least.

2.6.2 Genetic modification

We recommend three changes to the current regime in respect of GM organisms to give greater recognition to

the Māori interest. As we have said, we acknowledge that ERMA is shortly to become the Environmental Protection Agency, but believe our analysis and proposals will have equal application in the new regime.

First, we recommend the addition of a paragraph (c) in section 5 of the HSNO Act 1996 requiring all those exercising functions, powers, and duties under the Act to recognise and provide for the relationship between kaitiaki and their taonga species. We see this as a simple way of ensuring the Māori interest is given its due weight in ERMA's balancing process. Secondly, we recommend that Ngā Kaihautū maintain its advisory, rather than directive, role but that it should be able to appoint at least two members to the Authority itself. Including independently appointed Māori who understand tikanga Māori and the kaitiaki obligation in the Authority will add weight to the validity of the decision-making process and enhance ERMA's overall responsiveness to Māori issues.

Thirdly, we recommend that Ngā Kaihautū give advice not only when the Authority requests it but also when Ngā Kaihautū considers an application to be relevant to Māori interests. Such active engagement would ensure that the Authority had early warning of the Māori interest when it might otherwise not have been aware of it. And, as we have said elsewhere, it is to everyone's advantage that all perspectives are understood and are taken into account before the balancing process, not after it. The success of Ngā Kaihautū as a model mechanism for protecting Māori interests will depend on its independence. Its ability to act proactively will underscore its independence.

2.6.3 Intellectual property rights

We note that it is not appropriate for us to discuss the detailed provisions of the Patents Bill currently before Parliament, but it is appropriate for us to discuss current Crown policies in this area in general terms and the draft Bill before it entered Parliament, not least because they were discussed extensively by Crown witnesses in our hearings.[73]

We have said that IP law was not designed to protect the kaitiaki interest in taonga species and mātauranga Māori, and that the Patents Act 1953 and the Plant Variety Rights Act 1987 should be amended to do so. Current reform proposals do not go far enough. We recommend further reform in the following areas.

(1) *Patents Advisory Committee*

The Crown proposes creating a Māori committee to advise the Commissioner of Patents on whether inventions are derived from mātauranga Māori or use taonga species, and whether the proposed use is consistent with or contrary to tikanga Māori. The committee's role and structure would be similar to those of the pātaka komiti in respect of bioprospecting, and similar to Ngā Kaihautū in respect of GM. Such a body would serve as the focal point for identifying and protecting Māori interests. The komiti model is a good start, but it needs to go further if the Crown is serious about giving reasonable protection to the interests of kaitiaki.

Moreover, there are several ways in which the committee mechanism falls short of the design principles outlined in the previous section. First, the committee as proposed would consider a matter only when the commissioner requests it. Secondly, the committee is likely to be part-time and unsupported by an executive unit. It will not have an active investigative capacity. Thirdly, patent examiners are most often trained in law or science. They are unlikely to be ethicists or experts in tikanga Māori, and are therefore ill equipped to detect a potential problem in a patent application, and to balance cultural advice against scientific or legal argument. Additionally, we note that the committee will be effective only if there is a clear relationship between the subject matter of its mandate and the morality and *ordre public* exceptions. It will also need to ensure it implements procedures to enable kaitiaki to give notice of their interest, and requirements for applicants to disclose the use of mātauranga Māori or taonga species. We address all these issues below.

The Māori committee should have a mandate in two broad areas of patent law. The first is to advise the commissioner on the requirements of patentability – invention, novelty, inventive step, and utility. Without this mandate, the commissioner could, for example, grant a patent to an invention derived from mātauranga Māori when that derivation means the invention is not novel.

Secondly, the committee must be able to advise the commissioner on whether there are kaitiaki interests at

risk, even if the patentability criteria are satisfied. This is in line with article 27 of the TRIPS Agreement, which preserves the ability of signatory states to decline a patent application if it is contrary to *ordre public* and morality. This important exception is partially present in section 17 of the current Patents Act and expressly included in the Crown's current patent law reform proposal.

We accept that, at this stage, the Māori committee should remain in an advisory role, but it should not function only at the commissioner's request. The commissioner should be required to take formal advice from the committee when considering an application that raises Māori issues. And the committee should also be allowed to investigate any application or patent filed or granted in New Zealand, and advise the commissioner accordingly.[74] We also see value in the committee's being able to prepare guidelines and protocols to help applicants who are using mātauranga Māori or taonga species to engage with kaitiaki.

Finally, we recommend that the commissioner sit jointly with the committee chairperson or his or her delegate whenever, on advice from the Māori committee, IPONZ must decide on an issue in respect of tikanga Māori.

(2) *Ordre public and morality*

At present, the commissioner can decline registration of a patent if it is contrary to morality under section 17 of the Patents Act 1953. There is no specific reference to Māori, and that lack of specific reference weakens section 17 as a potential gateway for the consideration of Māori issues within the IP system. First, it opens up those interests to the shifting attitudes of successive officials. Secondly, 'morality' itself may be inadequate to cover protection of fundamental Māori values. In New Zealand, where issues between Māori and Pākehā are usually negotiated by reference to the principles of the Treaty of Waitangi, the Māori relationship with taonga species and mātauranga Māori may be seen less as an issue of moral probity and more an issue of social policy. That is, it affects the proper functioning of civic society. Seen in this way, the place of Māori interests in IP law is an issue of *ordre public*.

Thus, we recommend that the commissioner be able to refuse patents that are contrary to *ordre public* as well as morality. This would cover, for example, the circumstance in which the invention unduly interferes with the kaitiaki relationship with a taonga species. *Ordre public* is also relevant to the consequences of failing to disclose use of mātauranga Māori in the patenting process.

The Commissioner of Patents will need to be given explicit power to refuse to register an otherwise compliant patent application on such grounds. In doing so, the commissioner should also be required to balance the interests of kaitiaki with the valid interests of others – including the interests of the applicant, the wider economy and community, and the species itself. But the Māori interest needs to be articulated in the Act in such a way as to ensure that kaitiaki relationships with taonga species and mātauranga Māori are expressly protected in accordance with their proven depth unless it can be demonstrated that other interests deserve priority. The Patents Act will need to be changed to provide for this balancing process. As we have said, the commissioner will need to sit with an expert in tikanga Māori when making these decisions. We say this on the basis that it seems to us unlikely that a Commissioner of Patents will have the necessary expertise to make sound decisions in these respects.

(3) *Notice of the kaitiaki interest*

Before IPONZ could decide on a patent application, processes would need to be put in place to ensure that patent applicants and kaitiaki have early notice of each other's interests, and to allow kaitiaki to advise IPONZ of any concerns they have about a particular application for registration. Early notice of competing interests is essential for the prompt resolution of potential conflict. We therefore recommend that kaitiaki be able to formally register their interest. This recommendation aligns with our recommendation in chapter 1 for the registration of kaitiaki relationships in respect of taonga works.

By casting the responsibility on kaitiaki to be proactive, kaitiaki would be able to demonstrate their commitment to safeguarding relationships with taonga species and mātauranga Māori. Registration would be a practical means by which kaitiaki can demonstrate at the outset just how important these relationships are to them. A register would also give patent applicants fair warning of the kaitiaki interest. We appreciate that patent applicants require

certainty and transparency in their dealings with kaitiaki, and a register would assist all parties in this respect.

Kaitiaki may be iwi, hapū, whānau, or individuals. They should be able to register which species sourced from which areas are taonga to them. Kaitiaki should also be able to record aspects of mātauranga Māori they believe might be used by patent applicants. Though a great deal of mātauranga Māori is already in the public domain, the registers will have to be made public if they are effectively to provide notice to potential applicants. Decisions about registration are therefore best left to kaitiaki. If they do not want to register mātauranga or relationships, they can choose not to do so. That said, kaitiaki should always have a right to object to a patent application, irrespective of whether they have registered their interest. This will ensure that those who prefer not to publish their mātauranga or relationships are not disadvantaged by their decision.

We discuss the question of how to identify kaitiaki in section 2.6.4 below.

(4) *Disclosure*

A second mechanism which will be necessary to encourage early engagement between the parties is to cast the obligation on patent applicants to disclose whether any mātauranga Māori or taonga species have contributed to the research or the invention in any way.

There is intense international debate around disclosure as a means of preventing the misappropriation of genetic resources and traditional knowledge in accordance with articles 8(j) and 15 of the Convention on Biological Diversity. The question for us here is whether a disclosure requirement in New Zealand law would help protect the kaitiaki relationship with taonga species and mātauranga Māori.

We have said that the level of protection needed to keep a particular relationship safe and healthy can be gauged only after a case-by-case analysis of the kaitiaki relationship in question, the effects of IP ownership upon it, and the interests of the wider community. A genuine balancing of all valid interests has therefore to occur at an early stage – before a patent is granted. Any later and the kaitiaki relationship may already have been damaged. It should therefore be mandatory for all patent applicants to disclose the mātauranga Māori and genetic and biological resources that contributed to the research or invention or that in any way led to the patent application. In this way, the kaitiaki interest in those things will be considered as a matter of course in the patent application process.

To enhance the transparency of the system, we recommend that IPONZ's records of disclosure applications be made readily accessible to the public.

A patent applicant who fails to comply with a disclosure requirement can be subject to a range of sanctions. To understand these it is important to appreciate that current patent law distinguishes between formal and substantive disclosure requirements. Formal requirements include, for example, providing addresses and copies of foreign patent applications within particular timeframes. Substantive disclosure requirements relate to the scientific or technological nature of the invention and whether the patentability criteria have been met. Failure to meet substantive requirements may lead to re-examination, rejection, invalidation, or revocation of a patent.

A purely formal disclosure requirement without consequences does not give patent applicants sufficient incentive to disclose the use of mātauranga Māori and taonga species. But invalidation or revocation as consequences of a substantive disclosure requirement may be too heavy-handed in some situations. We would prefer to see mandatory disclosure of any use of mātauranga Māori and genetic and biological resources that have contributed to the research or invention, while the consequences of failing to make proper disclosure should be a matter for the commissioner (sitting with the chair of the Māori committee, or his or her delegate) to decide. This means that in some cases a patent will indeed be revoked or refused. But in other cases there will be no sanction at all, because the risks to the relationship between kaitiaki and taonga species are limited, or the parties have found ways to mitigate them. Uniformly harsh consequences that affect the validity of a patent even when the effect on the kaitiaki relationship is minimal would have an unnecessarily chilling impact on research and development and on the biotechnology sector, and cannot be justified. We also note that this discretionary approach is consistent with the case-by-case approach we favour in several other parts of this chapter and the chapter on taonga works.

(5) *Plant variety rights*

We described in section 2.5.1(3) the proposals contained in the 2005 draft Plant Variety Rights Amendment Bill that are relevant to this claim. The first is to give the commissioner more control over variety names, and the second is that discovered varieties may no longer qualify for a PVR. We support these changes, but recommend that any new PVR legislation also include a power to refuse a PVR if it would affect kaitiaki relationships with taonga species. In order to understand the nature of those relationships and the likely effects upon them, and then to balance the interests of kaitiaki against those of the applicant and the wider public, the Commissioner of PVRs should be supported by the same Māori advisory committee that we recommend becomes part of the patent regime.

We have not addressed one issue that was raised by claimants and plant nurseries, although it is not strictly about PVRs. This relates to whether there are any Māori interests in unmodified taonga plant species propagated for sale and export by private business interests such as nurseries.

Having said that kaitiaki do not have a proprietorial interest in any taonga species but that the cultural relationship between kaitiaki and the taonga species should be protected, the question is whether propagation and sale of taonga species by non-kaitiaki is inconsistent with that relationship. We do not think so. In fact, we think it entirely desirable to encourage businesses and individuals dedicated to the revegetation of New Zealand in native flora, and that such replanting is consistent with kaitiaki relationships. Nor is a basis for the argument that Māori consent is necessary for the sale or export of unmodified taonga species. Sale and export is really about specimens, not species. It does not affect the underlying nature of the species, or kaitiaki relationships with them, and it is that which must be properly protected.

2.6.4 Finding a kaitiaki

One of the practical issues that researchers and Crown officials told us they would like resolved is the question of how to identify who is a kaitiaki and who is not. In the previous chapter, we suggested a kaitiaki registration system for those claiming an interest in taonga works; in section 2.6.3(3), we said that kaitiaki should be able to register their interest in taonga species. We acknowledge that identifying kaitiaki of taonga species is more difficult because the species are not the creations of kaitiaki communities, and many taonga species can be found in various parts of the country. Many communities will have their own mātauranga about the species, and in some cases there will be multiple kaitiaki, all of whom have a genuine interest.

But the difficulty is not intractable. We have in mind a register similar to that suggested for taonga works that allows kaitiaki communities to record their status in respect of particular species within or sourced from their rohe. The provenance of the genetic and biological material will give one hapū or iwi priority over the others. Even if other iwi have broader interests, the iwi or hapū from whose territory the material is taken should be treated as the relevant kaitiaki in the first instance.

If a decision is required in the case of multiple registrations, or other kaitiaki identification issues, the role of the Māori committee will be important. We would expect the committee to develop ethical guidelines about consultation and negotiation, and the commissioner and the chair of the Māori committee, or his or her delegate, to look to the committee for formal advice on the question.

Registration of local kaitiaki will not address national issues – for example, where it is proposed to modify the genetic profile of a taonga species in a way that raises issues for all members of that species. We foresee such issues being taken up by a national body representing the interests of kaitiaki nationwide. It will be for Māori themselves to develop such a body as they see fit.

2.7 Conclusion

We conclude that the kaitiaki relationship with taonga species is entitled to a reasonable degree of protection. In exceptional cases – like the tuatara – kaitiaki are justified in claiming an interest in each living specimen of a species within their rohe, but we do not think kaitiaki have rights in the genetic and biological resources of taonga species that are akin to the Western conception of ownership.

We also conclude that kaitiaki have valid rights in respect of the mātauranga Māori associated with their

taonga species, though such rights do not amount to exclusive ownership of that knowledge, at least where the knowledge is already publicly known. Activities involving the commercial exploitation of mātauranga Māori must give proper recognition to the interests of kaitiaki, including their rights to acknowledgement and to ensuring that mātauranga Māori is respectfully and, where appropriate, accurately presented. Just what is 'proper recognition' must depend on the circumstances. Kaitiaki relationships with their mātauranga will all be different, just as they often are with taonga species. There will be cases where a consent requirement is appropriate. In others, disclosure or consultation will be sufficient. The answer will depend on the balancing process in which the importance of the relationship will be weighed against the interests of researchers or the holders of IP rights on a case-by-case basis.

In all cases, the primary driver of the Māori interest is the kaitiaki relationship with mātauranga Māori and the taonga species.

We recommend changes to bioprospecting, GM, and IP laws that will enable key statutory decision-makers to protect that relationship, and we recommend that decision-makers put in place infrastructure and people with the expertise to assist them to make good decisions in that respect.[75] The thrust of our analysis has been that the history, depth, and cultural importance of these relationships to Māori mean that a system that failed to give reasonable protection to them would be unjust as well as in breach of the Treaty of Waitangi. But there is a bigger picture as well. The technology we have discussed in this chapter reflects the fact that humans have come to exercise control over the matrix of life itself. We now have powers that were once the exclusive preserve of the gods. These developments must be matched by our moral and ethical capacity to make good decisions in deploying these technologies for ourselves and future generations. By introducing the ethic of kaitiakitanga into these processes, we enrich our moral and ethical capacity, and we will make better decisions. If kaitiakitanga says we humans are less important and that taonga species and the whakapapa of life are more important, then that outcome alone will benefit all of us.

Is there a collateral risk that these changes will diminish innovation in New Zealand? Experience teaches us that this fear is more imagined than real. We were struck by the evidence given by the Crown research institutes (in contrast to the stance taken by the Crown itself). For 20 years now the Crown research institutes have built up research and business relationships with Māori – not because the law has required it or because there was a commercial risk to be mitigated, but because doing so enhanced and grew their businesses. All Crown research institutes employ at least one Māori portfolio manager, and others (such as the National Institute of Water and Atmospheric Research) have specialised Māori business development units. We heard of Crown Research Institute projects ranging from joint research work with Ngāi Tahu over tītī (muttonbirds) to ventures with other iwi in aquaculture and medicinal product research. We heard Crop and Food Research tell us how active it has been in bioprospecting and genetic modification: prior informed agreement of Māori, full disclosure, and access and benefit sharing were accepted bottom lines. We heard of the extensive research relationships between GNS Science and Māori landowners in which prior informed consent and access and benefit sharing were givens. Māori relationships in bioprospecting, genetic modification, and IP were not killing business. In fact, they were enhancing and developing them for the benefit of all. And they were doing so ethically.

The path has already been marked out. New Zealand's law and policy has to catch up.

2.8 Summary of Recommendations

The kaitiaki relationship with taonga species is entitled to a reasonable degree of protection. In exceptional cases, such as the tuatara, kaitiaki can justifiably claim an interest in each living specimen of a taonga species within their rohe. But beyond this, we do not think kaitiaki have rights in the genetic and biological resources of taonga species that are akin to the Western conception of ownership.

Kaitiaki also have valid rights in respect of the mātauranga Māori associated with their taonga species, even though such rights do not amount to exclusive ownership of that knowledge, at least where the knowledge is already publicly available. Thus, activities involving the

commercial exploitation of mātauranga Māori must give proper recognition to the prior interests of kaitiaki; kaitiaki are entitled to acknowledgement and to have a reasonable degree of control over their mātauranga Māori. 'Proper recognition' will depend on the circumstances. There will be cases where a consent requirement is appropriate. In others, disclosure or consultation will be sufficient. The answer will depend on the balancing process in which the importance of the relationship will be weighed against the interests of researchers or the holders of intellectual property rights on a case-by-case basis.

Accordingly, we recommend several changes to bioprospecting, GM, and IP legislation to ensure the kaitiaki relationship with taonga species and mātauranga Māori receives a reasonable degree of protection. Just what is reasonable requires case-by-case analysis, a full understanding of the level of protection required to keep the relationship safe and healthy, and a careful balancing of all competing interests. These include the interests of IP holders, the public good in research and development, knowledge, and the species itself. None of these, including the kaitiaki interest, should be treated as an automatic trump card.

Importantly, all the reforms we recommend can be accommodated within the existing frameworks. They are:

1. *Bioprospecting:* We recommend the Department of Conservation take the lead in developing a bioprospecting regime that is applicable within the conservation estate and complies with the requirements of section 4 of the Conservation Act 1987. Joint decision-making between DOC's regional conservator and the pātaka komiti (which already deal with matters relating to the cultural harvest of native flora and fauna on the conservation estate) offers a potential avenue for protecting the kaitiaki interest in bioprospecting: we therefore recommend an expanded role for the komiti. Its role would need to change from an advisory one to one of joint decision-making with the regional conservator. We do not think a compulsory requirement for access and benefit sharing and prior informed consent is justified because not every bioprospecting proposal will involve mātauranga Māori or affect the kaitiaki relationship with taonga species. No one interest should have automatic priority.
2. *Genetic modification:* We recommend the following changes to the current regime to give greater recognition to the Māori interest.
   - An additional paragraph (c) in section 5 of the HSNO Act 1996 should require all those exercising functions, powers and duties under the Act to recognise and provide for the relationship between kaitiaki and their taonga species.
   - Ngā Kaihautū Tikanga Taiao (the specialist Māori committee that advises ERMA) should maintain its advisory role, but should be able to appoint at least two members to the Authority itself.
   - Ngā Kaihautū should give advice not only when the Authority requests it, but when Ngā Kaihautū considers an application to be relevant to Māori interests.
3. *Intellectual property:* We recommend various measures to protect the kaitiaki relationship with taonga species and mātauranga Māori to a reasonable degree. Specifically, we recommend:
   - Establishing a Māori committee to advise the Commissioner of Patents about whether mātauranga Māori or taonga species have contributed in any way to the invention, whether the proposed use is consistent with or contrary to tikanga Māori, the requirements of patentability, and (even if the patentability criteria are satisfied) whether there are kaitiaki interests at risk. The committee should not be reactive: the commissioner should be required to take formal advice from it and work with a member of the Māori committee when making patent decisions.
   - Ensuring in the law that kaitiaki relationships with taonga species and mātauranga Māori are expressly protected in accordance with their proven depth (unless it can be demonstrated that other interests deserve priority). This includes a mechanism to ensure that any mātauranga Māori is treated as a key factor in

decisions about whether a patent application is novel or involves an inventive step.

- Empowering the commissioner to refuse patents that are contrary to *ordre public* as well as morality.
- Enabling kaitiaki to formally notify their interest in particular species or mātauranga Māori by way of a register. This would allow kaitiaki to demonstrate the importance of their relationship, while also giving patent applicants fair warning of the kaitiaki interest. That said, kaitiaki should always have a right to object to a patent application, whether or not they have registered their interest.
- Requiring patent applicants to disclose whether any mātauranga Māori or taonga species have contributed to the research or invention in any way. The Intellectual Property Office must make these records publicly available. Patent applicants who fail to comply with a disclosure requirement can be subject to a range of outcomes, from no sanctions at all to the patent being revoked, to be decided by the commissioner and the chair of the Māori committee (or his or her delegate) on a case-by-case basis.

In respect of PVRs, while Māori have no proprietary rights in taonga species, the cultural relationship between kaitiaki and taonga species is entitled to reasonable protection. We support the Crown's proposed changes to the Plant Variety Rights Act, but recommend that any new PVR legislation also include a power to refuse a PVR if it would affect kaitiaki relationships with taonga species. In order to understand the nature of those relationships and the likely effects upon them, and then to balance the interests of kaitiaki against those of the PVR applicant and the wider public, the Commissioner of PVRs should be supported by the same Māori advisory committee that we recommend becomes part of the patent regime.

Text notes

1. Document R8(c) (*The New Zealand Biodiversity Strategy* (Wellington: Department of Conservation and Ministry for the Environment, 2000)), p 6. 'This level of endemism is remarkable internationally. Both species of New Zealand bat are endemic, as are all four frogs, all 60 reptiles, more than 90 per cent of insects and a similar percentage of marine molluscs, about 80 per cent of vascular plants, and a quarter of all bird species. In contrast, Great Britain, which separated from continental Europe only 10,000 years ago, has only two endemic species: one plant and one animal. Half a dozen islands in the Hauraki Gulf have a greater level of endemism than the whole of Britain'. (Ibid, p 2)
2. Statistics New Zealand, *Hot off the Press: Latest Statistics from Statistics New Zealand – Bioscience Survey: 2009* (Wellington: Statistics New Zealand, 2010), p 7. The total sums single-year data from the last financial year for which respondents had results available as at August 2009.
3. These are summaries of more comprehensive definitions set out in Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, ch 2. These summary definitions are based on and consistent with those used in the international Convention on Biological Diversity.
4. Document K11 (Robert McGowan, 'The Contemporary Use of Rongoa Maori (Traditional Maori Healing)' (masters thesis, University of Waikato, 2000)), p 67
5. William Colenso, 'Vestiges: Reminiscences of the Ancient Maori', *Transactions and Proceedings of the New Zealand Institute*, vol 24 (1891), p 464 (as quoted in Murdoch Riley, *Māori Healing and Herbal: New Zealand Ethnobotanical Sourcebook* (Paraparaumu: Viking Sevenseas NZ Ltd, 1997), p 126)
6. Hirini Clarke, under cross-examination by counsel for Ngāti Porou, 7th hearing, 23 April 1999 (transcript 4.1.7, p 449)
7. 'The use of honey as a traditional remedy for bacterial infections is known since ancient times': Elvira Mavric, Silvia Wittmann, Gerold Barth, and Thomas Herle, 'Identification and Quantification of Methylglyoxal as the Dominant Antibacterial Constituent of Manuka (*Leptospermum scoparium*) Honeys from New Zealand', *Molecular Nutrition and Food Research*, vol 52, no 4 (April 2008), p 483.
8. Document H9 (Terewai Grace, brief of evidence on behalf of Ngāti Koata, undated), p 16
9. Document P25(a) (Tate Pewhairangi, brief of evidence in support of Ngāti Porou, 10 August 2006), pp 4–6
10. Statute of Monopolies 1623 (UK), s 6. Grants were issued for a period of 14 years.

11. Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, art 33

12. Patents Act 1953, s 10(3)–(4)

13. While that is the theory, in practice, some patent applicants try to provide opaque descriptions that limit their usefulness to other inventors. There is debate about the effectiveness of patent specifications and claims.

14. For example, section 57(3) of the Wildlife Act 1953 (which applies to almost all vertebrates, but not to plant life or to most microbiota) provides as a general rule that any animal living in a wild state is owned by the Crown even when it is located on private land. Such material includes indigenous species, or parts thereof, fossilised plant or animal material, soils, rocks, and any other geological material: Conservation General Policy, s 12(d). The same applies to wild animals that are harmful introduced species under section 9(1) of the Wild Animal Control Act 1977.

15. In 2001 the Ministry of Economic Development took over from DOC as the lead agency in bioprospecting policy. We were told the rationale for the change was that bioprospecting is significant for economic development and should therefore be well integrated with other economic development policies: Mark Steel, under cross-examination by counsel for Ngāti Kahungunu, 20th hearing, 22 December 2006 (transcript 4.1.20, p 399).

16. Conservation General Policy, s 12(c)

17. We refer to this in Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, sec 4.6.3(5). We say there that these committees are generally made up of expert hapū representatives who advise the department on how to exercise their statutory powers for the allocation of customary use rights. The komiti also provide feedback on applications, and the department supports decisions made by hapū.

18. Convention on Biological Diversity 1992, arts 15.5, 15.7

19. Ibid, art 1

20. Though the intention of Article 8(j) is clear, the requirement 'to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity' applies only 'as far as possible and as appropriate' and 'subject to . . . national legislation'. Even with these conditions, however, the article draws a direct connection between traditional knowledge holders and Prior Informed Consent and Access and Benefit Sharing.

21. Convention on Biological Diversity 1992, art 22. See chapter 1 for further discussion of the 1994 TRIPS Agreement, which sets minimum standards for the protection of IP and provides a framework for New Zealand's domestic IP law.

22. Hazardous Substances and New Organisms Act 1996, s 9(2)(a); Hazardous Substances and New Organisms (Methodology) Order 1998

23. The Hazardous Substances and New Organisms Act came into force on 1 July 1998. For the development of the Hazardous Substances and New Organisms Act, see document K2 (Robert McClean and Trecia Smith, 'The Crown and Flora and Fauna: Legislation, Policies, and Practices, 1983–98', report commissioned by the Waitangi Tribunal, 2001), pp 612–616.

24. A new Environmental Protection Authority will be operational by 1 July 2011. It will combine the functions of ERMA with other national-level regulatory and consenting functions. The Environmental Protection Authority (EPA) Bill was introduced into Parliament on 16 November 2010 and passed its first reading unanimously on 24 November 2010. We refer throughout this chapter to ERMA, but our analysis and proposals will have equal application under the new regime.

25. We refer to 'the Authority' in this context; 'ERMA' refers to the organisation as a whole. We refer to Ngā Kaihautū Tikanga Taiao as 'Ngā Kaihautū' in subsequent references.

26. Hazardous Substances and New Organisms Act, s 5

27. Hazardous Substances and New Organisms (Organisms Not Genetically Modified) Regulations 1998; Hazardous Substances and New Organisms (New Organisms Forms and Information Requirements) Regulations 1998; Hazardous Substances and New Organisms (Low-Risk Genetic Modification) Regulations 2003; Hazardous Substances and New Organisms (Genetically Modified Organisms – Information Requirements for Segregation and Tracing) Regulations 2008

28. Hazardous Substances and New Organisms (Methodology) Order 1998

29. Hazardous Substances and New Organisms (Methodology) Order 1998

30. 'Māori Membership of Institutional Biological Safety Committees (IBSCs) and Consultation Requirements with the Māori Community', ERMA: *New Zealand Policy Documents Series: Policy Documents Relating to New Organisms* (May 2006), p 34

31. 'Consultation Requirements with the Māori Community', ERMA: *New Zealand Policy Documents Series: Policy Documents Relating to New Organisms* (May 2006), pp 36–38; 'Requirements for Consultation with Māori on HSNO Applications that Involve Human Cell Lines and/or DNA', ERMA: *New Zealand Policy Documents Series: Policy Documents Relating to New Organisms* (May 2006), pp 40–41.

32. Field testing is defined as 'the carrying on of trials on the effects of the organism under conditions similar to those of the environment into which the organism is likely to be released, but from which the organism, or any heritable material arising from it, could be retrieved or destroyed at the end of the trials': Hazardous Substances and New Organisms Act 1996, s 2.

33. Hazardous Substances and New Organisms Act 1996, s 53. See section 38G(2)(a) in relation to review of conditional release approvals. Note that the provisions for public notification and a

full submission process does not apply to development approvals that have been fast-tracked under the Act's 'rapid assessment' provisions: see Hazardous Substances and New Organisms Act 1996, ss 42, 42A, 42B.

34. *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213

35. Patents Regulations 1954, schedule 3, Patents Forms A and B

36. The exact parameters of the obviousness test are disputed in New Zealand and overseas. This is a highly contentious area of patent law.

37. The US Patent Office's approach to usefulness is that to be patentable, the gene sequence must have a useful application that has 'specific, credible, and substantial utility'. In its 2001 Utility Examination Guidelines, the United States Patent and Trademark Office stated 'where the application discloses a specific, substantial, and credible utility for the claimed isolated and purified gene, the isolated and purified gene composition may be patentable': Department of Commerce: United States Patent and Trademark Office, 'Notice: Utility Examination Guidelines', *Federal Register*, vol 66, no 4, p 1093.

38. There is one Commissioner of Patents, Trade Marks and Designs, and a separate Commissioner of Plant Variety Rights (PVRS). For simplicity, here and in subsequent references we refer to the roles separately in their particular statutory contexts.

39. Intellectual Property Office of New Zealand, 'Contrary to Morality: Raising Objections under Section 17(1)', Ministry of Economic Development, http://www.iponz.govt.nz (accessed 24 September 2010)

40. Intellectual Property Office of New Zealand, 'Contrary to Morality: Raising Objections under Section 17(1) (Superseded)', Ministry of Economic Development, http://www.iponz.govt.nz (accessed 24 September 2010)

41. Intellectual Property Office of New Zealand, 'Contrary to Morality: Raising Objections under Section 17(1)', Ministry of Economic Development, http://www.iponz.govt.nz (accessed 24 September 2010)

42. For example, in New Zealand a patent has been granted for an isolated gene sequence that is present in breast and bladder carcinoma: patent 537579.

43. A period of 20 years in the case of non-woody plants or 23 years in the case of woody plants: see Plant Variety Rights Act 1987, s 14.

44. Plant Variety Rights Act 1987, s 10(4)(a)

45. Ibid, s 10(4)(b)

46. Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, art 27

47. Ibid, art 33

48. Ibid, art 1.1

49. Ibid, art 27(2)

50. Unless the so-called invention is really a copy of some remedy or process already known to mātauranga Māori and the 'inventor' has added nothing, the current system does not protect kaitiaki relationships with taonga species. While it is necessary to fit within the *ordre public* and morality exceptions to obtain additional TRIPS-compliant protection within the patent system, there is greater flexibility in *sui generis* systems of protection that operate in addition to the TRIPS baseline. We have discussed this issue in chapter 1 on taonga works.

51. Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 3rd ed (London: Sweet & Maxwell/Thomas Reuters, 2008), para 2.238

52. Daniel Gervais, 'Patents: Ordre Public and Morality', *Resource Book on TRIPS and Development* (New York: United Nations Conference on Trade and Sustainable Development/Cambridge University Press, 2005), p 375

53. Daniel Gervais, 'Patents: Ordre Public and Morality', *Resource Book on TRIPS and Development*, p 375

54. The morality exclusion has its source in British patent law.

55. Document Q14 (Nursery and Garden Industry Association of New Zealand Inc, submission on the Wai 262 claim, 15 September 2006), pp 3–5; doc Q2 (Black Bridge Nurseries, submission on the Wai 262 claim, 11 September 2006), p 2

56. Document Q14, pp 1, 4–5

57. Document Q15 (Paul Morgan, submission on behalf of the Federation of Māori Authorities, undated), pp 3, 5

58. Document R10 (Dr Rick Pridmore, brief of evidence on behalf of the Association of Crown Research Institutes, 21 November 2006), pp 5–7, 14

59. Document R9 (Dr Christopher Downs, brief of evidence on behalf of Crop and Food Research, 21 November 2006), p 9

60. 'Molecular Breeding', Scion, http://www.scionresearch.com/research/forest-science/tree-improvement/molecular-breeding (accessed 18 February 2011). Scion provided other case studies: see doc R23 (Dr Tom Richardson, brief of evidence on behalf of New Zealand Forest Research Institute Ltd ('Scion'), 21 November 2006), pp 1–14.

61. Geological and Nuclear Sciences calls these Biological Material Transfer Agreements: see document R11(d) (Institute of Geological and Nuclear Sciences Limited, 'Biological Material Transfer Agreement', undated)

62. Document Q20 (New Zealand Institute of Patent Attorneys Inc, submission in relation to the indigenous flora and fauna and cultural and intellectual property (Wai 262) inquiry, undated), pp 1–3

63. This is known as 'prior art'.

64. *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, 284

65. Document R16 (Mark Steel, brief of evidence on behalf of the Ministry of Economic Development, 21 November 2006), pp 60–61

66. As noted earlier, there is one Commissioner of Patents, Trade Marks and Designs and a separate Commissioner of Plant Variety Rights. . We refer to the roles separately in their particular statutory contexts.

67. At the time of writing, neither the Patents Bill nor the draft PVR amendments has been enacted.

68. World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore, 'The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles', secretariat document, WIPO/GRTKF/IC/9/4, 9 January 2006, annex, p 3; see also doc R16(mmm) (World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Draft Report (Second Draft)', secretariat document, WIPO/GRTKF/IC/9/14, 5 November 2006), p 154

69. Document R6 (Helen Anderson, brief of evidence on behalf of the Ministry of Research, Science, and Technology, 21 November 2006), pp 13–17. As we note in chapter 6, in our further discussion of the Ministry of Research, Science, and Technology, a new agency, the Ministry of Science and Innovation, has taken over the Ministry's work and that of the Foundation of Research Science and Technology.

70. *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, 287

71. This was discussed extensively in evidence by the noted ethnobotanist Dr Darrell Posey: see doc F1(b).

72. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, ch 6

73. Treaty of Waitangi Act 1975, s 6(6), which states that with some exceptions, the Waitangi Tribunal shall not have jurisdiction over Bills introduced to the House of Representatives; see also *AG v Mair* [2009] NZCA 625 per Baragwanath J.

74. This particular power would apply only in respect of patents granted after the date of the reform.

75. We offer and discuss a set of partnership principles for this purpose in chapter 6 and in Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, sec 6.6.8.

Whakataukī notes

Page 60: Natalie Angier, *The Canon: A Whirligig Tour of the Beautiful Basics of Science* (New York: First Mariner Books, 2008), p 19

Page 61: Hirini Moko Mead and Neil Grove, *Ngā Pēpeha a ngā Tīpuna* (Wellington: Victoria University Press, 2001), p 86

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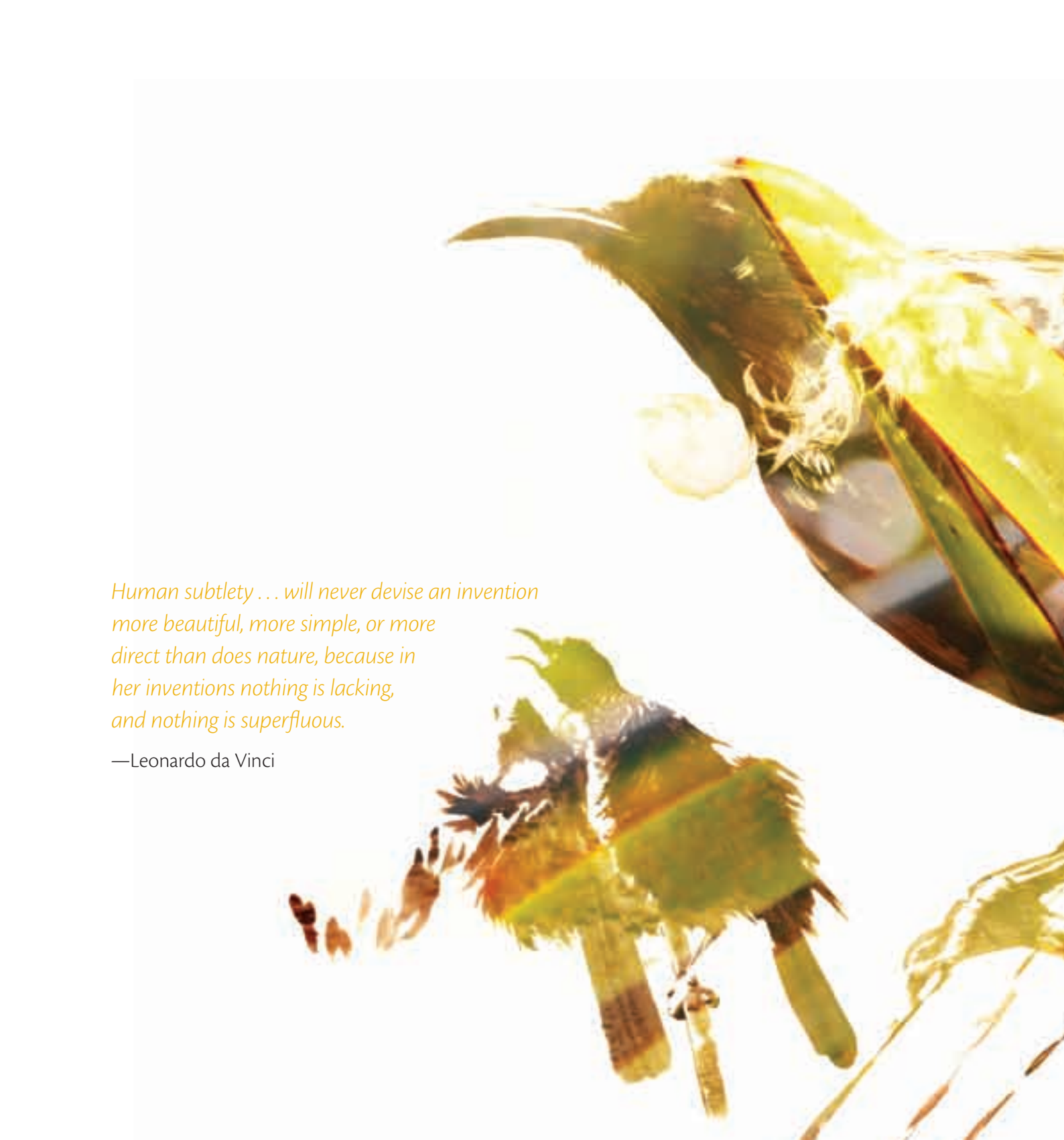
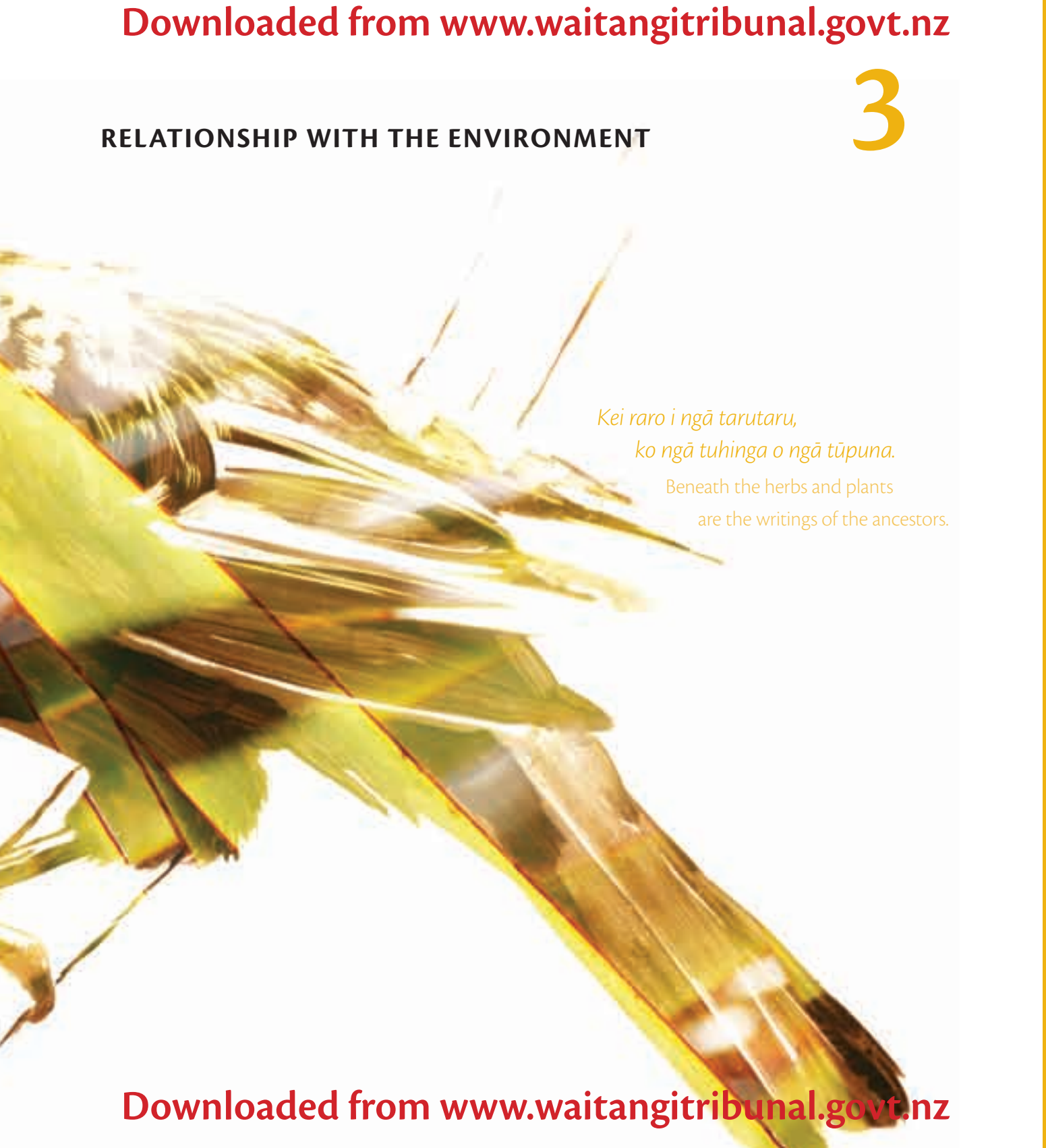


Human subtlety . . . will never devise an invention more beautiful, more simple, or more direct than does nature, because in her inventions nothing is lacking, and nothing is superfluous.

—Leonardo da Vinci

3

RELATIONSHIP WITH THE ENVIRONMENT



Kei raro i ngā tarutaru,
ko ngā tuhinga o ngā tūpuna.
Beneath the herbs and plants
are the writings of the ancestors.

The kauri Tane Mahuta in Waipoua Forest. Māori culture evolved in response to the environment of Aotearoa as, over many generations, people formed relationships with the land, water, climate, and flora and fauna that sustained them. Over time, even the gods subtly realigned: Papa-tū-ā-nuku (the female Earth) took a much stronger role and, in most tribes, her son Tāne-mahuta (the male personification of the primordial forest ecosystem) assumed the senior position amongst his siblings. In this way, Māori culture became a product of the environment, and its survival depends on the exercise of kaitiakitanga in relation to that environment.

CHAPTER 3

RELATIONSHIP WITH THE ENVIRONMENT

3.1 The Environment and Mātauranga Māori

There is an old saying: 'Kei raro i ngā tarutaru, ko ngā tuhinga a ngā tūpuna' (beneath the herbs and plants are the writings of the ancestors). This remains true even in the fundamentally modified environment of modern New Zealand. And so the most powerful indicator that mātauranga Māori is a product of these islands is to be found in the environment itself – in the names imprinted in it, and the ancestors and events those names invoke.

The environmental issues raised by the Wai 262 claim pose one essential challenge: how can the voice of mātauranga Māori, etched as it is in the land, still speak in our changed circumstances? That is the question we attempt to answer. To do that, we must first understand the deep values that impel the Māori voice.

Of the two core values, the first is whanaungatanga or kinship. We mean kinship here in the wider sense, as used in a culture that sets such store by descent that commonly recited family lines are measured in 40 generations or more. As we have said in the preceding chapters, whanaungatanga is the organising principle of mātauranga Māori. It describes relationships between people, between people and natural resources, even between related bodies of knowledge. In fact, all relationships of importance in mātauranga Māori are explained through kinship. That is why whakapapa (genealogy) is so important: it is the practical manifestation of the kinship principle. For this reason, Māori relationships with taonga in the environment – with landforms, waterways, flora and fauna, and so on – are articulated using kinship concepts. Indeed, the first step in understanding the Māori relationship with the landscape (for example) is to understand that descent from it is an essential Māori belief. Māori attitudes towards the environment make sense if that is grasped.

The second core value is kaitiakitanga. It is often translated as guardianship or stewardship. Generally speaking, this is a fair approximation, although it lacks the core spiritual dimension that animates the concept. In Māori tradition the 'guardians' or 'stewards' are, as often as not, supernatural beings. Kaitiakitanga is really a product of whanaungatanga – that is, it is an intergenerational obligation that arises by virtue of the kin relationship. It is not possible to have kaitiakitanga without whanaungatanga. In the same way, whanaungatanga always creates kaitiakitanga obligations.

The Reverend Māori Marsden, in his writings on kaitiakitanga (which he prepared for those developing the Resource Management Act), suggested that people involved in environmental management should be guided by three basic principles that derive from a Māori world view:

Tree ferns in native bush, Lake Tarawera. Only remnants of the environment in which Māori culture evolved now survive.

- humankind's contribution is to enhance and maintain the life support systems of Papa-tū-ā-nuku;
- people should treat Papa-tū-ā-nuku with love and respect in recognition of her life-supporting function, her role in the creation of the natural world, and her place in our own whakapapa; and
- we do not own Papa-tū-ā-nuku, but are recipients, and therefore stewards, of the natural environment.[1]

This is a good representation of the highest ideals of whanaungatanga and kaitiakitanga in respect of the environment. We heard many examples in evidence that demonstrated these ideals in practical terms. The idea of a kin relationship with taonga, and the kaitiakitanga obligation that kinship creates, explains why iwi refer to iconic mountains, rivers, lakes, and harbours in the same way that they refer to close human relations. It explains why elders feel comfortable speaking directly to those elements and features, and why those elements and features are viewed as embodying distinct spiritual, as well as physical, qualities. It also explains why relationships with the environment are so important to the claimants. It is through those relationships that the Māori culture evolved, and through those relationships that it has a future.

We turn now to see how whanaungatanga and kaitiakitanga are incorporated in modern environmental management.

3.2 Modern Environmental Law and Policy in New Zealand

Environmental law was comprehensively reformed in the decade from the mid-1980s through the Resource Management Law Reform project. The reform reflected

a major ideological shift in approach to New Zealand's natural resources, from one that was primarily exploitative to one more focused on environmental well-being as a credible outcome in its own right. The first step in the process was completed in December 1986 when the Environment Act was passed into law, its two purposes being to establish the Ministry for the Environment and the Parliamentary Commissioner for the Environment. Each organisation focused on Māori issues to a much greater extent than in the past. The Ministry, with a larger budget, did this structurally through the creation of Maruwhenua, its Māori secretariat.

In 1989 a large-scale reorganisation of the local government sector was undertaken. It significantly reduced the number of local councils with regulatory power over planning and land use, and generally called them city and district councils. In addition, regional councils were established to control the key environmental parameters of water use, air quality, and erosion.

The third, and final, piece of the puzzle was the enactment in 1991 of the Resource Management Act (RMA). It was an omnibus measure designed to bring together, under a single rationalised and integrated system, the dozens of often single-issue and contradictory Acts relating to the environment.

Local authorities would drive the system. They would apply the innovative high-level principles set out in part 2 of the Act (see below) to environmental management, using locally derived district and regional plans. These plans would provide for the allocation of the resources

Lake Rotomahana. The settlement in 2000 of Te Arawa's Treaty claims provided for Te Arawa's ownership of Rotorua lake beds and influence over local authority RMA decision-making relating to the water in the lakes and the air above them.

Ngunguru Sandspit, Northland. Proposals for the subdivision and development of the sandspit on Northland's east coast have long caused grief and pain for the people of Te Waiariki, a hapū of Ngāti Wai. In 1832, the spit was the scene of a major battle, the culmination of a sustained campaign by tribes from the south, which left the hapū decimated.

of the district or region in accordance with the principles of the Act and priorities set by relevant councils. In Wellington, the Ministry for the Environment would generate environmental policies that would filter into the system through law reform, national policy statements on matters of national environmental importance, and judicious exercise of the Minister's call-in powers in respect of major projects with national implications. Meanwhile, the Parliamentary Commissioner for the Environment would be an independent advocate for the environment itself,

responsible for overseeing the effectiveness of environmental management processes and agencies, with a kind of 'bully pulpit' reflecting the fact that the office was to be answerable only to Parliament.

This structure has survived largely intact, albeit with some recent amendments. In 2009, amendments to the RMA established the Environmental Protection Authority as an office within the Ministry, and introduced new processes aimed at streamlining and increasing central control over consenting for projects of national significance. The Environmental Protection Authority Act 2011 established the authority as a Crown entity independent of the Ministry and gave it additional functions.

At an early stage in the RMA reform, Māori raised the matter of unresolved Treaty claims to the ownership of resources that would come to be regulated under the new law. These included minerals, geothermal energy, water, the foreshore and seabed, riverbeds, and so forth. All had been the subject of longstanding political or legal claims, or both, but nonetheless remained out of earshot of 'mainstream New Zealand'. The response of the RMA reformers was to take all questions of ownership off the table, and to assert that the Act would only 'regulate' the use of natural resources, and would contain no declarations as to their ownership. It is fair to say that Māori were generally sceptical, especially as consent for access to resources such as water effectively secured their ownership.

Following extensive dialogue with Māori and wider interests, a series of Māori-specific provisions was drafted into the Bill that had a surprising effect on the overall feel of the legislation. Part 2 of the Act contains the driving principles to which we have referred, the overriding one being the carefully defined concept of 'sustainable management' in section 5. All functionaries under the Act must strive to achieve this ideal. Section 6 provides a list of seven 'matters of national importance'. The list includes protecting the natural environment of coastlines and other land–water margins, protecting outstanding natural features from development, and other considerations of that ilk. Among them is section 6(e), which requires councils to '*recognise and provide for* . . . the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga' (emphasis added). This is a potentially powerful injunction, even though it is subject to the overarching 'sustainable management' purpose. Perhaps unwittingly, the reference to Māori relationships with various taonga in the natural environment evokes the whanaungatanga value.[2]

Section 7, in part 2, has the nominally prosaic title 'Other matters'. It currently requires councils to have '*particular regard to*' a list of 11 specific matters (emphasis added). Among them is kaitiakitanga. In turn, kaitiakitanga is defined as 'the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship'. Thus, section 7 imports a core principle of mātauranga Māori into the national environmental regulatory regime.

Section 8 of part 2 contains the Treaty provision. It says:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall *take into account* the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). [Emphasis added.]

The phrasing of these protections suggests a cascading order of priority from the core principle of sustainable management, to matters of national importance, to other matters, and finally to the Treaty of Waitangi. In addition, there is intense competition between the factors listed within each level under sections 6 and 7.

The operational mechanisms in the Act provide a number of triggers through which these part 2 principles can have practical effect in the day-to-day working of the system of environmental management. Councils must give effect to these priorities in drafting district and regional plans, and they must both consult with tangata whenua and take into account the iwi's own planning documents (known as 'iwi management plans') in preparing those plans. In addition, there is limited provision for iwi to exercise regulatory authority in their own right in particular circumstances, or to do so in partnership with councils. Finally, when councils act as consenting authorities, there is a general requirement for them to take account of the purpose and part 2 principles in deciding individual

resource consent applications, as must the Environment Court on appeal. In these and other ways, the recognition of the Māori relationship with the environment, kaitiakitanga, and the Treaty is integrated into the overall system.

Having described in general terms the two core Māori values of particular relevance in environmental matters, and having set out how the modern system of environmental management operates, we can now return to the question we posed at the outset. Can the voice of mātauranga Māori be heard in the operation of such a system?

3.3 The Treaty and the Environment

We begin this discussion with two preliminary issues. The first relates to what the Treaty says about the environment. We do not think the environment as a whole is a taonga, at least not in the sense that the term is used in the Treaty. To accept such an idea would be to accept that everything is a taonga, making the concept itself meaningless as a source of rights and obligations. The environment in mātauranga Māori is the atua (gods) themselves: Ranginui, Papa-tū-ā-nuku, Tāne-mahuta, Haumia-tiketike, and so on. The atua transcend taonga. Indeed, the natural elements manifested as atua contain, or have dominion over, taonga, but it is wrong to think of the atua as taonga. Rather, the taonga are the particular iconic mountains or rivers, for example, or specific species of flora or fauna having significance in mātauranga Māori.

The second issue involves defining the Crown Treaty partner. The Crown submitted that it does not have Treaty responsibilities for RMA functions. It argued that local authorities exercise relevant powers under the RMA, and that local authorities are not the Crown. We can deal with this issue quickly. It is now well settled that the Crown does not absolve itself of Treaty obligations by using its powers to subdivide kāwanatanga functions between central and local governments. If the Crown chooses (as it has) to create a system of local-level environmental management through the statutory devolution of its government function to local government, it must do so in terms that ensure that its Treaty duties are fulfilled. Thus, while local authorities are not the Crown, as its statutory delegates they must be given clear Treaty duties and be made accountable for the performance of them.

A stream in native forest. The claimants sought the ability to regulate and control their relationships with taonga such as rivers and streams, areas of land and bush, flora and fauna, pā sites, wāhi tapu, and other parts of the environment of significance within mātauranga Māori.

Those matters aside, the arguments of the parties can be summarised in brief terms. The claimants contended that the guarantee of tino rangatiratanga in the Treaty gives kaitiaki the right to control and regulate their relationship with the environment. They argued that the default position should be either joint management of the environment or outright kaitiaki control, although they recognised that compromise would be required to accommodate other vested interests. Without kaitiaki being at the centre of environmental decision-making,

the claimants contended that the voice of mātauranga could not be heard where it counted. The Crown, on the other hand, argued that the existing regime gave the Māori voice appropriate priority and there was no need to do more.

In our view, the best way to think about the Treaty, and Māori and Crown interests in the environment, is to begin with kaitiakitanga.

3.4 Kaitiakitanga in Practice

Kaitiakitanga, which we introduced in section 3.1, can be described as Māori environmental law, policy, and practice. Three practical examples of kaitiakitanga given by Ngāti Koata witnesses will suffice to illustrate the point (these being three of literally dozens of examples given by claimant iwi).

The first example is drawn from the evidence of Alfred Elkington. It refers to the tikanga associated with gathering flax that he had learnt from his grandmother.[3] The location that was best for gathering the strongest flax was well known, and the rights to take flax from that place were defined by reference to whakapapa. The process for cutting the flax was also clearly defined. Mr Elkington's grandmother said that the best time for cutting flax was 'just when the sun came up' and she would speak to the flax, telling the flax that 'she had to cut it to make it look beautiful, and because if she didn't cut it then the flax would grow up ugly and untrimmed'. Mr Elkington's evidence also refers to the importance of cutting the flax correctly to ensure the sustainability of the resource. The off-cuts of flax were also disposed of carefully. A karakia was said over the off-cuts to make them tapu and then they were burned because the flax fibre would not otherwise break down. The Ngāti Porou and Tai Tokerau weavers who gave evidence made it clear that this reverence continues today.[4]

Mr Elkington also gave evidence about the system for managing native forests, based around strict selection and the minimisation of waste. For example, the wood from the pāhautea (New Zealand cedar) was both soft and long-lasting and was therefore reserved for specific limited uses. Except for making paddles and repairing boats, that type of tree would never be cut down. 'We would leave good trees to use for our next paddles.' The process for selecting the right tree to cut down for carving or other purposes was also careful and deliberate. A crucial part of this process was the karakia to Tāne-mahuta. Mr Elkington stated that this karakia was a means of 'asking for guidance' to ensure that only the correct tree would be cut down. 'We did not want to cut down the wrong tree, as that would be a waste.'[5] This created a system for managing native forests based on the kaitiaki relationship.

Harakeke (flax, *Phormium tenax*). Claimants gave evidence about the tikanga associated with the harvesting of harakeke for weaving and the reverence with which it is gathered. These tikanga maintain the relationship between kaitiaki and taonga.

Similar systems were in place for the management of kaimoana. Priscilla Paul and Jim Elkington both referred to the practice of managing and transplanting pipi, cockles, mussels, kina, pāua, oysters, and scallops for a variety of reasons, including sustainability.[6] Transplantation was managed according to the spawning cycles of the various species, and traditional regulatory mechanisms such as rāhui were used to ensure sustainable quantities of kaimoana developed before any harvesting took place. Wero Karena of Ngāti Kahungunu also evoked the effectiveness of kaitiakitanga, saying that the minds of Māori were impregnated with 'spiritual mechanisms' that acted as 'a system of checks and balances', preventing theft of resources without any need for active policing.[7]

Prior to colonisation these practical systems of kaitiakitanga controlled all environmental management. Today, these systems can only operate informally because, through the RMA, the statutory authority necessary to exercise formal kaitiakitanga is actually vested in the Crown and local government. Iwi wish to express their kaitiakitanga despite this loss of authority. Though they often articulate that desire by adopting familiar Pākehā legal concepts like ownership or legal title, in reality the debate is not about who owns the taonga, but who exercises control over it. Indeed, although the English text of the Treaty guarantees rights in the nature of ownership, the Māori text uses the language of control – tino rangatiratanga. Equally, kaitiakitanga – which is the obligation side of rangatiratanga – does not require ownership. In the end, it is the degree of control exercised by Māori, and their influence in decision-making, that needs to be resolved in a principled way through the use of the concept of kaitiakitanga.

Nor does it follow that where a taonga is identified, or a kaitiaki relationship is established, the Treaty requires that Māori should be accorded exclusive control. There are many overlapping and conflicting interests in today's environment, and to adopt a one-size-fits-all remedy without reference to the interests of others – including that of the environment itself – is both impractical and unfair. Not all taonga will be of the same worth – some will be more important than others, and more deserving of protection. Nor will all competing interests be the same. Some will be capable of accommodation without conflict, while others will be entitled to greater priority than the demands of kaitiakitanga.

It is not appropriate therefore for the Tribunal to offer a blanket answer to the claimants' environmental claims. The claimants sought Māori control of taonga Māori, but there will be occasions where that cannot, indeed should not, be the result. Similarly, the Crown argued for Crown or local authority control of all decision-making affecting taonga in the environment, yet there will be circumstances in which this will be entirely inappropriate. Accordingly, what is needed here is a system that allows all legitimate interests (including the interests of the environment itself) to be considered against an agreed set of principles, and balanced case by case.

Such a system should be capable of delivering the following outcomes to kaitiaki:

- *control* by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority;
- *partnership* models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision-making but other voices should also be heard; and
- *effective influence and appropriate priority* to the kaitiaki interests in all areas of environmental management when the decisions are made by others.

It should be a system that is transparent and fully accountable to kaitiaki and the wider community for its delivery of these outcomes.

We turn now to look at whether each of these outcomes is, or could be, provided for in the current RMA system.

3.5 Delivering Kaitiaki Control in the RMA

The RMA contains two mechanisms that are capable of delivering proactive control of taonga within the environment to kaitiaki. The first is contained in section 33. It allows local authorities to transfer any of their functions, powers, or duties to iwi authorities or other statutory authorities. This includes the ability to transfer the power to promulgate RMA planning instruments and grant resource consents.

The second potential control power relates to heritage protection authorities under section 188. This provides

that any body corporate with an interest can apply to the Minister for the Environment to be made a heritage protection authority for the purpose of protecting 'any place'. The term place is broadly defined as including any feature or area, and the whole, or part, of any structure. Once a body corporate is granted protection authority status, it is generally empowered to make a heritage order over the relevant place. If an order is made, no use of the place which contravenes the order is permitted.

Both powers are significant and intended to be so. Yet in the 20 years since the enactment of the RMA, these provisions have never been invoked in favour of iwi, despite attempts (several, in the case of section 33) to do so. There appears to be nothing that iwi can do to achieve their use. Given the thoroughgoing infusion of Māori values into Part 2 of the Act, this must be seen as major gap in the Act's credibility. Central and local government have argued in various forums that there are reasons for this, including a lack of capacity on the part of iwi. To the extent such arguments reflect a lack of resourcing, that certainly has been the case. The cumbersome process local authorities must go through to transfer powers – which in the case of section 33 involves complex consultation processes usually reserved for the most significant council decisions, and the meeting of certain conditions such as that the transfer of powers is desirable on the grounds of 'efficiency' – is surely also a factor. But those factors are not true reasons justifying a failure to act. In any case, we emphatically reject any assertion that iwi and hapū lack the ability to translate centuries of kaitiakitanga of the environment into an RMA context.

Ironically, while explicit and relatively long-standing statutory avenues are available at the discretion of local government, several agreements under which iwi are to receive substantive regulatory control in their own right have been negotiated outside the RMA process. One example is the Ngāti Porou–Crown Deed of Agreement in respect of the tribe's foreshore and seabed claims. Features of that deed include an ability to continue ongoing customary activities without the need for resource consent; and the right for Ngā Hapū o Ngāti Porou to decline resource consent applications if the activity is likely to have a significant adverse effect on their relationship with the environment in the territorial customary rights area. At the time of writing, legislation giving effect to the settlement had been introduced to Parliament and was awaiting its first reading.

Māori should not have to incrementally await the settlement of their Treaty or customary rights claims in order to achieve effective control of environmental regulation in appropriate cases. While the existence of an ongoing customary relationship with resources may be one basis for the transfer of significant powers to kaitiaki, it should not be the only way. The provisions of the RMA make it clear that transfers of this kind should be possible in the ordinary course of business. This glaring shortcoming needs to be remedied. We will return to how this might be done in section 3.8.

When is kaitiaki control likely to be appropriate? We talked in section 3.4 about the balancing exercise that must be undertaken to determine whether kaitiaki should be accorded control of the taonga. We noted that it would be necessary to reach a view about the importance of the taonga in mātauranga Māori, as well as the significance of third-party interests. Each case will be different, and there is little to be gained from trying to predict all possibilities, but common sense suggests some general principles may assist. First, if there is a significant body of mātauranga Māori about the taonga, that will be an indication of its importance to iwi. The greater the evidence of the taonga's importance, the greater the need to consider kaitiaki control as the appropriate outcome. Secondly, third-party interests must be considered – for example, where private property interests will be affected by restrictions proposed by kaitiaki, an exclusive control model may well be inappropriate. We would, however, caution against assuming that the interests of kaitiaki and private right-holders are automatically in conflict. In our experience, this is not necessarily the case at all.

3.6 Delivering Partnership in the RMA

In 2005, Parliament enacted section 36B of the RMA to provide for joint management agreements. Such agreements can be entered into between local authorities and iwi authorities or groups that represent hapū, and they can provide for the joint performance of any of the local authority's functions, powers, or duties under the RMA

relating to natural or physical resources. Again, it is clearly intended that joint management bodies exercise significant RMA powers.

It was anticipated by many that this provision might achieve a meaningful level of local government uptake. However, in the six years this provision has been in operation, we are aware of only one example, between Ngāti Tūwharetoa and the Taupō District Council. While a unique and laudable initiative, it remains unproven and appears to be somewhat tentative. Though it might appear at first glance to have wide coverage, several layers of restriction come into play. First, it only applies to notified resource consents and private plan changes on, or affecting, multiply owned Māori land. Secondly, while the resource consent or private plan change applicant is notified of the option of having the application heard by a joint committee, the applicant can opt out of this process, in which case the council will control the process. Thirdly, if a joint committee is convened, the council and Ngāti Tūwharetoa each choose two qualified commissioners, with the council choosing the fifth commissioner and chairperson in the event agreement cannot be reached between the parties. The chairperson has a casting vote in the event of a split vote.

In the recent Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Waikato-Tainui have achieved a degree of co-governance in respect of the management and rehabilitation of the Waikato River – a tribal icon and a severely compromised national resource. The range of interests in the Waikato River and its catchment cannot be overstated: there are a number of iwi interests along its length from Lake Taupō to Port Waikato; there are

The Waikato River. A 2010 Treaty settlement provided for a form of co-governance over the management and rehabilitation of this iconic river.

electricity-generation businesses; a significant proportion of the country's dairy farms; and dozens of communities, city and district councils, one regional council, and central government. The Act essentially effects a complex joint management agreement between Waikato-Tainui and relevant local authorities, which includes spiritual and cultural imperatives in policy and planning instruments, together with joint decision-making powers in particular circumstances and iwi influence in others.

Agreements between the Crown and other Waikato River iwi are also reflected in the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act, which was passed by Parliament in October 2010.

There is no question that these Treaty settlement models are innovative. They are, however, relatively new and, as such, their practical impact remains to be seen. To a large extent, their success will depend on the relationships that are built between kaitiaki and the relevant local authorities. Furthermore, as with the control mechanisms we referred to above, it is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business, and that Māori are being made to expend the potential of their Treaty settlement packages to achieve results the resource management reform promised, two decades ago, would be delivered. The Crown accepted in hearings that the transfer of exclusive or shared decision-making power should not depend upon proof of customary title or historical wrongs. It follows that what must be proven is the existence of a kaitiaki relationship with the taonga in question. That ought to be enough.

3.7 Delivering Kaitiaki Influence in the RMA

Where circumstances do not justify control or partnership outcomes for kaitiaki, there is nonetheless a strong case for a general principle of kaitiaki influence throughout the operation of environmental regulation within the iwi rohe (traditional territory).

Currently that influence is expressed in two ways – through district or regional policy and planning instruments, and in individual resource consent applications. Councils must consult with tangata whenua in the preparation of planning instruments such as district and regional plans, and while there is no obligation to consult in respect of resource consent applications, applicants will often be advised to do so as a matter of best practice. Certainly, tangata whenua can always participate in notified consent applications within their rohe, and with limited notified applications upon receipt.

Whether the interest is in a new planning instrument or a particular consent, the degree of Māori influence is dictated by the priority accorded Māori interests in part 2 of the RMA, and by the cogency of the issue the tangata whenua wish to bring forward. In reality, these influence triggers produce piecemeal and inconsistent results. If relations between iwi and the local authority are good and well resourced, Māori priorities stand a fair chance of being heard. If not, the Māori voice is effectively silenced.

It was no doubt for this reason the Local Government Act 2002 introduced requirements for Māori contribution to local authority decision-making. Specifically, under section 63 of the Act, a local authority must: provide opportunities for Māori to contribute to its decision-making processes; consider ways in which it may foster the development of Māori capacity to contribute to those processes; and provide relevant information to Māori for the purpose. A local authority can address this by ensuring that processes are in place for consulting with Māori.

In addition, Ministry for the Environment officials who appeared before us referred to a number of the Ministry's programmes aimed at enhancing Māori engagement with the RMA. For example, guides have been published focusing on a Māori audience, and Māori law specialists have been contracted to deliver workshops to iwi and hapū.

It is fair to say that the system is designed to facilitate Māori reaction to priorities being set by local councils and applicants. While this in itself is an advance on the pre-RMA position, there are obvious structural shortcomings in this approach. Other than the almost entirely unused control and partnership mechanisms to which we have referred above, there are few opportunities for Māori to take the initiative in resource management. Māori are usually sidelined in the role of objectors.

There is one important exception. Section 61(2A) of the RMA requires that district and regional plans must take into account 'any relevant planning document recognised by an iwi authority' and lodged with the council, where

it is relevant to the resource management issues of the region.[8] These 'iwi management plans' provide the only mechanism by which iwi authorities are able to exercise influence on resource management decisions by setting out their own issues and priorities without any consulting council or applicant filter. It is the only instance where Māori can be proactive in resource management without needing the consent of a minister, a local authority, or an official.

One problem is that iwi do not generally have access to the resources to fund the necessary technical and democratic processes. To date, there are few iwi management plans with a sufficient technical basis to influence local authorities decisively. The other problem is the relatively weak statutory provision for iwi management plans; as we have said, the RMA is silent on their purpose and content, and requires only that they be 'take[n] into account' when councils are preparing their plans.

These shortcomings urgently need to be remedied.

3.8 Reforms

Although the RMA represented a significant step forward towards the end of last century in making room for the Māori voice in environmental management, much of its potential remains disappointingly unrealised. In particular, the Act has failed to deliver any iwi control of iconic taonga within their environment, despite the existence of the section 33 transfer power and the section 188 heritage protection authority option. Nor has it even delivered an effective wide-ranging model for partnership via the section 36B joint management provision.

Instead, control and partnership outcomes have emerged from outside the RMA system through customary title applications, such as that of Ngāti Porou, and historical claims settlements, such as that of Waikato-Tainui. In addition, iwi influence in resource management generally remains inconsistent and overly reactive. It depends too much on the resources available to iwi and the quality of iwi–local authority relations. This patchiness persists despite the compulsory consultation provisions in schedule 1 of the RMA and in the Local Government Act.

It is sadly ironic that those with the power to embrace iwi partnership within the rubric of RMA decision-making (but have consistently failed to do so) are the first and loudest to complain when iwi seek to avail themselves of the only other recourse open to them – Treaty settlements.

In the claimants' view, a general change in decision-making under the Act might be brought about by amending section 8, so that decsion-makers must act consistently with the Treaty rather than merely taking account of it. Other Tribunals have recommended this amendment, although it was noted recently that this alone would not be enough to effect change.[9] We have a similar view: amendment of section 8 on its own is not the answer, and we prefer the suite of interlocking reforms proposed below.

3.8.1 Enhanced iwi management plans

The absence of compulsion is the most glaring omission in the present legislation. Unless kaitiaki can compel the other parties who have power under the Act to engage with them, their ability to exercise control, partnership, and influence will always be limited. If the system is to be Treaty compliant, therefore, this must change. Those with powers under the Act need to accept that iwi involvement in RMA matters within their respective rohe will be compulsory, formal, and proactive, just as it is with any other public authority within the relevant district or region.

The mechanism for achieving this should be enhanced iwi management plans. These plans have been in the RMA from day one, but their potential has never been truly crystallised. We consider enhanced iwi management plans, which we call iwi resource management plans (IRMPs), to be the lynchpin of a Treaty-compliant RMA system.

These plans would be prepared by iwi in consultation with local authorities. They would identify section 33 control and section 36B partnership opportunities for formal negotiation with councils. They would identify heritage protection authority opportunities in respect of iconic areas for the iwi. They would set out the iwi's general resource management priorities in respect of taonga and resources within their rohe.

Once an iwi has finalised its IRMP, a formal statutory negotiation process between iwi and local authority representatives should be convened to confirm it. During this phase, there may be compromise. Where there is

agreement, the IRMP should have the same status under the RMA as any district or regional plan or policy statement, as the case may be. (For example, where the IRMP applies to land use planning issues, it would have the same status as a district plan; where it concerns water and air discharges, it would have the same status as a regional plan; where it concerns broad matters of regional policy, it would have the same status as a regional policy statement.) Where the parties cannot agree, more than one option should be available to them:

- they may agree to disagree – in which case the relevant IRMP provision will still be a relevant consideration for RMA decision-making, albeit not binding;
- they may refer the matter to formal mediation by the Environment Court or via an alternative agreed process; or
- either or both parties may refer the matter to the Environment Court for final determination. We would suggest that in the event of such a reference, the Court should include at least one commissioner who is expert in mātauranga Māori or an alternate Environment Judge who is also a Māori Land Court Judge. Any decision of the Court would be binding.

We recommend that the RMA be amended to implement this IRMP concept.

3.8.2 Improved mechanisms for delivering partnership and control

Reforms are also needed in respect of sections 33, 36B, and 188. It is through these mechanisms that kaitiaki control will be delivered when that is justified. Yet the RMA neither requires nor provides incentives for such mechanisms to be used. Indeed, if anything, they impose procedural hurdles and conditions that weigh against their use.

These provisions should be easier to use. They should not impose unnecessary barriers to partnership or transfer of power. In section 33, the procedural requirements must be simplified. Both this section and section 36B should be reviewed to encourage transfer of control, or partnership, where that is appropriate, rather than discourage such transfers as they do now. Nor should local authorities be able to unilaterally revoke at any time transfers of power under section 33, as they currently can.

Secondly, local authorities should be required to explore options for delegation to kaitiaki (as we proposed above as part of the IRMP process). They should also be required to regularly review their activities to see whether they are making appropriate use of sections 33 and 36B, and they should report to the Parliamentary Commissioner for the Environment explaining why they determined to make delegations under section 33, or formed partnerships under section 36B, in some cases and not in others. This is particularly important where kaitiaki have sought such delegations. In turn, the commissioner's annual report to Parliament should set out the performance of every local authority in making delegations to kaitiaki, as well as the steps kaitiaki have taken in administering resources over which power has been delegated.

In addition, the Ministry for the Environment should be required to proactively explore options for kaitiaki to be designated as heritage protection authorities under section 188. Just as local authorities should report to the commissioner on their use of sections 33 and 36B, the Minister for the Environment should annually report to Parliament on the designation of kaitiaki as heritage protection authorities.

We recommend that the relevant statutes be amended to implement these reforms.

3.8.3 A commitment to capacity building

We acknowledge that there will be capacity issues here. Although many iwi are fully engaged in RMA processes, some will not be ready at this point to take control of the management of important taonga, or to manage them in partnership.

And compulsory engagement will only work if iwi have the resources and capacity to make that engagement meaningful. To develop IRMPs, iwi will need access to relevant experts such as lawyers, scientists, engineers and so on. For these reasons, iwi should be funded to participate unless they make an active decision not to engage. The Government could contribute dedicated amounts into the Environmental Legal Assistance Fund, administered by Ministry for the Environment, or to a separate kaitiakitanga fund. The primary aims of any such funding must be to enhance Māori participation in resource management processes, and to ensure that all iwi have access to the resources and expertise necessary to prepare robust

plans. That will ensure two things – first, that plans comprehensively state all relevant iwi interests, and secondly, that the plans are articulated in a way that can be easily integrated into the wider system.

In addition to IRMP funding, the Ministry for the Environment should step up by placing greater emphasis on capacity-building. Evidence given by the Ministry on its Māori issues work left us with the distinct impression that Māori programmes had been deprioritised. This must not continue. The Ministry's Māori secretariat, Maruwhenua, was once a ground-breaking unit within the New Zealand public sector. It needs to be again. There remains much work to be done if the promise of the RMA is to be fully realised, and Maruwhenua needs to be the face of that work within government. It must be Maruwhenua's mission to assist all iwi to prepare effective IRMPs and to encourage kaitiaki to take up greater responsibilities under the Act. Apart from the obvious environmental outcomes, this is the means by which the Crown can maximise iwi investment in our system of law. Accordingly, we recommend that the Ministry for the Environment commit to building Māori capacity to participate in RMA processes and in the management of taonga.

3.8.4 Greater use of national policy statements

Finally, we turn to the question of national policy. One of the reasons that local authorities have struggled to effectively engage with Māori, and in particular to make use of iwi management plans and provisions for partnership and transfer of power, is that there has been a lack of guidance from central government. National policy statements and national environmental standards were supposed to provide leadership for councils to follow; instead, in 20 years very few have been developed, and until very recently none have made specific reference to kaitiaki involvement in decision-making. That should change. We recommend that the Ministry for the Environment develop national policy statements on Māori participation in resource management processes, to include: policies for achieving nationally consistent implementation of IRMPS; use of mechanisms for kaitiaki control and joint management; and other means by which Māori may influence environmental decision-making.

3.8.5 Conclusion

The arrangements that have been achieved through Treaty settlement and customary rights negotiations give us some cause for hope. Clearly, it is possible for the Crown and its delegates to find ways of sharing and delegating environmental management powers with kaitiaki. It is happening already; it is just that it is not happening within the environmental management regime as it should be.

However, with a combination of systemic change, central government leadership, local authority willingness, and enhanced iwi capacity, appropriate levels of kaitiaki control, partnership and influence can become a feature of the New Zealand environmental decision-making regime.

3.9 Summary of Recommendations

The relationships between kaitiaki and the natural environment – entwined as they are with the fundamental concept of whanaungatanga – are crucial to Māori culture and identity. Under the Treaty, the Crown must actively protect the continuing obligations of kaitiaki towards the environment.

Kaitiakitanga is extensively acknowledged in the Resource Management Act 1991. The Act purports to 'recognise and provide for' Māori relationships with their ancestral lands, waters, sites, wāhi tapu and other taonga as 'matters of national interest'. It also specifically requires those who exercise powers under the Act to 'have particular regard to' kaitiakitanga and to 'take into account' the principles of the Treaty.

We have found that a Treaty-compliant environmental management regime is one that is capable of delivering the following outcomes, by means of a process that balances the kaitiaki interest alongside other legitmate interests:

- *control* by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority;
- *partnership* models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision-making but other voices should also be heard; and

- *effective influence and appropriate priority* to the kaitiaki interests in all areas of environmental management when the decisions are made by others.

The RMA regime has the potential to achieve these outcomes through provisions such as sections 33, 36B, and 188. But they have virtually never been used to delegate powers to iwi or share control with them. Where some degree of control and partnership has been achieved, this has almost always been through historical Treaty and customary rights settlements. We do not believe that iwi should have to turn to Treaty settlements to achieve what the RMA was supposed to deliver in any case.

Accordingly, we recommend that the RMA regime be reformed, so that those who have power under the Act are compelled to engage with kaitiaki in order to deliver control, partnership, and influence where each of these is justified. Specifically:

- *Enhanced iwi management plans:* We recommend that the RMA be amended to provide for the development of enhanced iwi resource management plans; that these plans be developed by iwi in consultation with local authorities; that these plans identify iwi resource management priorities and opportunities for delegation of control to kaitiaki or establishment of partnerships; and that these plans be confirmed during a joint statutory negotiation process between iwi and local authority representatives, during which there may be compromise. We recommend that, once adopted, these plans have the same status under the RMA as any district or regional plan or policy statement as the case may be.
- *Improved mechanisms for delivering control:* We recommend that the RMA's existing mechanisms for delegation, transfer of powers, and joint management be amended to remove unnecessary barriers to their use. We recommend that local authorities be required to regularly review their activities to see if they are making appropriate use of sections 33 and 36B, and be required to report annually to the Parliamentary Commissioner for the Environment explaining why they made delegations or established partnerships in some circumstances and not in others. We also recommend that the Ministry for the Environment be required to proactively explore options for delegations under section 188, and to report annually to Parliament on this.
- *A commitment to capacity-building:* We recommend that the Ministry for the Environment commit to building Māori capacity to participate in RMA processes and in the management of taonga, and that this commitment should include providing resources to assist kaitiaki with the development of iwi resource management plans, and assisting kaitiaki to develop the resources or technical skills needed to exercise their kaitiaki roles.
- *Greater use of national policy statements:* We recommend that the Ministry for the Environment develop national policy statements on Māori participation in resource management processes, including iwi resource management plans, and arrangements for kaitiaki control, partnership and influence on environmental decision-making.

Text notes

1. Te Ahukaramū Charles Royal, ed, *The Woven Universe: Selected Writings of Rev Māori Marsden* (Ōtaki: Estate of the Reverend Māori Marsden, 2003), p 46
2. By a more recent amendment, paragraph (g) makes special provision for rights recognised under the Foreshore and Seabed Act 2004 by requiring councils to 'recognise and provide for . . . the protection of recognised customary activities'.
3. Document H8 (Alfred Elkington, brief of evidence, undated), pp 7–10
4. Document D3 (Niki Lawrence, brief of evidence, undated), pp 7–8; doc D5 (Mata Ra-Murray, brief of evidence, undated), pp 3–4; doc D6 (Haana Murray, brief of evidence, undated), pp 14–15; doc D7 (Merereina Uruamo, brief of evidence, undated), pp 2–3; doc P28 (Connie Pewhairangi, brief of evidence, 16 August 2006), pp 3–4
5. Document H8, p 13
6. Document H12 (Priscilla Paul, brief of evidence, undated), pp 18–19; doc H16 (James Elkington, brief of evidence, undated), pp 13–15, 20
7. Document I17 (Wero Karena, brief of evidence, 2000), p 12
8. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, sec 3.3.2(2)

9. Waitangi Tribunal, *The Report on the Management of the Petroleum Resource*, (Wellington: Legislation Direct, 2011), pp169–170

Whakataukī notes

Page 102: Leonardo da Vinci, *Leonardo da Vinci's Note-books*, trans Edward McCurdy (New York: Empire State Book Company, 1923), p76

Page 103: Source unknown

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The conservation of natural resources is the fundamental problem. Unless we solve that problem it will avail us little to solve all others.

—Theodore Roosevelt

4

TAONGA AND THE CONSERVATION ESTATE

Whatungarongaro he tangata,
toitū he whenua hoki.

People disappear,
the land remains.

CHAPTER 4

TAONGA AND THE CONSERVATION ESTATE

4.1 Introduction

Everybody has heard the story of Rātā. He went to the forest to select a tree with which to build a canoe that would carry enough men to punish those who had killed his father. He selected a large tree and spent the day felling and trimming it. He returned in the morning to begin adzing the hull, but found that his log was once again a living tree and there was no sign of the previous day's work. Perplexed, he spent the day repeating the task. And the following morning he found that the tree was restored for a second time. After a third felling, he hid close by, hoping to catch the culprits in the night. As the sun set the forest came alive with insects and birds. This was the karakia they used as they worked:

Rātā ware, Rātā ware,
Noho noa koe ka tuatua noa i a Tāne,
Koia i whekii, koia i whekaa,
Rere mai te maramara,
Koia i piri, koia i mau,
Rere mai te kongakonga.
Koia i piri, koia i mau,
E tu Tāne, kia torotika to tu,
Tihe mauriora!

Ignorant Rātā, ignorant Rātā,
You took liberty and felled Tāne,
Hear the thud, hear the sound (of the adze),
The chips fly hither,
Stick together, hold together,
The fine chips fly hither,
Stick together, hold together,
Arise Tāne, and stand straight,
Behold, he lives anew!

In this way, the birds and the insects taught Rātā that the forest must be respected and that its resources will not be provided to humans on demand, but only after the most careful and reverential request accompanied by appropriate ceremony. Rātā learnt that humans are no match for the kaitiaki of Tāne. The legacy of these teachings has been handed on from generation to generation until today. We have heard many examples from the claimants, just two of which we give here.

The first of these examples concerns Ngāti Hine's response to the sharp decline in Northland's population of kūkupa (kererū) numbers. This decline, which has been taking place for a long time, reflects the clearing of the northern forests, predation by introduced pests, and increased human activity. Ngāti Hine have hunted kūkupa in the forests within their rohe for a millennium – they remain to this day a traditional food of great mana.

In 1994 the Department of Conservation (DOC) transferred to Ngāti Hine guardianship and management of the 350-hectare Motatau Forest, situated right in the heart of Ngāti Hine territory. The forest was renowned within the tribe as a rich source of kūkupa. Knowing this and the wider problem of decline, Ngāti Hine declared a rāhui (traditional

◀ A stand of native forest (Trounson Kauri Park)

Kererū (kūkupa) flying.

ban) on the taking of kūkupa from Motatau. It is still in place. Ngāti Hine leader Kevin Prime declared that taking would resume only when the kūkupa had become a pest.

Another example is provided by Ngāti Kurī's efforts to protect pūpū harakeke, a large and ancient form of land mollusc known in English as the flax snail. They are a threatened remnant species found only in a small area at North Cape, within the traditional territory of Ngāti Kurī. The Ngāti Kurī people treasure them because they are so rare and beautiful. But in Ngāti Kurī tradition they are most revered as the guardians of the tribe. Stories are told of the sounds made by pūpū harakeke as they were crushed beneath the feet of approaching warriors, warning the Ngāti Kurī people of approaching danger.

Now Ngāti Kurī want to save the pūpū harakeke. Since the 1990s, DOC and Ngāti Kurī have worked to protect this taonga and its habitat. DOC undertook initial scientific research and consulted the iwi about a recovery plan. In 2005, Nellie Norman of Ngāti Kurī won a contract to undertake protection work aimed at protecting pūpū harakeke from predators. Though progress has been made, there are significant unresolved issues from the iwi's perspective. These issues centre around access to this taonga (as permits are needed to visit scientific and nature reserves where most remaining pūpū harakeke are found) and decision-making authority. As Ms Norman told us, 'Ngati Kuri are the rightful decision-makers on issues concerning our taonga tuku iho.'[1] Ngāti Kurī have yet to assume this role.

Like the foregoing examples, the claims that we heard in respect of the conservation estate were essentially about the desire of iwi to exercise kaitiakitanga over the forests, mountains, waterways, plants and wildlife, and other taonga within their rohe. Only by exercising kaitiakitanga, it was argued, can mātauranga Māori in relation to those taonga survive.

4.1.1 Why is DOC so important to the claimants?

DOC owns or is responsible for more than eight million hectares of land, about one third of New Zealand. This estate is by far the largest Crown-owned land asset. It includes native forests, rivers, mountains, wetlands, and other precious landscapes and ecosystems. The department is also responsible for about 1.28 million hectares of marine reserves, and for conservation of marine mammals such as tohorā (whales) and protected wildlife throughout New Zealand.

DOC's greatest land treasures are the national parks and offshore islands. It is in the parks and islands, where DOC makes its greatest efforts to counter the effects of introduced pests and weeds, that we have our best remaining opportunities to encounter the landscapes and forests where Rātā learned his place.

DOC was founded on an ethic of community involvement in its work. This is reflected in many of the department's programmes, but is present most powerfully in its structure. DOC's 11 regional conservancies are assisted by community-nominated and ministerially appointed conservation boards with formal statutory decision-making powers. At national level there is the New Zealand Conservation Authority – again appointed by the Minister following community nominations, and again

Pūpū harakeke (flax snail) of Te Paki Trig.

with formal statutory decision-making powers to complement the work of officials.

Māori place enormous value on the conservation estate, at two levels. First, it is not only a vast landscape by New Zealand standards; it is also where most of the surviving taonga places can be found. Unlike the rest of New Zealand, which has been so heavily modified by farming, urbanisation, and other land use changes, many parts of the DOC estate remain similar, at least, to that in which te ao Māori was created. And although it is owned by the Treaty partner, every inch of it is tribal territory. Landscapes and landforms evoke the old stories, and they in turn evoke whakapapa. For this reason, individual iwi and hapū relationships with conservation land remain tangible in ways not usually possible in more modified environments. Sometimes relationships with flora and fauna can be recreated within the DOC estate as substitutes for those that have been lost elsewhere.

Secondly, DOC is responsible for almost all remaining indigenous flora and fauna species – many of which are found nowhere else in the world, and many of which are threatened or endangered. For most iwi and hapū, the department controls access to and relationships with such taonga, Without them, mātauranga Māori simply cannot survive.

For these reasons, the DOC estate and relations with the department were of particular significance for the claimant iwi. All iwi called extensive evidence about DOC. Departmental officials, whether from head office or conservancy-based, attended all hearings. This was the only

subject to evoke such consistently high focus from both sides.

4.1.2 The claimants' concerns

As explained above, the claimants wish to exercise kaitiakitanga over taonga within their rohe. In the context of the environment, they said that taonga in respect of which kaitiaki rights and obligations apply include indigenous flora and fauna and the ecosystems and habitats that support them; geographic features such as forests, lakes, rivers, mountains, and offshore islands; sites such as pā and wāhi tapu; and the mātauranga and tikanga associated with those parts of the environment. They argue that the exercise of kaitiaki relationships is essential to the preservation of mātauranga Māori, and that it is their right, guaranteed by the 'tino rangatiratanga' promise in article 2 of the Treaty. They also argue that the Treaty obliges the Crown to actively protect kaitiaki relationships with taonga, and to ensure they are preserved for future generations.

They submitted that their ability to exercise kaitiakitanga has been severely compromised – initially by land losses and environmental changes since the time of Cook and more recently by legal and policy restrictions. The claimants argued that tino rangatiratanga guarantees their right to control or decision-making power in relation to taonga. However, the Crown has reserved ownership and control over indigenous wildlife and the conservation estate for itself, and in practice DOC restricts access to and control over those taonga. While the claimants acknowledged DOC's efforts to inform and consult them, and sometimes involve them in decision-making (as in the Motatau example above), they argued that these efforts rarely went far enough to allow them to fully express their kaitiaki relationships.

In this context, the claimants felt demeaned by requirements to seek DOC permission for customary use of taonga (such as plants for weaving and rongoā, whale bone for carving, and feathers for korowai), and felt that these requirements showed a lack of respect for their mātauranga and tikanga.

The claimants' final concern was about commercial activity within the conservation estate. This ranges from high-profile tourism operations such as skifields to very low-profile activities such as stock grazing, and brought the Crown some $13.9 million in income in 2009/10.[2] The claimants expressed concern that they were often excluded from decisions about such commercial activities, and that they were seldom awarded licences (known as 'concessions') to carry out such activities themselves.

Transmitter being attached to a captive North Island kōkako before being released in Hawke's Bay. Like most other indigenous bird species, kōkako are fully protected under the Wildlife Act and DOC is responsible for managing their recovery.

For its part, DOC emphasised the good work being done on the ground to protect Māori values in the DOC estate, and the real advances being made in the quality of relations between DOC conservancies and local iwi. DOC was able to point to the innovative use of iwi liaison officials within its Pou Kura Taiao network, and to the obviously warm relationships between regional conservators

and iwi leaders in the relevant conservancies. We were informed of several other collaborative initiatives that are fostering both conservation and mātauranga Māori. Clearly, enormous progress has been made since 1987 when the department was established.

Although the department was comfortable in consultation mode with iwi, officials admitted that stepping beyond this to substantive power-sharing presented legislative, structural, and policy challenges.

The claimants' concerns are addressed below under the following themes:

- *Legislation and guiding policy* in respect of DOC's obligations to give effect to Treaty principles and its interpretation of those obligations;
- *Māori involvement in conservation decision-making*;
- access to flora and fauna for traditional practices such as weaving, carving, and ceremonies – known as *customary use*;
- Māori involvement in decision-making about, and tangata whenua access to, *commercial opportunities on the conservation estate*; and
- the Crown's approach to Māori aspirations for taonga places and species in *national parks*.

Finally, we consider a way forward aimed at bringing together kaitiaki and conservation interests.

We turn now to deal with each issue in the order set out above.

4.2 Legislation and Guiding Policy

DOC was created by the Conservation Act 1987 to administer that Act, and others including the National Parks Act 1980, the Wildlife Act 1953, the Marine Reserves Act 1971, the Reserves Act 1977, and the Marine Mammals Protection Act 1978.

Section 4 of the Conservation Act 1987 provides: 'This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.' This is the most powerful Treaty clause currently on the statute books. It creates positive obligations to find ways to give effect to the Treaty in all of DOC's activities. In this claim, iwi and DOC officials are challenged to explore what section 4 really means in the administration of the department and the conservation estate.

There is no definitive list of Treaty principles. Whenever the courts or Tribunal have proposed Treaty principles, they have done so in the context of the problem they are dealing with at the time. Indeed, the Court of Appeal has said that there could never be a final list, as '[t]he Treaty obligations are ongoing. They will evolve from generation to generation as conditions change.'[3] The Executive (Cabinet and the public service), Parliament, the courts, and the Waitangi Tribunal have all had their say at various times on what they think the principles are.

The only government-wide statement of Treaty principles was that published by the fourth Labour Government in 1989. They are as follows:

- the principle of government (the kāwanatanga principle);
- the principle of self-management (the rangatiratanga principle);
- the principle of equality;
- the principle of reasonable cooperation; and
- the principle of redress.[4]

Under the umbrella of the Conservation Act we find the Conservation General Policy (CGP), which is approved by the Minister of Conservation and is the leading statement of the department's operating policies under the Acts it administers. Similarly, under the National Parks Act 1980 we find the General Policy for National Parks. Subject to legislation, these policies are binding on the department and override all other conservation strategies and policies.

These general policies (in their glossaries) define Treaty principles as the 'principles of the Treaty of Waitangi identified from time to time by the Government of New Zealand'.[5] Each has a section on Treaty responsibilities, which lists the five 1989 principles referred to above.

These principles of course represent no more than the Executive's position on the subject at the time, and are a pale imitation of the principles as defined by the courts and the Waitangi Tribunal. In the *Lands* case, decided in the year DOC was established, five Court of Appeal judges characterised the Crown–Māori relationship under the Treaty as a partnership.[6] This concept has been at the centre of Treaty discourse ever since, and has been affirmed time and again by this Tribunal. The partnership principle can be seen as an overarching principle which

encompasses many others that have been developed by the courts and the Waitangi Tribunal, including the right of the Government of the day to govern, the Māori right of rangatiratanga and the concomitant duty on the Crown to protect that rangatiratanga, and the obligation on the Crown to act reasonably, honourably, and in good faith in dealing with Māori under the Treaty.

In 1995, the Court of Appeal considered section 4 of the Conservation Act in the *Whales* case, in which it found that the Crown had an obligation under the Treaty to actively protect the Māori interest in taonga. The court furthermore said that statutory provisions for giving effect to the principles of the Treaty of Waitangi should not be 'approached narrowly' and nor should they be limited to mere procedural safeguards such as consultation.[7]

The CGP and the General Policy for National Parks omit not only the partnership principle but also that of active protection, and they read down others, for example, by reducing rangatiratanga to mere self-management. These general policies are examples of the narrow construction of the principles of the Treaty that the court cautioned against in the *Whales* case.

In evidence, DOC argued that it was an operational department, and that crafting a list of Treaty principles was a task better suited to a policy ministry. The department's then acting general manager of policy said the list of Treaty principles in the CGP had little direct impact either on other policies or on DOC operations. We are not convinced by this argument. Treaty principles should not be abstract for a department like DOC; they should be the primary drivers of Māori-interest policies.

We have no doubt that the department's interpretation of Treaty principles is influenced by the Executive, and in particular by a 2006 document *Crown–Māori Relationship Instruments: Guidelines and Advice for Government and State Sector Agencies* which imposes a view of Treaty principles that is narrow and skewed to the interests of the Executive. We will have more to say on these guidelines in section 4.3.2. Here, we acknowledge that there is a place for the Government to provide guidance to its departments, but that guidance cannot restrict those departments' statutory obligations, and nor should it seek to pick and choose only those Treaty principles that suit it.

Section 4 imposes on DOC an obligation to take a wider view of Treaty principles than that espoused by the Executive alone. In the absence of any statutory definition of Treaty principles, it is the principles expressed by the courts that the department must apply and give effect to. Hence, although the general policies do not make reference to partnership as a Treaty principle, it is nonetheless a principle which DOC must give effect to.

The CGP and the General Policy for National Parks must be amended to reflect the full range of relevant Treaty principles as articulated by the courts. The terms of section 4 plainly make that mandatory. Indeed, DOC's failure to include these in its lead general policy documents probably renders those documents in breach of that section. While Treaty principles as articulated by this Tribunal do not bind the department as a matter of law, it would be unduly restrictive for the department to treat them as irrelevant to its work. They too must be given due consideration. In addition, as the courts and the Tribunal have said, Treaty principles are not set in stone. They can and must evolve to meet new circumstances. This too must be adequately reflected in general policies. We recommend that the policies be amended accordingly.

As the courts have said, the government principle affirms the right of DOC to give primacy to its conservation mission, but this right is not absolute. It must be achieved in a manner that is based on partnership, and to the greatest extent practicable supports the tino rangatiratanga of hapū and iwi, and provides active protection for their interests in taonga.

4.3 Māori Involvement in Conservation Decision-making

In this section, we consider whether the structures, policies, and practices for Māori involvement in conservation decision-making give life to the partnership principle and other relevant Treaty principles.

4.3.1 Pou Kura Taiao

DOC was one of the first government agencies to establish a national network of iwi liaison officers within its own structure. Such networks are common now, but in the

early 1990s this was ground-breaking. Each of DOC's 12 conservancies has at least one Pou Kura Taiao (originally titled Kaupapa Atawhai Manager)[8] chosen for their mana within the Māori community, and for their knowledge of tangata whenua, tikanga, and te reo Māori. Pou Kura Taiao are led by a Wellington-based Deputy Director-General, Kaupapa Atawhai, who is a member of the department's executive leadership team.

According to DOC's then acting general manager of policy, the role of Pou Kura Taiao within the department is to 'monitor and sustain departmental capability to achieve effective engagement' between Māori and the department.[9] While that is undoubtedly true, we rather like the fuller description provided by Benjamin Hippolite, a former Kaupapa Atawhai Manager from the Nelson/Marlborough conservancy:

> In the very first hui after I was appointed Iwi Liaison Officer, they had a Māori man come down from Head Office. While we were on one of the islands in the Marlborough Sounds I took him aside and I asked him what my responsibilities were. He looked me in the eye and he said I should go by the wairua. I'm familiar with that. All my life I have been guided by the wairua and so that came naturally to me. Later on I realised that I did have responsibilities, but the wairua would help me to comply with these. My first responsibility was to be the bonding agent between the Crown and iwi Māori. My second responsibility was to try and find a win-win situation for both sides.[10]

The evidence we heard showed that relationships between conservancies and local iwi had two consistent characteristics. First, they were close and generally positive, though not without disagreements. Secondly, they were underpinned by a generally excellent understanding within the conservancy of traditional Māori communities, networks, and characteristics. This is no doubt because of the deep understanding brought by Pou Kura Taiao to DOC–iwi relationships. Peter Williamson, the East Coast/Hawke's Bay conservator, illustrated the point:

> For the East Coast Hawke's Bay conservancy the most important and most frequent contact in terms of consultation, day-to-day operational work and kanohi ki te kanohi contact with Māori is at the hapū level. This is because we acknowledge that the hapū is the manawhenua within each parcel of land managed by us. Any proposed or current operational programmes on such lands that we are aware will significantly impact (either positively or adversely) on iwi/hapū interests are preceded by a series of meetings with the hapū to discuss, inform, seek hapū perspective and issues, and hopefully, agreement to support.
>
> Day-to-day operational presence out in the field, informal chats, formal meetings, staff and hapū working together on conservation programmes on public conservation lands and private Māori land, the kapu ti round and the attendance at tangi of local people, are all building blocks for sustainable and positive working relationships between staff and hapū within the conservancy.[11]

It became clear to us that, as a means of upgrading DOC's capacity to relate to tangata whenua on the ground, there is no better model in government than Pou Kura Taiao.

We therefore have no problem with what Pou Kura Taiao are doing. The problem for us is what the model is unable to do. By this we mean that Pou Kura Taiao are an excellent cross-cultural mediator, but do not, and cannot, replace the Māori Treaty partner itself. Too often we saw expectations dashed because either Māori or DOC expected Pou Kura Taiao to be a proxy for that larger role.

Something beyond Pou Kura Taiao is needed. If DOC is really serious about its relationship with Māori, it is time to move beyond warm personal relationships to structural and policy recognition. We turn now to deal with those issues.

4.3.2 Policies guiding DOC–Māori relationships

We have already referred to the primary role of the CGP among DOC policies, and explained our concerns about the Treaty principles in that policy. Section 2 of the CGP lists the department's Treaty responsibilities, structured according to a hierarchy of priorities and obligations. There are some things the CGP says 'will' be done, leaving no discretion with officials. These include seeking and maintaining relationships with tangata whenua in order to enhance conservation, encouraging their involvement

in conservation on public land, and consulting them over the preparation of 'statutory planning documents' (such as conservation management strategies) and in respect of specific proposals 'that involve places or resources of spiritual or historical and cultural significance'.[12]

There are other things the CGP says 'should' or 'may' be done. 'Should' obligations are discretionary but strongly encouraged, whereas 'may' policies provide flexibility, allowing officials to take an action if they so wish. The policy says that '[p]artnerships to enhance conservation and to recognise mana should be encouraged and may be sought and maintained'. 'May' policies include negotiating agreements to support partnerships, and authorising customary use of traditional materials and species on a case-by-case basis.[13]

The CGP also prioritises Māori interests in the whole area of marine species and habitat management. For example, tangata whenua 'will' be invited to participate in planning, establishing, and managing marine reserves, and kaitiaki 'will' be given both access to and a role in the management of dead or stranded marine species. Similarly, the CGP commits to involving kaitiaki in the identification, preservation, and management of wāhi tapu. The CGP is excellent insofar as consultation with iwi is concerned, and the provisions relating to the coastal marine area and wāhi tapu are positive. But, once again, the problem lies in what is not said. Consultation is fine, but if partnership is the intellectual framework for the principles of the Treaty it must be seen in every aspect of DOC's work. Partnership should be a 'will' obligation under the CGP, and opportunities to share power with tangata whenua should be sought at every opportunity. We recommend that the policy be amended accordingly. We also recommend the same amendments to the General Policy for National Parks, which contains provisions on Treaty responsibilities that are almost identical to those in the CGP.

Similarly, where DOC's conservation mission can be achieved in a manner consistent with the tino rangatiratanga of hapū and iwi in conservancies, then the rangatiratanga principle suggests that is the outcome which is to be pursued. Again, to use the CGP's terms, that ought to be a 'will' obligation, rather than a 'should' or 'may' one. Again, we recommend that the policies be amended accordingly.

We saw three other policies of relevance to DOC's relationships with Māori. In 2006, DOC issued an extensive formal *Consultation Policy* and companion *Consultation Guidelines*.[14] The more detailed guidelines reflect 20 years' experience of consultation with tangata whenua. For instance, they contain insights into the ways in which traditional communities operate, the place of te reo and tikanga, and the best models for communicating complicated ideas in a marae setting. As far as they go, we commend them as thoughtful and comprehensive. In general, we have been impressed by the willingness of DOC to consult with Māori, and the structures that have been put in place to enable this. Our concern, as we have said, is that consultation on its own is not sufficient to give effect to the principles of the Treaty.

Te Kete Taonga Whakakotahi: A Partnerships Toolbox (*Te Kete*) is a DOC internal publication which aims to provide guidance on ways to move beyond consultation and 'forge effective and successful partnerships with tangata whenua',[15] and notes that these partnerships can help the department to comply with its legislation and achieve its consultation goals. As far as we are aware, *Te Kete* remains in draft form, so its practical impact is impossible to determine. Nonetheless, the introduction makes clear that it is a 'soft law' guideline document.

Te Kete describes a 'partnerships continuum', ranging from informing and consulting to involvement in decision-making, all the way to devolution of authority and transfer of title.[16] It also sets out practical examples of partnership (such as joint restoration projects, iwi involvement in species transfers, and tangata whenua management of wāhi tapu) and provides a list of mechanisms for delegation of decision-making authority and for transferring ownership. Most of its examples, however, tend to be crowded at the consultation or advisory body end of the spectrum; *Te Kete* acknowledges that transfer of title and devolution of authority are relatively rare except in the case of Treaty settlements, where title and authority transfer had been achieved by statute.

This, along with *Te Kete*'s uncertain status, illustrates our concern that, in the management of the conservation

estate, the Crown reads down the principle of partnership to consultation in most cases. In doing so, it falls well short of the commitment to Treaty principles reflected in section 4 of the Conservation Act. Furthermore, even if *Te Kete* is finally signed off, its effectiveness will depend entirely on the goodwill of managers and on the political will of their masters. It contains no teeth of its own. It may end up serving no greater purpose than filling shelf space in conservancy libraries.

The last policy we will consider is not of DOC's making, but rather applies to all Crown agencies. In 2004, a Cabinet decision was made to standardise the Crown's approach to establishing formal relationships with Māori organisations. In May 2006, Te Puni Kōkiri and the Ministry of Justice published *Crown–Māori Relationship Instruments: Guidelines and Advice for Government and State Sector Agencies* (which we introduced in section 4.2). We see the attempt to encourage consistent practice as understandable. But in several respects the guidelines give us cause for concern.

First, any government agency drafting a Crown–Māori Relationship Instrument (CMRI) is authorised to use only three sources of statements about the principles of the Treaty: approved statements of government policy that are already in use (for example, in legislation or government policies); statements used in government submissions to the courts or Tribunal; or statements drafted especially for the particular circumstances or relationship. In other words, the Executive itself is the only source of statements about the principles of the Treaty in CMRIs. No statement of the higher courts, let alone the Waitangi Tribunal, may be used. Rather, only statements *by* the Crown *to* the courts or the Tribunal are permissible. At least so far as the courts are concerned, it is difficult to see how this can be justified either in law or as wise practice. DOC, as we have explained, is required to give effect to the principles as defined in the law (that is, by the courts in the absence of legislation); the CMRI guidelines amount to Executive override of this statutory obligation. What is needed in the guidelines is a much more objective and legitimate set of principles, along with acknowledgement that the guidelines cannot restrict or override DOC's statutory obligations. Accordingly, we recommend that the guidelines be amended to allow statements of Treaty principle that reflect the full range of principles defined by the courts and the Tribunal.

Secondly, the guidelines ban government agencies from including in any agreement an admission of Treaty breach, unless there has been a previous independent admission of the same breach in the Treaty settlement process. While we can certainly understand the need for caution in acknowledging Crown wrongs, to adopt an effective policy of denying agencies the discretion to do so in appropriate circumstances goes too far. Is the Treaty settlement process to be the only place in which the Crown admits it was wrong? Surely not.

Thirdly, all CMRIs across the entire state sector are subject to approval by a specially constituted officials group. A CMRI whose terms do not comply with these guidelines stands no chance of being approved, unless a specific exception is made by Cabinet. This is an option for none but the bravest and most determined chief executive. In fact, these 'guidelines' are no such thing; they are rules. While there is virtue in consistency and rationalisation, there must be concern about the chilling effect these rules will have on Crown–Māori relationships.

There are serious implications here for DOC. It is an agency whose success depends, and will continue to depend, on building relationships with Māori communities. It is difficult to see how individual conservancies can make creative use of the Treaty relationship in agreements with tangata whenua when the only acceptable references to the Treaty are those that have already been made by the Crown in other contexts. Section 4 of the Conservation Act puts DOC in a different category from other Crown agencies; it requires DOC to be more responsive than these guidelines allow. DOC officials should feel able to refer to the historical mana whenua of iwi and the need to restore lost relationships with land no longer in Māori ownership without running afoul of a Wellington ban on acknowledging past breaches. It is time for the Executive to take a less risk-averse approach, and to make room for organisations like DOC to chart their own Treaty path within principled limits. The CMRI 'guidelines' are far too restrictive for an organisation with a statutory duty to build sound Treaty relationships.[17]

4.3.3 Māori involvement in conservation strategy and planning

In reference to Pou Kura Taiao (see section 4.3.1) we said that warm relationships are no substitute for proper structures that bring DOC and iwi together. We turn now to assess the governance structures that guide conservation policy and decision-making.

The formal link between DOC and its stakeholder communities is managed through the New Zealand Conservation Authority and 13 regional conservation boards (which have similar but not identical boundaries to DOC conservancies). These bodies were established by the Conservation Act.

The Conservation Authority's functions go the heart of DOC's operations and include:

- approving, reviewing, and amending all conservation management strategies and conservation management plans in operation at conservancy level;
- reviewing and reporting to the Minister or the Director-General on the effectiveness of the department's administration of general policies under associated legislation for which the department is responsible;
- investigating any conservation matter it considers of national importance and advising the Minister or the Director-General on the same; and
- advising the Minister and Director-General annually on all expenditure priorities.

The Minister of Conservation appoints the Conservation Authority's 13 members. The appointment process reflects a careful balance of stakeholder interests. The Minister must consult the Minister of Māori Affairs about two appointments, the Minister of Tourism about two, and the Minister of Local Government about one. Four members are appointed following public nomination. Other members are appointed or recommended by Te Rūnanga o Ngāi Tahu, the Royal Society of New Zealand, the Royal Forest and Bird Protection Society, and Federated Mountain Clubs of New Zealand.

The functions of the conservation boards also go the heart of DOC's work, and include:

- recommending that the Conservation Authority approve the conservation management strategy for its territory;
- approving, reviewing, and amending conservation management plans applying to its territory;
- advising the Conservation Authority and Director-General on the implementation of the conservation management strategies and plans applying to its territory; and
- advising the Conservation Authority and Director-General on any conservation matter relating to any area within the jurisdiction of the board.

Again, membership is the subject of careful balancing of stakeholder interests. Each board has up to 12 members, appointed by the Minister after a public nomination process. The importance of the DOC estate to Māori is reflected in an expectation in the Act (section 6P) that special provision be made for tangata whenua on each board. There are board positions as of right for the following:

- the ariki of Ngāti Tūwharetoa on the Tongariro Taupō board;
- nominees of the Taranaki Māori Trust Board and the Whanganui River Māori Trust Board on the Taranaki/Whanganui board;
- the head of the Kāhui Ariki on the Waikato board; and
- two nominees of Te Rūnanga o Ngāi Tahu on each of the conservancies within its rohe; and one in the Nelson/Marlborough board.

Other than the authority and the boards, there are few, if any, examples in the state sector of such a level of structural partnership between a department and the community. The statutory provisions speak to a model that is much more than token engagement with the community. This reflects an assumption that the Government alone cannot do justice to the task of stewardship of the conservation estate. Rather, the job can only be done when government resources and expertise are combined with widespread community support. That partnership is reflected in the structures we have just described.

We acknowledge that specific room is made for the Māori voice at both Conservation Authority and board levels. We gathered from the evidence of conservators that the Māori voice was welcomed and valued by the department. We would not wish to diminish the willingness of the Government to integrate Māori voices into its

partnership structures. Nor would we wish to undervalue the contribution those voices have made. But in reality, the Māori voice is included only as one among many on these boards. Given that the department must interpret and administer the Act 'so as to give effect to the principles of the Treaty of Waitangi', and given that the law is clear that the Treaty 'signified a partnership' between the Crown and Māori,[18] it must be time to move to a model which gives the Māori voice its own distinct space. The integrated model is useful as far as it goes, but it is not a Treaty partnership.

We said in chapter 3 that we do not think the environment as a whole is a taonga, at least not in the sense that the term is used in the Treaty. Rather, we said, the environment is the atua (gods) themselves, who transcend and have dominion over taonga. The taonga themselves are the particular iconic mountains or rivers, for example, or specific species of flora or fauna having significance in mātauranga Māori.

We also said in that chapter that Māori interests in these taonga should be balanced, on a case-by-case basis, with other legitimate interests. In the case of DOC, those include the interests of the environment itself and the taonga that comprise the environment; the interests of other people who use or rely on the conservation estate, including scientists and researchers, recreational users, the tourism industry, and so on; and the community as a whole, which derives a sense of identity from iconic landscapes and species (the most obvious example being the kiwi). We have also said that the paramount interest should be that of the environment itself, as the Court of Appeal found in the *Whales* case (referred to earlier). Subject to that, processes are needed that balance the remaining interests on a case-by-case basis, delivering kaitiaki *control* of taonga in situations where the kaitiaki interest clearly outweighs all others, *partnership* in situations where kaitiaki should have a say in decision-making but other voices should also be heard, and kaitiaki *influence* with appropriate priority in all other situations. In the case of DOC, as we have said, the starting point should be partnership. This reflects the overwhelming importance of DOC-controlled places and species to tangata whenua. It is in the conservation estate that the taonga that survive from Kupe's time can still be found, so it is there that kaitiakitanga can be exercised. And it is only by exercising kaitiakitanga that a central element of mātauranga Māori can survive.

Within that overall partnership framework, decisions can be made case by case about individual places – such as wāhi tapu or wetlands of significance to a particular hapū – or species, such as the pūpū harakeke or kūkupa we referred to earlier.

The current policies and structures are not delivering this partnership. There are some rare exceptions, such as Ngāti Hine's guardianship and management of Motatau Forest (referred to earlier), and some more recent examples agreed between iwi and the Crown as part of historical Treaty settlements (such as the Ngāti Porou–Crown 'dual authority' for governance of the conservation estate within the Ngāti Porou rohe, agreed in that iwi's December 2010 deed of settlement).[19] But these are few and far between and for many reasons iwi should not have to turn to historical settlements to achieve outcomes that should be theirs as of right. New structures are needed that allow the Crown and Māori to engage effectively to the benefit of both conservation and mātauranga Māori, at both national and local levels. These new structures should work with the existing Conservation Authority and conservation boards, to determine, case by case, the appropriate level of tangata whenua control, partnership, or influence over taonga in the environment, and to develop new models for management of those taonga.

We therefore recommend the establishment of a national Kura Taiao Council and conservancy-based Kura Taiao boards, to sit alongside the existing Conservation Authority and conservation boards (which would retain their existing membership). These new structures should have responsibility for setting Kura Taiao strategies and plans at national and regional levels; the strategies should form part of the relevant conservation management strategies, and plans should form part of any relevant conservation management plan or national park plan. Any inconsistencies would have to be worked through jointly between the relevant boards. The Kura Taiao Council and boards should have power to advise the Minister and the Director-General as appropriate, just as their equivalent non-Māori partnership structures do.

These structures are necessary, in part, because there

Tītī (muttonbird) chicks being cleaned of wax and down, Big South Cape Island, 1961. Tītī have been a traditional food source for lower South Island Māori for many centuries. The 1998 Ngāi Tahu settlement returned the Tītī Islands to Ngāi Tahu ownership. The islands are managed by Rakiura (Stewart Island) Māori as though they are a nature reserve, but provision is made for the sustainable harvest of tītī in accordance with traditional practice.

are so many points of intersection between the two worlds. This proposal implements the principles of the Treaty because it puts Māori above the status of just one stakeholder group among many. Māori should not have to constantly compete against a multitude of assertive stakeholders to be heard. There must also be the opportunity for direct Crown–Māori dialogue, through dedicated statutory structures.

The creation of purpose-built Māori relationship structures will bring advantages in addition to Treaty compliance. With their own place in our conservation structures, Māori will be able to play a more constructive role. With a Māori equivalent to the Conservation Authority and the conservation boards, the context will be right for Māori involvement in setting the agenda rather than reacting to somebody else's. A greater investment from the Māori community in DOC's work can only produce better conservation outcomes. If nothing else, it will have the positive effect of feeding mātauranga Māori values and approaches directly into conservation management. The evidence we heard from DOC witnesses themselves confirmed that even the limited Māori involvement in conservation management to date had produced beneficial results for DOC and the estate. It is difficult to see a downside to a change that would see that role strengthened.

We are aware that there are already direct relationships between DOC and iwi at head office and especially at conservancy levels. It is not our wish that the new structures interpose themselves between iwi and DOC as some sort of Kura Taiao middleman. We have no doubt that would be both inefficient and unacceptable to iwi. Nor do we apprehend that these structures and existing iwi organisations will compete any more than, for example, the Royal Forest and Bird Protection Society representative on the Conservation Authority competes with the organisation that nominated him or her. The aim must be to enhance iwi influence in the DOC estate and their control of mātauranga Māori through this structure, not dilute it.

4.4 Customary Use

Nothing may be taken from the DOC estate without a permit. This means that Māori may not access or harvest any taonga species from within the DOC estate or any area subject to DOC jurisdiction without having first received permission from an official or the Minister.

For national parks, the consent of the Minister is required, and he or she may give consent only if it is consistent with the relevant management plan. For reserves under the Reserves Act 1977, reserve boards have limited permitting powers, but beyond that ministerial consent in required.

Under the Wildlife Act 1953, only the Director-General can authorise the taking or killing of protected wildlife from the DOC estate, and under the Marine Mammals Protection Act 1978, no person can take any marine mammal, alive or dead, without a permit from the Minister or his or her delegate. Similarly, in marine protected areas administered by DOC, no taking is allowed without a permit from the Minister.

Access to the DOC estate and DOC-controlled species, wherever they may be, is for Māori an issue of the greatest significance. As we have said, the estate contains almost all remaining indigenous flora and fauna species, and is the largest – indeed, often the only – source of such taonga. Without access to them and the right to harvest, mātauranga Māori cannot survive.

While customary use – as part of a broader kaitiaki relationship – might on the face of it appear to be at odds with DOC's conservation mandate, for some time now iwi and DOC have been exploring ways in which to provide for iwi access and harvest rights. Their efforts have borne fruit in several parts of the country, as the following examples illustrate.

The Morere Scenic Reserve is a 364-hectare forest remnant in the heart of the rohe of Ngāti Rakaipaaka (a hapū of Ngāti Kahungunu) between Wairoa and Gisborne. It contains significant quantities of kiekie, a highly prized weaving fibre. Morere kiekie was in such high demand by weavers throughout the area that DOC and Ngāti Rakaipaaka undertook a study of the sustainable harvest capacity of the resource. Rats were trapped and harvest limits were determined. Any kiekie harvesting is now subject to Rakaipaaka consent, and the substantive effect of the arrangement is that Rakaipaaka is the manager of the resource, although technically it is DOC that issues the

Tohorā (whale) at Ruawharo marae, Ōpoutama. Tohorā are central to the identity of many iwi. Ruawharo, the tohunga of the Tākitimu canoe, is said to have attracted whales to the Māhia Peninsula by planting their mauri (life force) on shore. Ruawharo whānau say that the tradition lives on in their fishing and seagoing today.

permits. The arrangement appears to work well for DOC, tangata whenua, and, most importantly, the kiekie.

Several iwi around the country claim a special relationship with the tohorā, or whale. With some, such as the East Coast descendants of Paikea, that relationship begins with the migration story itself and is affirmed through direct whakapapa connection. The earliest stories of voyaging to Aotearoa associated with Kupe have the tohorā as the travellers' guide.

A central aspect of the Ngāti Wai claims before us related to their unique perspective on the tohorā. As their name suggests, Ngāti Wai say that their primary relationship is with the sea. Whales, they say, have been a revered part of their culture and a rich source of food, oil, and bone since the beginnings of the tribe. In the 1990s, after much trial and error, Ngāti Wai concluded protocols with DOC for the management of whale strandings within their rohe. Among other things, these protocols provide for joint management and handling of every stranding within the Ngāti Wai rohe.[20]

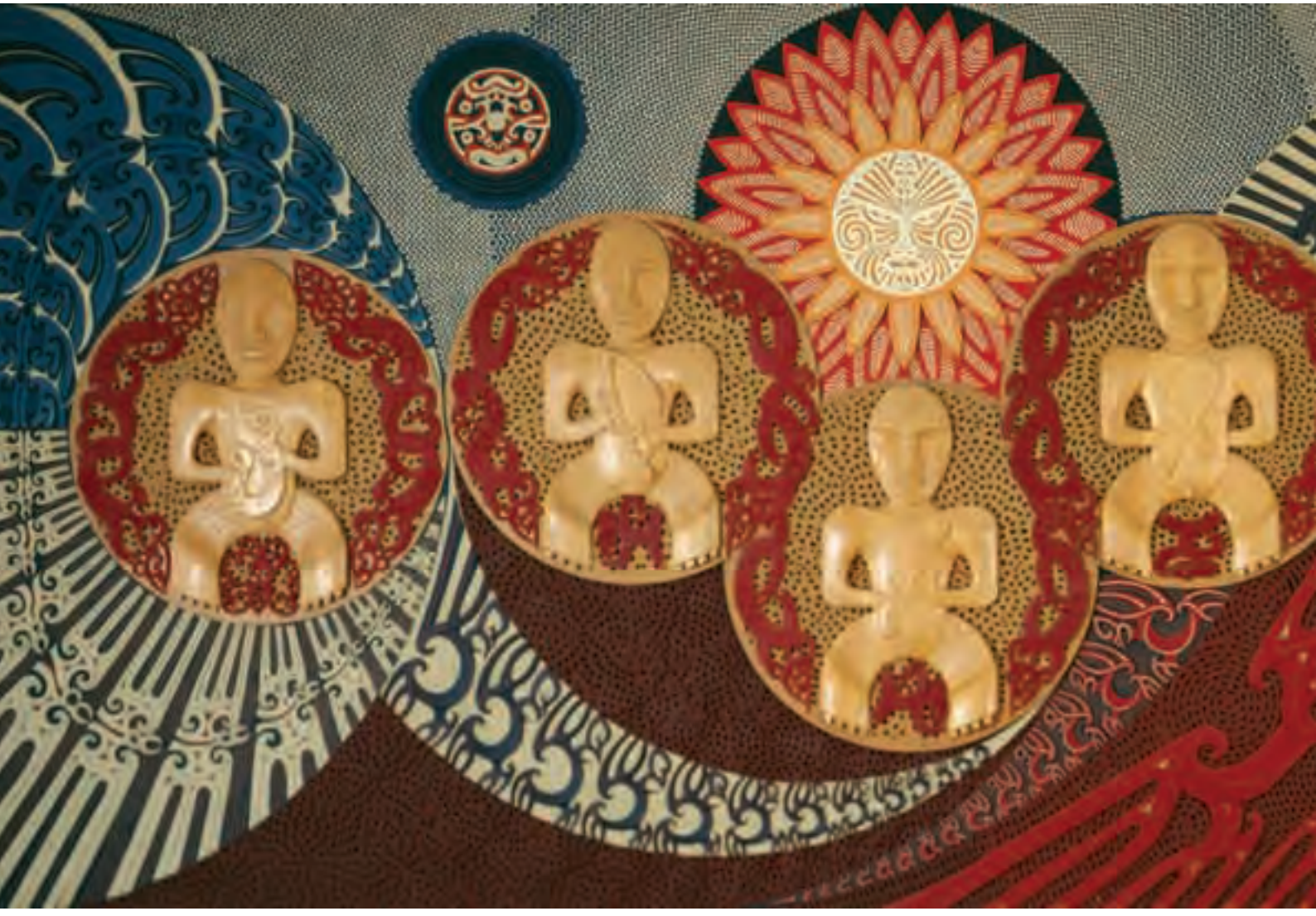
Laly Haddon, a well-known kaumātua of Ngāti Wai, described how this new relationship with DOC had worked after an 18-metre Bryde's whale beached at Pākiri:

> we exercised our rangatiratanga on that tohora. We had an exemption to protect it, to bury it and to preserve the taonga and we did exactly that. . . . before that the Conservation Department just got a big digger and buried it. And it's so important because the whale as a tohora has been part of our history of the Ngati Wai history through all these years and it was a great feeling to be carrying out the traditions and encouraging younger people to be part of that and to know that we are carrying out the obligations that in true terms are part of what the Treaty is all about. And I felt confident in that and I suppose that's the whole basis that we can work comfortably together.[21]

We have referred in section 4.1 to DOC's transfer of guardianship and management of the Motatau Forest to Ngāti Hine and the rāhui placed by Ngāti Hine on the taking of

Te Aurere, built by Hekenukumai Busby. This fully functional waka haurua (double-hulled voyaging canoe) is similar to vessels used by early Polynesian voyagers.

Dimensional sketch of HMS *Endeavour* by Francis J B Bayldon, 1923. The former merchant collier was the first European ship to reach New Zealand since Abel Tasman's *Heemskerck* and *Zeehaen*.



Te Wehenga o Rangi rāua ko Papa by Cliff Whiting. This artwork, housed at the National Library, illustrates the separation of Papa-tū-ā-nuku and Ranginui by their son Tāne Mahuta and the creation thereby of the world of light.

▶ Alfred Elkington of Ngāti Koata said his grandmother had told him the best time for cutting harakeke was 'just when the sun came up'. She would speak to the flax as she worked, telling it that 'she had to cut it to make it look beautiful, and because if she didn't cut it then the flax would grow up ugly and untrimmed'.

◀ Tūī feeding from ripe harakeke flowers. Harakeke plants are pollinated by tūī as they flit from flower to flower, and in turn supply the tūī with an important source of nectar. This interdependence reflects the connectedness of species within te ao tūroa (the entirety of the natural world).

Collage of harakeke images showing pods, leaves, and flowers from different types of harakeke. The varieties and elements of harakeke have a diversity of qualities. *Clockwise from top left:* tapamangu, one of the best muka (prepared fibre) varieties; gum has medicinal uses; tamataua, a good piupiu-weaving variety; tupurupuru, found near Gisborne and used for kete and whāriki; and ngaro, a very strong fibre once favoured in the flax trade.

▶ Worked flax fibre or muka.

▶▶ Finished use of muka as a fish hook cord.

▼ Finished use of muka as a kete tāniko.

All these items are held by Te Papa.

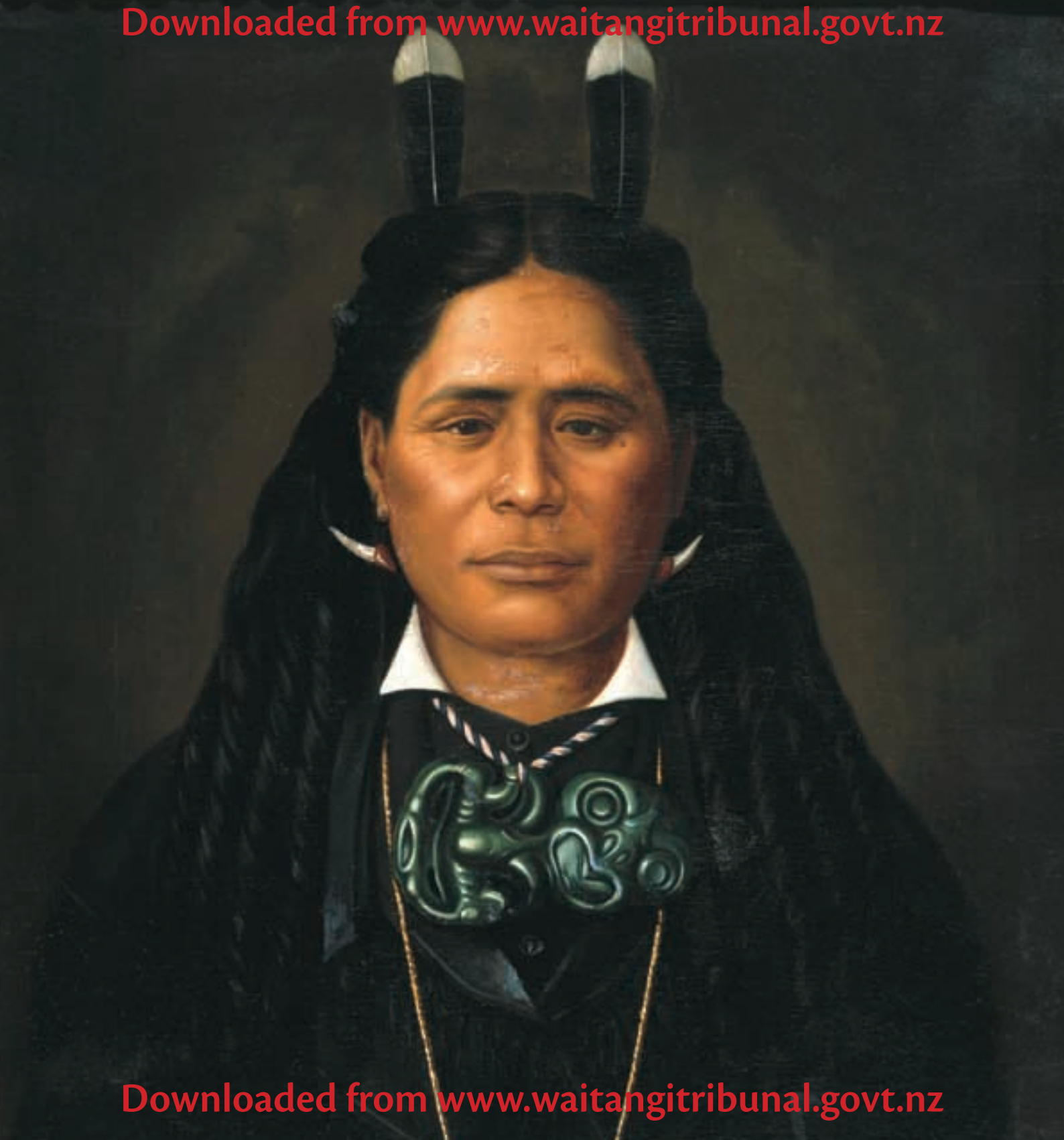
◄ Weaving feathers at a cloak-making demonstration, Te Papa, 2000. Obtaining feathers for weaving is a particular challenge, with the Crown having granted itself ownership of both native wildlife and the feathers of protected native birds under the Wildlife Act 1953.

▼ Carol Kohi and Debbie Ngamoki at their weaving class at Te Wānanga o Aotearoa, Kawerau. Raranga is an aspect of one of the 19 subfields of the 'Field Māori' section of the New Zealand Qualification Authority's National Qualifications Framework.

Hei tiki, traditionally carved in pounamu (greenstone) or bone, have been worn as adornment and as important signifiers of tribal identity for hundreds of years. They are regarded as taonga, reverence for which passes down through generations. Today, tiki are also made, and even mass produced, from modern materials as well, and worn by Māori and non-Māori alike. They also feature as a motif on items as diverse as clothing and crockery to signify 'New Zealand' identity. The following pages show many examples of tiki.

▶ Hei tiki owned by Hongi Hika. Most, though not all, taonga works are old; the greater the antiquity, the greater the mana of the work because of the closer connection in time to the ancestors who provide a community with its identity.

▶ Mrs Ngahui Rangitakaiwaho of Wairarapa wearing a hei tiki, by Gottfried Lindauer, 1880. Each taonga work has a kaitiaki – a person or people whose lineage or calling creates an obligation to safeguard the taonga itself and the mātauranga that underlies it.



Hei tiki, 1850–1900, whale bone, paua shell, wax, maker unknown, Rangitāne, Manawatū.

Hei tiki, 1911, pounamu inanga, Arahura, Te Papa.

Hei tiki, 2001, Corian, paua shell, Rangi Kipa, Te Papa.

Hei tiki, 2008, pounamu, synthetic fibre, Lewis Gardiner, Te Papa.

These pictures show both contemporary and older hei tiki, made from bone, pounamu and synthetic materials, and a display of older hei tiki from many different iwi at Te Papa. A touch screen display nearby allows the museum viewer access to the available background information for each tiki. Te Papa shares decision-making with iwi in the presentation of taonga.

Hei tiki display, Te Papa.

◄ Badge of the No 75 RNZAF Squadron.

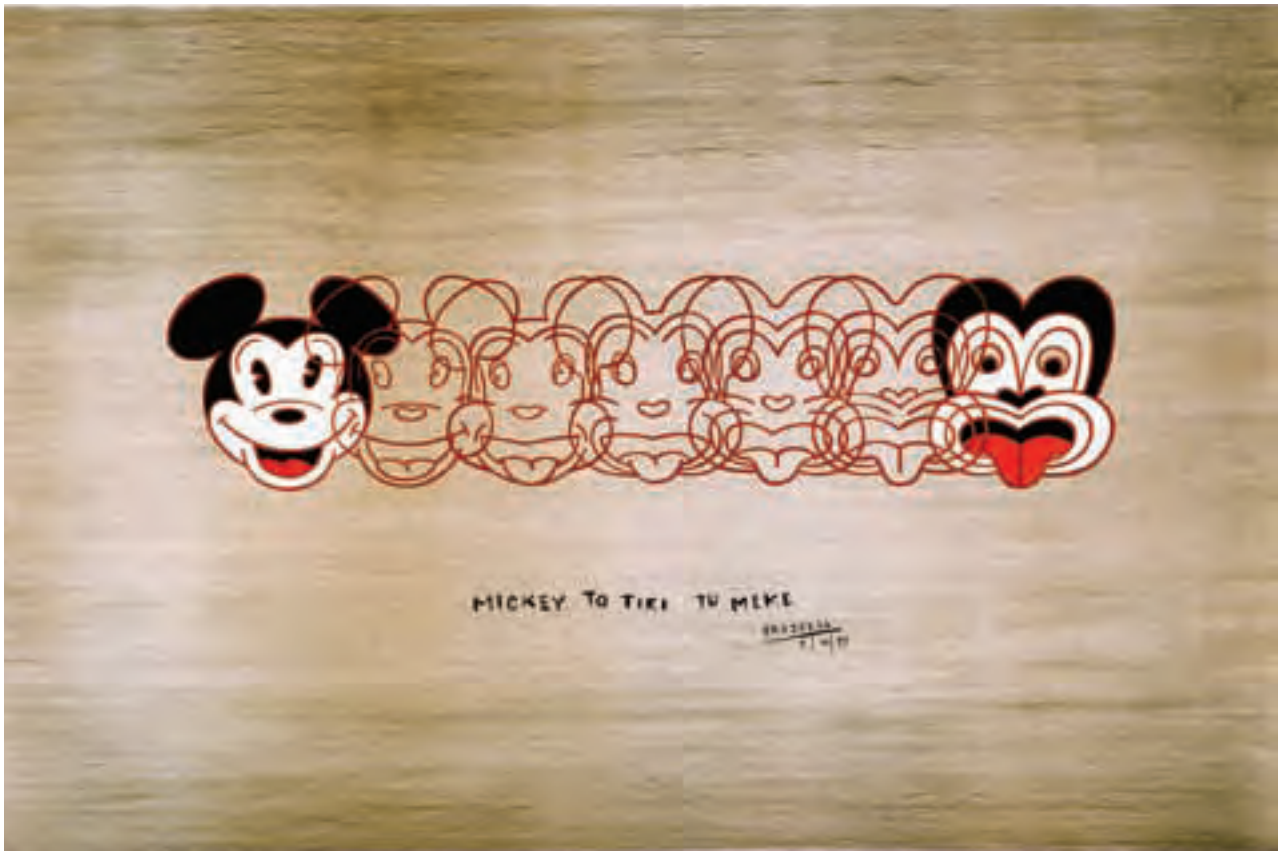
► *Tiki Times*, a Second World War prisoner of war newspaper, Millwitz, Germany, 1944.

From the camaraderie of Brownies to the prisoner of war camps of World War Two, the tiki has been a marker of New Zealand identity and pride. The series of tiki images on this and the following page demonstrate innovation in representation. We call hybrid works such as these, which incorporate Māori elements with other artistic traditions, taonga-derived works.

▼ Brownie hei tiki badge.

▲ Tiki jersey by Jannelle Preston.

◄ The Beatles at Wellington Airport during their New Zealand tour, 1964.



Mickey to Tiki Tu Meke by Dick Frizzell, 1997. Frizzell is one of a long line of prominent Pākehā artists who have combined distinctively Māori design elements with those of Western and other cultural traditions in their work.

▶ Whakapapa Tūhonohono Tangata, a stamp commemorating Māori Language Year, 1995.

◀ Marcus Haliday, four, with Danielle Raharahara from Te Kohanga Reo o te Rangimarie, Papatoetoe, 2008. That year the number of kōhanga reo nationwide fell for the tenth year running.

New Zealand 10 cent, one shilling, half crown and 20 cent coins. The use of Māori motifs in national symbols such as coinage shows the centrality of Māori culture in our national identity.

▶ The All Blacks perform *Ka Mate* in front of the English rugby team at Twickenham, London, 21 November, 2009. One of the best-known taonga works, *Ka Mate* is not protected by modern intellectual property laws such as copyright. A March 2011 Memorandum of Understanding between Ngāti Toa and the New Zealand Rugby Football Union promotes respectful use of the haka and permits its ongoing use by the All Blacks.

◀ *Te Maori* exhibition, Field Museum, Chicago, 1985. Professor Hirini Mead believes that this exhibition was a seminal event in the reawakening of pride in Māori culture. Six hundred thousand people saw the exhibition in the United States; when it toured New Zealand it was seen by 920,000 people.

▶ The cover of Creative New Zealand's statement of intent for 2007–10. A waka taua gliding under the Golden Gate Bridge is a powerful example both of Creative New Zealand's purpose and of how New Zealand presents itself to the world.

▶ Gordon Hatfield completes a moko on one of his carvings.

▼ Te Puia Māori Arts and Craft Institute team members carving the waka *Te Kākano*, which was gifted to China at the Shanghai World Expo in 2010.

In 2009, Creative New Zealand released an important report on the Health of Māori Heritage Arts. Toi whakairo (carving) was found to be in good health, as were whare pora (weaving, textiles, and basket making) and haka. However, tārai waka (canoe design and construction, voyaging, and navigation) was in a poor state. Tā moko was in good health apart from the traditional practice of uhi (chiselled moko). We show examples of these art forms on this and the opposite page.

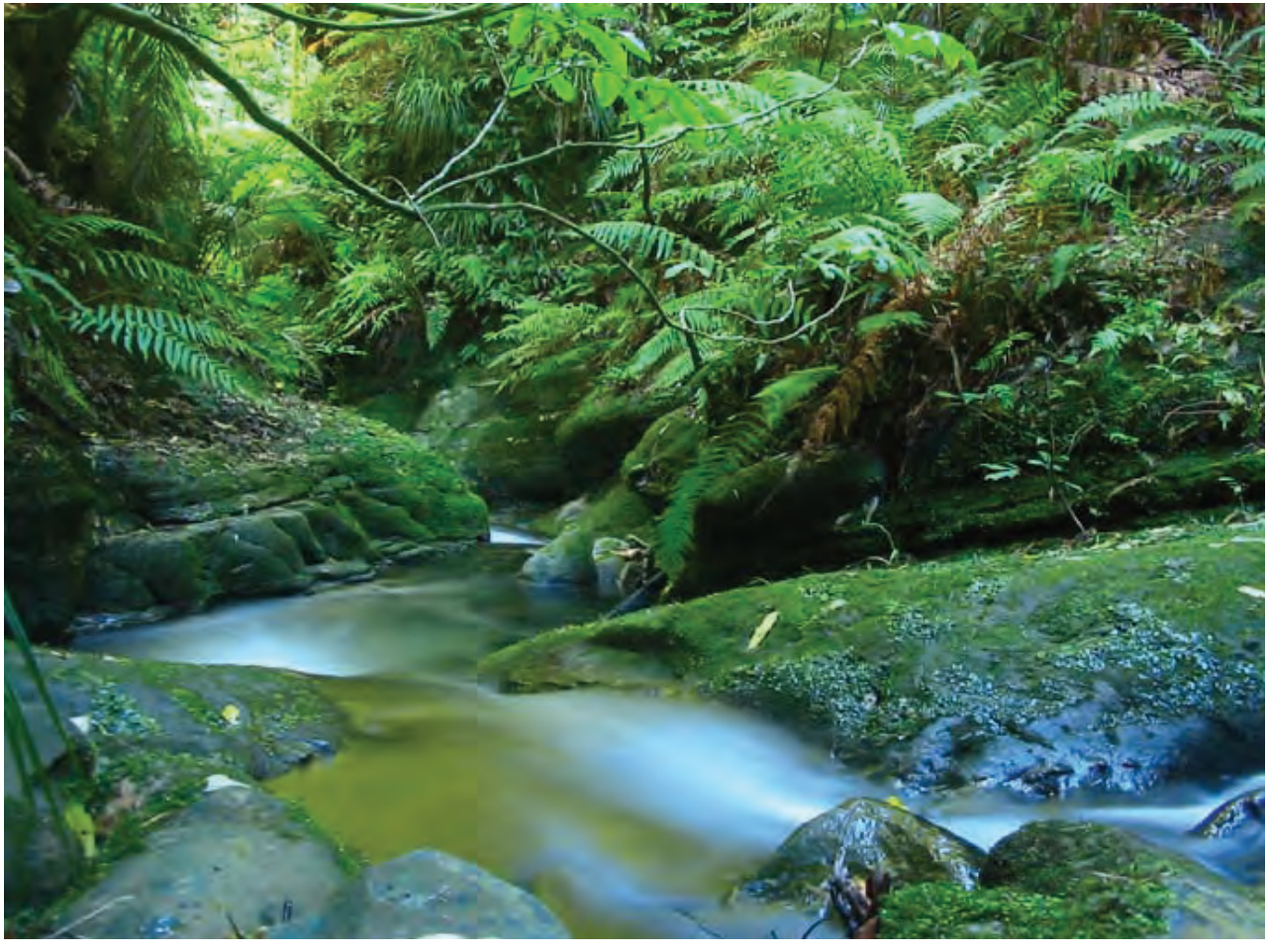
◀ Claimant Te Hema Nui a Tawhaki Witana (Te Rarawa) presents taonga at one of the early Wai 262 hearings.

◄ Tā moko artist Richard Francis (Te Arawa) and assistant Paki Wilson etch tā moko into Tenerore Manawaiti at Te Papa's marae.

▼ Te Waka Huia perform in St Mark's Square during the 2009 Venice Biennale.

▶ Tuatara eating a wētā on Takapourewa (Stephens Island). Ngāti Koata and the Department of Conservation have a joint management agreement in respect of the island and its tuatara.

▼ Mōrere Springs Scenic Reserve. In the 1990s, the Department of Conservation devolved management of the reserve's kiekie to Ngāti Rakaipaaka, allowing tangata whenua access to this important weaving plant.



▲ Te Hauturu-o-Toi/Little Barrier Island. In May 2011, Ngāti Manuhiri and the Crown signed a deed of settlement providing for the return of the island to Ngāti Manuhiri and its immediate gifting back to the Crown. The island's status as a nature reserve will continue.

◄ Muttonbirder Detta Russell with a sooty shearwater (muttonbird) chick, Stewart Island, 2001. Under Ngāi Tahu's 1998 Treaty settlement with the Crown, Rakiura Māori received both ownership and management of the nearby Tītī Islands, with a right to continue the sustainable harvesting of muttonbirds.

Traditional shellfish gathering is ordered by the requirements of kaitiakitanga, including sustainable harvesting and the imposition of rāhui.

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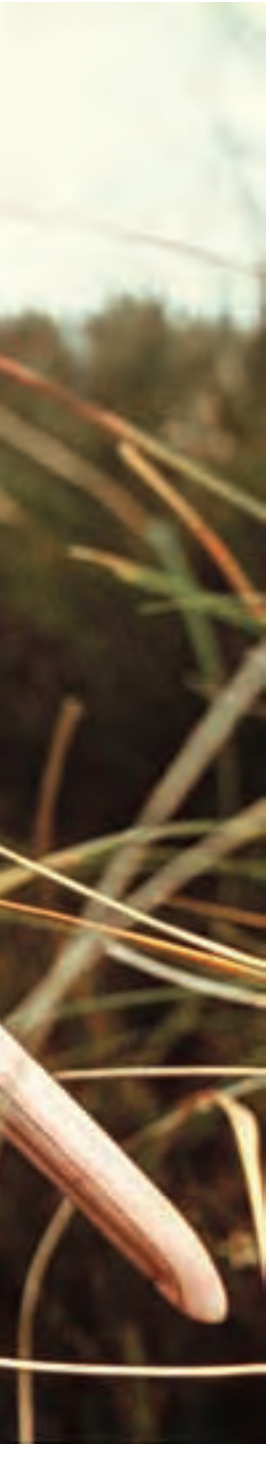

▶ Kākāpō chicks. As a result of Ngāi Tahu's 1998 Treaty settlement with the Crown, Ngāi Tahu are formally involved in the management of Whenua Hou, or Codfish Island, where most of the world's 130 or so kākāpō live.

◀ Pūkeko. The Department of Conservation has sought to accommodate cultural harvesting by encouraging the hunting of game birds such as pūkeko.

◀ Kiwi, Te Anau region. Kiwi are New Zealand icons, but predation and habitat loss have seen the population plummet from around 12 million to some 80,000.

▶ North Island kōkako. After many years' absence from Te Whānau a Apanui land at Ngāpukeariki, 18 kōkako were released there in 2005 in a joint venture between Te Whānau a Apanui, Tūhoe, and the Department of Conservation. Prior pest control was funded by the Ngā Whenua Rāhui scheme, under which the land was covenanted.

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Whales (tohorā) are key elements of Ngāti Porou and Ngāti Wai tradition. Wayne Ngata of Ngāti Porou told us: 'We have a special relationship with the pakake or tohorā . . . The whale relationship is like the distant relation you know exists but rarely see and it is couched in mystery as much as it is in earthly reality.'

Mānuka (*Leptospermum scoparium*). Hirini Clarke told us the plant is 'a wonderful resource for Māori'. Its wood is ideal for implements and traditional martial arts weaponry. Mānuka oil, with its wide range of medicinal properties, is extracted from the foliage of the plant; honey from its flowers. Mr Clarke lamented the lack of protections for the Māori relationship with this important taonga species.

Pōhutukawa (*Metrosideros excelsa*). The tree has a revered place in many traditional Māori stories. Some claimants were concerned that the breeding of new varieties of pōhutukawa and its close relative the rātā for the ornamental plant market has occurred without consultation with them.

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Awatea and Manaia Haenga planting rongoā trees at Pokai Marae, Ruatōria, during Conservation Week 2009. Mātauranga rongoā cannot be supported if there are no rongoā rākau left, or at least none that tohunga can access.

kūkupa there. Ngāpuhi also support a ban on the taking of these birds.

Finally, we heard evidence of conservancy-based komiti of iwi representatives that now operate in many areas as advisory groups to the Conservator or the Director-General in processing permit applications. Te Pātaka o Te Tai Tōkerau is an example of this model in operation in the Northland conservancy. Some claimants objected to the komiti's role being restricted to advice, and some said that the mana over access and use should be with the kaitiaki, not DOC. No doubt the komiti have shortcomings, but they at least ensure some level of Māori involvement in decision-making, and whatever the legal position, their moral authority is significant.

These examples demonstrate two points. First, where Māori and conservationists have worked together, they have rebuilt trust that was previously lacking. Secondly, Māori access to and use of indigenous species have not led to wholesale despoliation of those species or the conservation estate. On the contrary, it has brought into the management process a group of people with the most profound regard for both. We are convinced from the evidence we heard that the claimants would not jeopardise the survival of the taonga species they wish to care for as kaitiaki. Rather, the survival of species is, for both kaitiaki and conservationists, a shared bottom line.

In 1992, the Minister of Conservation asked the Conservation Authority to prepare a report on customary access and harvest. The authority published its interim report in 1997. It accepted the difficulties DOC faced in considering harvesting regimes in the estate and in respect of species over which it has jurisdiction. And it noted the view of some non-Māori submitters that 'Maori couldn't be trusted and that Maori lack the skills, knowledge, sophistication and commitment for modern conservation management'.[22] The evidence we heard – particularly from DOC – convinced us that nothing could be further from the truth. The authority was of this view, and was open to Māori involvement in management and decision-making.

Though some recommendations were made in the report, and a work plan around them was approved in 1999, as far as we can tell a genuine national policy framework for customary access and harvest did not crystallise until several years later. In the Conservation General Policy (CGP) of 2005, customary use became a fully discretionary 'may' subject. Paragraph 2(g) provides:

> Customary use of traditional materials and indigenous species may be authorised on a case by case basis where:
>
> i. it is consistent with all relevant Acts and regulations (including fisheries legislation), conservation management strategies and plans;
>
> ii. it is consistent with the purposes for which the land is held;
>
> iii. there is an established tradition of such customary use at the place; and
>
> iv. the preservation of the indigenous species at the place is not affected.
>
> The views of tangata whenua should be sought and had regard to.[23]

The General Policy for National Parks contains similar, but not identical, provisions. Paragraph 2(g) provides:

> Customary use of traditional materials and indigenous species may be allowed on a case-by-case basis where:
>
> i) there is an established tradition of such use;
>
> ii) it is consistent with all relevant Acts, regulations, and the national park management plan;
>
> iii) the preservation of the species involved is not adversely affected;
>
> iv) the effects of use on national park values are not significant; and
>
> v) tangata whenua support the application.[24]

We have some concerns about these provisions, especially when they are compared to the partnership models for access and use that we have discussed above. We were surprised to see in the CGP that the provision for customary use was not a 'will' policy – that is, it was not compulsory provided certain conditions were satisfied. Nor should customary use be decided by DOC on a 'case by case' basis. The phrase gives a sense of unfettered discretion without reference to precedent or practice. Each permit is effectively treated as an exception. We do not think

this is the right starting point from which to address one of the most important Treaty issues in DOC operations. The evidence consistently before us was that successful models for provision of access and harvest rights involved broadly agreed protocols with tangata whenua, and decision-making shared with or transferred to them on an ongoing basis. There is no hint of this in either the CGP or General Policy for National Parks. We recommend that they be amended.

We were especially troubled by the requirements in section 2(g)(iii) of the CGP that there must be 'an established tradition of such customary use at the place', and 2(g)(i) of the General Policy for National Parks that there must be 'an established tradition of such use'. These provisions come perilously close to requiring the applicant to prove an aboriginal right of access and harvest in respect of the particular resource in question. In reality, as we have said, the DOC estate is often the only place where these resources remain. These resources can be seen as substitutes for those that have been lost over time outside the DOC estate. It is therefore wrong in principle to require a tradition of use at the place of harvest. Assuming tangata whenua support, it would be consistent with the obligation of active protection of mātauranga Māori if that requirement were dropped. We recommend that this be done.

We were also provided with a 'final draft' of DOC's 'Customary Use of Indigenous Plants, Animals and Traditional Materials: Policy Guidelines', which were produced in 2006. These appear to be an attempt to put meat on the bones of the CGP and national parks policy, but whether or not that is the case, the guidelines are clearly more informed by DOC's experiences on the ground than the two policy documents that precede them. The guidelines say that customary use 'is essential to the maintenance of Maori cultural and traditional knowledge' and sustains kaitiaki relationships.

There are, according to the guidelines, limits to what can be done within the law:

> Current legislation establishes that access to many indigenous species is restrictive, and does not allow devolution of decision-making in relation to customary use of native birds, plants and other traditional materials. While tangata whenua determine the need for and the choices of materials for customary use at the local level, responsibility and accountability for decisions to enable use remains with the Director-General or the Minister of Conservation.[25]

While the guidelines acknowledge that providing for customary use while also protecting wildlife may be a challenge, they say that this challenge is 'one that current experiences show can be achieved'.[26]

There is no need to go through the guidelines themselves in any detail – they do indeed express an intention to share decision-making and administration as far as possible within the law. These guidelines, and DOC evidence, suggest that there is no problem of willingness within the department to share and perhaps even devolve power; the problem is with DOC's inability to do so within the law. It follows that legislative steps are needed. The pātaka komiti provides the basis for a workable model. In that system, tangata whenua experts advise DOC on applications for the harvest of cultural materials from the conservation estate. This arrangement should take the next logical step of moving to full statutory co-management of customary use by DOC, as the representative of the Crown's interest in conservation, and the pātaka komiti, as representatives of kaitiaki. Joint decisions should be made on the basis of the following core principles: first and foremost, the recovery and survival of the species; and secondly, the right of iwi to exercise kaitiakitanga and maintain their culture.

There remains one other issue to address. Under the Wildlife Act, the Crown retains ownership not only of protected wildlife but also of materials from those wildlife that Māori use to create taonga works (such as feathers in korowai). The Crown explained that the ownership created by the Wildlife Act was in order to address the complexities of common law. But in solving this problem the Crown clearly created another by ignoring its obligations under the Treaty to safeguard any Māori rights to control or manage these species. From a kaitiaki perspective, wildlife is not 'owned' at all; rather, kaitiaki are bound by obligations towards these taonga. The Crown's approach has therefore created new grievances and complexities for itself. By adopting ownership as the means of taking control, it has invited those with pre-existing claims

to respond in kind. It is control, and not ownership, that is the real issue. To that extent, we recommend that the Act be amended so that no-one 'owns' protected wildlife. Rather, provision should be made for shared management of protected wildlife species. In this case of customary use, that shared management could be via the partnership between DOC and the pātaka komiti we have outlined.

In the case of taonga works derived from protected wildlife, the Crown should certainly not retain ownership; to do so is a form of cultural dispossession. We recommend that the legislation be amended 'to allow tangata whenua to have lawful ownership of the Taonga, crafted from natural materials, that sustain culture and tradition'.[27] Such changes will not lead to the endangerment of taonga species, because the shared management we propose must retain species survival as its core objective.

4.5 Commercial Activity on the Conservation Estate

The DOC estate is not just an empty wilderness tended by committed but underpaid DOC rangers. There are in fact many private businesses operating profitably in the estate. Most of these businesses hold concessions from the Minister of Conservation under part 3B of the Conservation Act. A concession can be a permit to carry out an activity, or a lease or licence to establish structures. Concessionaires must purchase the concession from the department. The Crown's annual income in 2009/10 from concessions was $13.9 million. Concessions are therefore a reasonably lucrative source of additional funds to the Crown to assist in funding the department's work.

Three concession issues arose in the claims before us. The first related to the level of Māori involvement in the department's consideration of concession applications. The second related to the degree of priority, if any, the department accorded tangata whenua applicants in granting concessions and commercial contracts. The third was that the concessions regime provided no legal avenue for kaitiaki to share in the benefits from commercial use of a resource.

We were provided with a copy of DOC's Standard Operating Procedure for Concessions. It runs to 117 pages of fine print. It generally separates low-impact concession activities from high-impact, and provides an intensified inquiry process in the latter case. There are various references to consultation with tangata whenua in the case of some low-impact activities and all high-impact ones. It appears that most conservancies have now developed locally agreed triggers that guide officials as to when consultation with tangata whenua will be required in concession applications. As a result, the Standard Operating Procedure is light on tangata whenua consultation procedure.

In this area, as with customary use, we were left with the impression that the rules around consultation were developed out of local relationships, rather than national

Tūroa Skifield, Mt Ruapehu. Skifields such as Tūroa are among the higher profile DOC-granted concessions.

policy. In practice, this appears to be working, and we are minded to leave well enough alone. But there are moves towards national policy in access and harvest, and we saw no national policy on consultation in relation to concessions. So we would add a word of caution.

The more localised arrangements are, the more they will rely on the individuals on both sides who have built the relationships. We have often seen in the past that these kinds of arrangements last only as long as the individuals remain. It is important that relationships and the expectations that come from them are embedded in the conservancies' systems so that they survive the departure of the people who built them. If concession consultation processes are to be localised, they should at least be included in the wording of conservation management strategies and conservation management plans.

The priority given to aspiring tangata whenua concessionaires caused us more trouble. The Standard Operating Procedure (the only national documentation on concessions that we received) contains no encouragement whatsoever for tangata whenua to seek concessions.

We were generally impressed throughout our hearings by the way in which DOC officials at conservancy level appeared to work hard at enhancing tangata whenua relationships with the DOC estate and DOC-controlled species in all of their work. We were therefore surprised and disappointed that this commitment did not appear to be present in the concessions Standard Operating Procedure.

The development of tangata whenua business in the DOC estate would seem to us to be an excellent way of strengthening these relationships between iwi, their whenua, and taonga species. The Court of Appeal's finding in the *Whales* case supports a view that tangata whenua interests in taonga are entitled to a 'reasonable degree of preference', to be weighed alongside other legitimate interests, in decisions about commercial activities on the conservation estate.[28] Applying that principle to concession applications that derive from taonga on the conservation estate would be consistent with section 4, and therefore not discriminatory. We recommend that DOC amend its policies and practices accordingly.

We do not intend to say here that Māori should always receive preference in every concession application. That is clearly not contemplated by Treaty principle. But it is incumbent upon the department to develop rational policies and procedures that address the issue, in particular to guide the preparation of documents for tendering or in situations where there are multiple applications. There will be instances where Māori preference arises because there is some ao Māori, mātauranga Māori, or taonga Māori aspect to the concession – for example, historical or botanical tours. In other cases, the intensity of Māori relationships with, or tikanga about, a place, reserve, or national park ought logically to suggest a level of Māori priority.

We would not wish to pre-empt a DOC inquiry into what the relevant considerations or circumstances might be. Our complaint is that there is no policy about this subject at all. It seems incongruous to proceed on the basis that Māori have a special place in the management and administration of the DOC estate except where there is money to be made. This gap should be addressed.

The final issue concerned kaitiaki sharing in the benefits of commercial activity on the conservation estate. Crown revenue from concessions is returned to DOC for spending on conservation activities. This revenue makes up a relatively modest proportion of overall Crown spending on conservation, and it benefits the taonga towards which kaitiaki have obligations. The real issue is not about kaitiaki sharing in the revenue, but the degree to which kaitiaki have a say in the management of taonga. That is the central issue of this chapter, and is addressed in our proposals for reform.

4.6 National Parks

National parks are the jewels in the conservation estate – the most iconic landscapes and untouched rivers, lakes, and forests. Under the National Parks Act 1952, these areas are 'preserved as far as possible in their natural state' in the interests of all New Zealanders. For tangata whenua, these are often areas of tremendous significance, as homes to remaining examples of taonga plants and wildlife, and as the sites of the maunga, awa, and other environmental features from which tribal identity is derived.

Although claimant submissions did not focus on parks per se, their concerns in respect of the conservation estate applied with even greater force in national parks.

Uluru, Australia. It is now 25 years since ownership of Uluru (Ayer's Rock) was restored to the Anangu people of central Australia. This powerful symbol of Australian nationhood is, to Anangu, an ancestor, as are other landforms, plants, and animals from their traditional lands.

All claimants argued for the return of DOC land to iwi. This submission applied as much to national parks as it did to the wider DOC estate. DOC staff who gave evidence acknowledged that the return of land was a matter of great significance for iwi, and also acknowledged that it might be possible to conserve the natural environment without DOC actually owning the land.

Since our hearings concluded, the possible return of national park land has become a matter of controversy, with the Crown and claimants squaring off over whether national park land should be made available in Treaty settlements as a matter of general principle. We acknowledge that this is a genuine debate that must be had. However, it is important to place this debate in an international context first and then in a local Treaty context. These issues are not unique to New Zealand nor to our particular Treaty settlement process.

In Australia, the return of national parks to Aboriginal ownership has been a routine occurrence for three decades. In the 1970s, motivated by the necessity to recognise Aboriginal land rights in the Northern Territory, the Government negotiated with traditional owners of various national parks or conservation areas for the return of land title, in exchange for joint management and long-term lease-back arrangements. In 1981, Gurig National Park north-east of Darwin became the first jointly-managed, Aboriginal-owned national park. Similar arrangements followed at Uluru-Kata Tjuta (Ayers Rock and the Olgas), Nitmiluk (Katherine Gorge), and Kakadu national parks.[29] In 2008 there were negotiations planned or under way for co-management of 27 national parks and reserves in the Northern Territory.[30]

Following the lead of the federal government, all Australian states and territories have now adopted legislation providing for considerable Aboriginal input into conservation governance and management. In general terms, the joint management arrangements include a guaranteed Aboriginal majority on the park's board, the recognition of Aboriginal residence and customary use within the park's boundaries, the commitment to the training of Aboriginal people to work as park staff, and the payment of a proportion of park revenues to the Aboriginal

Te Rerenga Wairua (Cape Rēinga). Te Rarawa witness Te Witi McMath told us of the spiritual pathways throughout New Zealand that spirits tread before leaving this world on their journey to te ao mārama – the world of light. The last terrestrial point in their pathway is Te Rerenga Wairua, the leaping place of the spirits. Te Rerenga Wairua is sacred to the iwi of Te Tai Tokerau, and indeed to all Māori. DOC management of Te Rerenga Wairua was a source of concern to the claimants.

owners. In this way, a positive model has developed that has been of mutual benefit to both parties as well as to the environment.

There is an obvious reason why New Zealand has not followed the Australian example with national parks. There has simply been no lever like aboriginal title to force the Government to take such steps. As a result, we lag behind Australia in this area. The current round of Treaty negotiations, however, suggests that we are now entering the situation Australia found itself in with the land rights movement in the 1970s, where something will have to give. The national parks in the more mountainous areas of the South Island were not places where Māori communities lived or continue to live, but North Island parks like Urewera and Whanganui have a long and recent history of Māori occupation. Tūhoe communities, for example, live on lands contiguous to the Urewera National Park that Māori retained. In our view, and without wishing to cut across any Tribunal findings in district inquiries, our national parks should be available for return of title and shared management if the circumstances of alienation and the ongoing strength of kaitiakitanga warrant it. Australia shows us that there is nothing to fear.

We recognise that some may regard the Australian situation as not comparable, viewing national parks there as vast and remote and thus more suited to return to local indigenous people. New Zealand national parks, some will say, are much smaller and closer to our towns and cities. That may be so, but if universal access is guaranteed, and the conservation of species remains paramount (as it clearly also does under the terms of Aboriginal customary use in Australian parks), then we fail to see that this invalidates title return and co-management. Moreover, a number of the parks returned in the Northern Territory have both much higher visitor numbers than our own, as well as singularly iconic status. If anything, we sense that

that status – in Kakadu, Uluru, and elsewhere – has even been enhanced by Aboriginal ownership or co-management. We could do well to learn from that example.

4.7 Kaitiaki Conservation

In the preceding sections, we have set out proposals for legislative, policy, and structural change, and for co-management of taonga, based on Treaty principle. Those changes and the partnership approach they encompass have potential to provide a basis for a new approach to conservation management, one that acknowledges the commonality between kaitiaki and conservation interests, and reconciles the differences; one that protects and supports mātauranga Māori while also preserving and protecting the environment.

This synthesised 'kaitiaki conservation' approach would of course have the survival and regeneration of the environment as its primary concern, and it would harness both mātauranga Māori and te ao Pākehā's conservation expertise to that end. In bringing mātauranga Māori into a genuine partnership, it would acknowledge the importance of human-environment relationships. The environment needs active protection; damaged ecosystems and vulnerable species will not recover and flourish without human intervention.

As a further step towards this new approach, the partners should review the conservation legislation as a

Tuatara, Takapourewa/Stephens Island, Marlborough Sounds. For Ngāti Koata, the tuatara of Takapourewa are a taonga. The iwi's kaitiaki obligations towards these ancient creatures are a source of pride and identity. The island is home to about 50 per cent of New Zealand's (and therefore the world's) population of tuatara, and is managed under an agreement between Ngāti Koata and DOC.

whole. At the core of this review will be the articulation and expression of 'kaitiaki conservation', an approach that synthesises the preservationist philosophy and mātauranga Māori, and that is based on a genuine partnership between Crown and Māori involving the new models of decision-making and management that we set out earlier. To the extent that there are statutory constraints on the full exercise of kaitiakitanga, such a review could identify them and negotiate ways to remove them, so that DOC is left in no doubt that it can pursue creative approaches to fulfilling its section 4 obligations.

We recognise that this is not a trivial, nor a particularly easy, shift for either party to make. But we are mindful that there has been no such fundamental debate since the Conservation Act was passed in 1987, and that many of the other Acts in this area are much, much older. Practice and attitudes amongst those who are active in this field have changed significantly in the time since this Act was passed; so has the environment itself. What we heard from both sides convinced us that there is sufficient depth of thought and goodwill for this to succeed. Indeed, given DOC's reliance on community effort, and the potential to learn from mātauranga Māori, this approach can only benefit the taonga that are so precious to the department, the claimants, and indeed, all New Zealanders.

4.8 Living Partnerships – Some Conclusions

In the 24 years since DOC was established, the department and iwi have taken some steps towards the partnership promised by section 4 of the Conservation Act. For the most part, we are convinced that the partners are ready to go to the next stage, because the necessary changes for DOC are in structure, law, and policy rather than attitude. The suggestions we make recognise that progress. They are aimed at moving things beyond the important principle that DOC should be constantly talking to iwi about its work, toward the even more important principle of responsible power-sharing. Examples of the shift already exist locally in many parts of the country, but power-sharing is not yet part of the structure and culture of the entire organisation – especially not at head office in Wellington where iwi relationships are weakest and easily overshadowed by abstract fears about iwi intentions and capacity. That is why we argue both for changes in the legislation which is currently inhibiting power-sharing, and for the establishment of partnership structures to operate alongside the Conservation Authority and boards. The same goes for the changes we suggest in the areas of customary harvest and concessions. Together, all of these changes should encourage the partners to explore the new ground that will carry them through the next 24 years.[31]

Partnerships are not necessarily predicated on equal power. In this case, DOC will almost always be the more powerful partner, because it generally brings greater resources and a statutory mandate to the table. It is not equal power that is necessary for a successful partnership, but an equal investment in the ultimate success of the joint endeavour.

For the Crown, the joint endeavour in this instance is the mutual survival of mātauranga Māori, and land and species. For the department, stewardship of the DOC estate and protected species is about respecting the intrinsic value of that which remains to us, and offering New Zealanders – indeed the world – the opportunity to feel their wonder. For Māori, it is about those things and the survival of their own identity. Without the mātauranga Māori that lives in the DOC estate, kaitiakitanga is lost. Without kaitiakitanga, Māori are themselves lost. There may not be equal power, but there is certainly equal investment in the outcome. That is why in our view ultimately the partnership between DOC and Māori will prevail.

4.9 Summary of Recommendations

Most of the surviving examples of the natural environment in which mātauranga Māori evolved are under DOC control. The department's operations are thus of paramount importance to those wishing to exercise kaitiakitanga in relation to the environment, as provided for in the Treaty.

The Conservation Act 1987 contains one of the strongest legislative requirements for the Crown to give effect to its Treaty obligations. However, the principles of the Treaty, as they have been defined by the courts and by the

Waitangi Tribunal, are not adequately reflected in DOC's guiding policies; and, as a result, they do not adequately infuse DOC's day-to-day work.

Given the importance of the environment under DOC control to the survival of the Māori culture, Treaty principle requires that partnership and shared decision-making between the department and kaitiaki must be the default approach to conservation management. Within that overall partnership framework, decisions can be made case-by-case about management of individual taonga, taking into account the interests of kaitiaki, the interests of the taonga themselves, and other interests.

It is on this basis that we have formulated our recommendations for legislative, policy, and structural reform. Specifically:

- *Partnership between DOC and iwi:* We recommend that partnership becomes a 'will' obligation under the Conservation General Policy (CGP) and the General Policy for National Parks; and that the principle that DOC's conservation mission should wherever practicable be achieved in a manner that is consistent with the tino rangatiratanga of iwi and hapū also becomes a 'will' obligation under these general policies. We recommend that partnership be formalised through the establishment in statute of a national Kura Taiao Council and conservancy-based Kura Taiao boards; and that these entities have responsibility for setting Kura Taiao strategies and plans at national and conservancy level, to form part of any relevant conservation management strategies or plans or national park plans. We further recommend that conservation legislation be reviewed with the aim of bringing together and reconciling the differing approaches to conservation management represented by mātauranga Māori and te ao Pākehā, and that such a review should identify and respond to any statutory barriers to kaitiakitanga.
- *Treaty principles:* We recommend that the CGP and the General Policy for National Parks be amended to reflect the full range of Treaty principles that apply in law – that is, those articulated by the courts. While Treaty principles as articulated by the Tribunal do not bind the department as a matter of law, it would be unduly restrictive for the department to treat them as irrelevant to its work; accordingly we recommend that they too be given due consideration. In addition, as both the courts and the Tribunal have said, Treaty principles are not set in stone. They can and must evolve to meet new circumstances. We recommend that this, too, be adequately reflected in the general policies. We further recommend that the Crown–Māori Relationship Instruments guidelines also be amended to allow statements of Treaty principle that reflect the full range of principles defined by the courts and the Tribunal. We also recommend that the guidelines acknowledge that Crown policy instruments cannot override requirements that are set down by statute.
- *Co-management of customary use:* We recommend that provision be made for full, statutory co-management of customary use by DOC and by pātaka komiti as representatives of kaitiaki. They should make joint decisions. We recommend that the CGP and the General Policy for National Parks both be amended to make customary harvest and access a 'will' responsibility provided appropriate conditions are satisfied, with a presumption in favour of customary practices rather than mere case-by-case discretion; and that those policies be amended to remove the requirement that there be 'an established tradition of such customary use at the place' before customary use may be permitted.
- *Ownership of protected wildlife:* We recommend that the Wildlife Act be amended so that no-one owns protected wildlife, and that the Act instead provides for shared management of protected wildlife species in line with the partnership principle. We also recommend that the Act be amended so that the Crown does not own taonga works derived from protected wildlife, but instead allows 'tangata whenua to have lawful ownership of the Taonga, crafted from natural materials, that sustain culture and tradition'.
- *Commercial activity on the conservation estate:* We recommend that DOC policies and practices be amended to give tangata whenua interests in taonga a 'reasonable degree of preference' when

the department makes decisions about commercial activities in the conservation estate. We also recommend that DOC formalise its policies for consultation with tangata whenua about concessions within their rohe.

Text notes

1. Document P6 (Nellie Norman, brief of evidence, 11 August 2006), p 2
2. Department of Conservation, *Annual Report for the Year Ended 30 June 2010* (Wellington: Department of Conservation, 2010), pp 101, 105
3. *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 656 (CA)
4. Document R8(a) (Department of Conservation, *Conservation General Policy* (Wellington: Department of Conservation, 2005)), p 15; Alan Ward, *National Overview*, 3 vols, Rangahaua Whanui Series (Wellington: GP Publications, 1997), vol 2, pp 493–494
5. Document R8(a), p 60
6. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA)
7. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 558 (CA)
8. The name was changed after a kaumātua objected to the mixture of English and Māori in the title Kaupapa Atawhai Manager.
9. Document R8 (Doris Johnston, brief of evidence on behalf of Department of Conservation, 21 November 2006), p 4
10. Document P38 (Benjamin Hippolite, brief of evidence, 14 August 2006), p 3
11. Document R14 (Peter Williamson, brief of evidence on behalf of Department of Conservation, 21 November 2006), p 9
12. Document R8(a), pp 16–17
13. Ibid
14. Document R8(i) (Department of Conservation, *Consultation Policy* (Wellington: Department of Conservation, undated)); doc R8(j) (Department of Conservation, *Consultation Guidelines* (Wellington: Department of Conservation, undated))
15. Document R8 p 27, app 1, p 3
16. Ibid, p 27, app 1, pp 3–4
17. The partnership toolbox/*Te Kete* specifically notes that these guidelines have to be followed if the agreement is written down: doc R8, app 1, p 3.
18. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664 per Cooke P, 701 per Casey J, 682 per Richardson J, 692 per Somers J, 703 per Casey J, 719 per Cooke P
19. Ngāti Porou and Te Runanganui o Ngāti Porou Trustee Limited as Trustee of Te Runanganui o Ngāti Porou and the Crown, *Deed of Settlement of Historical Claims* (Wellington: Office of Treaty Settlements, 2010), pp 47–48
20. Document R8(u) (Department of Conservation, *Domestic Trade in Whale Bone from Whales Stranded in NZ and a Framework for the Role of Māori in the Management of Whale Strandings; Public Discussion Paper* (Wellington: Department of Conservation, 2007)), p 9
21. Laly Haddon, oral evidence on behalf of Ngāti Wai, 1st hearing, 17 September 1997 (transcript 4.1.1, pp 111–112)
22. Document A20 (New Zealand Conservation Authority, *Maori Customary Use of Native Birds, Plants and Other Traditional Materials: Interim Report and Discussion Paper* (Wellington: New Zealand Conservation Authority, 1997)), p 12
23. Document R8(a), p 16
24. New Zealand Conservation Authority, *General Policy for National Parks* (Wellington: Department of Conservation, 2005), p 16
25. Document R8(n) (Department of Conservation, *Customary Use of Indigenous Plants, Animals and Traditional Materials: Policy Guidelines* (Wellington: Department of Conservation, 28 November 2006)), p 2
26. Ibid, p 1
27. Ibid, p 7
28. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 561–562 (CA)
29. Kakadu was in fact returned to Aboriginal ownership in 1978, but joint management arrangements were put in place in 1989: see Director of National Parks and Kakadu Board of Management, *Kakadu National Park Management Plan 2007–2014* (Darwin: Director of National Parks, 2007), p 6.
30. Dermot Smyth, 'Joint Management of National Parks in Australia', *Working on Country: Contemporary Indigenous Management of Australia's Lands and Coastal Areas*, ed R Baker, J Davies, and E Young (Oxford: Oxford University Press, 2001), pp 75–78; Dermot Smyth and Graeme K Ward, eds, *Protecting Country: Indigenous Governance and Management of Protected Areas*, (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2008), pp 2–4; Donna Craig, 'Recognising Indigenous Rights through Co-management Regimes: Canadian and Australian Experiences', *New Zealand Journal of Environmental Law*, vol 6 (2002), pp 240–246

31. See also chapter 6 and Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, sec 6.8, where we propose a set of working principles for a cooperative working partnership or genuine joint venture.

Whakataukī notes

Page 122: Theodore Roosevelt, address to the Deep Waterway Convention, Memphis, Tennessee, 4 October 1907

Page 123: Hirini Moko Mead and Neil Grove, *Ngā Pēpeha a Ngā Tīpuna* (Wellington: Victoria University Press, 2001), p 425

More than a cluster of words or a set of grammatical rules, a language is a flash of the human spirit, the filter through which the soul of each particular culture reaches into the material world.

—Wade Davis

5

TE REO MĀORI

Ko te reo te mauri o te mana Māori.

The language is the core of our Māori culture and mana.

—Sir James Henare

CHAPTER 5

TE REO MĀORI

5.1 Preface

During the drafting of this report, we were aware that the parties might benefit from the early release of certain chapters as they grappled with the complex issues involved in the claim. We preferred not to do so, however, on the basis that the principal value of the report would be in its totality rather than in its components. But, after the Minister of Māori Affairs announced in July 2010 a full ministerial review of the Māori language sector and strategy, we reluctantly decided that it would be best to release our te reo Māori chapter in advance of the rest of the report so that the review panel would have our own analysis available as it conducted its inquiry. It seemed unhelpful for two inquiries into the same subject matter to proceed in silos.

We therefore released the te reo Māori chapter in pre-publication format on 19 October 2010. In a matter unrelated to the advance release of the chapter, we also declared our findings and recommendations to be provisional only. We did so mainly because the chapter addressed matters that went beyond the narrow set of reo issues agreed to earlier by the Crown and claimants concerning tribal dialects and the protection of te reo from inappropriate use. We had, indeed, considered the Crown's entire Māori language programme of work (our reasons for doing so are mentioned below in section 5.3 and explained in more detail in *Ko Aotearoa Tenei: Te Taumata Tuarua*[1]). We therefore acknowledged that the parties would have placed more and perhaps different evidence in front of us had the inquiry actually been framed in such a way, and we accordingly provided the opportunity for any party to make a submission on the te reo Māori chapter's contents to us by 25 November 2010, which we would consider before issuing our full and final Wai 262 report.

We received submissions from the Crown, Ngāti Koata, and Ngāti Porou.[2] The Crown attached a lengthy statement, written by Te Puni Kōkiri, which set out 'factual points' that the Tribunal should address. Ngāti Koata and Ngāti Porou both supported the Tribunal's findings but disagreed with its recommendations, arguing for a direct role for individual iwi in identifying the appropriate remedies to safeguard te reo. After due consideration, we were not convinced by these submissions that the chapter needed to be amended. Any changes we have subsequently made are minor only, and relate principally to matters of report-wide consistency and cross-referencing. We have not updated the chapter to 2011, so it continues to refer to the situation at the time of the chapter's initial release. In recognition, however, of the fact that a brief period for submissions did and could not constitute a full inquiry into the reo issues we covered, our findings and recommendations should rightly continue to be regarded as provisional. This is far from the last word on the subject, but it is now for others to take the matter further.

5.2 Introduction

Te reo Māori is a taonga. It is the platform upon which mātauranga Māori stands, and the means by which Māori culture and identity are expressed. Without it, that identity – indeed the very existence of Māori as a distinct people – would be compromised. No party before us disagreed with these propositions.

In a claim about mātauranga Māori, te reo Māori would always be an issue. And so it is in Wai 262, where the claimants sought protections for te reo principally in support of iwi dialects and against inappropriate use.

5.3 The Scope of the Issues

This is not the first time this Tribunal has considered a claim about te reo Māori. It released a comprehensive report in 1986 on the Crown's Māori-language obligations under the Treaty of Waitangi. It concluded that te reo was a taonga guaranteed by the Treaty, and that the Crown had significant responsibilities for it. The Crown has rightly responded over two decades with an extensive array of Māori-language policies and programmes, and that process is ongoing.

In this inquiry, the Crown was reluctant to revisit these developments. Counsel argued that they had been litigated once and that was enough. For their own reasons the claimants agreed to this confinement in the early stages. At the outset, therefore, our inquiry was restricted to Crown support for tribal dialect – for example, te reo o Ngāti Porou – and to inappropriate or offensive uses of te reo Māori.

That is not, however, how things turned out in the hearings. The Crown gave evidence about its entire range of reo initiatives – describing it as context only. But it soon became clear that it was more than this: the Crown's response to the ostensibly narrow issues before us would not have made sense without this broader view. Some claimant groups took a similarly expansive approach in their evidence. We were somewhat surprised by this, given the agreed narrowing of the issues.

Our concern resolved itself when counsel for Ngāti Koata asked the Crown's leading Māori-language policy witness whether protecting or promoting te reo o Ngāti Koata would necessarily also include protecting or promoting te reo Māori generally within the Ngāti Koata rohe. The witness replied, 'I think there's a clear relationship between the two, yes.' Counsel then asked, 'And therefore if Te Reo Māori suffers a loss then Te Reo o Ngāti Koata must suffer a loss too?' The reply was, 'Given the connection, yes.'[3]

This exchange confirmed for us that the agreed restriction to tribal dialect was unworkable. The Crown witness was right: loss in one would affect the other, and vice versa. In fact, we could not assess the Crown's performance in protecting and promoting dialect until we had first completed a review of the Crown's te reo Māori performance across the board. It was obvious in the end that the general evidence provided by the Crown and claimants was not so much background to the story as the story itself.

We are conscious of the fact that the parties did not call evidence with the broader issues in mind, even if their evidence was broad in fact. We accept that this means our inquiry into te reo was not as complete as it could have been and that further research may yield better insights. Our findings and recommendations ought properly to be treated as provisional for that reason. But we are satisfied that we would be remiss, as a commission of inquiry, not to comment on matters of concern where we feel sufficiently conversant with the facts to do so.

5.4 Decline and Revival

It makes sense to start our review with the Tribunal's te reo Māori report in 1986. It found the language was seriously threatened, and recommended that te reo Māori be made an official language; that special measures be instituted in the areas of education and broadcasting; and that the public sector upgrade its capacity to converse with its Māori-speaking citizens in the Māori language.

The Maori Language Act was passed the following year, making Māori an official language of New Zealand and creating the Māori Language Commission, later known as Te Taura Whiri i Te Reo Māori. The commission has a board of five members, all appointed by the Minister of Māori Affairs. Its statutory mandate is wide-ranging. Under section 7, its functions include:

- initiating or developing policies and practices to give

The Waitangi Tribunal's 1986 *Report of the Waitangi Tribunal on the Te Reo Maori Claim*. The Tribunal found that te reo was a taonga and that urgent action was needed to improve its health.

effect to Māori being an official language of New Zealand;
- generally promoting te reo as a living language; and
- advising the Minister of Māori Affairs as requested on matters relating to the Māori language.

Under section 8 of the Act, the commission also has powers to:
- hold or attend any inquiries to enable it to ascertain the wishes of the Māori community with respect to te reo;
- undertake or commission research into the use of te reo;
- consult with Government departments about the use of te reo in the course of their business;
- publish information relating to the use of te reo; and
- report to the Minister on any matters regarding te reo that it thought should be drawn to the Minister's attention.

The growth of Māori broadcasting policy was one of the first developments in the post-Maori Language Act era, and was marked by extensive litigation between Māori interests and the Crown. After a radio-related claim came to the Waitangi Tribunal, the Crown set about funding a network of 21 iwi radio stations. The network was fully operational by 1993. Māori interests moved to prevent the transfer of broadcasting assets to Radio New Zealand and Television New Zealand respectively in 1989. The litigation culminated in an unsuccessful Privy Council appeal, but it nonetheless produced a Crown undertaking, and after a 13-year delay a dedicated Māori television channel went to air on a permanent basis in 2004. Te Māngai Pāho was established in 1993 to fund the Crown's Māori broadcasting initiatives. It spent $49.8 million on this in 2006.

We do not mean to diminish the Crown's now significant commitment to Māori language broadcasting when we acknowledge that both the Māori radio and television ventures were built on the shoulders of unfunded community-based Māori initiatives in the 1980s.

Unfunded Māori community-based projects were also the driving force in Māori-language education in the early days. The Ātaarangi adult teaching method was initiated in 1979; the first wānanga opened at Otaki in 1981; the first kōhanga reo in Wainuiomata in 1982; and the first kura kaupapa Māori at Hoani Waititi Marae in west Auckland in 1985. The Crown's te reo Māori education funding built on these grassroots endeavours, though Crown support came more quickly in some areas than in others. By 1993, there were 809 kōhanga attended by more than 14,000 students – half of all Māori in pre-school. By 1999, there were 455 schools (including 59 kura kaupapa) offering some degree of Māori-medium education. Nearly 31,000 pupils – 27,000 Māori and 4,000 non-Māori – were being educated through te reo Māori in varying degrees. Funding for wānanga after Treaty settlement with the Crown saw the number of students learning te reo at the tertiary level peak at 36,000 in 2003.

Other notable milestones in Māori-language education have included the statutory recognition of the kura kaupapa guiding philosophy in 1999, the launch of the Education Ministry's Māori-medium curriculum in 2008, and the publication of its Māori education strategy also in 2008. There have also been various initiatives to attract and retain te reo and Māori-medium teachers, and to increase Māori-language teaching resources.

Ten years after the Maori Language Act, Te Puni Kōkiri led the relevant Government agencies in developing the first set of Māori language policy objectives. This was an attempt to rationalise a sector that had evolved in a relatively unplanned way since the 1980s. Five years later, the first Māori language strategy (MLS) was developed by officials, and this version was approved by Cabinet in July 2003. It was a generational plan that set out goals to be achieved by 2028. The overarching vision was: 'By 2028, the Māori language will be widely spoken by Māori. In

▶ Pita Sharples speaking at the opening of New Zealand's first kura kaupapa Māori at Hoani Waititi Marae in 1985. Invited dignitaries included the Prime Minister, David Lange, and the Governor-General, Sir Paul Reeves.

◀ During their inquiry into the te reo Māori claim, members of the Tribunal visited a kōhanga reo at Waiwhetu in Lower Hutt in June 1985. The visit inspired the following comments in their published report: 'The infants come to a place where nothing but Maori is spoken. They have their day filled with activity – games, songs and other pastimes to be found in any kindergarten – but all in Maori. Within a surprisingly short time they master Maori fluently in a childish way until they are five or six years of age when they go to an orthodox primary school. By that time they are able to carry on an animated conversation in Maori and we watched them doing so in a Kohanga reo that we visited.' The members pictured are Chief Judge Edward Durie and Paul Temm QC.

The lawyers acting for the New Zealand Māori Council in the *Broadcasting Assets* case about to enter the Downing Street, London, offices of the Privy Council in 1993. *From left:* Eugenie Laracy, Martin Dawson (who acted for Ngāti Koata in our inquiry), and Sian Elias (now the chief justice).

particular, the Māori language will be in common use within Māori whānau, homes and communities. All New Zealanders will appreciate the value of the Māori language to New Zealand society.'[4]

5.5 The Health of Te Reo Today

A major survey completed in 1979 found there to be 64,000 fluent speakers of Māori, most of them older than 40. But, ominously for the health of the language, there were probably only 100 pre-schoolers fluent in te reo. The situation could hardly have been more precarious.

By 1996, Māori participation in kōhanga and Māori-medium schooling, and the higher profile given to the Māori language in Crown-funded broadcasting, had begun to turn these figures around – at least as they applied to the younger age groups. The national census that year revealed that 25.0 per cent of the Māori ethnic group – 129,000 speakers – rated themselves able to converse in Māori. This proportion was maintained in 2001 at 25.2 per cent.

But the next census in 2006 told a different story. The proportion of Māori who spoke Māori dropped to 23.7 per cent even as the total number of Māori speakers of conversational Māori grew to 131,600. Officials said it was evidence of stabilisation after decades of decline, but there were 8,000 fewer speakers than there should have been had the proportion truly stabilised. Some of this loss is attributable to the death of older native speakers, but a decade previously that loss had been offset by the rise of the kōhanga generation. Now ground was being lost at both ends. From 1996 to 2006, the percentage of Māori children under 10 (excluding those for whom 'no language' was recorded) who spoke te reo Māori declined from 22.1 per cent to 18.5 per cent – a deficit of more than 4,000 tamariki.

The decline in Māori-language acquisition among children must be a matter of the deepest concern. It is literally true that the survival of te reo depends on this age group.

The figures for the younger speakers reflect a consistent decline in the number of Māori children attending kōhanga reo. By 2009, there were 5,200 fewer children attending nearly 350 fewer kōhanga than at the 1993 peak. Kōhanga tamariki were now less than a quarter of all Māori children in pre-school, as against half at the peak. If the 1993 rate of Māori participation in kōhanga had

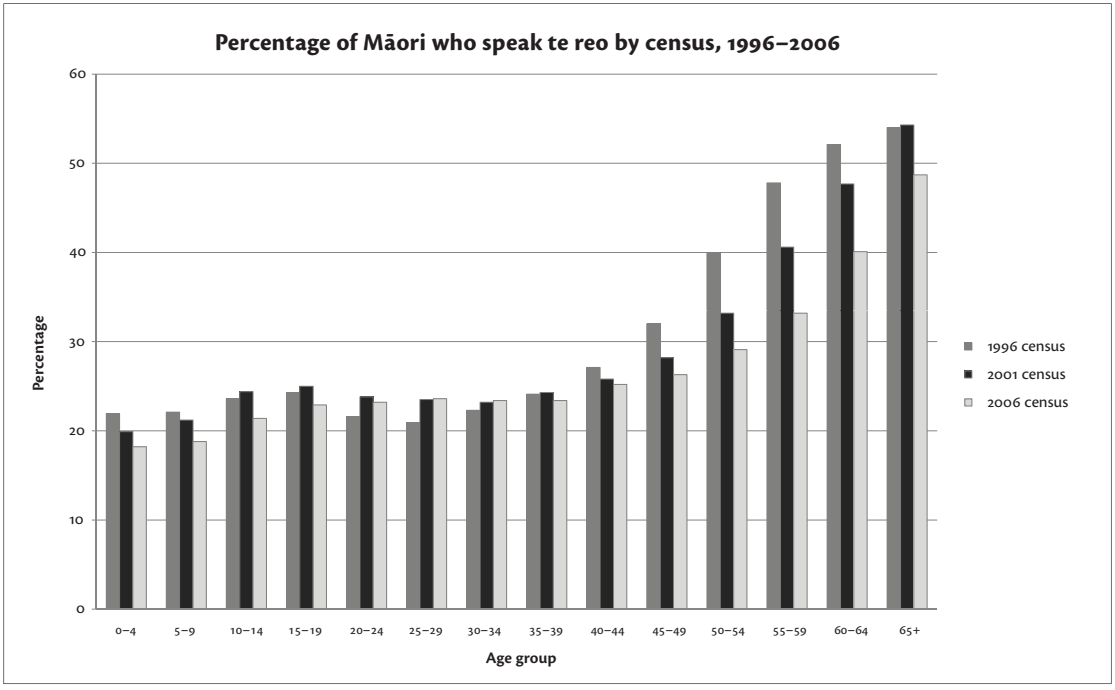


Figure 5.1

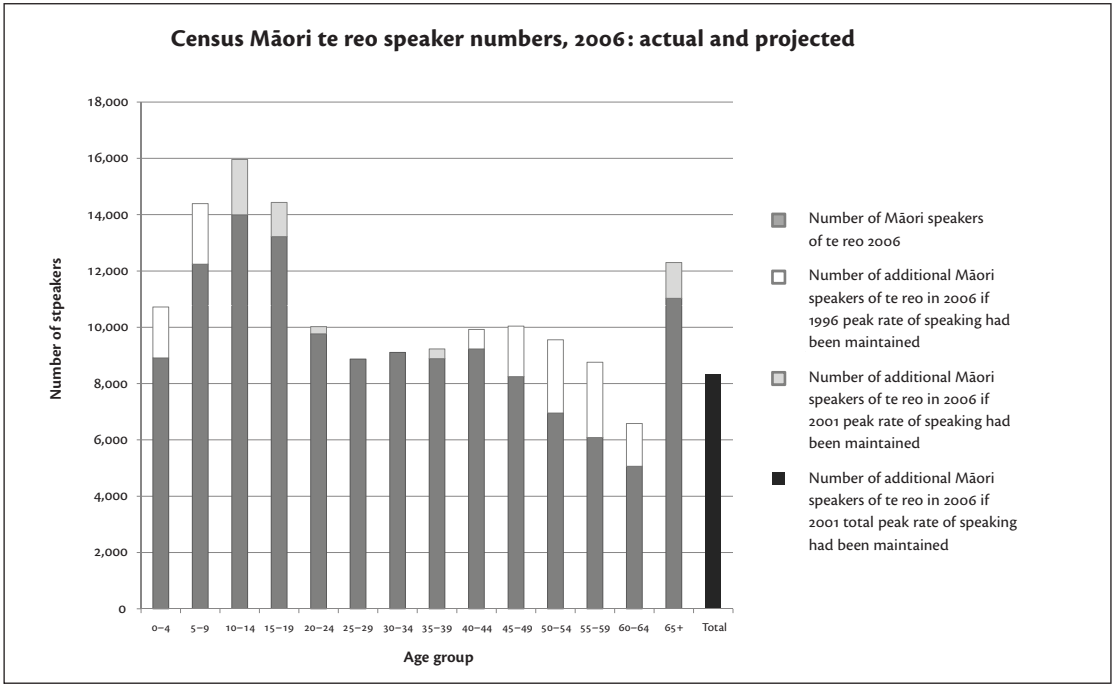


Figure 5.2

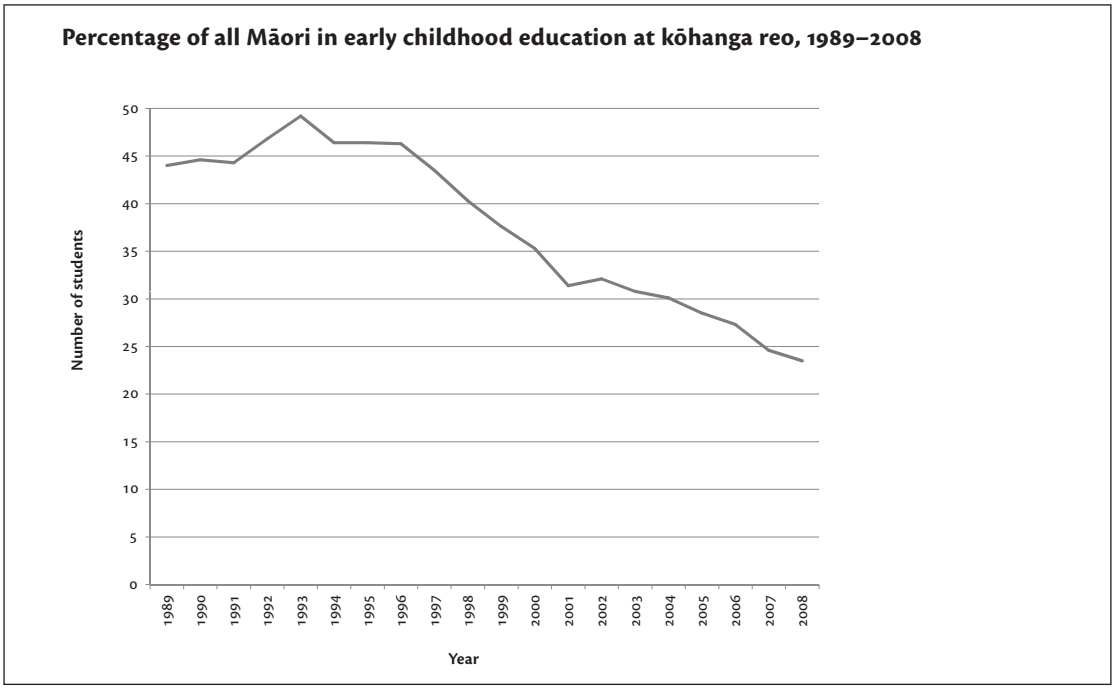
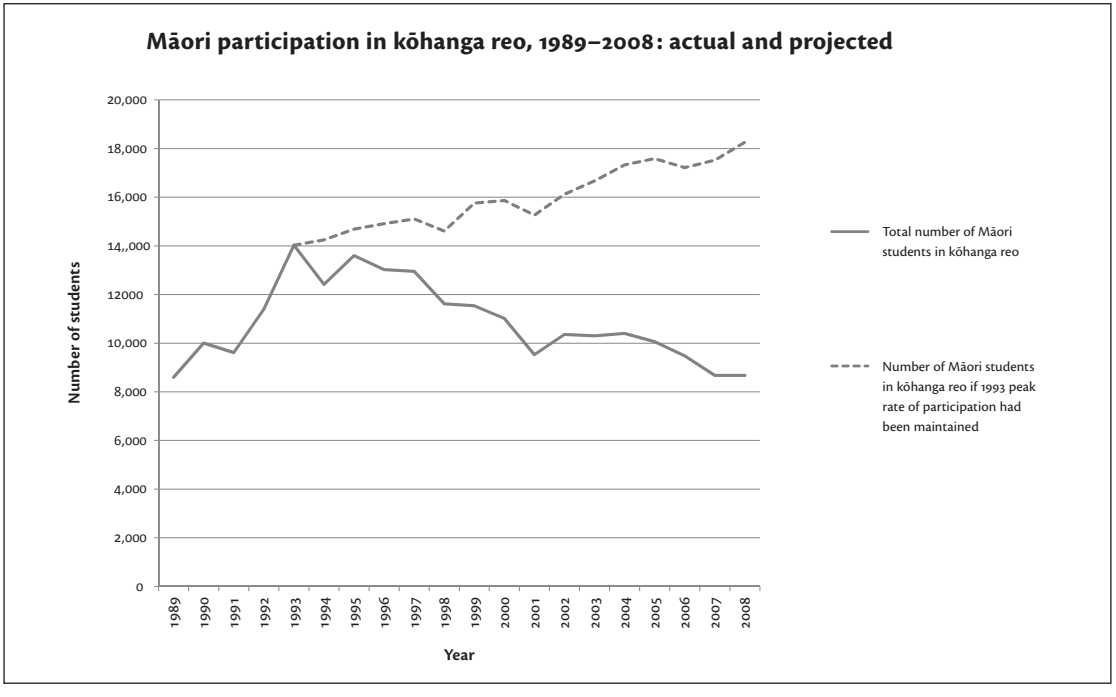


Figure 5.3



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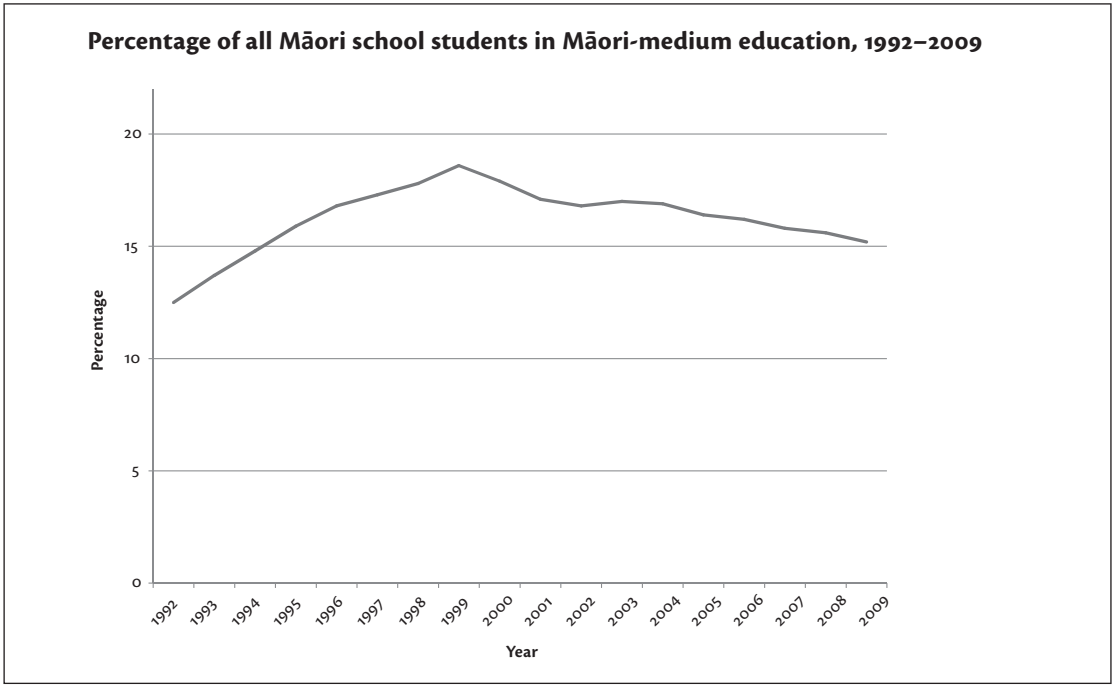

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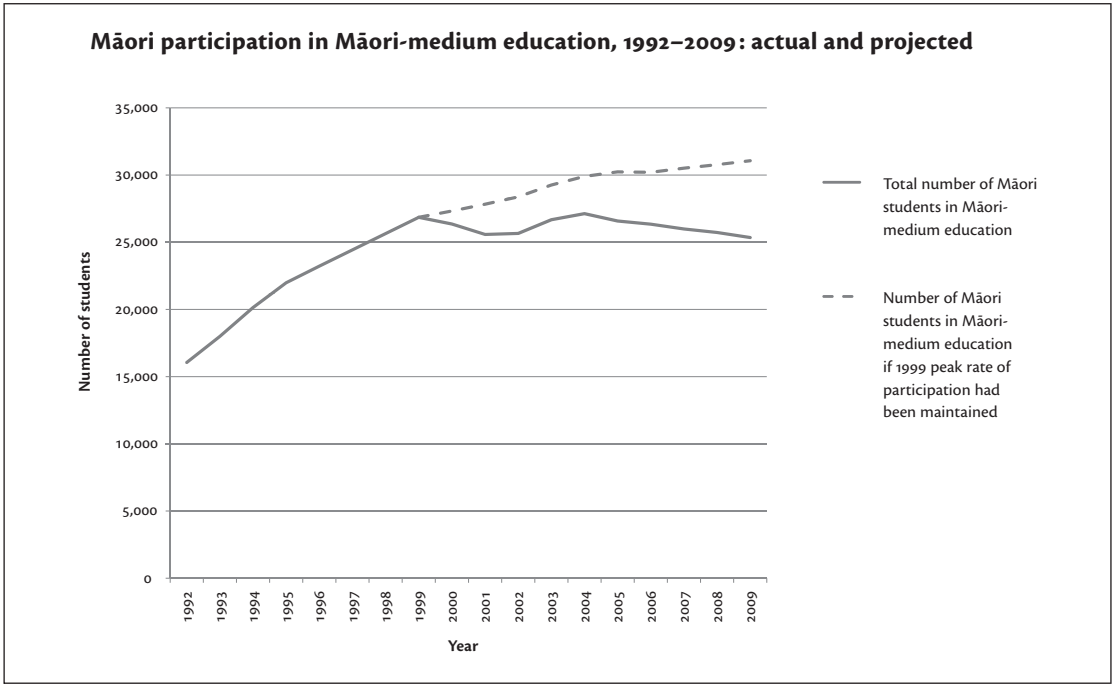


Figure 5.6

been maintained, by 2008 the number of Māori tamariki at kōhanga reo would have increased to 18,300. In reality, in that year the enrolment at kōhanga was only 9,200, including 8,700 Māori children – 9,600 fewer Māori children than there would have been had the 1993 share been maintained. Kōhanga have lost ground rapidly.[5]

Another worrying trend is that tamariki in kōhanga are now also more likely to be learning te reo from second-language learners than from older native speakers. This means that the rich diversity of tribal dialect is not being passed on in kōhanga to the same extent.

The census figures are also reflected in declining participation in Māori-medium education at school level. The proportion of Māori school children in Māori-medium education fell from a peak of 18.6 per cent in 1999 to 15.2 per cent in 2009.[6] In 2009, there were 5,700 fewer Māori students learning via the medium of Māori to some degree than there would have been had the 1999 proportion been maintained. The peak in non-Māori participation in Māori-medium education (in terms of the proportion of students) came in 1998. Had that proportion been maintained, there would in 2009 have been an extra 1,650 non-Māori students in Māori-medium learning.

The number of students learning te reo in tertiary institutions has also significantly declined since the wānanga-driven peak of 2003. Students participating in Māori language courses dropped from 36,000 in 2003 to 17,000 in 2007.

Two clear conclusions can be drawn from these figures. The first is that the revival of the Māori language can succeed through programmes of Māori language education for children. The second is that by the turn of the millennium there was strong evidence that this strategy had stopped working.

5.6 Te Reo and Treaty Obligations 20 Years On

5.6.1 Introduction to rights and duties

As we have said, te reo is a taonga and the protection it enjoys as such under the Treaty of Waitangi means the Crown owes special obligations in respect of it. After 20 years of litigation and policy development these propositions are now uncontroversial. Apart from questions of affordability, we cannot see that there are any countervailing interests that might limit the Crown's obligations. The survival of te reo Māori is no longer just of deep interest to Māori people – it is a matter of national pride and identity for all New Zealanders. Everybody wins when the Māori language thrives.

We think it is also important to acknowledge that the obligations are not all one way. Te reo is not the sole responsibility of the Crown. Māori have an equal if not more significant role in its survival and growth.

We turn now to assess the detailed Treaty obligations owed by both sides. Unlike the 1986 Tribunal, we are not dealing with these matters afresh. Our assessment comes in the midst of a State-assisted programme of language revival that is already a generation old, and the MLS tells us that the Crown means to maintain an ongoing commitment for at least another generation. To some extent, therefore, our role is that of a Treaty auditor of past and present programmes, and of the MLS's future plans.

From this, we think there are four primary duties on the Crown and two on Māori in terms of te reo. The Crown's duties are partnership, wise policy, appropriate resources to achieve policy goals, and a Māori-speaking government.

The Māori duties are necessarily directed to the areas in which Māori have the greatest contribution to make. They are kōrero Māori and partnership.

We discuss these duties below and comment on the extent to which the Treaty partners are meeting them.

5.6.2 Crown–Māori partnership

Partnership is a well-understood Treaty principle. It requires each party to act reasonably and with utmost good faith toward the other.[7]

There is in our view no area of Crown–Māori relations more appropriate for its application than the future of the Māori language. That future cannot be made secure by Māori efforts alone or Crown efforts alone. It will depend on the ability of both sides to co-operate, participate, and contribute.

On the Crown's part there must be a willingness to share a substantial measure of responsibility and control with its Treaty partner. In essence, the Crown must share enough control so that Māori own the vision, while at the same time ensuring its own logistical and financial

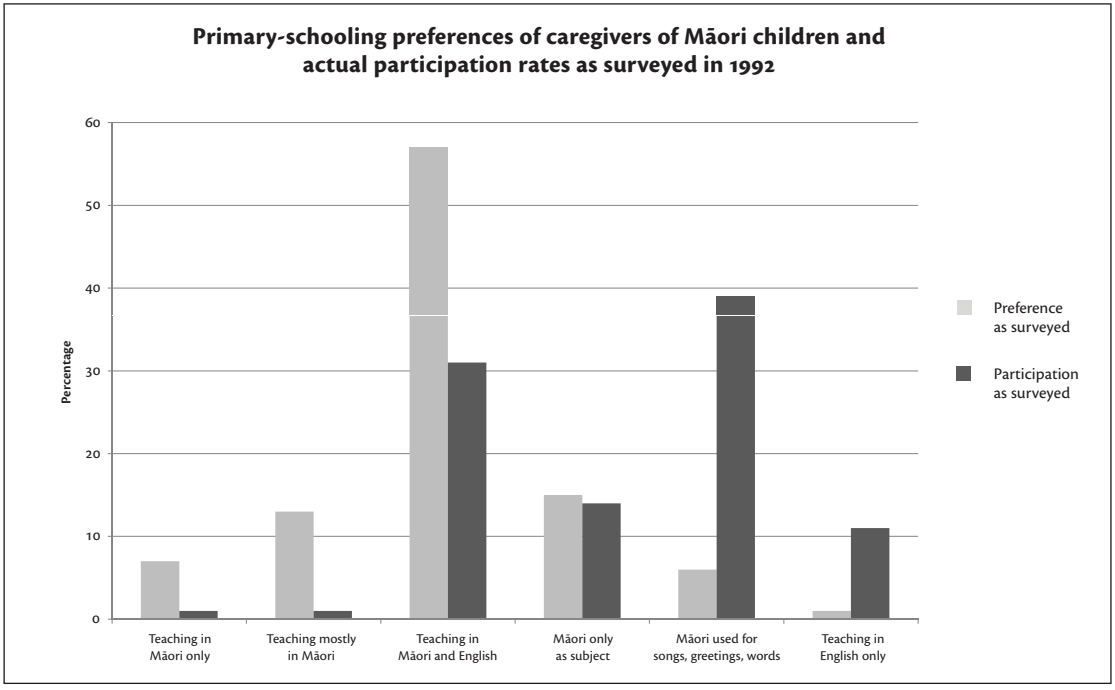


Figure 5.7

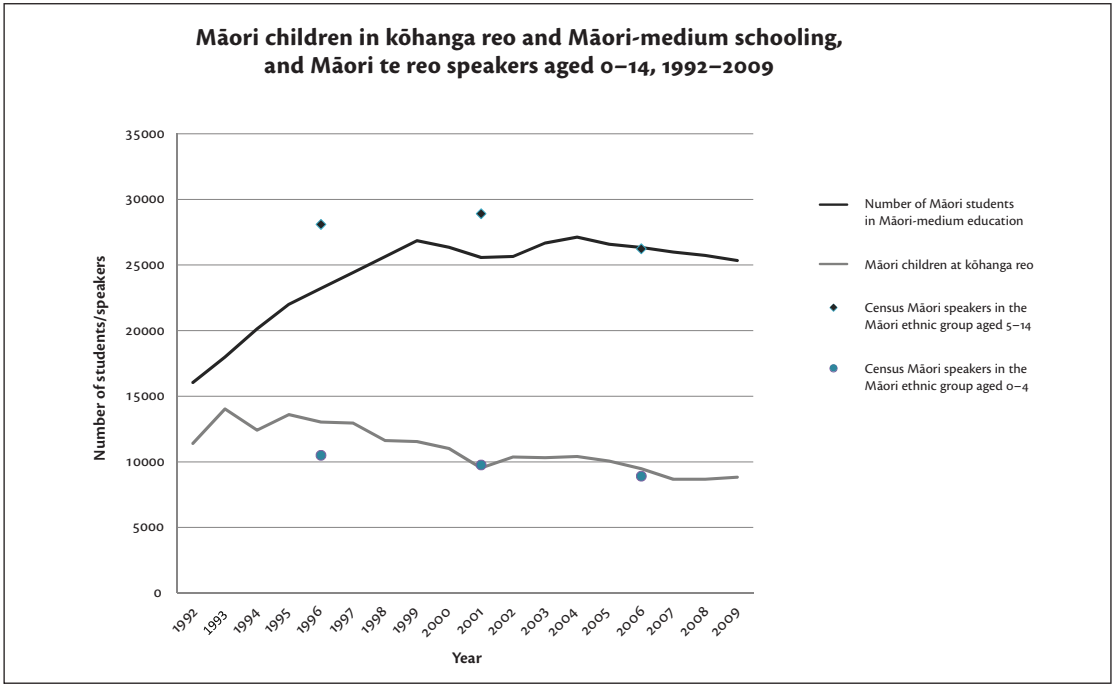


Figure 5.8

support, and also research expertise, remain central to the effort. Partnership in the context of te reo should be a true joint venture.

If at the strategic and policy-formulation level the Crown must reach out to Māori, then Māori must also reach out to the Crown. They must step up to take a leading role in building the vision. Once it is built, Māori must be prepared to take co-ownership of it. We use the term co-ownership in two senses. First, Māori must welcome the Crown as a partner in Māori-language revival; and secondly, Māori must accept the responsibilities that come with ownership of the vision – most importantly, shared responsibility for its success or failure.

In examining the Crown's performance we have found a fundamental problem with the MLS 2003. It is not a partnership document. It is clear that neither the Treaty nor the importance of the language were paramount in its design. We were told that Māori-language experts were consulted and a stakeholder reference group used. That may well be. No doubt the contribution made by these individuals and groups was valuable. But consultation with them does not represent a partnership with the Māori community. We were referred to two large Māori language conferences held in 2001 and 2002 and sponsored by Te Taura Whiri. As far as we can tell, these were useful academic discussions about language revival. They were not overt and active engagements with the Māori community or their leaders on a broad front about a Māori-language blueprint.

We were told that a two-week consultation round was held with Māori communities in March 2003. But a two-week engagement was not enough. How can 14 local hui be seen as building a partnership with the Māori community over a vision for something as significant as an MLS designed to endure for a generation? We would have expected a longer, more iterative process of engagement with Māori at a national and local level. In truth, this consultation was designed merely 'to confirm key components' of the draft document.[8] The agenda had already been set by the Crown, working in what appears to have been a private process with experts and stakeholder organisations.

Partnership-building is a political process. It suggests a commitment to securing wide buy-in from the Māori community for the objectives of the partnership. How could it work in reality? Policy-making in the Māori language sector would need to be led by an agency that not only has expertise in te reo, but also allows an authoritative and independent Māori voice at the Crown-funded table. Such a body would need to harness Māori passion for te reo, and yet withstand the pitfalls of bureaucratisation.

The fact that the MLS was not developed through this kind of genuine partnership makes it a strategy by bureaucrats for Māori, and in our experience that never works. The fact is, if the MLS does not capture the imagination of grassroots Māori communities, and of Crown agencies, what is its point? It is after all a leadership document, and those who would follow it need to be inspired by it. We are not even satisfied that they know about it.

The goals of the MLS, which may fairly be described as unambitious, confirm our fears. We deal with them below.

5.6.3 Wise policy

The Crown was granted kāwanatanga in article 1 of the Treaty. This is generally translated in the case law as the right to govern. It is unarguable that the right to govern should be exercised wisely so as to produce well-designed policy which is implemented efficiently to minimise the cost to the taxpayer. That is an obligation owed by every government in the world, whatever the source of its right to govern. But here there is a greater dimension: a taonga of the utmost importance is at issue. In this Treaty context, the State owes Māori two kāwanatanga duties: transparent policies forged in the partnership to which we have referred; and implementation programmes that are focused and highly functional. Te reo Māori deserves the best policies and programmes the Crown can devise.

We have outlined the decline in the number of Māori speakers, particularly among younger Māori. Here, we must examine whether this is the result of a failure in policy or a Māori rejection of their own language.

(1) *Revival policy*

It is likely that Māori demand for Māori-language education was at its highest in the 1980s when the language revival movement was new and optimistic. Every available seat in kōhanga and Māori-medium schooling was taken, and demand clearly exceeded supply.

Newspaper headlines have regularly touched on te reo teacher shortages.

The Ministry of Education began to measure Māori demand in the 1990s. It commissioned surveys in 1992 and 1995, which showed more than two-thirds of Māori caregivers of pre-school and primary school children wanted some level of Māori-medium primary education for their tamariki. We should be cautious in drawing any firm conclusions from these data as, for a number of reasons, the demand figures may have been overstated.[9] But what is striking about the surveys is not the absolute numbers; it is the apparent gulf between the numbers of parents who wanted their children in Māori-medium education, and the number of children actually in that form of learning. Two surveys, three years apart, consistently recorded that demand for Māori-medium education was much higher than the rate of participation. This, along with the shortage of Māori-speaking teachers, suggests that supply could not keep up with demand. Thousands of Māori children (there is no need to be more precise than that) were in monolingual English education when their caregivers wanted either Māori-immersion education or (principally) bilingual education including Māori.

By the time of the surveys, the gap between supply and demand would have been so large that it was impossible to meet that demand to a reasonable standard within a reasonable time. Officials needed to have taken proper and rigorous steps in the early 1980s to estimate kōhanga demand. Had they done so, it seems likely that they could have foreseen the massive up-take of kōhanga reo through the 1980s and into the next decade, and inevitably an equally large flow-through demand for Māori-medium primary education.

The Ministry would have had to achieve an unprecedented increase in qualified teachers in time for this predictable bubble. Indeed, a report commissioned by the (then) Department of Education in 1987 estimated (conservatively, as it turns out) that at least 1,000 more Māori-speaking teachers would be needed over the following decade to service the kōhanga generation.

A 1986 teacher recruitment advertisement in the Department of Māori Affairs's magazine. The following year, the Department of Education commissioned a report from bilingual education expert Bernard Spolsky, who concluded that there was an urgent need for bilingual teachers and that at least 1,000 more would be needed over the next decade.

We accept that this was a huge task for the education sector. There was certainly no surplus of Māori-speaking teachers in the 1980s that could have been tapped into. But that made it a genuine challenge, not an insurmountable obstacle. Māori-medium and te reo teachers could have been found and trained if the infrastructure had been in place to train them and the financial incentives had been sufficient to attract willing candidates. Success depended on the Ministry accepting at an early stage that a substantial increase in resources would be needed to create the teachers who would meet the growth in demand.

Perhaps as a result of the surveys in 1992 and 1995, the Ministry did eventually take urgent steps to achieve rapid increases in teachers and student places, and there was some reprioritisation of education resources. But it was too little too late: the increases were insufficient and achieved so quickly that the quality of education suffered markedly. The result was Māori parents and caregivers began to vote with their feet back to mainstream education. Peak demand (in terms of the proportion of Māori students in Māori-medium learning) came in 1999. In the decade since, demand has clearly declined, irrespective of supply. While demand may still exceed supply in the sense that there remain serious teacher shortages, falling participation in Māori-medium education is ongoing to this day.

We conclude that a failure of imagination and planning in the education sector led to the major gulf between Māori-medium education supply and demand. Moreover, it was this very deficit of supply that drove demand down and may continue to drive it down. There is no suggestion yet that the bottom of this renewed decline in the fortunes of te reo has been reached.

(2) *Decline policy*

If our assessment of the decline in te reo numbers over the last decade is correct, then the set of Māori language policy objectives adopted by the Government in 1997 (the key statements of what was effectively the first version of the MLS) needed to be powerful indeed. They needed to be imaginative and aspirational, and to acknowledge the realities of the situation. And they needed to be able to bring Māori people with them. We are sorry to say they were none of these things.

In short, in December 1997 Cabinet agreed to five objectives for the language:

- to increase the number of Māori who could speak Māori;
- to improve their proficiency levels;
- to increase opportunities for te reo to be used;
- to develop te reo to allow it to be used for the 'full range of modern activities'; and
- to foster positive attitudes to te reo.[10]

There were no specific targets set as part of this strategy.

It must not be forgotten that this first strategy came 15 years after the first kōhanga was established. Not only did the strategy lack substance, it was arguably too late.

By 2003, when the MLS was comprehensively revised, the past failures of vision and the evidence of renewed decline should have been even more obvious. The teacher supply issue remained a perennial problem; the 2001 census showed a marked decline in speakers aged zero to nine; and Māori-medium school numbers had dropped. Instead, the 2003 MLS was intentionally high level, and so lacking in ambition that its goals were either easily achievable or so vague as to be meaningless. For example, it proposed that the majority of Māori should be able to speak Māori 'to some extent' by 2028. This goal will be measured by Te Puni Kōkiri's five-yearly language survey, the majority of whose respondents – by Te Puni Kōkiri's own definition – *already* reach that level. Its aim for tribal dialects was simply that they be 'supported' by 2028.[11]

The goals were also watered down from the discussion document used as the basis for the 14 consultation hui in

March 2003. It appears that this occurred in the Cabinet approval process. Gone, for example, were both the aspiration for Māori language use to be 'doubled' by 2028 in domains such as national and local government, and the ambition for te reo to be in 'common use in the majority of Māori homes' by that year.[12]

We acknowledge that a decision had been made not to have specific targets in the Strategy, and instead to carry out work from 2003 to have them in place by 2008. The inescapable conclusion, however, is that that work should have been undertaken in the lead-up to 2003.

In hearings in early 2007, the Secretary for Education said that her Ministry could in fact start to plan specific targets using all the data at its disposal. She said she thought the supply of Māori-medium education now essentially met demand. She was right, of course, but not for good reasons. As we have said, this occurred because of poor policy-making rather than increased capacity, and it ignored the urgent need for demand to grow again. It is a matter of deep concern to us that, in its Māori education strategy for 2008 to 2012, the Ministry's ambition is only to see the number of school students in 'Māori language education' remain at 2006 levels.[13] Either the Ministry is well aware of what appears to be an inexorable decline – indeed, it is already clearly failing to maintain the 2006 levels – or its own strategy follows the lack of ambition in the MLS.

In November 2007 (after the conclusion of our hearings), the Office of the Auditor-General reviewed the implementation of the MLS – although, understandably given the office's expertise, not its goals. The office observed that it was by no means certain that the key implementation milestones for 2008 (set in 2004) would be achieved. These targets, which were necessary to attain the limited MLS goals by 2028, were at this late stage going to be achieved only with 'sustained commitment to the Strategy and timely action by all lead agencies'.[14]

Both the Ministry of Education and Te Puni Kōkiri claim significant growth in te reo speakers on the basis of the latter's 2006 national Māori language survey. But this survey is contradicted by the 2006 Census. Its methodology has also been criticised by one of New Zealand's leading linguistics scholars.[15] In fact, there is now irrefutable evidence that the number of young Māori speakers of te reo (aged 0 to 9) is in decline both proportionately and in absolute terms. It is time officials grappled with this reality in policy and planning, and it is time Māori were advised.

Te Puni Kōkiri's 2003 *Māori Language Strategy*, a key document in our inquiry. Its vision is for te reo to be 'widely spoken' by Māori by 2028.

5.6.4 Appropriate resources

Just as the Government's Māori-language agenda has been deficient, so too have been the resources allocated to implementing it. Crown witnesses all stressed the limits of the funding available for protecting and enhancing te reo and its dialects. Perhaps the limits of their ambition in the MLS stemmed from these budgetary constraints, but it is quite possible that the equation is the other way around – that is, the limits of ambition have defined the limits of resources. Te Puni Kōkiri's failure to seek any new money in its budget 2006 is indicative of at least a degree of this.

There is an old Māori proverb: 'Mā te huruhuru, te manu ka rere' ('Birds can fly only with feathers'). In this context, the survival and growth of the Māori language requires sufficient resources. Just what is sufficient depends on a reasonable assessment of the cost of implementing the reo policies developed in partnership between the Crown and Māori – no more, no less. This calculation becomes more difficult when there are (and there always are) competing priorities for the same dollar. It is not our place to dictate which should take priority – hip replacements or reo teachers. It is sufficient for us to reiterate two important points of principle: te reo Māori is a taonga, the protection of which is guaranteed by the Treaty of Waitangi; and the Treaty itself is a constitutional

The 2007 report by the Office of the Auditor General, *Implementing the Māori Language Strategy*. The report paints a picture of lost opportunities due to poor communication and coordination, unrealistic expectations, and deprioritising within agencies.

instrument of overriding significance. Indeed, the Treaty is the source of the Crown's right to decide on priorities. All of this means, in our view, that in the competition for Crown resources te reo Māori must take a 'reasonable degree of preference'.[16]

Once the vision is in place and the programmes rolled out, Māori must use the facilities they have had a hand in building. If the Crown's resource is funding, the Māori resource is people. They must fill the kōhanga reo and the Māori-medium schools, and shift the Māori education demand curve back to its early 1990s trajectory. They must overcome the personality clashes that sometimes arise in kōhanga and kura communities and that inevitably impact on the tamariki. We acknowledge that these things can happen only in tandem with Crown provision of better infrastructure and more teachers. We also acknowledge that these changes will take time. But they will serve no purpose unless Māori return in numbers to Māori-medium education.

Māori educationalists and opinion leaders must be prepared to adopt an inclusive approach, including being ready to promote and use different education models. The fact is, not all parents want total immersion education in Māori. There is, according to the surveys and literature, a significant demand for bilingual models. Work needs to be done to ensure that that is a genuine option, rather than simply the model a school adopts when its teachers are not fluent enough in te reo for immersion.

We are aware of the argument that the Crown's spending on te reo should be focused more directly on communities where te reo is a common means of communication. We agree, but this must not mean the Crown reducing its focus on more 'mainstream' te reo resourcing. There is no future in an 'either/or' approach to funding if the language is to be protected.

5.6.5 Crown and Māori kōrero Māori

As the Privy Council found in the *Broadcasting Assets* case, 'Maori are also required to take reasonable action, in particular action in the home, for the language's preservation.'[17] While the classroom is a starting point, it is in the home and community that the language will truly live. Crown programmes have little influence over language choice in these domains. There is no alternative but for Māori to speak Māori in these environments, in particular to children, if te reo and its dialects are to survive and flourish. They must guard against complacency about the health of the language and overcome any whakamā (embarassment) they may feel in using it.

On the Crown's part, there needs to be a mind-shift away from the pervasive assumption that the Crown is Pākehā, English-speaking and distinct from Māori. More than ever the Crown now presents a Māori face to the nation and the world – in international relations, trade facilitation, diplomacy, peacekeeping. New Zealanders are following suit in the sporting arena and elsewhere. The fact that, as a young country, we have two founding cultures is one of our competitive advantages on the world stage, and we should use this to maximum effect. The Crown must lead by example: we cannot build our national identify on a superficial co-option of Māori culture.

In 1986, the Tribunal recommended that Māori speakers should be able to engage with all agencies of the State in te reo as of right. Little progress has been made on this front, even though the number of Māori speakers of te reo has increased from an estimated 81,000 in 1986 to 131,600 in 2006.

Of the 100 Government agencies surveyed by Te Puni Kōkiri in 2001, 18 said they had Māori-language plans. Four of these agencies provided their plans for assessment, but Te Puni Kōkiri approved only two of them. That is, 2 per cent of Government agencies in 2001 were able to demonstrate that they had acceptable Māori-language

plans. We presume that the overwhelming majority had taken no Māori-language planning steps at all. We understand that Te Puni Kōkiri surveyed Government agencies again in 2006, but the survey did not ask about Māori-language plans. We infer from this that even Te Puni Kōkiri is no longer focusing on Māori-speaking ability within the public sector.[18] If the core Māori agency does not see a Māori-speaking government as a priority, there can be no reason to expect the wider public sector to feel the need to do so.

This must change – even if a change in the law is required to achieve it. In fact we understand Cabinet agreed in 2003 to review the Maori Language Act, including those aspects relating to the language responsibilities of Crown agencies. The review did not proceed. It should now be revived.

The Maori Language Act as currently drafted does place obligations on courts and tribunals to facilitate the use of Māori in proceedings (section 4). The problem is there are practical barriers to exercising this right. Notice must be given, interpreters organised; indeed, to all intents and purposes, the use of Māori in proceedings operates on the same footing as the use of foreign languages. That is, the right is available but there are significant issues of practicability and convenience. Since most speakers of Māori can also speak English, the incentives to use the dominant language in proceedings will generally outweigh personal preference. Even in the Māori Land Court, where the parties are almost exclusively Māori, and te reo Māori is used often, there is no full-time infrastructure for simultaneous translation. If te reo Māori is not normalised even in this jurisdiction, we can only reflect on the scale of the impediments to its free use elsewhere.

As an example of positive steps being taken towards achieving a Māori-speaking government, officials referred us to Language Line, a translation-on-demand service for a number of Government agencies. We understand that, if the number is called, a fluent Māori speaker will reply to assist. But we were advised that the line is barely used by Māori. When pressed by counsel, the Crown's Māori-language witness accepted that getting through and finding assistance involved 'a bit of mucking around with the telephone'.[19]

The modern Māori-language revival is a generation old now. It is time to transform the theoretical right to engage with the Government in Māori into a practical reality.

A New Zealand passport. Te reo Māori has been used on the passport's inside pages since 1994 and on its cover since 2009.

5.7 Conclusion

When the Tribunal recommended in 1986 that:

- te reo Māori be made an official language of New Zealand;
- a supervisory body be established by statute to foster the use of the language;
- all children who wish to learn Māori be able to do so from an early age; and
- the Treaty obligations to protect te reo Māori be met in broadcasting policy,

and the Maori Language Act was passed the following year, te reo advocates may have felt that a sufficient regime would be put in place to revive te reo and ensure its survival as a living language.

However, in 2010 there must be a deep-seated fear for the survival of the reo. The number of speakers is down in the key younger age groups, and older speakers with the highest fluency – whose language comprises the unique tribal variations of te reo – are naturally declining in number. For all the rhetoric about forward progress, even the Crown's key witness conceded that there was still a need for 'life support'.[20]

Not only must there be a great concern about the language's health, therefore, and in particular the health of tribal dialects, but there must also be a deep unease about

the Crown's responses to that. In the late 1970s, after decades of Government neglect or worse, te reo had reached a time of crisis. But Māori action breathed new life into the language. In fact, so powerful was this Māori commitment to revitalisation that, in the 1980s and early 1990s, it practically knew no bounds. How else can one explain the growth, in just a decade, of the kōhanga reo movement from nothing to the scale of its operation in 1993? How else should one view the surveys at that time that showed enormous Māori demand for Māori-medium education? We suspect that, but for bureaucratic and political failure to capitalise adequately on this momentum, te reo Māori would not be in such a worrying state today.

The remarkable thing is that Māori do not know this story. The received wisdom is that the revival of te reo over the last 25 years is nothing short of a miracle – and there is an element of truth in that. But the notion that te reo is making steady forward progress, particularly amongst the young, is manifestly false.

The issue of teacher supply and education has clearly been central to the fate of the revival's momentum. In saying this, we are aware of the pitfalls of focusing exclusively on education. We understand the experts' view that focusing overly on formal education risks neglecting the home and community environment, where the language spoken in everyday life is a living tongue in every sense. However, we still believe that Māori language education is crucial. Children's focus is captured here, and where schooling is backed up by Māori-language broadcasting and support for those who wish to speak te reo in the home, it is a sphere where the Crown can make an enormous impact. The reality is, though, that the proportions participating in Māori-language learning in the education system, with the exception of the tertiary level, have declined since the 1990s. In 2010, it is vital that this be rectified.

Having criticised the lack of vision in the past, however, we are not convinced of its abundance today. Instead, we observe in the Māori education strategy a contentment to hold the status quo in the number of students in Māori language education in schools; an apparent ministerial satisfaction with a Maori Language Act that is clearly failing to advance the Government's own efforts to speak te reo; endless teaching scholarship plans that may be linked to perceived demand levels but are not necessarily linked to long-term goals about language health and vitality; and a language survey that may not be giving the most accurate information but has nevertheless provided opportunities for positive media statements. Bearing in mind that the vision is for the majority of Māori to speak te reo (albeit 'to some extent') by 2028, we wonder how strong the match-up is between the long-term goals and the current action.

One day, perhaps, there may be a Māori flight from the mainstream system to Māori immersion and bilingual learning, given the currently tentative indications of better educational outcomes for Māori children in that environment. Will the bureaucracy be prepared for that?

In sum, and with reference to the four principles required of the Crown in modern Māori-language policy, there has been:

- A failure of partnership, with Māori lacking meaningful input into (let alone control of) the key decisions being made about their own language.
- At best, only a belated move to develop policy that will help revive te reo and safeguard dialect. The gains made since 1980 owe more to the sheer power of the Māori-language movement than to Government action, and that movement has itself been weakened by the governmental failure to give it adequate support and oxygen.
- Inadequate priority accorded te reo in resourcing as a result of this policy failure.
- Failure by the Government itself to become more Māori-speaking and thus reflect the aspirations of a growing number of the citizens it represents.

By contrast, Māori have largely met their own obligations to te reo. As we have shown, at the time it really mattered, Māori were up for it. The momentum they generated was crucial, for Māori have a tendency to live up to the expectations they create of themselves – and in the 1980s and early 1990s that expectation clearly was to be Māori-speaking.

5.8 Reforms

The Government's Māori language agenda is not working. The decline in speaker numbers in key demographics and the dwindling proportion of young Māori participating in

1972: Māori language petition

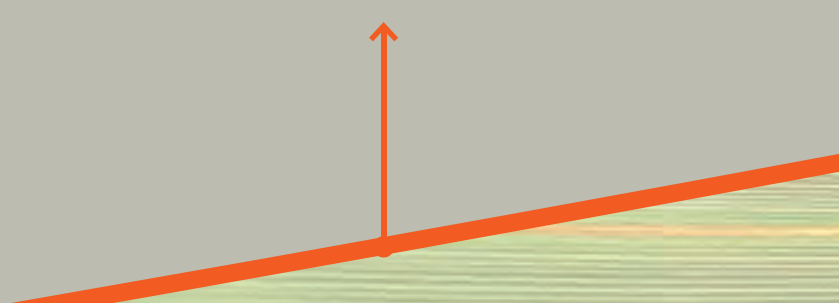
Members of Nga Tamatoa who participated in a three-week sit-in at Parliament in 1972 to protest about – amongst other things – the loss of te reo

1970

1972

TIMELINE: THE REVITALISATION AND RENEWED DECLINE OF TE REO MĀORI, 1970–2010

Te reo speakers: Growth and decline in speaking proficiency amongst Māori children



Two members of the Waitangi Tribunal, Chief Judge Edward Taihakurei Durie (left) and Paul Temm QC, visit a kōhanga reo at Waiwhetu, Lower Hutt (1985)

1977: First bilingual school at Rūātoki

1979: Te Ātaarangi established

1980: Māori Language Week March

1982: First kōhanga reo established in Wainuiomata

1977 — 1979 — 1980 — 1982 — 1983

Kōhanga reo: Growth and decline in kōhanga reo enrolments

Late **1970s:** Estimated that fewer than 100 Māori children under five fluent in te reo

1982: First kōhanga reo established

1983: 4,132 children in 170 kōhanga; 33 per cent of all Māori children in early childhood education at kōhanga

1985: Pita Sharples speaking at the opening of Te Kura Kaupapa Māori o Hoani Waititi

1986: Release of the *Report of the Waitangi Tribunal on the Te Reo Maori Claim*

1987: Te Upoko o te Ika Māori Radio Station launched

1987: Maori Language Act passed

1984 | 1985 | 1986 | 1987 | 1989

1989: 8,724 children in 470 kōhanga; 44 per cent of all Māori children in early childhood education at kōhanga

1986: An estimated 700 Māori children under 10 speak te reo

1987: Fifty primary schools offering Māori-medium education; 3 per cent of all Māori primary school students in Māori-medium education

1995: Stamps marking Māori Language Year

1996: Census form released in te reo

1990 | 1991 | 1992 | 1993 | 1995 | 1996

1991: 261 primary and 54 secondary schools offering Māori-medium education

1992: 17,426 students in Māori-medium education; 12.5 per cent of Māori students in Māori-medium education

1993: 14,514 children in 809 kōhanga; 49.2 per cent of all Māori children in early childhood education at kōhanga

1995: 25,284 students in Māori-medium education; 15.9 per cent of Māori students in Māori-medium education

1996: 10,500 (21.9 per cent) of Māori aged 0–4 in census speak te reo

Māori-medium education: Growth and decline in Māori-medium schooling enrolments

1999: The incorporation of the guiding philosophy of the kura kaupapa Māori movement, Te Aho Matua, into the Education Act

2003: Release of the *Māori Language Strategy*

Te Rautaki Reo Māori

The Māori Language Strategy

1998 | 1999 | 2000 | 2001 | 2002 | 2003

1999: 30, 793 students in Māori-medium education; 455 schools offering Māori-medium education; 18.6 per cent of Māori students in Māori-medium education

2001: 9,765 (19.9 per cent) of Māori aged 0–4 in census speak te reo

2002: 10,389 children in 545 kōhanga; 31.6 per cent of all Māori children in early childhood education at kōhanga

2004: Launch of Māori Television

2009: Number of kōhanga drops to 464

2004 2006 2008 2009 2010

2006: 8,910 (18.2 per cent) of Māori aged 0–4 in census speak te reo

2008: 9,165 children in 467 kōhanga; 23.4 per cent of all Māori children in early childhood education at kōhanga

2009: 28,231 students in Māori-medium education; 394 schools offering Māori-medium education; 15.2 per cent of Māori students in Māori-medium education

Māori-medium education do not justify claims of success, despite advances in areas such as Māori language broadcasting. Most of the key indicators show that the language is currently going backward. The Government has clearly now recognised that there is a problem by appointing an independent panel of language experts to thoroughly review the te reo Māori strategy and spend. We do not have the panel's expertise in this field and have no desire to pre-empt their deliberations. It is of course open to them, however, to take account of our views in the course of their own inquiry.

We believe action is urgently needed to turn the negative statistics around. It will not be easy, and results will not come overnight, but such has been the plight of te reo over the last decade that it cannot afford more of the same. It is with this sense of urgency that we make our provisional recommendations for reforms. We make no apology for the fact that these recommendations are far-reaching. Simply, the gravity of the situation calls for proportionate action.

In sum, we recommend that four fundamental changes occur:

- Te Taura Whiri should become the lead Māori language sector agency. This will address the problems caused by the lack of ownership and leadership identified by the Office of the Auditor-General.
- Te Taura Whiri should function as a Crown–Māori partnership through the equal appointment of Crown and Māori appointees to its board. This reflects our concern that te reo revival will not work if responsibility for setting the direction is not shared with Māori.
- Te Taura Whiri will also need increased powers. This will ensure that public bodies are compelled to contribute to te reo's revival and that key agencies are held properly accountable for the strategies they adopt. For instance, targets for the training of te reo teachers must be met, education curricula involving te reo must be approved, and public bodies in districts with a sufficient number and/or proportion of te reo speakers and schools with a certain proportion of Māori students must submit Māori language plans for approval.
- These regional public bodies and schools must also consult iwi in the preparation of their plans. In this way, iwi will come to have a central role in the revitalisation of te reo in their own areas. This should encourage efforts to promote the language at the grassroots.

Central to these recommendations is a greater role for Te Taura Whiri, as originally intended under the Maori Language Act. It has the expertise and the singular focus upon te reo that equip it for such a role. Moreover, its governance by an appointed board creates the opportunity for a partnership platform for Māori and the Crown. In short, Te Taura Whiri should lead the Māori-language sector and be run by a board appointed by both Māori and the Crown.

We recommend that the new Te Taura Whiri have the authority to require and approve Māori language plans of the following public agencies and authorities:

- all central government agencies;
- all local authorities, district health boards and regional branches of central government in local body districts where the census shows a sufficient number and/or percentage of te reo speakers in the population;
- all State-funded schools (other than kura kaupapa and other immersion schools) with at least 75 students, of whom at least 25 per cent are Māori; and
- all State broadcasters, as well as any other broadcasters drawing on Te Māngai Pāho funds.

In addition, Te Taura Whiri should approve all early childhood, primary and secondary curricula involving te reo, as well as all level 1 to 3 tertiary te reo courses. It should also set targets for the training of Māori language and Māori-medium teachers and require and approve plans from teacher training institutions showing how they will meet these targets.

Both the authorities and agencies in districts that meet the speaker threshold and schools that have the required Māori student population must consult with local iwi in the formulation of their plans. In this way we believe that iwi language planning will become implemented in the instrumentalities of the State. We also note the strong desire in certain Māori communities for local control,

and make the tentative suggestion that the kōhanga reo in any tribe's rohe be allowed (with a 75 per cent majority) to secede from the Kōhanga Reo National Trust and come under the administration of the iwi authority. That is of course a matter for Māori rather than the Crown.

Finally, we recommend that Te Taura Whiri offer a dispute-resolution service to kōhanga and kura whānau to ensure that the occasional conflicts we have mentioned cause as little disruption to children's learning as possible.

These reforms may appear challenging. The question, however, is whether we as a nation wish to preserve te reo as a living language or not. If we do, our recommendations merely reflect the urgency of the situation and the pressing need for further change. They also need not necessarily come at great extra cost, since reprioritisation may well address most new expenditure.

Into the future, as New Zealand becomes more ethnically diverse, it is likely that our indigenous culture can help unify us and define our national identity. Te reo Māori will be a critical aspect of this. It needs to remain strong enough to play this role.

5.9 Summary of Recommendations

Clearly, the Government's Māori language agenda is not working. Most of the key indicators show that the language is currently going backward. We therefore provisionally recommend that:

1. A revamped Te Taura Whiri become the lead Māori language sector agency, as intended in the Maori Language Act and as befits the agency's expertise and singular focus.
2. Te Taura Whiri function as a Crown–Māori partnership through the equal appointment of Crown and Māori appointees to its board. Refer to *Ko Aotearoa Tenei: Te Taumata Tuarua* for more detail on how the appointment process could work.[21]
3. Te Taura Whiri have greater powers, including:
    - the authority to require and approve Māori language plans of the following public agencies and authorities:
        - all central government agencies;
        - all local authorities, district health boards, and regional branches of central government in local body districts where the census shows a sufficient number and/or percentage of te reo speakers in the population;
        - all State-funded schools (other than kura kaupapa and other immersion schools) with at least 75 students, of whom at least 25 per cent are Māori; and
        - all State broadcasters, as well as any other broadcasters drawing on Te Māngai Pāho funds.
    - and the authority to:
        - approve all early childhood, primary and secondary curricula involving te reo, as well as all level 1–3 tertiary te reo courses; and
        - set targets for the training of Māori language and Māori-medium teachers and require and approve plans from teacher training institutions showing how they will meet these targets.
4. Both the authorities and agencies in districts that meet the speaker threshold, and schools that have the required Māori student population, consult with local iwi in the formulation of their plans. In this way, iwi language planning will effectively become implemented in the instrumentalities of the State.
5. Te Taura Whiri offer a dispute-resolution service to kōhanga and kura whānau to ensure that the occasional conflicts that occur disrupt children's learning as little as possible.

We also make a tentative suggestion to address the strong desire in certain communities for local control. Perhaps the kōhanga reo within any iwi's rohe could be allowed (with a 75 per cent majority) to secede from the Kōhanga Reo National Trust and come under the control of the local iwi authority. This is of course a matter for Māori rather than the Crown, but we raise it nonetheless.

Text notes

1. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, sec 5.2.3
2. Papers 2.538, 2.537, and 2.540 respectively.
3. Steven (Tipene) Chrisp, under cross-examination by counsel for Ngāti Koata, twenty-first hearing, 25 January 2007 (transcript 4.1.21, p 343)
4. Document R33(j) (Te Puni Kōkiri and Te Taura Whiri, *Te Rautaki Reo Māori – The Māori Language Strategy* (Wellington: Te Puni Kōkiri, 2003)), p 5
5. We use 2008 here because we do not know the number of Māori children in licence-exempt early childhood services in 2009.
6. The peak in actual Māori student numbers in Māori-medium education did not come until 2004. However, even this high point represented further decline in the proportion of Māori students in immersion and bilingual learning. Moreover, the total number of Māori students has declined each successive year since 2004.
7. See Waitangi Tribunal, *Ko Aotearoa Tenei: Te Taumata Tuarua*, vol 1, sec 4.4.7
8. Document R33(cc) (Cabinet Policy Committee, 'Revised Māori Language Strategy', minute of decision, POL Min (03) 17/13, 23 July 2003), p 1
9. This is because the surveyed rate of actual participation in Māori-medium education was considerably higher than what we know to have been the case in these two years. It is of course also possible some caregivers told the survey-takers what seemed the 'right' answer about their preferred schooling for their children.
10. Te Puni Kōkiri, *Te Tūāoma: The Māori Language –The Steps that Have Been Taken* (Wellington: Te Puni Kōkiri, 1999), p 11
11. Document R33(j), pp 19, 25. Te Puni Kōkiri's 2001 survey recorded that 42 per cent of Māori could speak te reo 'to some extent', a category which included those who spoke te reo 'very well', 'fairly well', and 'not very well' (ie, anyone who could speak more than a few phrases). In the 2006 survey, the same level was described as 'some degree of speaking ability', and had climbed to 51 per cent of Māori: see doc R33(a) (Te Puni Kōkiri, *The Health of the Māori Language in 2001* (Wellington: Te Puni Kōkiri, 2002)), p 20, and Te Puni Kōkiri, *The Health of the Māori Language in 2006* (Wellington: Te Puni Kōkiri, 2008), p iv.
12. Te Puni Kōkiri, *A Shared Vision for the Future of Te Reo Māori* (Wellington: Te Puni Kōkiri, March 2003), pp 6, 8
13. Ministry of Education, *Ka Hikitia – Managing for Success: The Māori Education Strategy*, 2009 update (Wellington: Ministry of Education, 2009), p 35
14. Document R33(yyyy) (Controller and Auditor-General, *Implementing the Māori Language Strategy* (Wellington: Office of the Auditor-General, November 2007)), p 20
15. Winifred Bauer, 'Is The Health of Te Reo Māori Improving?', *Te Reo: The Journal of the Linguistic Society of New Zealand*, vol 51 (2008)
16. This phrase is taken from the Court of Appeal's decision in what is known as the *Whales* case, where Ngāi Tahu were entitled to have a 'reasonable degree of preference' over other ventures seeking a licence for whale-watching operations at Kaikoura: *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 554.
17. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 519 (PC)
18. Even the Māori Language Strategy contains no explicit goal in relation to a Māori-speaking government, although it does include Government agencies as a targeted domain for increasing Māori language use. The Office of the Auditor-General noted that both Te Taura Whiri and Te Puni Kōkiri staff viewed providing public services in te reo as having a lower priority compared to other MLS goals.
19. Steven (Tipene) Chrisp, under cross-examination by counsel for Ngāti Koata, twenty-first hearing, 25 January 2007 (transcript 4.1.21, p 346)
20. Steven (Tipene) Chrisp, under questioning by the presiding officer, twenty-first hearing, 25 January 2007 (transcript 4.1.21, p 362)
21. Waitangi Tribunal, *Ko Aotearoa Tenei: Te Taumata Tuarua*, vol 2, sec 5.6.2

Whakataukī notes

Page 150: Wade Davis, *Light at the Edge of the World: A Journey Through the Realm of Vanishing Cultures* (Vancouver: Douglas and McIntyre, 2001), p 13

Page 151: Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 4th ed (Wellington: GP Publications, 1996), p 34

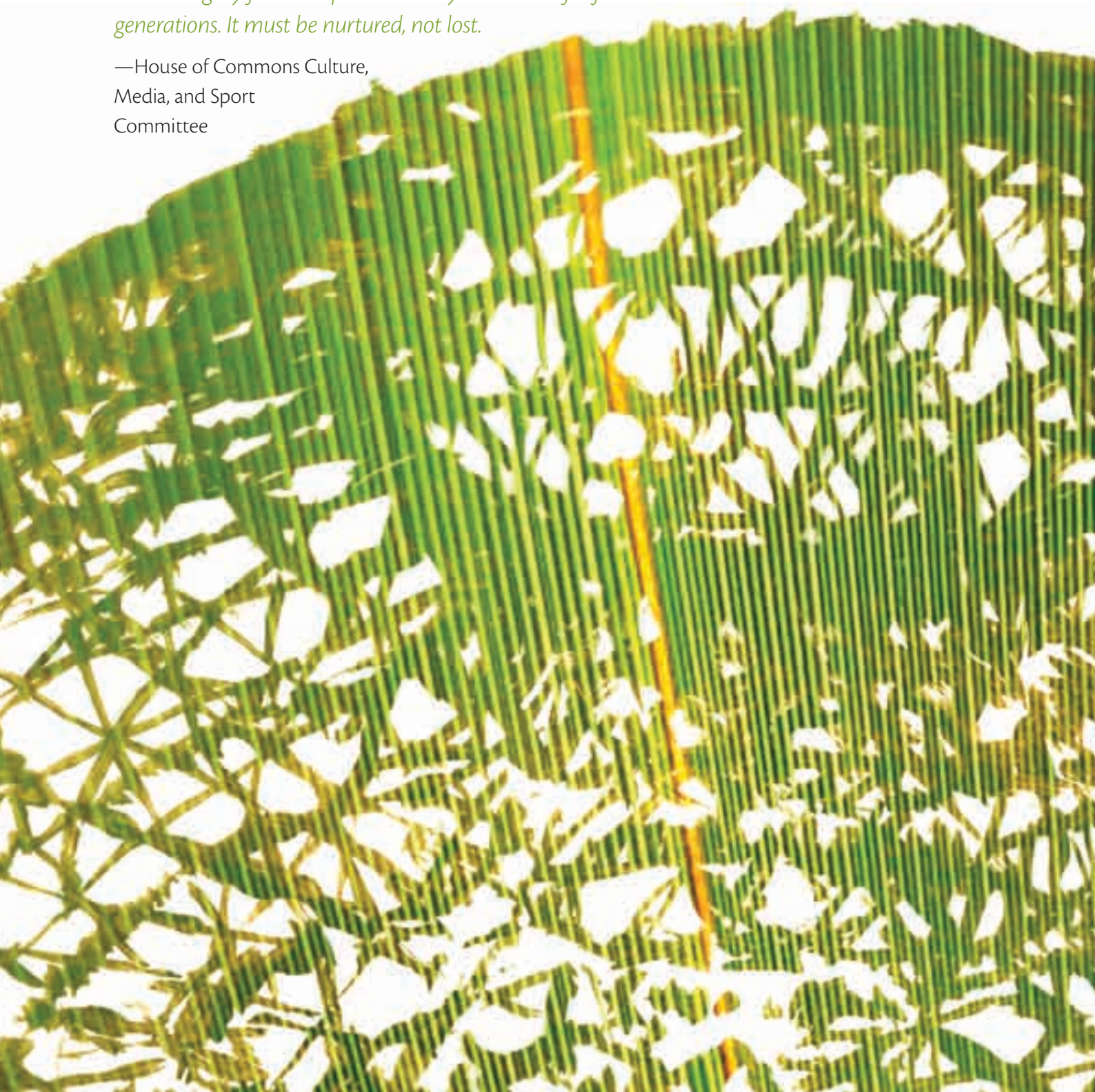
Timeline notes

Figures in the timeline are either taken from the text or from Lisa Davies and Kirsten Nicholl, *Maori i Roto i nga Mahi Whakaakoranga: Maori in Education – A Statistical Profile of Maori Across the New Zealand Education System* (Wellington: Ministry of Education, 1993).

Downloaded from www.waitangitribunal.govt.nz

The rich legacy from the past is held by us on trust for future generations. It must be nurtured, not lost.

—House of Commons Culture, Media, and Sport Committee



6

WHEN THE CROWN CONTROLS MĀTAURANGA MĀORI

Ko te manu kai miro, nōna te ngāhere,
ko te manu kai mātauranga, nōna te ao.

The bird that eats miro inherits the forest,
but the bird that eats traditional knowledge
inherits the world.

Archives New Zealand holds over 4 million records dating from 1840 to the present day. Numerous records contain mātauranga Māori, whether in the form of correspondence from Māori leaders to government ministers and officials, or Crown records regarding Māori leaders, communities, and land.

CHAPTER 6

WHEN THE CROWN CONTROLS MĀTAURANGA MĀORI

6.1 Introduction – The Mātauranga Māori Agencies

This chapter relates to a number of the Crown agencies and entities that are responsible for the protection, preservation, and/or transmission of mātauranga Māori. They include the Ministry for Culture and Heritage and the agencies within its sector: Creative New Zealand, the Museum of New Zealand Te Papa Tongarewa (Te Papa) and Television New Zealand (TVNZ). The chapter also deals with the organisations responsible for New Zealand's documentary heritage: Archives New Zealand, the National Library, and, again, TVNZ. In addition, it addresses the roles of the Ministry of Education and the New Zealand Qualifications Authority (NZQA) in overseeing education delivery, and the policies of the Ministry of Research, Science, and Technology (MORST) in respect of the relatively substantial research funding pool. We make some comment on Te Puni Kōkiri's work in the area of mātauranga, too.

We also touch on the work of a number of Crown entities that did not present evidence but whose work is highly relevant: Radio New Zealand, the Lottery Grants Board, New Zealand On Air, the Foundation for Research, Science and Technology (the foundation), and the Health Research Council. Since they were not part of our inquiry,[1] we make no findings about them.

Of course there are other agencies that have a role in the support, oversight, ownership, and custody of mātauranga Māori, and we deal with a number of them elsewhere. For example, the Department of Conservation provides administrative support for the Mātauranga Kura Taiao Fund (described in *Ko Aotearoa Tēnei: Te Taumata Tuarua*[2]), a ministerial fund which is focused on the preservation and transmission of mātauranga Māori in biodiversity management, and the Ministry for the Environment funds programmes aimed at identifying and maintaining mātauranga Māori in respect of environmental management. The Ministry of Health does likewise in regard to rongoā Māori. Cross-agency support for the revival of te reo Māori necessarily involves support for mātauranga Māori.[3] In fact, every agency that appeared in our inquiry, and doubtless most that did not appear, are these days required to work with mātauranga Māori to some extent in performing their functions. But in most of these agencies, mātauranga Māori is incidental to their core business.

By contrast, for the agencies considered in this chapter – all of which operate in the field of culture and identity in some way – mātauranga Māori is at the heart of what they do. All of them engage actively and explicitly with mātauranga Māori as part of their work. MORST, for example, has a 'Vision Mātauranga' policy. Te Papa has a mātauranga Māori strategy. As custodian of significant mātauranga Māori material, Archives New

Zealand has deliberate policies in place for dealing with it. By considering the claims about these agencies together, both individually and within their sectors, we have been able to see more clearly both the problems they confront with respect to mātauranga Māori, and some solutions to them.

Before going further, we will briefly introduce the agencies themselves. We have divided them into three sectors, as follows:

- the culture and heritage agencies;
- the education agencies; and
- the research, science and technology agencies.

6.1.1 The culture and heritage agencies

The importance of the culture and heritage agencies to the survival and transmission of mātauranga Māori is immense. Through several of these agencies, the Crown is, in legal terms, the owner of the various artefacts and media (such as films and manuscripts) within or upon which the mātauranga sits – and so is the de facto custodian of the mātauranga itself. In other cases, the Crown funds the perpetuation of certain mātauranga-based arts or the advancement of new ones. The Crown also provides the means by which many Māori can be exposed to their culture, be that via broadcasting or the upkeep of marae.[4] The significance of these roles to Māori, indeed to the country, cannot be overstated.

These agencies' work around mātauranga Māori operates in four loosely distinct spheres: moveable cultural heritage (artefacts); documentary heritage; broadcasting; and funding for the creation and presentation of taonga works. Some agencies have functions across more than one of these areas. We describe each of the agencies in turn.

The Ministry for Culture and Heritage is responsible for the Crown's activities across a wide range of matters related to what might loosely be called national identity. As the lead agency in the area of arts, culture, and heritage, it advises its Minister on policy; funds and monitors the performance of certain Crown agencies within its purview, such as Creative New Zealand and Te Papa; and has some operational functions, including (and importantly for this sector) administration of the protected objects regime. The Ministry also disburses money directly to

The Museum of New Zealand Te Papa Tongarewa. Te Papa holds the world's largest collection of taonga Māori artefacts.

Items such as the wharenui Te Hau ki Tūranga (left) and Te Takinga Pātaka show the great value and variety of taonga held by Te Papa.

certain arts organisations such as the Royal New Zealand Ballet, the New Zealand Symphony Orchestra, and Te Matatini Society Incorporated, the body which organises the biennial national kapa haka championship. The Ministry has departmental expenditure of around $14 million annually, but the amount it disburses to other agencies and organisations for cultural and heritage activities is around $260 million. It is this disbursement function that makes the Ministry's role so important. The Ministry employs approximately 100 staff.

Te Papa in Wellington is the only museum in New Zealand that is a Crown entity, and it is partly Crown- and partly self-funded. It is a modern museum both in its style of presentation and in the way in which it is managed. It holds the world's largest collection of taonga Māori artefacts, ranging from the iconic nineteenth-century carved house Te Hau ki Tūranga to humble stone fragments. It also includes a vault containing the human remains of Māori, which have largely been returned from overseas collections and are held in a manner respectful of tikanga Māori. Te Papa is an extremely important repository of mātauranga Māori.

Creative New Zealand (otherwise known as the Arts Council) is funded roughly equally by the Ministry for Culture and Heritage and the Lottery Grants Board. It in turn distributes this money to professional arts organisations that it funds on a recurrent basis; to local authorities, which fund around 2,500 community arts projects annually; and to roughly 500 of the well over 1,000 projects that bid for funds from its contestable funding pools each year.

Over the years, it has had several boards or committees that make these funding decisions, the principal amongst them being the Arts Board and Te Waka Toi.[5] The former has had a general role and the latter has specifically funded Māori projects. The current Government has signalled an intention to roll these various boards and committees into one, with a guaranteed minimum of four Māori members out of thirteen. What this means exactly for the funding distributed by Te Waka Toi is unclear (Te Waka Toi has allocated 12 per cent of the contestable project funding offered by Creative New Zealand). Among other things, Te Waka Toi has offered overseas residencies to Māori artists; developed a 'Tohunga Tukunga' programme aimed at funding expert carvers, weavers, and others to pass on their skills to younger artists; and had another programme, called 'Toi Ake', aimed at developing art on an iwi basis.

TVNZ is the successor (along with Radio New Zealand) to the New Zealand Broadcasting Corporation. It is a Crown entity operating as both a commercial and a public broadcaster across several television channels, and is a key purveyor of culture through this core broadcasting function. From 2003 it had a charter agreement with ministers that required it to promote New Zealand identity and culture in its programming, including 'the presence of a significant Māori voice'.[6] The current Government, however, has decided to remove the charter from the legislation and replace it with a more open-ended set of obligations which include the screening of content that 'reflects Māori perspectives'.[7]

Radio New Zealand, also a Crown entity, is a fully public broadcaster. It is funded principally by New Zealand On Air (the trading name of the Broadcasting Commission), which has funding dedicated to promoting locally-made content on New Zealand television and radio. Radio New Zealand has a charter agreement with shareholding ministers which obliges it to provide

'programmes which reflect New Zealand's cultural diversity, including Maori language and culture'.[8]

Radio New Zealand and TVNZ also maintain archives which are significant repositories of mātauranga Māori. Some of the film and television footage in TVNZ's archive dates back to the New Zealand Broadcasting Corporation era, and some was acquired when TVNZ purchased the National Film Unit in 1990. Altogether, its archives measure 20 kilometres of shelving. Aside from the film reels, they include one million video items and 500,000 music recordings. Films and images relating to Māori people, including living images of experts, practitioners, and performers explaining, describing, and showing aspects of mātauranga Māori, form a large part of the collection. It is acknowledged by TVNZ to be priceless. Radio New Zealand's archive is called Sound Archives/Ngā Taonga Kōrero. This includes some 14,000 lacquer discs, 20,000 open reel tapes, and 10,000 analogue and digital tape cassettes. The Māori part of this collection – Ngā Taonga Kōrero, which is held in Auckland – includes recordings of a very large number of Māori cultural events.

Archives New Zealand was until late 2010 a stand-alone Crown agency responsible for the care and storage of all government records (under section 11 of the Public Records Act 2005), but it has now been folded back into the Department of Internal Affairs. Its archives fill 96 kilometres of shelf space. It holds 21,500 motion picture reels, and a total of 4.4 million separate files and other records, including the surviving drafts of the Treaty of Waitangi. It is impossible to know how much of the archive is or contains mātauranga Māori, but the then chief archivist, Dianne Macaskill, told us that the mātauranga Māori material in the care of Archives New Zealand is substantial indeed.

The National Library includes the Alexander Turnbull Library. It is the storehouse of the nation's knowledge. Overall, the National Library has a collection of 2.9 million books, 4.5 million photographs and negatives, and 100,000 paintings and drawings, nine kilometres of manuscript shelf space, and myriad other documents, including newspapers, CDs, serials, ephemera items, and an increasing number of documents stored in electronic form. Although its collection is international, it has a particular focus on material relating to New Zealand, and

Part of the Pacific collection at the National Library. These are some of the many books in the library's collection which contain Māori subject matter.

one of its aims is to make its collection available to all the people of New Zealand.[9] The National Library is, among other things, a vast repository of mātauranga Māori.

Like Archives New Zealand, in late 2010 the National Library was integrated into the Department of Internal Affairs. In the interests of completing this report it was not possible to provide further updates on this situation beyond the end of 2010. We are unsure, for example, whether there will be any effect on current arrangements concerning mātauranga Māori, since at the time of writing ongoing consideration was being given to the existing Māori-focused staff positions and internal Māori advisory groups serving these repositories. This report should inform those considerations.

Finally, the Lottery Grants Board, which also operates under the auspices of the Department of Internal Affairs, has a Marae Heritage and Facilities Fund. Part of this fund, which has grown to around $8 million, is applied annually to the conservation of marae artworks, and the bulk of the fund is used for the construction of new marae buildings. This funding thus contributes both to the creation of Māori cultural infrastructure and to the preservation of Māori heritage.

6.1.2 The education agencies

One of the features of New Zealand education in the last 20 years has been the drive to integrate mātauranga Māori into learning at all levels. As a result, various aspects of mātauranga Māori are packaged and delivered on a daily basis to hundreds of thousands of New Zealanders, Māori and non-Māori alike, from pre-schools to universities. This must be seen as a significant and positive development. One of its unavoidable effects is that the Crown, as the funder and largest provider of education in New Zealand, must oversee the interpretation and transmission of mātauranga Māori wherever it occurs within the state-funded education system. There is now deep Māori interest both in how much control the Crown has over mātauranga Māori education and in the way it exercises that control. This is a different matter from the teaching of te reo in our education system, with which we have dealt in chapter 5.

The two agencies we focus on here are the Ministry of Education, the lead agency with overall responsibility for the education system, and NZQA, which oversees the system of academic and vocational qualifications.

6.1.3 The research, science, and technology agencies

In December 2010, the Government passed legislation to merge MORST and the foundation into a new Ministry of Science and Innovation. Again, in the interests of completing our report it was not possible to provide a full update of these changes, and so our focus here is necessarily on the situation existing before the passage of legislation. While some details will have changed, the thrust of our analysis should remain unaffected.

The Crown's research, science, and technology sector operates under a three-tiered system. The Minister, on advice from MORST, sets policy for the Crown's support of the sector. Beneath MORST, but independent of it, are three funding agencies which must give effect to that policy through their oversight of the approximately $720 million annual research budget. Those agencies are the foundation, the Royal Society of New Zealand (which, though not a Crown agency, has an important role in allocating Crown research funding), and the Health Research Council.

In their respective areas of responsibility, these three agencies distribute funds to research organisations enabling them to embark on research in a wide range of subjects relating to science and technology. Funded organisations include Crown research institutes, tertiary education institutes, private firms, and community organisations. The amount specifically tagged for mātauranga Māori-related research is small, at less than one per cent of the total. The Ministry has developed a specific policy in respect of this issue called 'Vision Mātauranga'.

6.1.4 Te Puni Kōkiri

Te Puni Kōkiri is a small policy ministry with limited operational capacity. We treat it separately from the agencies described above for two reasons. First, the funds it disburses range across all three sectors. Secondly, its focus on mātauranga Māori extends across almost the entire organisation. Its position is unique in this respect. More specifically, it has a policy workstream on mātauranga Māori, 'mātauranga' is one of the three themes of its overall strategic direction, and it operates a $23 million fund

that annually distributes money to hundreds of projects involving the transmission or preservation of every conceivable aspect of mātauranga.

6.1.5 Summary

In greatly summarised form, we have described the Crown agencies we deal with in this chapter. We turn now to our framework for analysis, which is underpinned by the concepts of shared responsibility, reasonable limits on the Crown's obligation, and partnership for Crown agencies and kaitiaki.[10] That is, we outline why Māori and the Crown share responsibility for the preservation and transmission of mātauranga, why the Crown must, however, balance other valid interests, and the key principles that should apply in the creation of viable new models of Crown–Māori partnership in the culture and heritage, education, and research, science, and technology sectors.

6.2 Framework for Analysis

6.2.1 A shared responsibility

We have by now firmly established that mātauranga Māori is a taonga and thus subject to article 2 protection by the Crown under the Treaty. No one can reasonably deny this. But in saying this, we must also emphasise that Māori are the kaitiaki of their own mātauranga and it cannot survive without them. The Crown certainly cannot – and should not – assume that role for itself. Rather, the Crown must support Māori leadership of the effort to preserve and transmit mātauranga Māori, with both parties acting as partners in a joint venture.

There are three reasons why – even with concerted effort – Māori cannot succeed without this state support. These relate to the fact that, first of all, Māori no longer live in relatively closed village communities, with access to tohunga and traditional knowledge as part of everyday existence. Today, Māori are a highly urbanised and even globalised people, with this dispersal often caused by economic and social circumstances well beyond whānau control. Secondly, the quite severe impact of past state policies that actively sought – even with some Māori complicity – to undermine mātauranga Māori cannot be easily undone. Thirdly, in today's society, the transmission of all forms of national arts and culture – from ballet to broadcasting – could not occur without state support and, indeed, intervention. Without local content quotas, subsidies, and the like, local culture would be heavily displaced by global culture.

There are two other reasons why state involvement in the preservation and transmission of mātauranga is essential. The first is that Māori culture has become an intrinsic aspect of New Zealand culture and identity, and thus support for mātauranga is of benefit not just to Māori but to us all. Without a vibrant Māori culture, New Zealand would lose a key plank of its uniqueness and sense of identity. The other reason relates to the way the country is changing demographically. As Māori become an ever larger proportion of the New Zealand population, then Māori culture must become ever more 'mainstream'. As part of this process, the Crown itself must develop an increasingly Māori complexion.

6.2.2 Reasonable limits on the Crown's obligation

There are of course reasonable limits on the Crown's obligation. As Crown counsel and Crown witnesses are wont to remind us, the Crown's obligation to Māori must be constrained by limited funds, competing priorities, and the wider public good. The legitimate rights and expectations of others must also be considered. These will include, for example, private property rights in physical taonga and manuscripts.

The arts and broadcasting often struggle to make headway in the competition for Government resources, as do heritage-based agencies such as museums and libraries. This will necessarily limit the amount available for mātauranga Māori-related programmes in those areas.[11] On the other hand, a scarcity of funds accentuates the need for each agency to establish clear objectives for expenditure, and for agencies operating in the same field to co-operate.

Similarly, there is clear tension between the expectation of kaitiaki that they should control access to iwi- or hapū-based mātauranga Māori held, for example, in the National Library or Archives New Zealand, and the broader principle – fundamental in any free society – of open access to information held by the State. The idea that kaitiaki should have some control over their own mātauranga Māori makes sense at one level. Nevertheless, many of the beneficiaries of open access to such information

Archaeological dig, Cook's Cove, Tolaga Bay, November 2007. The process for determining the ownership of items found during such excavations is set out in the Protected Objects Act 1975.

are Māori themselves who cannot, for whatever reason, access the material via kaitiaki. We must therefore find new ways of resolving these tensions so that rules developed in the name of rangatiratanga do not have the unintended effect of distancing Māori from their mātauranga.

The treatment under the Protected Objects Act 1975 of taonga tūturu or Māori artefacts found in New Zealand provides a further example.[12] Around 180 of these items are found annually. Kaitiaki argue forcefully that the law should recognise Māori title to taonga tūturu, no matter who finds them. Kaitiaki argue that unless there is clear evidence the item is no longer Māori owned, interim title should be vested in the tangata whenua of the place where it is found, not in the Crown. There is much to commend this principle. The law, however, makes the Crown the interim ('prima facie') owner and puts the onus on kaitiaki to apply for title to the chief executive of the Ministry for Culture and Heritage.[13] While at first glance this appears unfair, the Crown has the advantage of expertise in the care of these items, the facilities to store them, and the money to fund ongoing care. Few iwi and even fewer hapū have this capacity. There is a real risk that recognition of presumptive title in the tangata whenua will serve only to endanger the physical integrity of very fragile taonga. This is perhaps one example where the principle would favour Māori empowerment, but practicalities must in most cases outweigh it.

The point of balance between these competing considerations may well be found in concepts of conditional title such as Crown trusteeship, and in custody partnerships – that is, shared responsibility between the relatively resource-rich Crown and iwi whose spiritual and emotional investment in the mātauranga is much greater.

These examples serve to make the point that there are nearly always other interests to be balanced which set reasonable limits on the Crown obligation. There can be no single rule. Each case has its own context, and each context helps us to define the appropriate limits. What is common to all cases is the need to identify these wider or competing interests and to carefully weigh them.

6.2.3 A principled and co-ordinated approach

We recommend that a series of principles apply to the establishment of viable partnership models between Māori and the Crown in the retention and transmission of mātauranga Māori. While each case will vary, we think that Crown co-ordination, appropriate prioritisation, sufficient resourcing, and shared objective-setting with Māori are all needed to ensure success. These 'working principles' would allow for the practical application of the higher-level principles of good Crown conduct articulated over the years by the courts and the Waitangi Tribunal.

Some of these working principles particularly stand out. Crown co-ordination, for example, is of great importance, given the number of agencies within each sector and the ensuing danger that they will pull in different directions. Agencies should not just avoid duplication of effort, but should be conscious of their own roles within broader mātauranga strategies. Given the size of the culture and heritage sector, we accept that this co-ordination may need to take place at sub-sectoral level – say between the broadcasting, archival, arts, and antiquities agencies respectively. But that may not obviate the need for general sectoral co-ordination on overall and shared goals for mātauranga Māori.

At whatever level of co-ordination they operate, agencies must set objectives in partnership with Māori, and steps must be taken to identify the appropriate representatives of the Māori Treaty partner. Amongst the sectors we cover in this chapter there are a number of advocates, lobby groups, and experts for the relevant areas of mātauranga who lend themselves to being grouped into electoral colleges. But true partnership requires engagement with the non-specialist Māori community rather than just the 'usual suspects'. Moreover, the varied nature of the three sectors covered in this chapter means that a different formula will be needed to establish partnership arrangements in each case.

Having set out our framework for analysis of shared responsibility, reasonable limits on the Crown's obligation, and co-ordinated partnership, we now proceed to assess the performance of the mātauranga agencies. In doing so, we particularly apply the principles for Crown–Māori partnership in the retention and transmission of mātauranga.

6.3 A Sector-by-Sector Analysis

Beginning first with the culture and heritage sector and then turning to education and research, science, and technology, we discuss in brief the agencies' current objectives, programmes, and sums expended on mātauranga Māori. Following that we outline any partnership processes they currently have in place for engaging with Māori. After briefly relating the claimants' concerns about these agencies, and the Crown's response to those contentions, we conclude with our analysis of the agencies' performance and our proposals for change. Our suggested reforms should lead to genuine Crown co-ordination and partnership arrangements and, as a result, corresponding benefits for mātauranga Māori.

6.3.1 Culture and heritage agencies

(1) *Current objectives, programmes, and expenditure*

For our description of the current objectives and processes of the culture and heritage agencies, we once again distinguish between those agencies involved in: moveable cultural heritage; documentary heritage; broadcasting; and funding the creation and presentation of taonga works.

Some agencies, such as the Ministry for Culture and Heritage, of course appear under more than one of these headings. In order not to lose sight of the Ministry's overall objectives and the full range of its functions, therefore, we begin with a note about its strategic focus.

(a) the ministry for culture and heritage

As already noted, the Ministry for Culture and Heritage has a direct involvement in arts and culture funding and moveable cultural heritage. It also has oversight of the Government's interests in broadcasting, channelling funds to Radio New Zealand (specifically for Radio New Zealand International), New Zealand On Air and, until recently, TVNZ. It undertakes a few other operational activities, such as funding Māori oral history projects, sponsoring and hosting a Fellow in Māori History (which in 2008 yielded a history of C Company of the 28th (Māori) Battalion), and making the content of its online encyclopaedia available in both Māori and English.

The Ministry has high-level objectives with respect to mātauranga Māori. One of its nine 'priorities' is

'Increased contribution of Māori and Māori culture' and a 'long-term goal' is 'An increased presence and profile of culture in New Zealand that also realises the potential of Māori'. One of the external trends it sees as influencing its work programme is the fact that 'Māori culture will be increasingly important both as the Māori population grows, and as more New Zealanders gain an appreciation of Māori culture'.[14] The Ministry has also seen the number of te reo speakers and Māori Television ratings as indicators of Māori cultural strength. At the time of our hearings it had a Kaihautū Māori, and it now has a Pou Ārahi Whakahaere or Strategic Māori Adviser.

Like other agencies, the Ministry's interaction with iwi as a result of Treaty settlements has significantly expanded in recent years. As part of each settlement the Minister for Arts, Culture and Heritage is now responsible for issuing protocols about a wide range of matters, including decisions about taonga tūturu; iwi input into board appointments; tendering for spiritual, cultural, and professional services; and developing an inventory of an iwi's taonga held by Te Papa.

(b) MOVEABLE CULTURAL HERITAGE

Te Papa places considerable emphasis on mātauranga Māori in its objectives and programmes. These include a central commitment to honouring the Treaty, and the aim of sharing decisions with kaitiaki on the care and display of taonga held within its collections. Te Papa also aims to develop and maintain relationships with Māori groups, to operate under a 'partnership' between the chief executive and the kaihautū, and to underpin all its activities 'by scholarship and mātauranga Māori'.[15] In practical terms, the museum has a Rōpū Whakamana Māori team, a Karanga Aotearoa kōiwi repatriation programme and team, 2½-year-long iwi exhibitions, and so on. So much of what Te Papa does is focused on mātauranga Māori that it is impossible to quantify the proportion it spends on such activities.

The Ministry for Culture and Heritage plays a 'facilitative' and protective role with respect to the discovery, return, and export of taonga tūturu. This includes meeting the costs of sending items found in swamps to the wet wood laboratory at Auckland University for preservation.

Boxes containing kōiwi tangata (human remains) of 33 Māori are carried onto Te Papa's Rongomaraeroa Marae during a repatriation pōwhiri in 2009. The return of such remains from overseas museums follows usually delicate negotiations.

(c) DOCUMENTARY HERITAGE

Since Archives New Zealand stores the country's record of government activity, it necessarily holds a significant amount of mātauranga Māori material. Its awareness of this is reflected in the fact that 'Responsiveness to Māori' is one of its four strategic principles (along with 'Better, smarter, customer-focused services', 'Digital transformation', and 'Value for money').[16] Archives New Zealand requires knowledge of tikanga Māori at board level (the Archives Council), and gives advice to agencies on how to care for their records – including the protection of any mātauranga they might contain – before they are archived. Its staff also includes a kaihautū, who is a senior manager, and a cultural adviser.

The National Library makes a similar kind of commitment. Its Kaupapa Mahi Tahi partnership plan recognises both Māori rights to taonga and the need for those taonga to receive proper care. The Library operates under a principle of 'collaborative relationships' with whānau connected to the taonga in its collections. Like the Archives Council, the governing bodies for the Alexander Turnbull Library and the National Library are statutorily required to be able to advise the Minister on matters relating to mātauranga Māori. The National Library has also had a kaiwhakahaere Māori heading a 'Ratonga Māori – Services to Māori' team, which includes a number of specialist Māori-focused positions.

At TVNZ, the head of the organisation's Māori Department scrutinises and makes decisions on requests to access Māori images held in TVNZ's film and television archive.

(d) BROADCASTING

As we have noted, TVNZ's charter is soon to be replaced with a much less prescriptive and open-ended obligation for the broadcaster to screen content that 'reflects Māori perspectives'. Accordingly, the broadcaster intends to issue a revised statement of intent when the amending legislation is passed.[17] Under its 2007 Māori Content Strategy, it aims to become New Zealand's 'Māori Content Leader', mainly through the 'multiple platforms' of its two main channels, two digital channels, and its website.[18] TVNZ's Māori-focused news and current affairs programmes are funded directly by Te Māngai Pāho. Again, as mentioned, Radio New Zealand's charter requires it to provide 'programmes which reflect New Zealand's cultural diversity, including Maori language and culture'.

New Zealand On Air has a Māori strategy that includes the aim of supporting 'the production of quality Māori programmes made for a general audience in prime time'. In 2009/10 it spent $6.1 million on Māori broadcasting investments, predominantly on television content but also some radio programmes and music. Its Māori strategy describes a 'Māori programme' as 'one that makes a conscious effort to reveal something of the past, present or future of the Maori world'.[19]

(e) ARTS AND CULTURE FUNDING

The Ministry for Culture and Heritage's most notable direct involvement in Māori arts and culture funding is the $1.2 million it grants annually to Te Matatini, the national biennial Māori performing arts competition.

Among the five 'values' listed in Creative New Zealand's strategic plan is 'Partnering with Māori as tāngata whenua'.[20] The plan also has goals about preserving Māori heritage arts and producing innovative new Māori work. To achieve these goals Te Waka Toi has allocated approximately $3 million of contestable and recurrent funding to Māori artists annually. This corresponds to the general pool administered by the Arts Board on a proportion-of-population basis. Te Waka Toi has also operated specific programmes to support 'heritage' Māori arts (such as whakairo, whaikōrero, raranga, and so on). As noted, Te Waka Toi is soon to be disestablished, and it remains to be seen what impact this will have on the funding of Māori artists.

Lottery Grants Board money is disbursed across a number of themes, including an Environment and Heritage fund, which is allocated to projects that promote or conserve New Zealand's natural or cultural heritage (including the upkeep of local museums), and a Marae Heritage and Facilities fund of approximately $8 million annually, which funds marae upgrades and improvements.

▶ Te Waka Huia promoting New Zealand's presence at the Venice Biennale in 2009. Our national image in the international arena and at home is greatly strengthened by performances like these. The group's appearance was in part funded by Creative New Zealand.

Advice for applicants to the latter is provided by the specialist Māori heritage team at the Historic Places Trust. Lottery Grants decisions on funding applications are made by committees with specialist knowledge and skill. The Environment and Heritage fund committee has at least one Māori member, while the Marae Heritage and Facilities fund committee has an all-Māori five-person membership.

(2) *Partnership processes*

(a) The Ministry for Culture and Heritage

It is not clear what partnership processes the Ministry for Culture and Heritage has in place for dealing with Māori. It may well have a good relationship with Te Matatini Society, for example, and with iwi on specific projects. We are aware that the Ministry's Kaihautū Māori advised staff on their dealings and consultation with Māori; that a 'Māori Responsiveness Guide' exists for staff; and that the 2010 annual report referred to the Ministry's 'Increased collaboration with Māori on cultural policies and programmes',[21] but we did not receive information on any of these processes.

We take heart in any event from the Ministry's 2008 acknowledgement that achieving its key outcomes in coming years will increasingly rely on 'ensuring that the Ministry is equipped to liaise effectively and confidently with Māori'.[22] Again, we have no information about how and when this 'liaison' may be occurring. Counsel for Ngāti Koata claimed that the Ministry had conceded it relied on Te Puni Kōkiri for a Māori perspective, rather than engaging directly with Māori. While we are not convinced that the Ministry's witness actually suggested this, we do note that in its latest annual report the Ministry explains that it met its organisation capability objective of 'Increasing the involvement of Māori' through Māori language training for Ministry staff and implementing a relationship agreement with Te Puni Kōkiri.[23]

(b) Moveable cultural heritage

Te Papa undertakes wide-ranging engagement with Māori during the normal course of its business. The key partnership processes probably occur under the auspices of its 'Mana Taonga' policy, which 'provides iwi and communities with the right to define how taonga within Te Papa should be cared for and managed in accordance with their tikanga or custom'.[24] An example of this policy in action is the iwi exhibitions, which are managed in such a way that kaitiaki have real control over the presentation of their taonga. As part of its commitment to telling 'the nation's stories', Te Papa also aims to build 'relationships with Tangata Whenua'.[25] Despite the lack of statutory requirement for Māori representation on Te Papa's board, the museum's internal policy is that there should be 'effective Māori representation' at board level.[26] In early 2010, four of the eight Te Papa board members were Māori (although two were replaced by non-Māori when their terms expired in August 2010).

The chief executive of the Ministry for Culture and Heritage, as a matter of operational policy, consults first with tangata whenua and the appropriate local museum before determining custody of a found taonga tūturu. In terms of more substantive engagement on objectives with Māori, the Ministry established a Māori Reference Group a decade ago, when the Antiquities Act 1975 was under review. This committee advised, among other things, on the process for consulting Māori on the legislative changes, but had no lifespan beyond the introduction of the new Act. The original Bill (called the Protection of Moveable Cultural Heritage Bill) envisaged the establishment of a Rōpū Wānanga Taonga to work alongside a Cultural Heritage Council (in a similar fashion, perhaps, to the Arts Board and Te Waka Toi) in making decisions on the ownership, custody, and export of cultural artefacts, but this did not eventuate. We are unaware of the reason for this change.

(c) Documentary heritage

Archives New Zealand has an internal Māori consultative group, Te Pae Whakawairua, set up by the chief archivist in 2001/02. Members comprise a range of Māori individuals with backgrounds of relevance to Archives New Zealand's work. According to the chief archivist, the institution has a special relationship with Auckland hapū Ngāti Tipa, because of the location of the new Archives New Zealand building there, and with the Wellington Tenths Trust, because of the location of the Wellington office. Archives New Zealand also has working relationships with Te Wānanga o Raukawa, the Māori Studies

The Treaty of Waitangi on display at Archives New Zealand's headquarters in Wellington. The Treaty documents were included on UNESCO's Memory of the World register in 1997.

departments at Victoria and Otago Universities, and the Kaunihera Kaumātua in Wellington. Furthermore, it has established the position of community archivist, whose role is to work with Māori and other community groups on managing community archives.

It is notable, however, that Archives New Zealand refers to Māori in its latest annual report not as a 'partner' but as 'an important stakeholder'.[27]

The National Library also has an internal Māori consultative group called Te Komiti Māori. Its functions and purpose appear to be similar to those of Te Pae Whakawairua. As mentioned above, the Library has a principle of making collaborative care arrangements with whānau depositing material. Another of the guiding principles for staff on the care and preservation of Māori materials concerns consultation: the Library notes that 'Consultation with Māori staff shall not be an acceptable substitute for the development of collaborative relationships with Iwi and hapū'.[28] Like Archives New Zealand, the Library has a special relationship with the Wellington Tenths Trust, from whom it receives advice on protocol and policy issues. The Library sometimes partners with iwi over particular exhibitions, such as with Ngāti Kahungunu over the photographs in the Samuel Carnell archive.

TVNZ's witness told us that its Māori Department staff 'liaise extensively' with the Māori community when requests are made to use Māori images from TVNZ's film archives.[29] We have no information as to whether any such engagement occurs at Radio New Zealand when there are requests to use material from the Sound Archives/Ngā Taonga Kōrero collection. The collection's access policy emphasises 'permanent accessibility'.[30]

(d) BROADCASTING

TVNZ does not appear to engage directly with Māori in setting its objectives. Indeed, the broadcaster has dispensed with the position of kaihautū that existed at the time TVNZ's witness gave evidence in 2007. Nor does it appear that New Zealand On Air liaises with Māori in setting its objectives for Māori broadcasting. There is currently some Māori representation on the boards of both TVNZ and New Zealand On Air (one member each), but there is no statutory requirement for this. It does not appear that there is any Māori representation on the board of Radio New Zealand.

Hikurangi by Phil Berry. Berry (Ngāpuhi) has been permitted to use the Toi Iho mark of excellence from Te Waka Toi/ Creative New Zealand for his painting and kōwhaiwhai. The creation of the mark was facilitated by Te Waka Toi in consultation with Māori artists, who also designed and created the trade mark.

(e) FUNDING THE CREATION AND PRESENTATION OF TAONGA WORKS

Creative New Zealand was praised by the claimants for its collaboration with Māori artists on the Toi Iho 'Māori-made' mark. In terms of its core arts funding, however, we are unaware of any process it has in place for setting objectives in conjunction with Māori. It refers in its 2010 annual report to having 'in place a strategy for partnering with Māori',[31] but it is not clear what this entails. The most obvious form of partnership we are aware of is the Māori membership of Te Waka Toi, which is to be replaced, as noted, by a minimum of four Māori members of a new 13-strong single board of governance for arts funding.

The priorities for the Marae Heritage and Facilities committee of the Lottery Grants Board are set by the committee itself. The board's 2010 annual report notes that these included wharenui, wharekai, wharepaku, and fire safety equipment. While the committee members are themselves Māori and have strong links to the Māori community, it is not clear whether any formal engagement with that community occurs in the identification of these priorities.

(3) *The arguments of the parties*

The claimants offered some support for the work of the culture and heritage agencies, such as that of the Tai Tokerau claimants for Te Papa and its policies. But some claimants were concerned that kaitiaki often relied, for the recognition of their relationship with taonga works, on the goodwill of staff at agencies such as Archives New Zealand, the National Library, and TVNZ. They expressed concerns, for example, about the way Ministry for Culture and Heritage officials were charged with making important decisions under the Protected Objects Act without any formal requirement for Māori input, and objected to what they saw as the principle of public access overriding their rights as kaitiaki to mātauranga held in Crown repositories. Ngāti Koata, in particular, called for the statutory requirement for compliance with Treaty principles or provision for Māori participation at governance level at several agencies.

More specifically, the claimants also objected strongly to the assumption of prima facie Crown ownership of unearthed taonga tūturu, and claimed an unremedied prejudice from the operation of antiquities legislation before 1975. They felt the Crown should do more to help repatriate their taonga works from overseas museums. They contended that arts funding was insufficient to adequately support their mātauranga, and that TVNZ had made little commitment to its charter obligations (and would make less commitment with the charter's impending demise).

The Crown responded that it was making considerable efforts to support the kaitiaki relationship with taonga works, although it denied this right went as far as regulation and control. It pointed to policies such as Mana Taonga at Te Papa, which it felt gave iwi a considerable say in the presentation and care of their taonga, as well as programmes in support of Māori arts at Creative New Zealand. It contended that there were reasonable limits on its ability to accommodate kaitiaki desire for greater control. For example, it argued that there was a strong Māori interest in the maintenance of relatively open access to documentary mātauranga, and that Te Papa had fairly acquired most of its Māori collection. It also said it would return taonga it had not legitimately acquired, such as Te Papa's centrepiece, Te Hau ki Tūranga. Finally, we note that the Crown argued that no prejudice to Māori arose from either prima facie Crown ownership of newly-found taonga tūturu or the ending of the TVNZ charter.

(4) *Analysis of performance and recommended reforms*

A range of commitments are made by the culture and heritage agencies in terms of according mātauranga Māori an appropriate priority. Some locate Māori issues at the forefront of their strategic priorities, while for others the focus is more tangential. There are also internal inconsistencies. Archives New Zealand, for example, has 'Responsiveness to Māori' as one of its four strategic principles, which would appear to accord Māori interests the highest degree of priority – but it also describes Māori as a stakeholder rather than a partner.

We are aware that some Crown co-ordination occurs. Archives New Zealand, Te Papa, and the National Library, for example, collaborate on a range of issues relating to information and heritage policy, including those involving digital record-keeping. In its latest statement of intent Archives New Zealand states that it will 'work closely with both iwi and other agencies, including the National Library and Te Papa, to look at innovative and sustainable options to address the long-term aspirations of Māori'.[32] TVNZ shares archive footage with Māori Television for a retrieval fee. And the Ministry for Culture and Heritage and Te Puni Kōkiri signed a relationship agreement in June 2010 to reflect their common interest in Māori arts, culture, and heritage.

Beyond these few examples we have little to base an assessment on. We are unaware, for example, of the extent to which Te Puni Kōkiri, Creative New Zealand, and the Marae Heritage and Facilities committee co-ordinate over applications for funding for the preservation of marae artworks. We are also uncertain of the extent of co-operation between TVNZ and Māori Television over Māori programming and scheduling, in an area where competition seems counter-productive to the cause of preserving te reo and mātauranga Māori (TVNZ refers to Māori programming in any event as 'highly competitive' and notes its own 'tremendous advantage').[33] Nor do we know whether the Ministry for Culture and Heritage and Māori Television discuss mutual objectives, despite Māori Television ratings recently being one of the indicators of

cultural strength and identity identified by the Ministry in its Statement of Intent. We can assume that where such coordination does occur, it is on an ad hoc basis and aimed at avoiding duplication of funding, rather than from any co-ordinated strategy to preserve mātauranga Māori.

Overall, we believe current levels of co-ordination are insufficient. We would have hoped to see evidence of much greater collaboration across the sector on goals that contributed to a broad strategy. We recommend that Te Puni Kōkiri and the Ministry for Culture and Heritage take on leadership roles to achieve this. We recommend that research projects such as Te Puni Kōkiri's comprehensive marae survey and Creative New Zealand's completed inquiry into the health of Māori heritage arts provide a basis for setting priorities and ensuring Crown efforts are co-ordinated with clear objectives in mind.

Our assessment is that partnerships between the culture and heritage agencies and Māori do not currently exist. There are focus groups, specialist panels, and advisers, but nothing that could be described as a true partnership. Archives New Zealand does not even regard Māori as more than an important stakeholder amongst others. That said, we do not detect a lack of will amongst these agencies to establish stronger relationships with Māori. It may well be that, once stronger guidelines and a sympathetic policy environment are in place, partnership forums will quickly follow. So too might formal partnership arrangements, such as shared custody or Crown trusteeship, that are marked by the Crown's provision of resources and the necessary spiritual investment from Māori.

We suggest the formation of an electoral college as the solution to identifying representatives of the Māori partner. There are a number of obvious candidates for membership of this. We believe that bodies such as Toi Māori Aotearoa (the Māori artists body), Te Rōpū Whakahau (the Māori librarians collective), and Te Matatini Society, together with iwi organisations and other Māori entities with a more general focus, could successfully appoint representatives to sit at a partnership table with the Crown. Once again, our main concern is with the general principle, which we consider to be sound – it will be for others to determine the make-up of such a college.

Donna Campbell and Sam Mitchell at the Roopu Raranga Whatu o Aotearoa (National Weavers Association) hui, 2009. This national body for weavers is represented by the national Māori artists' umbrella body, Toi Māori Aotearoa. The latter is an obvious candidate for membership of any electoral college chosen to appoint Māori representatives to work in partnership with the Crown in the culture and heritage sector.

We recommend that the Māori representatives work with equal numbers of Crown appointees on a new kind of entity, which we will call a Crown–Māori partnership entity. The body's exact role and powers, and how it is serviced, are matters for the parties to settle, but adequate resources and time must be provided by the Crown to ensure successful engagement. This would include sufficient support for the work of an electoral college, if one is established.

We have other specific recommendations for the culture and heritage agencies, which we take up in *Te Taumata Tuarua*.[34]

6.3.2 Education agencies

(1) *Current objectives, programmes, and expenditure*

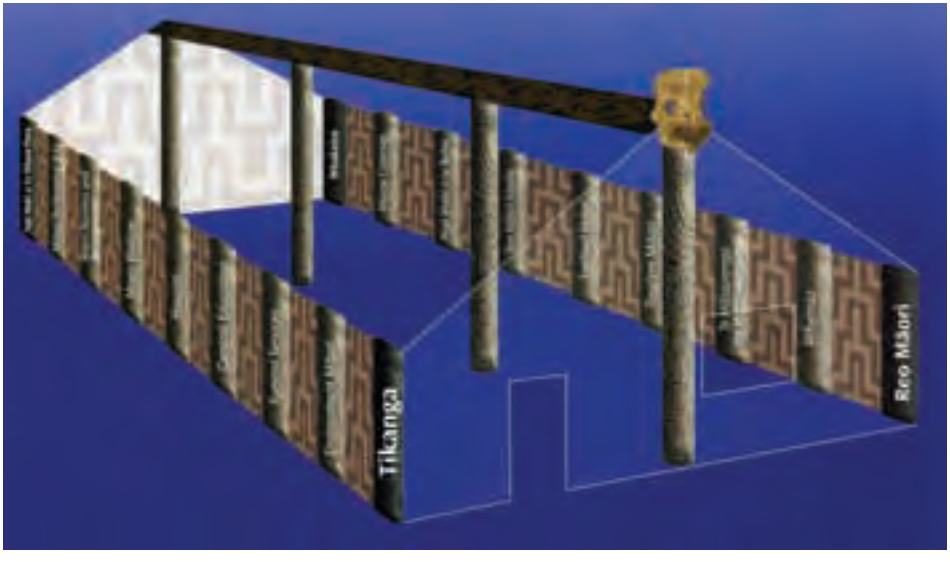
The Ministry of Education has a range of policies and programmes directed at mātauranga Māori. Schools are statutorily required to take steps to offer instruction in tikanga Māori where parents ask for it, and the new national curriculum adopted in November 2007 places emphasis on te reo Māori and the Treaty. The curriculum has a Māori-medium equivalent, called Te Marautanga, which (in translation) includes goals around nurturing 'the language and customs of whānau, hapū and iwi'.[35] Indeed, within the education system there now exists a Māori-medium or kaupapa Māori education pathway, from kōhanga reo to kura kaupapa Māori to wānanga. The transmission of mātauranga Māori, including especially te reo, is a core function of this learning option, some of which is of course replicated in the mainstream or English-medium system.

A vast amount of money – nearly $12 billion per annum – is expended on the education system, and every dollar has to be carefully allocated. But the cost of 'kaupapa Māori' education is not a burden on the budget. That is because the expenditure on providing kaupapa Māori students with an education would have occurred anyway, regardless of their choice of school.

The Ministry of Education has a Māori Education Strategy, called 'Ka Hikitia', which aims to lift Māori educational performance through a 'transformational' agenda of 'sharing power', supporting Māori 'self-development and self-determination', and including Māori culture in the learning process. One means to achieve this is to further education partnership agreements with iwi organisations.[36]

NZQA also has a Māori strategy, the 'Māori Strategic and Implementation Plan', which places great emphasis on the teaching of Māori knowledge. It was praised by the Wai 262 claimants for its willingness to accept Māori control over their mātauranga. NZQA in fact has an entire section within its National Qualifications Framework called 'Field Māori', which aims to cater for the growing demand for formal recognition of Māori teaching, knowledge, and skills. Field Māori includes almost 30 qualifications and 700 unit standards or courses. One explicit function of Field Māori unit standards is their contribution 'to the maintenance of Māori culture'.[37]

NZQA supports Field Māori through its Māori Qualifications Service business unit. This unit has a programme of provider development and support, which helps Māori providers to deliver quality programmes that 'uphold the principles of retention and preservation of Mātauranga'.[38]



Wharenui (meeting house) representing the many skills and disciplines of the Māori qualification category known as 'Field Māori'. NZQA notes on its website that 'the disciplines, or sub fields, within Field Māori are represented by pou (pillars) in the wharenui . . . where knowledge is nurtured. The four cornerstones are Reo Māori (the Māori language), Tikanga (Māori traditions and customs), Ngā mahi a te whare pora (traditional weaving), and Whakairo (traditional carving).'

(2) *Partnership programmes*

While we are unsure of the detail, we are aware that the Ministry of Education consulted with Māori about the content and direction of Ka Hikitia, as well as the content of the New Zealand Curriculum and Te Marautanga. We assume that there was also consultation on NZQA's Māori strategy, and in April and May 2010 NZQA undertook consultation on quality-assuring mātauranga Māori courses and qualifications. We also note that Te Rūnanganui o Ngā Kura Kaupapa Māori has a statutory right to be consulted about the designation of schools as 'kura kaupapa'. We must also make special mention of the system of Māori expert advisory committees or whakaruruhau that work with NZQA on the development of unit standards within Field Māori. These committees have advisory status only, and are not required by statute, but the NZQA witness told us that their advice was always taken and no whakaruruhau had been disestablished. As part of its Māori strategy NZQA has also now established a Māori advisory group called Ngā Kaitūhono, which is charged with ensuring 'the Authority's approach to Māori knowledge is compatible with Māori values'.[39]

Beyond this we are unaware of any formal joint objective-setting between education officials and Māori. There have been Hui Taumata Mātauranga in recent years, but these discussions could be more accurately described as a high-level sharing of ideas rather than a true partnership forum. The Secretary for Education, however, won support from the claimants for her willingness to enter into a 'long conversation' with Māori about ways in which decision-making could be genuinely shared with them.[40] Her outlook seems clearly reflected in the language used in Ka Hikitia, which we have described above.

(3) *The arguments of the parties*

The claimants generally had praise for the work of NZQA, particularly its strategic plan and the role of the whakaruruhau. However, they felt that the whakaruruhau should be entrenched as decision-makers rather than advisers, in order for rangatiratanga to be properly recognised. They also stressed that past Crown actions had greatly weakened Māori educational institutions, such as the whare wānanga.

As noted, the Ministry of Education also won praise for the commitment of the Secretary for Education and the content of the new national curriculum. Some claimants felt, though, that there remained scope for greater engagement with Māori, and Ngāti Porou claimants called specifically for greater Ngāti Porou control over the delivery of education to their students.

The Crown responded by pointing to the initiatives taken by NZQA and the provision for the teaching of mātauranga enshrined in the Education Act and embodied in the support for kōhanga reo, kura kaupapa Māori, and wānanga.

(4) *Analysis of performance and recommended reforms*

One of the Ministry of Education's six 'priority outcomes' is 'Māori enjoying education success as Māori'. To achieve this, the Ministry explains that 'we need an education system that captures and reflects that identity, language and culture are essential ingredients for all learners and critical to the success of Māori learners in education'. It also plans to build 'relationships with iwi as the prime sources and expert providers of identity, language and culture'. However, the indicators of the success of this priority outcome are not so much the retention or transmission of mātauranga Māori but the proportions of Māori participating in early childhood and tertiary education or achieving literacy and numeracy standards and NCEA qualifications.[41]

For its part, NZQA has as nine 'key initiatives', two of which relate specifically to *Te Rautaki Māori'*, the Māori Strategic Plan. The intended impacts of these are the creation of qualifications 'that contribute to Māori education and development . . . and take into account a Māori world view' and the delivery by institutions of 'programmes based on mātauranga Māori'. Like the Ministry, NZQA gives prominence to the desired outcome of 'Māori enjoying education success as Māori'.[42]

Overall, therefore, we believe there are some positive signs about the priority accorded mātauranga Māori within the sector. The leadership of a policy ministry ensures co-ordination in the education sector and places the education agencies in a strong position to work collaboratively towards mātauranga Māori objectives. However, we recommend that the Ministry develop some specific indicators around mātauranga Māori in order to

properly gauge its Māori-focused activities. Māori participation in education and the achievement by Māori of academic standards are not necessarily the same thing as the successful transmission of mātauranga.

At present there is also little that could be regarded as true partnership with Māori in objective-setting. To allow such formal engagement to occur, we suggest the selection of representatives of the Māori partner through an electoral college. The education sector indeed lends itself to this through the existing kaupapa Māori education pathway. In other words, the Kōhanga Reo National Trust, Te Rūnanganui o Ngā Kura Kaupapa, and Te Tau Ihu o Ngā Wānanga are representative bodies with broad mandates, and they could share in the appointment of representatives to sit at a partnership table with the Crown.[43] Others involved in that process would need to represent the interests of Māori in mainstream education.

As with our recommendation for the culture and heritage sector, here also we recommend the creation of a Crown–Māori partnership entity in education. As we collectively strive to find ways in which to lift Māori educational performance, the importance of such a body could be immense. Māori should feel they have ownership of the decisions taken by it, and this sense of partnership should have a positive impact on the Māori relationship with the education system overall. It would naturally need sufficient resources and time to be effective.

6.3.3 Research, science, and technology agencies

(1) *Current objectives, programmes, and expenditure*

The principal way in which MORST promotes mātauranga Māori in the science sector is through its policy framework Vision Mātauranga, introduced in 2005. Vision Mātauranga emphasises and seeks to 'unlock' the commercial or 'innovation' potential of mātauranga Māori.[44] The foundation speaks in a similar vein in its own strategy of Māori knowledge offering 'distinct points of premium value for the New Zealand brand'.[45] The Health Research Council refers to placing mātauranga Māori 'in the market place'.[46]

Only a very limited amount of money is tagged to the funding of mātauranga Māori in research, science, and technology, however, with MORST's 'Vision Mātauranga Capability Fund' (known from its inception in 2000 until 2010 as the 'Māori Knowledge and Development Output Expense') being less than one per cent of the entire science sector vote. To some extent, mātauranga is also catered for in the general science funding of the foundation and the Health Research Council: when deciding which proposals to fund, both agencies allocate some points to applications which deal with Māori issues (known among some researchers as 'ticking the Māori box').

Cover of *Vision Mātauranga*. This policy framework, introduced by MORST in 2007, aims to 'unlock' the 'innovation' potential of mātauranga Māori.

(2) *Partnership processes*

The greatest collaboration between Māori and the science sector seems to occur at the furthest remove from the policy-makers, and at the practical level of those conducting the actual research. We are certainly aware of productive relationships between Crown research institutes and Māori communities over research projects involving indigenous flora and fauna. Higher up the system, at MORST, the chief executive's advice to us was that it was difficult to know who the Māori right-holders were with whom MORST should consult, and that in any event her private discussions with Māori experts constituted engagement with Māori. She justified the absence of any mention of the Treaty from Vision Mātauranga on the basis that these expert advisers had felt it should be left out.

We are aware that there has been some engagement carried out by the foundation and the Health Research Council on their Māori-focused strategies, but not of its nature or extent. Nor do we know whether Māori appointees have a role in making decisions on funding applications which have opted to 'tick the Māori box'. A

Fishing using the tau kōura method, Lake Rotoiti. Te Arawa continue to use traditional methods for harvesting freshwater crayfish from the lake. NIWA notes on its website that bundles of fern fronds are left on the lake bed for kōura to take refuge in, before being hauled to the surface and into the boat where the kōura can be picked out. NIWA is collaborating with Te Arawa and Ngāti Tūwharetoa to use tau kōura as a basis for monitoring kōura populations in lakes. This research encourages the sharing of mātauranga about seasonal cycles and species habitat.

knowledgeable and all-Māori committee makes recommendations to the foundation on funding applications to the Tipu o Te Wānanga portfolio (part of the funding tagged to delivering Vision Mātauranga), but does so ultimately as advisers rather than decision-makers.

(3) *The arguments of the parties*

The claimants argued that the Crown was not supporting mātauranga Māori through its science policies. Ngāti Koata criticised MORST for the failure of Vision Mātauranga to mention the Treaty. The Tai Tokerau claimants said that, despite long recognition on its part of the value of supporting mātauranga Māori as a distinct knowledge system, MORST had failed to act accordingly.

For the Crown, the chief executive of MORST argued that Vision Mātauranga in fact went beyond her Ministry's actual Treaty obligations.

(4) *Analysis of performance and reform proposals*

We must acknowledge at the outset that MORST and the other science sector agencies are largely driven by economic imperatives and opportunities. After all, boosting economic activity was a key reason for their establishment. We also acknowledge that MORST – concerned with high-level policies and strategies, rather than day-to-day interaction with the community – sits at the opposite end of the government spectrum to Te Papa, for example. It is also clearly the promoter of the technological tradition that brought Tasman and Cook, rather than Kupe, to New Zealand.

Be that as it may, the science sector agencies must share responsibility for the preservation of mātauranga Māori, and see value in it for its own sake, rather than as some kind of niche market opportunity. The degree of priority placed upon it will thus need revisiting. In MORST's *Statement of Intent 2008–11*, mātauranga Māori is mentioned under only one of MORST's four strategic priorities, 'Sharpening the agenda for science', and not under 'Engaging New Zealanders with science and technology', 'Improving business performance through research and development', or 'Creating a world-class science system for New Zealand'.[47] In the 2009/2012 and 2010/2011 statements of intent it is not mentioned at all. If Vision Mātauranga is to have a 'transformational' impact, then it should feature more extensively than this. We recommend that science sector agencies give greater prominence to Vision Mātauranga, or make mātauranga Māori a strategic priority in its own right.

The science agencies already seem well co-ordinated. The foundation and the Health Research Council clearly take some lead from MORST, as can be seen from the similar emphasis on 'innovation' in their Māori-focused strategies. But we appreciate that there have been limits to the extent of this co-ordination, with both the foundation

and the council having policy functions and thus able to compete with MORST in the provision of advice to ministers. Moreover, MORST arguably has had less actual influence over government support for mātauranga Māori than the foundation, given the hundreds of millions of dollars of funding at the latter's disposal. Obviously, all this will change now that the foundation has been amalgamated with MORST. In any event, we emphasise that engaging with Māori in research and science must be done with as much shared purpose as possible.

Again, there are focus groups and advisory committees but no real partnerships with Māori in research, science, and technology (other perhaps than the successful working relationships between Māori communities and Crown research institutes mentioned above). Despite the good ideas that led to the establishment of the Māori Knowledge and Development Output Expense and the introduction of Vision Mātauranga, it is clear that mātauranga Māori has yet to get a foot inside the door of the research, science, and technology funding system in any meaningful sense. We recommend, as the best way for this to be achieved, the creation of a Māori purchase agent (that is, a body like the foundation that will disburse money to researchers) to boost Māori research capacity and fund the preservation of mātauranga Māori and research that explores the interface between mātauranga and modern applications.

We believe that this arrangement would be an appropriate expression of partnership in the sector. The representatives of the Māori partner would thus be the members of the board chosen to allocate these funds. In that research, science, and technology is a more contained sector than, say, culture and heritage – and has a smaller pool of Māori with expertise – a less complicated process than in the arts sector may well be employed for identifying representatives of the Māori partner. In other words, this could rely on our general guidelines set out in the conclusion to chapter 6 of *Te Taumata Tuarua* rather than the formation of an electoral college.[48] In any event, we recommend that board members include a mix of those with expertise in mātauranga Māori and science. We further recommend that, once it has achieved its key objectives, the fund should in due course be reintegrated with the mainstream system.

6.3.4 The special position of Te Puni Kōkiri

Te Puni Kōkiri is the successor to the Department of Māori Affairs. Quite understandably, 'Māori culture' – including mātauranga – is bound up in almost everything it does. For example, it has a 'Culture' directorate and a specific 'mātauranga Māori' work stream in its Policy Wāhanga, and an annual 'Māori Potential Fund' of $23 million to allocate to Māori organisations and communities across the country for projects that relate to 'mātauranga', 'rawa', or 'whakamana'.[49] This fund was created in 2006, consolidating several previous funds and giving them an overall strategic context.

As it happens, however, Crown counsel did not present any Te Puni Kōkiri evidence about this fund. We therefore later requested details from Te Puni Kōkiri directly. From this, we quickly gathered that the Māori Potential Fund is in fact a critical aspect of the State's contribution to the preservation and transmission of mātauranga Māori. Indeed, its investments appear to cover every conceivable aspect of mātauranga Māori – from artefacts and whare tupuna to reo a iwi and mōteatea.

Several things occur to us about the Māori Potential Fund. First, we recommend that it be protected and remain in place. However, we also recommend that its investments are evaluated, by both Māori and the Crown. We note that an internal evaluation of 'cultural investments' was due by 'the end of 2009',[50] but we do not know the outcome. Secondly, we think that the range of activities covered suggests the need for sound co-ordination with other mātauranga agencies to avoid any overlap. This might include the creation – particularly amongst the culture and heritage agencies – of a sector-wide mātauranga strategy.

Moreover, we do not see evidence of any partnership with Māori over this fund. As we understand it, officials determine the priority and success of funding applications on their own, and without direct input from the Māori community. This must change. We recommend that the Māori Potential Fund be allocated in partnership with Māori, with mātauranga experts and others from the community deciding equally with Te Puni Kōkiri on general funding priorities and the fate of specific applications. As such, we recommend the establishment of a board to allocate the fund, comprised equally of Te Puni

Kōkiri staff and representatives of the Māori community. This seems the appropriate expression of partnership in this case. Since the fund's coverage is so broad, we doubt an electoral college could easily be formed to choose Māori representatives in this instance. But perhaps the running of this fund could even provide some momentum for the establishment of a Māori appointments college with broad community mandate. If not, we suspect a consensual approach and the application of accumulated common sense will need to be employed.

6.4 Conclusion

In this chapter we have considered a wide range of agencies that are engaged with mātauranga Māori in some capacity. Some are performing better than others, but at least they all are doing *something* – which is itself a considerable advance on 20 years ago. In analysing the performance of these agencies we are conscious that the protection and transmission of mātauranga Māori is ultimately a shared responsibility between Māori and the Crown. We also recognise that there are usually other valid interests to weigh in assessing the extent of the kaitiaki interest in Crown-controlled mātauranga. For these reasons we have taken a balancing approach to assessing the Crown's performance.

While there are many policy and legislative similarities amongst the agencies in question, there are also marked differences. For example, there is greater recognition of mātauranga and the Treaty in certain governing pieces of legislation than in others. A feature common to all agencies is the existence of Māori advisory groups or senior Māori positions, but the titles differ and so does the status accorded to them. Overall, some agencies are clearly focused on the Treaty and committed to its principles, and several of them won specific praise from the claimants. In other cases, recognition of the Māori interest in the Crown's control of mātauranga Māori has been less forthcoming. And in very few cases do Māori have real decision-making power.

For all the positive initiatives of some of the mātauranga agencies, therefore, that very lack of decision-making power is a cause of prejudice. The Treaty requires Māori to at least share in the decisions taken to preserve and transmit their mātauranga. For example, the deliberations of the chief executive of the Ministry of Culture and Heritage about the export of taonga tūturu may well in themselves be fundamentally sound, particularly given the provision of Māori advice. But the absence of a decisive Māori voice in such matters is a breach of the Treaty and by definition prejudicial on its own. It is more difficult to quantify the prejudice that kaitiaki continue to suffer due to the cultural dislocation and disempowerment that manifestly persist following colonisation, but we have no doubt that there is Crown culpability for that loss of mātauranga as well.

It is time for all the mātauranga agencies – even those that are performing well – to step up and create real forms of partnership with Māori communities over the delivery and care of mātauranga. We think that the best way to achieve this will be through the establishment of partnership entities, where Māori representatives and Crown appointees will jointly set objectives for their sectors, take action, and monitor and evaluate them. To have the greatest effect, the Crown must simultaneously enhance its own internal coordination over mātauranga strategies. It must also adjust its mind-set and accept that it represents Māori too. These changes can help strengthen mātauranga Māori, which – for reasons of national identity, social cohesion, and economic advantage – is in everyone's interests.

6.5 Summary of Recommendations

Protecting and transmitting mātauranga Māori is a responsibility shared between Māori and the Crown: neither party can succeed without the help of the other. While there are reasonable limits on the Crown's obligation, and the need to balance Māori and other legitimate interests on a case-by-case basis, there is nonetheless a clear necessity for the Crown and Māori to work in partnership.

We therefore recommend the establishment of viable partnership models between Māori and the Crown in the retention and transmission of mātauranga Māori. We recommend that a series of principles apply to the construction of these working partnerships. These principles are set out in chapter 6 of *Te Taumata Tuarua*, and include

Crown coordination, appropriate prioritisation, sufficient resourcing, and shared objective-setting with Māori.[51] While each case will vary, all are needed to ensure success.

In addition, we make the following sector-specific recommendations and suggestions.

6.5.1 Culture and heritage agencies

- We recommend that Te Puni Kōkiri and the Ministry for Culture and Heritage take leadership roles to improve the current levels of co-ordination and collaboration between these agencies over matauranga Māori.
- We recommend the formation of a Crown–Māori partnership entity for the culture and heritage sector to guide agencies in the setting of policies and priorities concerning mātauranga Māori. It should comprise equal numbers of Māori and Crown appointees, and have adequate resources and time to ensure successful engagement. This body's exact role and powers, and how it is serviced, should be decided by the parties.
- We suggest the formation of an electoral college to identify representatives of the Māori partner to sit on this entity.

6.5.2 Education agencies

- Again, we recommend the establishment of a Crown–Māori partnership entity in the education sector. We suggest that Māori representatives to sit on it be chosen via an electoral college.
- We recommend that the Ministry of Education develop some specific indicators around mātauranga Māori in order to properly gauge its Māori-focused activities.

6.5.3 Research, science, and technology agencies

- We recommend the creation of a Māori purchase agent (that is, a body that will disburse money to researchers) as the appropriate expression of partnership in the science sector. It would boost Māori research capacity and fund the preservation of mātauranga Māori and research that explores the interface between mātauranga and modern applications.
- We recommend that members of the new entity's board include a mix of those with expertise in mātauranga Māori and science. Given the nature of the sector, they could be selected in accordance with the general guidelines set out in our conclusion to chapter 6 of *Te Taumata Tuarua*, rather than through an electoral college.[52]
- We recommend that, once it has achieved its key objectives, the fund be re-integrated with the mainstream system.
- We recommend that science sector agencies give greater prominence to Vision Mātauranga, or make mātauranga Māori a strategic priority in its own right.

6.5.4 Te Puni Kōkiri

- We recommend that the Māori Potential Fund be protected and remain in place.
- We recommend that the Māori Potential Fund's investments be evaluated, both by Māori and by the Crown.
- We recommend that the Māori Potential Fund be allocated in partnership with Māori, with mātauranga experts and others from the community deciding equally and transparently with Te Puni Kōkiri on general funding priorities and specific applications.
- As such, we recommend the establishment of a board to allocate the fund comprised equally of Te Puni Kōkiri staff and representatives of the Māori community.

Text notes

1. A member of the foundation's staff did answer some questions during cross-examination of the Ministry of Research, Science, and Technology witness.
2. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, ch 4
3. Te Māngai Pāho, Te Taura Whiri i Te Reo Māori and the Māori Television Service have functions primarily related to te reo Māori, and so we have dealt with them in chapter 5. Notwithstanding this, however, they are also certainly all 'mātauranga agencies'.

4. Of course, Māori also maintain marae out of their own resources.
5. There is currently also a Pacific Arts Committee and a Screen Innovation Production Fund.
6. Television New Zealand Act 2003, s 12(2)
7. Television New Zealand Amendment Bill 2009, cl 67
8. Radio New Zealand Act 1995, s 7(1)(b)
9. National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003, s 3
10. We set out the concepts more fully in Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, sec 6.8.
11. However, note that in the Broadcasting Assets case the Privy Council found that in times of economic buoyancy the Crown must spend appropriately to fulfil its responsibilities: *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC).
12. The Act came into force in 2006, when the Antiquities Act 1975 was amended. Because the new legislation was an amendment rather than an entirely new Act, it is known, perhaps confusingly, as the Protected Objects Act 1975, not 2006.
13. Protected Objects Act 1975, s 11
14. Ministry for Culture and Heritage, *Annual Report 2010* (Wellington: Ministry for Culture and Heritage, 2010), p 10
15. Document R32 (Arapata Hakiwai and Te Taru White, brief of evidence on behalf of Museum of New Zealand Te Papa Tongarewa, 8 January 2007), pp 5, 7
16. Archives New Zealand, *Statement of Intent 2010–2013* (Wellington: Archives New Zealand, 2010), p 12
17. Television New Zealand, *Statement of Intent For 3 Years Ending 30 June 2013* (Television New Zealand, 2010), p 4
18. Document R31(b) (Television New Zealand, 'Māori Content Strategy: Māori Content and Programming that Inspires New Zealanders on Every Screen' [2007]), pp 3, 18
19. New Zealand On Air, 'Te Rautaki Māori', June 2008, p 1
20. Arts Council of New Zealand, *Strategic Plan and Statement of Intent 2010–13* (Wellington: Arts Council of New Zealand, 2010), p 5
21. Ministry for Culture and Heritage, *Annual Report 2010*, p 9
22. Ministry for Culture and Heritage, *Statement of Intent 2008–2013* (Wellington: Ministry for Culture and Heritage, 2008), p 22
23. Ministry for Culture and Heritage, *Annual Report 2010*, p 20
24. Document R32(b) (Museum of New Zealand Te Papa Tongarewa, 'Mana Taonga', September 1992)
25. Document R32(c) (Museum of New Zealand Te Papa Tongarewa, 'Bicultural Policy', undated)
26. Document R32(a) (Museum of New Zealand Te Papa Tongarewa, 'A concept for the Museum of New Zealand, Te Papa Tongarewa', 2 December 1991), p 2
27. Archives New Zealand, *Annual Report for the Year Ended 30 June 2010* (Wellington: Archives New Zealand, 2010), p 10
28. Document R3 (Margaret Calder, brief of evidence on behalf of the National Library of New Zealand, Wellington, 21 November 2006), pp 14–15
29. Document R31 (Tanara Ngata, brief of evidence on behalf of Television New Zealand, 8 January 2007), p 10
30. 'Access Policy', Sound Archives, http://www.soundarchives.co.nz/policies/access_policy (accessed 24 March 2010)
31. Creative New Zealand, *Annual Report of the Arts Council of New Zealand Toi Aotearoa for the Year Ended 30 June 2010* (Wellington: Arts Council of New Zealand, 2010), p 80
32. Archives New Zealand, *Statement of Intent 2010–2013*, p 13
33. Document R31(b), p 3; doc R31(c) (Television New Zealand, 'Update to Crown Law on Television New Zealand's Māori Content Strategy and Implementation', undated), p 1
34. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, sec 6.9.1(1)
35. Ministry of Education, *Te Marautanga o Aotearoa English Translation* (Wellington: Ministry of Education, undated), p 7
36. Ministry of Education, *Ka Hikitia – Managing for Success: Māori Education Strategy, 2008–2012* (Wellington: Ministry of Education, 2008), pp 4, 5, 9, 11, 19, 27
37. Document R30 (Arawhetu Peretini, brief of evidence on behalf of New Zealand Qualifications Authority, 8 January 2007), p 11
38. Ibid, p 15
39. New Zealand Qualifications Authority, *The Māori Strategic and Implementation Plan for the New Zealand Qualifications Authority 2007–2012*, (Wellington: New Zealand Qualifications Authority, 2007), p 33
40. Karen Sewell, under cross-examination by claimant counsel, 21st hearing, 26 January 2007 (transcript 4.1.21, p 401); doc S3 (Counsel for Ngāti Kurī, Ngāti Wai and Te Rarawa, closing submissions, 16 April 2007), p 65
41. Ministry of Education, *Statement of Intent 2010–2015* (Wellington: Ministry of Education, 2010), pp 24–25
42. New Zealand Qualifications Authority, *Statement of Intent 2010–2013* (Wellington: New Zealand Qualifications Authority, 2010), pp 9–12
43. We say this notwithstanding our suggestion in chapter 5 that the kōhanga reo in any tribe's rohe be allowed (with a 75 per cent majority) to secede from the Kōhanga Reo National Trust and come under the administration of the local iwi authority.

44. Document R6(a) (Ministry of Research, Science, and Technology, 'Vision Mātauranga; Unlocking the Innovation Potential of Māori Knowledge, Resources and People', undated), p 3

45. Document R6(b) (FRST, 'Māori Economic Innovation Strategy 2005–2012', draft, December 2005)

46. Document R6(c) (Health Research Council, *Ngā Pou Rangahau Hauora kia Whakapiki Ake te Hauroa Māori: The Health Research Strategy to Improve Māori Health and Well-being, 2004–2008* (Wellington: Health Research Council, 2004)), p 19

47. Ministry of Research, Science, and Technology, *Statement of Intent 2008–2011* (Wellington: Ministry of Research, Science, and Technology, 2008), pp 6, 8, 10

48. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, sec 6.8

49. These are defined by Te Puni Kōkiri as 'building of knowledge and skills', 'development and use of resources', and 'strengthening leadership and decision-making': 'Māori Potential Approach', Te Puni Kōkiri, http://www.tpk.govt.nz/en/about/mpa (accessed 15 April 2011).

50. Paper 2.513 (Crown counsel, memorandum providing further information, 1 October 2009), p 10

51. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, sec 6.9

52. Ibid, sec 6.9.2

Whakataukī notes

Page 180: House of Commons Culture, Media, and Sport Committee, *Caring for our Collections: Sixth Report of Session 2006–07*, 2 vols (London: The Stationery Office Ltd, 2007), vol 1, p 3

Page 181: Source unknown

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

—Constitution of the World Health Organization

7

RONGOĀ MĀORI

Te mana atua kei roto i te
tangata ki te tiaki i a ia, he tapu.

The divine power that sustains wellbeing, sacred essence.


TAPU

CHAPTER 7

RONGOĀ MĀORI

7.1 Introduction

This chapter concerns rongoā Māori (traditional Māori healing) – what it has to offer, and the adequacy of current government support for it. By 'support', we mean more than funding alone; we refer also to the State's acceptance of rongoā, and its willingness to genuinely allow rongoā to make a difference to Māori health.

The claimants alleged that the practice of rongoā is not adequately protected or supported by the Crown. They contended that the Tohunga Suppression Act 1907 (the only significant historical issue that is dealt with in this report, and of iconic significance to Māori) effectively banned rongoā for most of the twentieth century and severely damaged mātauranga rongoā. Even since 1995, when the Government decided that health care providers should purchase rongoā services, funding levels have been too low to safeguard the practice or ensure the transmission of knowledge about it. They also argued that Crown regulation of rongoā ignores kaitiaki interests.

The Crown rejected these allegations, saying it supported rongoā to the extent allowed by universal funding constraints and the need to safeguard public health.

To weigh up these arguments, we will examine:

- what rongoā is, and where it sits within traditional Māori conceptions of health and well-being;
- the late nineteenth- and early twentieth-century crisis in Māori health;
- how the Crown justified the introduction of suppression legislation, and its subsequent impact;
- the Crown's growing support for rongoā since 1995 – expanding contracts, putting in place new structures and strategies, and facilitating the establishment of a national body of tohunga rongoā;
- the current crisis in Māori health;
- what rongoā has to offer; and
- whether the Crown is adequately supporting rongoā– not only because the Treaty requires it to, but because rongoā has the potential to make a real difference to Māori health. Could funding, strategies, and policies be improved? Does the Crown's attitude still reflect the sort of scepticism and suspicion that led to the suppression legislation? Is it genuinely allowing space for the Māori approach to operate, or is its embrace of rongoā altogether more token?

As we have said in the introduction, the question for us now is whether our two founding systems of knowledge – represented here by rongoā and Western biomedical practices – can exist side by side in this country, to the benefit of New Zealanders.

◀ *Tapu* by Horatio Robley, 1863. A tohunga is being served food by a child. Māori society strictly adhered to the rules of tapu. The most high-ranking tohunga, for example, were considered to be in a permanent state of tapu and were therefore not allowed to handle food.

7.2 Māori Conceptions of Health and Well-being

At the time of European contact, Māori society had developed a sophisticated system of public health. This system operated on an unwritten set of rules that was maintained by communal belief in their efficacy and power. The basis for these rules was, as Māori health expert Mason Durie has written (echoing earlier scholars such as Elsdon Best), the 'division of people, places, or events as either tapu or noa'.[1] We rely on Professor Durie's explanations throughout this introductory section.

'Tapu' essentially means 'off limits'. Breaches of tapu invited mental suffering and physical consequences such as disease or even death. Tapu people or items included food sources, such as fishing grounds in spawning season; those vulnerable to ill health or distraction, such as women who had recently given birth; and unsafe waste, such as rotting food or public latrines. It made eminent sense for these situations or matters to be tapu. Thus, tapu was not just a means of discouraging rule-breakers, but also a preventative measure that stopped people becoming sick and otherwise safeguarded the community's interests.[2]

'Noa', by contrast, 'denoted a state of relaxed access'. The balance between tapu and noa depended entirely on circumstances, such as the seasons, the state of communal health, and so on.[3] Obviously some things (such as waste) were always tapu, while some mundane matters (such as prepared food) were always noa.

Traditional Māori healing thus operated within what Professor Durie calls this 'wider philosophical and theoretical context' of tapu and noa. Injuries sustained through accidents or combat were known as 'mate tangata', and were treated in a relatively straightforward fashion. But there were different diagnostic process for 'mate atua' – illnesses for which there was no apparent cause, such as rashes, respiratory problems, or mental illness. Here the focus was on identifying and remedying the likely breach of tapu which lay behind the symptoms. As Professor Durie explains, skilful practitioners addressed both the root cause and the symptoms simultaneously.[4]

These practitioners were the tohunga. Tohunga means 'expert' and there were many types, such as expert carvers, boat-builders, horticulturalists – and healers

Tohunga using divining rods. Tohunga were expert in a variety of practical and spiritual matters and commanded considerable authority in Māori communities.

(described in this chapter as 'tohunga rongoā'). They commanded considerable respect and authority, although this depended on the maintenance of communal well-being. Their methods varied: many were 'quite pragmatic' while 'others derived from more complex understandings of religion, psychology and philosophy'.[5]

Professor Durie describes five categories of healing undertaken by tohunga, many of which were carried out in combination.[6] First are ritenga and karakia, or rituals and incantations (We switch to the present tense here because we are describing practices that are still very much alive). Second are rongoā, or plant medicines. Here Professor Durie uses the term 'rongoā' to refer to one aspect of traditional healing. Other commentators, including the Wai 262 claimants and government officials, tend to use 'rongoā' to mean all categories of traditional healing. With that preference in mind, we do likewise in our report. We are aware, however, that other terms may have traditionally existed to describe leaf medicines, such as 'wairākau'. In keeping with the common practice today, we refer to these herbal remedies as 'rākau rongoā'.

Thirdly, tohunga use mirimiri, a form of massage, usually to relieve sore joints and limbs but sometimes also to force evil spirits or kēhua from a sufferer's body. Subcategories of mirimiri include romiromi (using the fingers) or takahi (the feet). Fourthly, water is used in cleansing rituals or treatment of sickness, a practice probably

common to all societies. Traditionally the water used for healing came from springs or clear natural streams; in other words, tapu water was the purest. Lastly, there were minor surgical procedures, such as blood-letting to relieve swelling, incisions to drain infected ear drums, and so on.

The sophistication of traditional Māori healing is nowhere better demonstrated than in the area of rākau rongoā. Effective medicines were and continue to be derived from many native plants.[7] The antiseptic and soothing qualities of harakeke were well known to Māori and are used today in skincare products; koromiko is an authenticated remedy for dysentery and a favoured plant of tohunga rongoā; poroporo was used by Māori as a contraceptive and is now grown commercially around the world for this purpose; and mānuka, also much prized in traditional healing, has been shown to have unique antibacterial qualities. These are but a few examples.

It would be wrong to conclude, however, that the practice of rongoā was by any means focused upon herbal remedies. In the holistic Māori view of health, outward manifestations of sickness reflect broader environmental, family, or spiritual problems. Rākau rongoā are not considered effective on their own. Indeed, the most important form of treatment by tohunga was and remains spiritual. Robert McGowan, a Pākehā rongoā expert and former Catholic priest, told us how he had sought information from tohunga Paul Mareikura of Whanganui about the healing properties of certain plants. Mareikura replied: 'Why do you want to learn about medicines from the trees? You already have the main medicine.' Mr McGowan knew what this meant, but asked nonetheless. The reply came: 'You have the karakia. Without karakia nothing else matters. It is the most important medicine.'[8]

Rongoā, then, is a multi-dimensional form of care and healing, and its character reflects the environment in which it developed. It may well appear quite different from Western methods of health care, but on closer inspection there are in fact a number of similarities. As Professor Durie puts it:

> In essence there is a universal belief that, because unseen forces can cause illness, special efforts are necessary to protect communities and individuals. Rules must be observed and precautions enforced. Whether the unseen force is called a virus or an infringement of tapu may be less important than the subsequent practical application of measures designed to prevent illness or injury. As public health advocates the world over have demonstrated, it makes sense to separate the clean from unclean, replace dangerous situations with safe ones, and distinguish pure from contaminated water.[9]

7.3 The Colonial Māori Health Crisis and the Advent of Suppression

Waves of new diseases, including virulent epidemics, attacked Māori communities in colonial New Zealand. Despite their healing properties, rākau rongoā were ultimately no match for them. While tohunga may have been able to give their patients some relief, some methods



Three important rongoā plants: koromiko, harakeke, and mānuka.

Te Rangi Hiroa (Peter Buck), Apirana Ngata, and Maui Pomare in the 1920s. These old boys of Te Aute College and members of the Young Maori Party were determined campaigners for Māori health reform.

proved disastrous – such as immersing influenza sufferers in water, which commonly resulted in pneumonia.

In the face of this crisis, the tohunga's status was diminished. Community adherence to tapu around the sick and the dead – which would have helped check the spread of disease – accordingly slackened. Some tohunga at the turn of the nineteenth century also resorted to confused methods that had no basis in tradition.

Such problems tend to emerge where traditional cultures confront foreign diseases beyond their understanding or control. In late nineteenth-century New Zealand, they sparked a vociferous attack on the role of the tohunga by Pākehā politicians and educated Māori health reformers, led by Māui Pōmare (New Zealand's first Māori doctor) and other old boys of Te Aute College. Adjectives like 'pernicious', 'vile', 'cancerous', 'leering', and 'rascally' were used of the tohunga.[10] There was no attempt to differentiate between genuine traditional healers, and frauds and quacks – some of whom were Pākehā.

The Government initially responded by using the criminal law to prosecute the worst cases of medical misapplication or fraud. In the 1890s, several tohunga were charged with murder, manslaughter, or failing to provide the necessities of life. When in 1900 this was seen to be having little effect, the Government gave the Māori councils legislative power to regulate the activities of local tohunga. Native Minister James Carroll, a Ngāti Kahungunu leader, withstood the calls for an outright ban because he felt that it would be more effective to bring tohunga 'within the mesh of the law'.[11]

The Māori councils regulated tohunga for seven years, during which time the clamour for suppression persisted. In his capacity as the Māori Medical Officer of Health, Pōmare called annually for tohunga to be completely banned by law. In 1906, the emergence of Tūhoe prophet Rua Kēnana finally tipped the balance in favour of such a ban. Rua had prophesied a Māori millennium and persuaded a large number of followers to give up

their work for Pākehā and join him at a new community in Maungapōhatu. The Pākehā settlers were alarmed and the authority of Rua's rivals within the Tūhoe leadership was threatened. Carroll responded in September that year by introducing a Tohunga Suppression Bill. It seemed tailor-made for Rua, targeting those who claimed to foretell future events and who induced Māori to 'neglect their proper avocations'.[12]

Carroll's Bill did not proceed beyond its first reading, for reasons that are not clear. But it was back the following July in near-identical form. It passed with the full support of the House, although Apirana Ngata was able to secure an amendment that required the Native Minister to give his permission before police could proceed with a prosecution. The Tohunga Suppression Act 1907 essentially defined three offences:

- gathering Māori around one by practising on their superstition or credulity;
- misleading or attempting to mislead any Māori by professing or pretending to possess supernatural powers in the treatment or cure of disease; and
- misleading or attempting to mislead any Māori by professing or pretending to possess supernatural powers in the foretelling of future events.

Since tohunga by definition claimed supernatural powers, and operated on the basis of Māori belief in those

Maori Councils' representatives meeting the Governor, Lord Ranfurly, at Ruātoki in 1904. Also in attendance are Native Minister James Carroll and Native Health Officer Maui Pomare. From 1900 to 1907, the councils had legislative power to regulate the activities of local tohunga.

powers, one can see how the Act outlawed their activities. And as it did not distinguish between deliberate deception and traditional practice, the Act lumped tohunga together with frauds and charlatans.

7.4 Was the Tohunga Suppression Act Justified?

Historians disagree about the root cause of the Act. Many say it was aimed at stopping Rua, while others believe it reflected either genuine health concerns or a desire to claw back the power ceded to the Māori councils. But regardless of the underlying reasons, we see no justification for the legislation because:

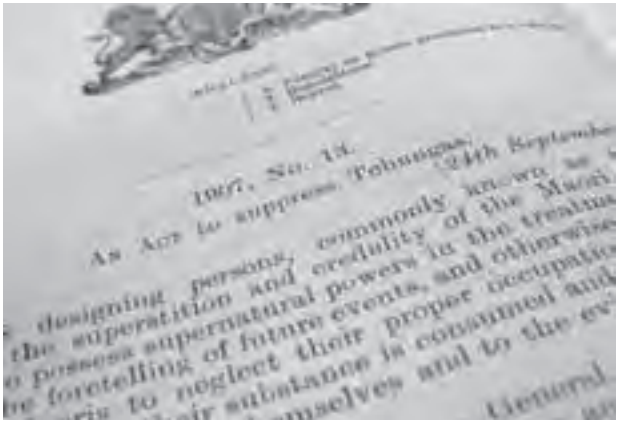
- It was not an adequate response to the late nineteenth-century Māori health crisis. If the Government really wanted to address Māori health, it should have provided more health services for Māori – services that were accessible and more culturally attuned. It did not do so. Another option would have been to better resource the Māori councils so they could more effectively license and regulate tohunga under the Maori Councils Act 1900. After all, in establishing the licensing regime, the Crown had correctly recognised that cultural experts are those best placed to supervise indigenous health practices. But the Government did not do that either.
- It failed to distinguish between tohunga whose activities were harmful and those whose activities were not.
- It was not needed to deal with 'quackery' – other legislative options were available (such as the Quackery Prevention Act 1908) or could have been created.

Moreover, the Tohunga Suppression Act was never likely to be effective. Ngata knew this when he told Parliament that, without adequate medical services to replace it, 'legislate as you will, you will never suppress tohungaism. You cannot do it. All the laws that could be passed in this House could not do it.' When asked why this was so, Ngata replied, 'You are getting down to bedrock when you get to tohungaism.'[13]

Rather than being a genuine attempt to deal with the problems affecting Māori at the time, the Act was an expression of an underlying mind-set that was fundamentally hostile to mātauranga Māori. The Act's very title sent an aggressive and provocative message about the Government's view of Māori beliefs. Far from tackling charlatans or dangerous practices, the legislation imposed an effective ban on traditional Māori healing overall. Thus, in our view, the Act was not only unjustified but also racist, in that it defined a core component of Māori culture as wrong and in need of 'suppression'.

Further, in removing the power of the Māori councils to regulate the activities of tohunga, the Crown was in breach of the Treaty principle of partnership, and in

Tūhoe prophet Rua Kenana at his Maungapōhatu community. Rua's emergence in 1906 tipped the balance in favour of a ban on tohunga.


1907, No. 13.
An Act to suppress Tohunga
designing persons, commonly known as
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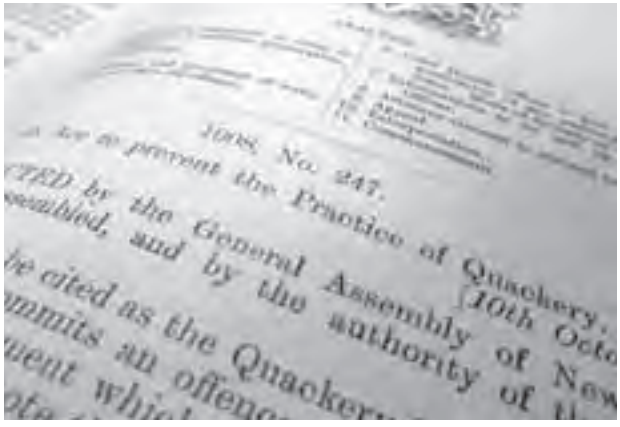
The Tohunga Suppression Act was passed in 1907 and remained on the statute books until 1962. It imposed an effective ban on traditional Māori healing.


1908, No. 247.
An Act to prevent the Practice of Quackery.
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The Quackery Prevention Act 1908 was aimed at preventing medical harm being done by tricksters and charlatans. Such legislation could have covered the activities of fraudulent tohunga.

outlawing those activities it was in breach of its duty of active protection. Given the paucity of medical care made available to Māori communities at this time, it was also in breach of the principle of equity.

7.5 The Impact of the Tohunga Suppression Act

Tohunga remained legally suppressed for 55 years, until the Tohunga Suppression Act was repealed in 1962. Ironically, the Act was never used against Rua. In fact prosecutions were relatively few and far between, with only nine convictions, all between 1910 and 1919.[14] As Ngata had predicted, the law failed to suppress the practice completely – at the time of the Act's repeal, tohunga were operating openly and retained a large Māori following. In our view, the Hunn Commission was correct to describe the law in 1960 as a 'dead letter'.[15]

However, the claimants contended that the Act drove traditional Māori healing underground, stigmatised it, and caused immense harm to mātauranga rongoā. This argument was rejected by the Crown, which said the Act was aimed not at 'natural healing processes' but at those who 'took advantage' of others through 'misleading behaviour'. The Crown said there was no evidence of the Act adversely affecting the practice of rongoā.[16]

On this last matter, the Crown is right to an extent. It is difficult to prove a causal link between the Act and the contemporary state of rongoā Māori. Any diminution in practice or knowledge is just as likely to have stemmed from altogether more prosaic causes. One is the urbanisation of Māori; another is deforestation and reduced access to the bush. Together, these robbed Māori of their connection with and knowledge of te ao tūroa, the natural setting for the practice of rongoā. As Mr McGowan puts it, 'the circumstances of the modern lifestyle do not facilitate the persistence of an environment in which such knowledge can be readily passed on to succeeding generations'.[17]

But – as we have indicated – the Crown's interpretation of the activities banned by the Act is incorrect. The Act did not distinguish between traditionalists and frauds in classifying offences. Nor do we believe that tohunga could practise 'natural healing processes' without professing the mana to cure sickness. In passing the Act, the Crown – reflecting the refusal of scientific medicine to see a spiritual dimension to health – wrongly assumed that modernity and tohunga could not co-exist. In this it doubly failed Māori, because in undermining the Māori system it offered nothing to replace it, despite the devastating effects in kāinga of poverty and disease.

Young Māori, Aotea Square, Auckland, 1984. Māori urbanisation is as likely a reason for the decline in rongoā knowledge as any direct impact from the Tohunga Suppression Act.

7.6 From Suppression to Gradual Support

During the decades that the Tohunga Suppression Act remained in force, Māori healing continued in both new and old forms. Even once suppression was lifted in 1962, the Crown did not expressly support rongoā – far from it. The Government essentially ignored its existence for the next two to three decades. When it eventually did act, in 1995, it was probably because the field of health could no longer ignore the growing recognition of Māori cultural practices and interests that was permeating other sectors, such as education. Professor Durie's work, including his book *Whaiora: Māori Health Development* in 1994, may have served as a prompt. In any event, the belated official recognition for rongoā may be contrasted with much quicker displays of state support for other forms of previously suppressed mātauranga, such as te reo (which we discuss in chapter 5).

Another reason for the delay in official support for rongoā was that tohunga themselves were understandably reluctant to engage with the State. In 1992, however, a group of healers formed Ngā Ringa Whakahaere o te Iwi Māori as an organisation to represent tohunga rongoā. Professor Durie suggests this was part of a conscious but difficult decision by tohunga to 'be recognized as an integral part of the New Zealand health service and to adopt a more public profile'. It also reflected a push by

Māori themselves for easier access to traditional healing services.[18]

In 1995, the Minister of Health accepted an advisory committee's recommendation that health care providers begin purchasing Māori rongoā services. Services began expanding slowly and incrementally, beginning with a pilot rongoā clinic in Napier in 1995. The next year, as the Ministry of Health sought Professor Durie's advice on criteria for purchasing traditional healing services, the expansion of services came to a halt. Professor Durie identified the need first to establish ethical guidelines and minimal standards of safety.[19] This led to the *Standards for Traditional Maori Healing*, published in 1999, which the Ministry jointly prepared with Ngā Ringa Whakahaere. In 2000, the Health Funding Authority contracted a further nine rongoā services.

The expansion of services stalled again in 2001, as the Ministry worked to put in place a rongoā development plan. This was eventually achieved with the 2006 publication of *Taonga Tuku Iho*. One of the main objects of this development plan was the establishment of a new national rongoā body, a subject we return to in section 7.8.

Aside from these delays, other factors also inhibited the growth of rongoā services. The main one was the ongoing restructuring and decentralisation occurring in government health services, culminating in the establishment in 2000 of a nationwide system of 21 district health boards (DHBs). The DHBs were given the primary responsibility for personal health care services, as well as 'delivering on the Crown–Maori partnership in health'. The Ministry of Health became a centralised funder and policy-maker.

Curiously, though, the Ministry maintained the contracted rongoā services. We understand these are currently worth about $1.9 million, spread over 16 contracts. Ministry witnesses told us that this was because the rongoā providers need 'stability and protection in the face of major sector upheaval'.[20] In reality, we consider that the Ministry's retention of the contracts also reflects the fact that the contracted tohunga have no trust in the DHBs. They have thus clung to the Ministry, despite its having no natural role in funding them. There is theoretically nothing to stop the DHBs greatly expanding the number of contracted rongoā services, but Ministry officials concede that they cannot influence the DHBs, for whom

Area at Matama near Dannevirke that has been cleared of nearly all forestation, 1880s. Greatly reduced access to native bush means Māori have substantially lost the natural setting for the practice of rongoā.

the development of rongoā services is not a priority. This lack of interest is unsurprising – DHBs have limited funds and, we suspect, limited appetite for services that may be regarded as politically or clinically problematic.

At the time of our hearing, two DHBs had directly contracted rongoā services, and others were indirectly funding rongoā services through contracts with primary health care organisations that employed traditional healers. Nonetheless, we were left with serious questions about whether the Crown's health care structure allows it to meet its own objectives for rongoā.

The expansion of rongoā service contracts has been slowed, therefore, not just by the sensible need for standards and an adequate strategy, but also by the less excusable problems created by the way in which the Crown has structured its health care system. In all of this we detect a distinct lack of urgency on the Crown's part to overcome the array of hurdles. Just why a degree of urgency would be appropriate is a matter we return to below.

7.7 What Form of Rongoā is Being Funded?

The Crown has understandably shied away from defining rongoā. Its *Standards for Traditional Māori Healing* provides no formal definition. But, indirectly, it reveals what the Ministry considers rongoā comprises, with its emphasis on hygienic preparation, storage, dispensing, and labelling of remedies (along with administrative and ethical issues such as record-keeping, referrals, and patient rights). There is no mention of mirimiri, karakia, use of water, or other spiritual aspects of healing: the *Standards* deal only with the far more tangible (and less controversial) practice of rākau rongoā.

Given this preoccupation, it is therefore perplexing that the Crown ceased officially to fund rākau rongoā in 2004. Rākau rongoā is explicitly excluded from contract specifications, ostensibly on health and safety grounds. However, overall contract funding levels remain unchanged. This raises the question as to exactly what the Crown now thinks it is funding.

The Crown maintained that healers proposed the exclusion of rākau rongoā themselves. We are not convinced that this is what happened but, in any event, the exclusion seems a distinctly odd development – and not only because the overall level of funding did not change. The Crown was effectively saying that a core aspect of a holistic healing process (indeed the only aspect the Crown had openly acknowledged it was funding) was suddenly too unsafe to fund. Yet contracted tohunga remain free to continue preparing rākau rongoā, and indeed are contractually obliged to do so in accordance with the *Standards*. So what was going on?

The simple fact is that we do not know why this change occurred, in part because the Crown could not explain it properly. One Crown witness thought it was because, as tohunga found it harder to access native plants, they were making bigger batches of product and storing it in unhygienic containers, such as old plastic milk bottles. But problems of access were nothing new, and compliance with the *Standards* required high standards of hygiene regardless. To us, it seems that the Ministry decided to curtail funding either because it wanted first to implement the next stage of its rongoā plan (that is, establish an authoritative national rongoā body that could monitor quality standards), or because it was looking to back out of responsibility for rākau rongoā in what was then an unfavourable political climate.

The explicit non-funding of rākau rongoā seems to be a further indication of a lack of courage or belief on the Ministry's part at a time of urgent need.

7.8 A New National Body

Back in 1996, Professor Durie identified the need for a national rongoā body of suitable standing. Such a body has long been regarded, then and since, as necessary to enable tohunga themselves to make decisions about the regulation and development of rongoā, rather than those decisions being made by an external agency such as the Ministry of Health. Examples of a national body's functions might include registration and credentialing, dealing with complaints, monitoring quality standards, supervising workforce training, and lobbying for tohunga at a national level.

In 1996, it was probably widely assumed, or at least hoped, that Ngā Ringa Whakahaere would be able to fulfil this role. Indeed, the Ministry collaborated with Ngā Ringa Whakahaere on the 1999 *Standards*. But at

Contemporary rongoā practitioner Atarangi Muru performing mirimiri. Some healers are funded by the Ministry of Health, but others choose to operate independently.

some stage the Ministry lost confidence in Ngā Ringa Whakahaere – exactly when and why, we do not know, although a Ministry document submitted in evidence said that after Ngā Ringa Whakahaere 'failed to function due to internal mismanagement and personality clashes within the system',[21] the Crown began to make plans for the establishment of an entirely separate body, which it said was urgently needed. It had partly justified its ceasing to fund rākau rongoā in 2004 on the very lack of such a body.

The 2006 rongoā development plan, *Taonga Tuku Iho*, also highlighted the need for a new body. The following year the Ministry supported an advisory group of contracted tohunga rongoā to progress the matter. All this was of course troubling to Ngā Ringa Whakahaere, which still saw itself as 'the authoritative and principal voice in respect of Māori traditional health and healing'.[22] Its problem was that its members made up only a third of the total number of contracted providers, and many whare oranga or healing centres had refused to join it. This was by no means just a reflection on Ngā Ringa Whakahaere: tohunga rongoā maintain their independence fiercely, including from each other. Claimants such as Ngāti Kahungunu also expressed strong support for Ngā Ringa Whakahaere. But the Crown had clearly moved on, and a new national body was launched in June 2008.

The new body is called Te Paepae Matua mō te Rongoā. The Crown is adamant that it does not control the body in any way, but simply provides funding support – which it also provides to Ngā Ringa Whakahaere. Some claimants complained that they had not been consulted in the process leading to the establishment of Te Paepae Matua but, crucially, Ngāti Kahungunu expressed support for Te Paepae Matua 'in the absence of any other structure which could be utilised by the iwi to provide bottom up support for rongoa within Ngāti Kahungunu'. Their criticism is now that Te Paepae Matua is not being sufficiently funded to succeed.[23]

7.9 The Modern Māori Health Crisis

Over the last 15 years, therefore, the Crown has gradually increased its support for rongoā Māori. Along the way it has paused to put in place the *Standards*, or develop a rongoā strategy, or to facilitate the establishment of an authoritative national body. It has refused to be rushed. When difficulties have arisen, it has ceased funding rākau rongoā and effectively shrugged about its inability to influence the DHBs to contract more services.

Throughout, we consider the Crown has lacked urgency, courage, and conviction. These qualities are desperately needed because, during the entire period in which the Crown has been purchasing rongoā services, there has been a growing crisis in Māori health.

Essentially, Māori health improved significantly for most of the twentieth century. This was particularly so in the first three post-war decades, when jobs were plentiful and Māori standards of living rose markedly. Between 1951 and 1980, the life expectancy gaps between Māori and non-Māori men and women more than halved. But by 1997, after more than a decade of socio-economic

reform and accompanying stress, the gaps had widened again (see figures 7.1 and 7.2). They have not worsened since, but this is no indication of Māori well-being.

That is because many Māori now suffer from so-called 'lifestyle diseases' and other problems that have reached practically epidemic proportions (see figures 7.3 and 7.4). Māori may be living longer than they were 100 years ago, but their later life is often blighted by disability or ill-health. Māori today have much higher rates than non-Māori of heart disease, stroke, heart failure, lung cancer, diabetes, asthma, chronic obstructive pulmonary disease, infant mortality, sudden infant death syndrome (cot death), meningococcal disease, schizophrenia, and other illnesses. After having had much lower rates of suicide than non-Māori until the 1980s, Māori males now have much higher rates. They also have much higher rates of motor vehicle accident deaths. Māori generally have much higher rates of interpersonal violence and unintentional injury. They are less likely to visit a doctor or a dentist. They have much higher rates of smoking, with 53 per cent of adult Māori women being smokers. Māori adults are much more likely than others to engage in potentially hazardous drinking patterns or regular cannabis use. Māori are also much more likely than non-Māori to be obese.

It is said that the reason for this calamity is largely to be found in socio-economic causes, which are key determinants of health status. Certainly, Māori are much more disadvantaged than non-Māori across all of the main socio-economic indicators, such as housing quality, home ownership, household crowding, income, unemployment, school completion, and so on. But there is clearly also a cultural dimension to health and well-being; for example, it is Pākehā women and not Māori who suffer bulimia and anorexia nervosa.[24] Various scholarly studies have also shown that achieving higher socio-economic status does not necessarily lead to better health outcomes for Māori. Cultural factors have been found to weigh heavily in Māori decisions to seek health care. The longitudinal Te Hoe Nuku Roa study also suggests that a stronger Māori cultural identity may be a factor in better health outcomes, even in the face of adverse socio-economic status. This strength of identity will derive from 'the capacity to access both cultural and physical resources, such as Māori language, marae and whānau'.[25]

In other words, while poverty affects health, so does culture. It influences people's lifestyles, whether they get sick, and whether they seek treatment. Solutions to poor Māori health, therefore, must be both socio-economic and cultural.

7.10 What Rongoā Has to Offer

In our view, rongoā is not *the* answer to the current Māori health crisis, but – as a culturally grounded system of health – it could be an important part of it. We say this for several reasons.

- *The medicinal properties of rākau rongoā are considerable*. Worldwide, the use of natural products in medicines is growing and the healing attributes of New Zealand's indigenous flora are acknowledged. As Apirana Ngata pointed out early last century: 'There is a large and unexplored field in the flora of New Zealand if only the medical men would devote their attention to it. Real remedies for certain complaints natural to the human being are to be found in our own flora.'[26] We believe the clinical value of mātauranga rongoā to health and well-being should be much more widely recognised.
- *Māori ideas about the role of the taha wairua in health remain the 'bedrock' Ngata spoke of in 1907*. They have not simply been replaced by clinical, Western biomedical practices. The place of spirituality in healing may meet with scepticism in some quarters, but it is hardly something foreign to mainstream medicine – we find ecumenical chaplaincy services in most hospitals, for example. And we have no doubt that many non-Māori New Zealanders have embraced a variety of 'alternative' healing and wellness regimes in recent years, such as yoga or Chinese medicine. Why should there be resistance to rongoā by virtue of its spiritual dimension?
- *Expanding rongoā services may draw more Māori into the primary health care system*. Consulting a tohunga will appeal to many Māori as a more culturally relevant and affordable health care option than

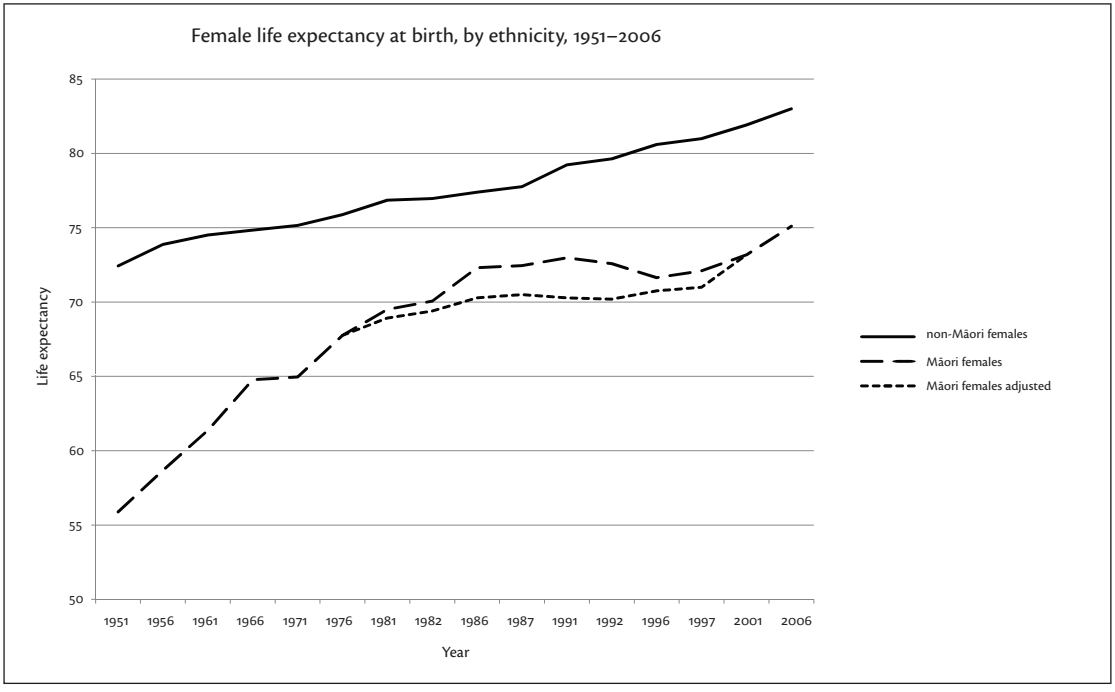


Figure 7.1

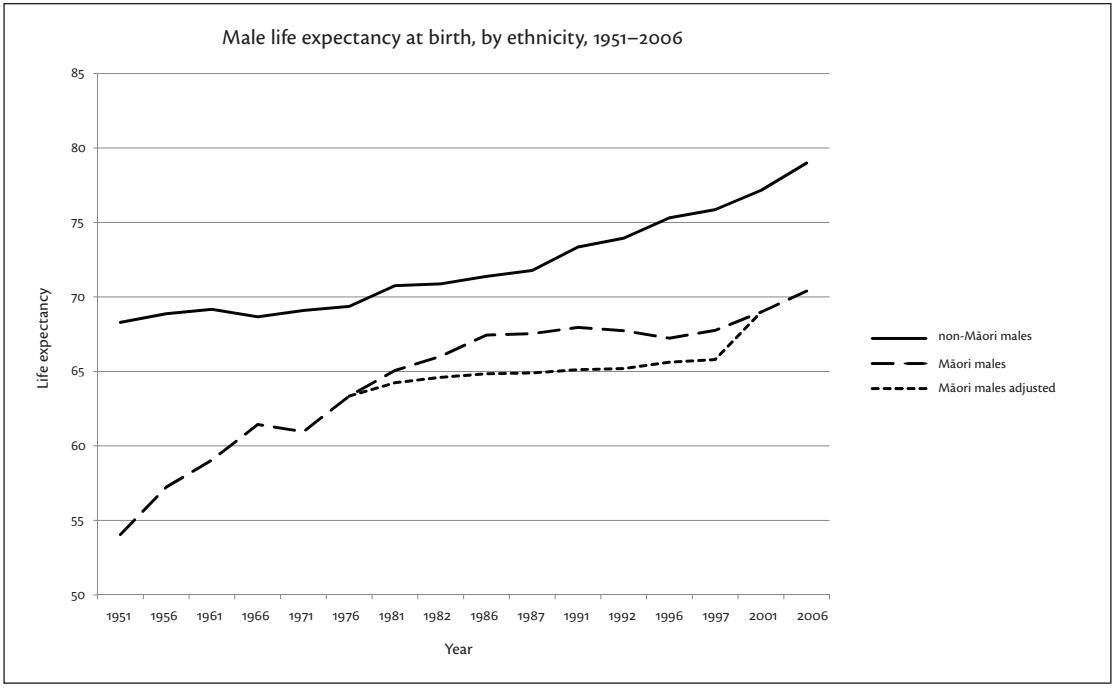


Figure 7.2

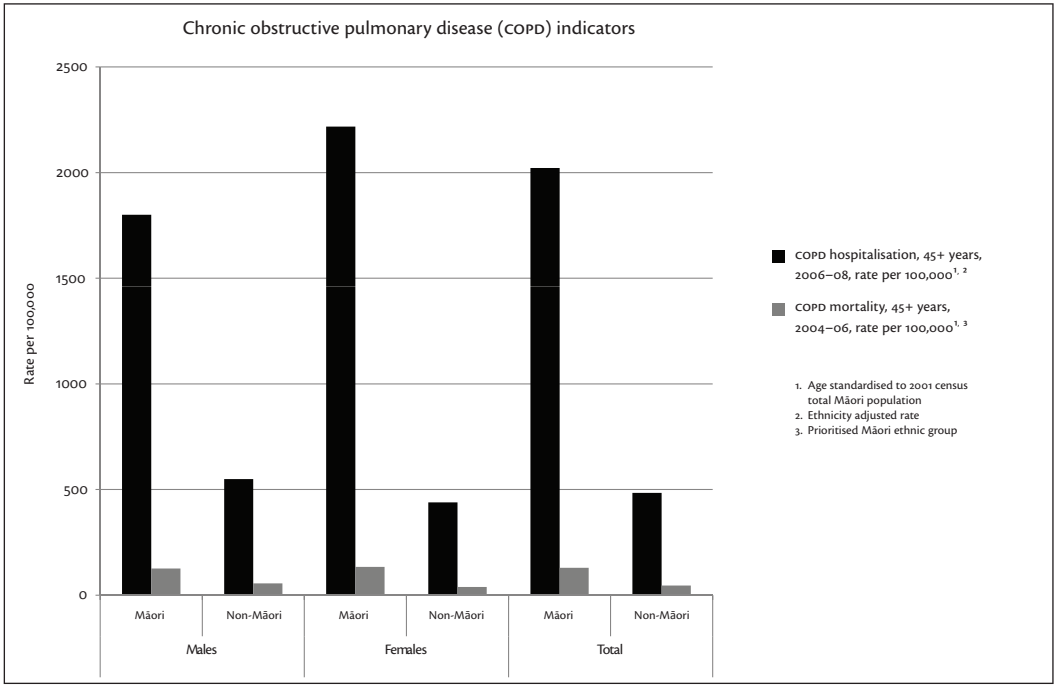


Figure 7.3

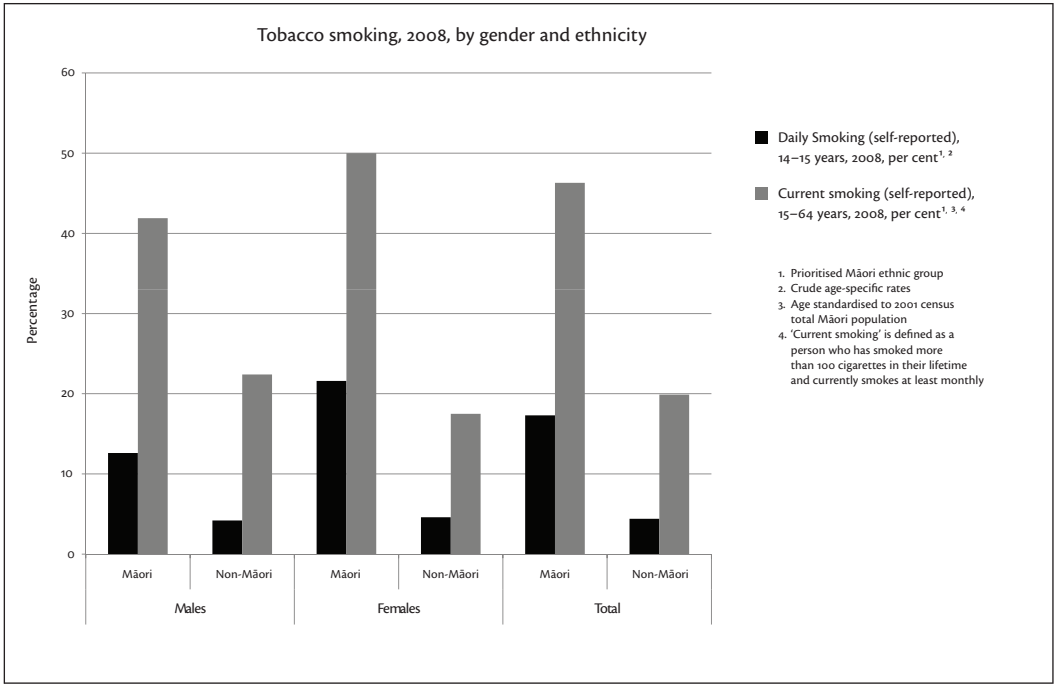


Figure 7.4

visiting a general practitioner. Subsequent referrals from tohunga rongoā to mainstream providers could thus bring more Māori into contact with the general health system at an early stage, rather than at the all-too-usual advanced stage of an illness when its severity has become quite apparent. In other words, as Professor Durie observed in 1996, reflections on value for money need to include consideration of 'the costs of no healing. . . . Early intervention might result in significant cost savings.'[27]

- *Despite a lack of hard data, the evidence suggests growing Māori demand for rongoā services.* Demand may be growing not only because of rising cultural confidence, but also because of disillusionment with the mainstream system's inability to arrest the epidemic of lifestyle diseases among Māori. The Crown should in turn meet this demand with the provision of services.

During our inquiry, we heard evidence of how rongoā is contributing to health and well-being. For example, kuia Heeni Philips operates a free Crown-funded rongoā clinic from her home in suburban Christchurch. Every few months she and a band of volunteers travel to the West Coast to collect plant materials from a Māori organic farmer, which they use to produce rākau rongoā as pills, liquid, or ointment. In the three months prior to December 2008, Heeni had seen 230 patients with complaints ranging from eczema and rashes to respiratory problems, asthma, and joint pain. Sometimes those arriving at her door simply need sympathy and support, which she willingly gives. Of the hundreds of people she sees each year, we can only speculate how many would have failed to seek out any help if their only option was a general practitioner.[28]

The current Māori health crisis is a matter of national importance. It is a significant problem shared by us all. Solutions that may help must be taken seriously indeed.

7.11 Reforms

We commend some aspects of the Crown's performance. We think, first of all, that the Crown deserves praise for funding rongoā services. After its initial commitment in 1995, it was right to seek expert advice on the necessary criteria for purchasing traditional healing services, and then to collaborate with Ngā Ringa Whakahaere to develop the *Standards*. It has correctly recognised that an authoritative and independent national tohunga rongoā body should play a leading role in monitoring compliance safety standards, and it has facilitated the establishment of Te Paepae Matua rather than dictated it.

But there is no sense of abiding energy or purpose about the Crown's actions. Its support for rongoā has been consistently punctuated by delays while administrative arrangements or strategic thinking have developed. It cannot exert any influence over the DHBs to contract more services. In 2004, it even took the regressive step of curtailing the funding of rākau rongoā. In the meantime, of course, Māori health problems have festered. The Ministry of Health seems to have lacked the imagination or conviction to engineer a genuine breakthrough, or the ability to see the contradiction in its priorities.

There can be only two reasons for this. First, the Crown may lack belief in the efficacy of rongoā, as we have described above. That is, it may lack conviction in the advantages to Māori health of rongoā's biomedical and spiritual qualities. It may not see the potential of rongoā to bring sick people into contact with the health system, or recognise the growing demand for rongoā services in the Māori community. If that is so, however, the Crown does not reflect this in its public pronouncements. *He Korowai Oranga*, the Māori health strategy, for example, states that Māori approaches to health will be affirmed through 'a gradual reorientation of the way that Māori health and disability services are planned, funded and delivered in New Zealand'.[29]

The second possible explanation is that the scepticism that led to the stigmatisation of tohunga and the Tohunga Suppression Act 1907 is still working against rongoā. The Ministry may not itself subscribe to this narrow-mindedness, but it is probably acutely aware of it. The media run occasional stories about rongoā that invite a degree of ridicule, and then turn to the Skeptics Society for opinion. During the period of the last Government, an Opposition member of Parliament asked the Minister of Health in the House whether there was 'any clinical evidence that

such healing is effective; or is this funding just political correctness gone mad?'[30] It was not long after this that the Crown withdrew funding for rākau rongoā. The two events may not be connected, but one can imagine the defensiveness that such attacks instil in Ministry staff.

The Crown's defensive mind-set must shift. It must work in genuine partnership with Māori to support rongoā and rongoā services. It is time for the Crown to stress the positive benefits of rongoā and its potential to combat the ongoing crisis in Māori health. Of course, herbal remedies must be proven to be safe, but rongoā cannot be evaluated simply in clinical or biomedical terms. It is a holistic and culturally based approach to well-being that surely offers much to a people whose health is mired in such difficulty.

Moreover, any cursory examination of likely costs and benefits suggests potential savings to the taxpayer. Each year the direct costs (through health services) and indirect costs (through lost productivity) of diabetes and obesity in New Zealand reach well over a billion dollars. As we know, Māori are significantly over-represented among sufferers of these illnesses. Government-funded rongoā services currently cost less than $2 million per annum. There is no magic number to indicate an appropriate level of funding. But the cost of underfunding rongoā is likely to be significantly higher than the cost of current funding. The Crown's present investment shows a lack of commitment to the idea that rongoā can make a difference.

We recommend the Crown take the following actions as a matter of urgency:

- Recognise that rongoā Māori has significant potential as a weapon in the fight to improve Māori health. This will require the Crown to see the philosophical importance of holism in Māori health, and to be willing to draw on *both* of this country's two founding systems of knowledge.
- Incentivise the health system to expand rongoā services. There are various ways in which this could be done – for example, by requiring every primary health care organisation servicing a significant Māori population to include a rongoā clinic.
- Adequately support Te Paepae Matua to play the quality-control role that the Crown should not and cannot play itself.
- Begin to gather some hard data about the extent of current Māori use of services and the likely ongoing extent of demand.

We also recommend that the Department of Conservation and the Ministry of Health coordinate over rongoā policy, since mātauranga rongoā so depends on access to rongoā rākau.

In addition to the tangible health benefits that rongoā has to offer, there is another reason why the Crown should support it more wholeheartedly in the ways we have described: namely, that there is a Treaty obligation as well. Rongoā is a taonga – even Crown officials readily concede this. It is central to Māori identity and, as Mr McGowan says, is as much 'an expression of being Māori . . . as it is about healing sickness'.[31] While mātauranga rongoā has declined because of reduced Māori access to native flora, changed lifestyles, and urbanisation, it has also suffered because of mainstream negativity, which the Government reflected (and so endorsed) in its suppression legislation a century ago.

Suffice it to say, under the Treaty of Waitangi the Crown bears a responsibility to rongoā of active protection. A case for expanded state support for rongoā services scarcely need be made out on such grounds, but that duty exists nonetheless.

7.12 Summary of Recommendations

The overall state of Māori health today is of great concern. In response to this the Crown has not promoted rongoā with any urgency. It either lacks a belief in the efficacy of rongoā or is too conscious of the lingering scepticism that previously led to the stigmatisation of tohunga and the Tohunga Suppression Act 1907.

The Crown's defensive mindset must shift. It must work in genuine partnership with Māori to support rongoā and rongoā services. It is time for the Crown to stress the positive benefits of rongoā and its potential to combat the ongoing crisis in Māori health.

We recommend the Crown take the following actions as a matter of urgency:

- Recognise that rongoā Māori has significant potential as a weapon in the fight to improve Māori health. This will require the Crown to see the philosophical

Frances Haenga planting rongoā trees at Pokai Marae, Ruatōria, during Conservation Week 2009. There appears to be a growing Māori demand for rongoā services, which may in part stem from a sense of disillusionment with the mainstream health system.

importance of holism in Māori health, and to be willing to draw on *both* of this country's two founding systems of knowledge.
- Incentivise the health system to expand rongoā services. There are various ways in which this could be done – for example, by requiring every primary health care organisation servicing a significant Māori population to include a rongoā clinic.
- Adequately support Te Paepae Matua to play the quality-control role that the Crown should not and cannot play itself.
- Begin to gather some hard data about the extent of current Māori use of services and the likely ongoing extent of demand.

We also recommend that, given the extent of environmental degradation and the challenges of access to the remaining bush, the Department of Conservation and the Ministry of Health coordinate over rongoā policy. Mātauranga rongoā cannot be supported if there are no rongoā rākau left, or at least none that tohunga rongoā can access.

Text notes

1. Mason Durie, *Whaiora: Māori Health Development*, 2nd ed (Auckland: Oxford University Press, 1998), p 7
2. Ibid, pp 8–9
3. Ibid, p 9
4. Ibid, pp 15–17
5. Ibid, p 17
6. Ibid, pp 17–20
7. See Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, sec 2.2.1
8. Document K11 (Robert McGowan, 'The Contemporary Use of Rongoa Maori (Traditional Maori Healing)', masters thesis, University of Waikato, 2000), p vi
9. Durie, *Whaiora*, p 21
10. Raeburn T Lange, 'The Tohunga and the Government in the Twentieth Century', *University of Auckland Historical Society Annual* (1968), p 16
11. Document K3 (David Williams, *Crown Policy Affecting Maori Knowledge Systems and Cultural Practices*, (Wellington: Waitangi Tribunal, 2001)), p 193
12. The first reading of the Bill was on 27 September 1906: NZPD, 1906, vol 137, p 825.
13. Apirana Ngata, 19 July 1907, NZPD, 1907, vol 139, p 520
14. However, a failed prosecution did occur as late as 1955.
15. Hunn to Hanan, 29 November 1962, AAMK, 869, 1591c, 19/10/6, Tohungaism 1961–62, Archives New Zealand (quoted in document K3, p 201)
16. Document T2 (Crown counsel, closing submissions, app 1, 21 May 2007), p 117
17. Document K11, p 125
18. Durie, *Whaiora*, p 59
19. Document I20, attachment D (Mason Durie, 'A Framework for Purchasing Traditional Healing Services: A Report for the Ministry of Health', June 1996)
20. Document R5 (Wi Keelan, brief of evidence on behalf of the Ministry of Health, 21 November 2006), p 74
21. Document R5(g) (Ministry of Health: Service Development Team Hui, 'NRW – Brief Timeline Analysis', 12 May 2003), p 1. Some healers associated with Ngā Ringa Whakahaere were also clearly resistant to any attempts to have them work in with Government priorities. For example, Te Whare Whakapikiora o te Rangimarie Trust maintained 'strong opposition to many government-designed policies or strategies': doc I25 (Dennis Lihou, brief of evidence, 2000), p 18.
22. Document P17 (Mark Ross, brief of evidence, 11 August 2006), pp 2, 5
23. Paper 2.503 (counsel for Ngāti Kahungunu, memorandum concerning rongoā issues, 19 June 2009), paras 5, 6
24. Mason Durie, *Mauri Ora: The Dynamics of Māori Health* (Melbourne: Oxford University Press, 2001), pp 24–25
25. Durie, *Whaiora*, p 197
26. Apirana Ngata, 19 July 1907, NZPD, 1907, vol 139, p 520
27. Document I20, attachment D, p 34
28. 'Aunty Heeni Hoping for a Visit', *Ngā Kōrero: Mai i Te Kete Hauora*, no 6 (November 2008), p 7
29. Ministry of Health, *He Korowai Oranga: Māori Health Strategy* (Wellington: Ministry of Health, 2002), p 3
30. Heather Roy, 4 November 2003, NZPD, 2003, vol 613, p 9630
31. Document K11, p 27

Whakataukī notes

Page 208: Constitution of the World Health Organization (signed 22 July 1946; entered into force 7 April 1948), preamble

Page 209: Te Taura Whiri i te Reo Māori, *He Pātaka Kupu: Te Kai a te Rangatira* (Auckland: Te Taura Whiri i te Reo Māori, 2008), p 444

To jaw, jaw is always better than to war, war.

—Attributed to Sir William Churchill, 1954

8

THE MAKING OF INTERNATIONAL INSTRUMENTS

Ko te kai a te rangatira, he kōrero.

Discussion is the food of chiefs.

Pita Sharples, the Minister of Māori Affairs, at the United Nations Permanent Forum on Indigenous Issues in New York in April 2010. The Minister announced that New Zealand would reverse its earlier position and support the Declaration on the Rights of Indigenous Peoples.

Delegates at the United Nations Earth summit in Rio de Janeiro in 1992. This summit led to the adoption of the Convention on Biological Diversity, to which nearly 200 states are now parties.

The New Zealand delegation, led by Minister of Māori Affairs Pita Sharples, perform a waiata on the opening day of the ninth session of the United Nations Permanent Forum on Indigenous Issues, New York, April 2010.

CHAPTER 8

THE MAKING OF INTERNATIONAL INSTRUMENTS

8.1 Introduction

From the previous chapters of our report, it will be clear that Māori interests are profoundly affected by the obligations taken on by the Crown when New Zealand enters into international agreements. Some, rightly called agreements, are binding and take effect automatically or are implemented by domestic legislation. Others are non-binding but set moral or political imperatives. If all states accept them, they can sometimes come to have the force of international law. As the Ministry of Foreign Affairs and Trade noted, New Zealand does not sign up to non-binding instruments unless it intends to abide by them. In this chapter, we use the term 'instruments' to describe both binding and non-binding arrangements.

The number and range of international instruments have grown enormously with globalisation in the last 20 years. This can be to the benefit of New Zealand, which is a small and less powerful nation needing the protection of rules-based international relations. But the range of international instruments now reaches into the lives of all New Zealanders and can change, reduce, or enhance their most basic rights. Māori interests in traditional knowledge, culture, economic development, and the environment, to name a few, are all affected.

This chapter addresses the question of how New Zealand decides its position on the negotiation and implementation of the many treaties, declarations, conventions, and so forth that the Crown has adopted. For us, the question is whether the Treaty of Waitangi provides for a reasonable degree of protection of Māori interests in this process and – if so – how. We then ask whether the Crown's present policies and practices are Treaty compliant, and recommend reforms where better engagement and accountability is needed.

We begin with some examples of international instruments that had or have the potential to affect or even transform Māori interests, and how New Zealand reached its position on them.

8.1.1 Declaration on the Rights of Indigenous Peoples

Perhaps the most important international instrument ever for Māori people is the United Nations Declaration on the Rights of Indigenous Peoples (DRIP). While it is non-binding, it nonetheless carries moral and political force, and will in time – it is expected – form the basis of a new body of customary international law on the subject of indigenous rights.[1] It is a landmark international acknowledgement that indigenous collectives as well as individuals have rights to self-determination and in respect of their culture, identity, language, employment, health, education, and other matter. At the time of our hearings, the Crown was concerned at what the Declaration said about self-determination

and territorial integrity for indigenous peoples, as well as its apparent support for indigenous claims to lands now in private ownership.[2] The Crown felt its terms went too far for New Zealand to support it.

Thus, New Zealand was a late and reluctant party to DRIP. It was one of only four states to vote against the Declaration when it was adopted by 143 votes in the General Assembly in 2007. DRIP was a matter of great concern for Māori. They felt that they had not been consulted, and that their views and interests, which were known to the Government anyway, were not regarded.[3] The Crown's evidence showed some consultation and engagement over the draft declaration, but basically nothing after 2003. The Crown held that it had consulted Māori about its proposed 2004 and 2005 changes to draft articles, whereas the claimants said that there had been no consultation since 2002.[4] The last consultation referred to in Crown evidence was a 2003 workshop at Victoria University, which the claimants denied had been representative or effective. While New Zealand did adopt the Declaration in 2010, with the caveat that it is non-binding, Māori felt angry and excluded for many years. During the long period when the Crown was not interested in talking to them, the claimants said that Māori had nowhere to turn except the international forums themselves and that New Zealand's international reputation had suffered as a result.

> *'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
>
> *'In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.'*
>
> United Nations Declaration on the Rights of Indigenous Peoples, art 1

8.1.2 The Convention on Biological Diversity

The Convention on Biological Diversity (CBD) was adopted during the United Nations Earth Summit in Rio de Janeiro in 1992. We have made frequent reference to the CBD in our report. It is a legally binding agreement for the protection of all forms of biodiversity (that is, ecosystems, species, and genetic resources) in the common interests of all humankind. As we have seen in chapter 2, one of the main reasons why Māori have a particular interest in the CBD is article 8(j), under which New Zealand must 'respect, maintain and preserve' mātauranga Māori that is 'relevant for the conservation and sustainable use of biological diversity'. As we have also seen, article 15 makes some provision for holders of traditional knowledge to receive benefits where that knowledge is used for commercial or research purposes.

The Crown engaged substantively with Māori in light of the significant Māori interests, at least until the signing of the CBD in 1992.[5] After that, however, the claimants said that they had been excluded from the ongoing international work programme of the CBD, which has – among other things – helped clarify the meaning of article 15. The Crown had not engaged with Māori about it, and Māori advisors were not included in New Zealand delegations. Aroha Mead, an expert on international instruments who gave evidence for Ngāti Porou, claimed that the Crown had adopted a:

> dismissive view that it is acceptable to develop and articulate views on issues of major significance to Maori . . . without Maori input, even though they know it will be criticized by Maori.[6]

In reply, the Crown said, among other things, that its genuine attempts to consult 'Maori stakeholders' had not always been successful, and that the consultation required under its own engagement strategy (see section 8.2) applied to binding agreements rather than the non-binding guidelines being developed through ongoing

CBD processes.[7] We will return below to this issue of the Crown not always engaging over an instrument important to Māori if the instrument or process is non-binding.

8.1.3 Agreement on Trade-Related Aspects of Intellectual Property Rights

We have discussed the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) in earlier chapters. Here, we note that it sets international minimum standards for the protection of IP and provides the framework for New Zealand's domestic IP law. In other words, the TRIPS Agreement establishes out the most that Māori can do to protect their taonga works and mātauranga under IP law, unless and until New Zealand adopts *sui generis* protections (see chapters 1 and 2). Also, any such protections must interact with the IP rights acquired by others under the TRIPS framework. Māori interests were and are at stake, therefore, when the TRIPS Agreement was negotiated and when it is interpreted, implemented, or amended. The claimants were concerned that there was insufficient consultation with Māori, or protection of their interests, during either the negotiation of TRIPS or the framing of domestic laws to implement it.[8]

In response, the Crown said that Māori had provided input on the Bill introduced to implement the TRIPS Agreement by way of submissions to Parliament's Commerce Select Committee, and that the Crown had consulted Māori further before any broader intellectual property law reforms were introduced.[9] The Crown also emphasised that signing up to the TRIPS Agreement was a condition of World Trade Organization membership.[10]

8.1.4 What do these examples suggest?

The examples we have just discussed throw some issues into stark relief. Māori interests are sometimes profoundly affected, whether by a whole instrument (as with DRIP) or particular articles (as in the CBD work programme). And yet the claimants are convinced that consultation with them has either been limited, ineffective, or non-existent, and the Crown was able to point to few examples of systemic or quality engagement in reply. It seems from our discussion of DRIP, the CBD, and TRIPS that there are potential flaws in the Crown's approach, if it:

- does not always engage with Māori if an instrument is non-binding;
- sometimes engages at the end (when laws are being passed) not from the beginning; and
- sometimes does not engage at all even when the Māori interest is important.

These potential flaws may arise from particular circumstances or may be systemic. We turn now to consider the Crown's policy framework for engagement. How, when, and why does the Crown engage?

8.2 Policies for Engagement with Māori over International Instruments

The Crown's current policies were developed in the Ministry of Foreign Affairs and Trade and consist of a general Māori outreach programme and of a strategy for engagement on individual instruments, which we have called the Māori engagement strategy. The Ministry's witness, Gerard van Bohemen, explained that the outreach programme provides general information and builds relationships with Māori. It involves hui and kanohi-ki-te-kanohi (face to face) meetings with iwi organisations, Māori businesses, pan-tribal organisations, academics and commentators.[11] The Ministry recognises that Māori interests are varied and can require targeted discussion with key stakeholders.

But the Ministry is not necessarily responsible for engagement with Māori over particular instruments. That is the task of the Government agency that has taken the lead on developing a position on a treaty or agreement. They do so according to the Cabinet-approved *Strategy for Engagement with Māori on International Treaties*.[12] The Māori engagement strategy is confined to binding agreements, although the Crown does sometimes also engage with Māori on non-binding instruments.[13] Under the strategy, the Crown seeks to ensure that issues of relevance to Māori in international treaties are identified early, and that 'engagement with Māori on a particular treaty is appropriately tailored according to the nature, extent and relative strength of the Māori interest'.[14] Identifying that interest and deciding the appropriate level of engagement is the task of the lead agency. Engagement, including consultation where needed, is supposed to occur throughout

the negotiation, ratification, and implementation processes. In the strategy, the Crown acknowledges that the Māori interest may sometimes be so strong as to be persuasive in deciding its position.[15]

But do these policies work in practice, and do they provide for sufficient and quality engagement over international instruments, so as to meet the Crown's Treaty obligations? We turn to these questions next.

8.3 Are the Crown's Policies and Practices Treaty Compliant?

8.3.1 The parties' concerns

The claimants argued that the Crown's policies are not Treaty compliant. They pointed to the Ministry of Foreign Affairs and Trade's evidence that the Māori engagement strategy is confined to binding instruments. They also argued that, in practice, the Crown engages too late – at the stage of ratification or domestic legislation – or poorly, or sometimes not at all. They were particularly frustrated by the Crown's refusal to engage with them over DRIP after 2002, and the CBD work programme, even though these two instruments went to the heart of their interests and Treaty rights.[16] As the claimants saw it, such failures occur not because the Crown is unaware of how it should behave, but rather because it does not live up to its own rhetoric. Counsel for Ngāti Koata said that the Crown made 'constant reference' to a 'domestic conversation' and 'proper engagement'. But 'when will this conversation begin?', asked counsel. Māori were 'constantly waiting'.[17] Part of the reason for this failure, in the claimants' view, was that the Crown got to decide the importance of the Māori interest in the first place, and a lack of departmental coordination sometimes defeated good intentions.[18]

The Crown saw things very differently. In its view, New Zealand must speak with one voice in international affairs, and that voice must be the Crown's. Māori permission to enter into international agreements was neither sought nor required.[19] Also, New Zealand is a small country with limited influence; it cannot get everything that it (or Māori) might want, and it has to work with 'likeminded' states to secure the best results possible in the circumstances.[20] The Crown denied that it was too late to consult Māori at the stage of ratification or domestic legislation, and also denied that its consultation had been poor or non-existent on particular instruments. Nonetheless, it was the Crown's view that it did not need to consult Māori in all cases; processes related to non-binding instruments were clearly an example of that. Overall, the Crown said that it had acted reasonably and in good faith where it had obligations to consult with Māori and recognise and protect Māori interests, and that it was doing all that was reasonably necessary in the dynamic world of international relations.[21]

8.3.2 Are the principles of the Treaty relevant to the making of international instruments?

In Article 1 of the Treaty of Waitangi, the Crown acquired kāwanatanga (the right to govern), which involved, among other things, the power to make policies and laws for the government of this country. Included in this, we think, was the right to represent New Zealand abroad and to make foreign policy. But the right to govern was acquired in an exchange with Māori tribal leaders and their peoples, in which the Crown guaranteed to protect Māori interests, including their full authority over their own affairs, or tino rangatiratanga. In this report, we are not concerned with any past failures of the Crown to honour this bargain as it related to the making of foreign policy and international instruments. Rather, our role is to determine whether the present regime for deciding these matters is Treaty compliant.

The Treaty entitles Māori interests to a reasonable degree of protection, when those interests are affected by the international instruments that the New Zealand Government negotiates or signs up to. This is not a small Treaty obligation for the Crown. It requires the Crown actively to protect those interests, if and when they are found to exist. We recognise, of course, that the Crown is not all-powerful (or even very powerful) in the international arena, so we would add the qualification that Māori interests must be protected to the extent that is reasonable and practicable in the international circumstances.

We would also note, as we have done elsewhere in this report, that it is for Māori to say what their interests are, and to articulate how they might best be protected – in this case, in the making, amendment, or implementation of international instruments. That is what the guarantee of

tino rangatiratanga requires. It is for the Crown to inform Māori as to upcoming developments in the international arena, and how it might affect their interests. Māori must then inform the Crown as to whether and how they see their interests being affected and protected. This is necessarily a dialogue: Māori and the Crown must always be talking to one another, whether it is occasional consultation as needed or something more regular, fixed, and permanent. We return to this point below. Here, we note that there must be a conversation, so that where Māori interests are affected by possible or proposed international instruments, those interests can be readily identified and understood, and a means of protection devised.

Finally, we think that, as in other situations discussed in this report, the degree of priority to be accorded the Māori interest depends on the scale of its importance to Māori and the nature and extent of likely impacts on it. Ultimately, this has to be ascertained by a properly informed Crown and then balanced against any valid interests of other New Zealanders and of the nation as a whole, if those interests are in tension. As we have said elsewhere, conflict between Māori and New Zealand interests is not to be assumed.

What does this mean in practical terms for the Crown's engagement with Māori over international instruments? Considering the broad spectrum of international matters, it would be impractical and undesirable for the Crown to engage in full-scale consultation with Māori over every international instrument. Sometimes Māori interests are small, identical to those of other New Zealanders, or confined to small parts of an agreement. On other occasions, they may be much greater or relate to the whole of an instrument. There can be no 'one size fits all' approach. Rather, the Treaty standard for Crown engagement with Māori operates along a sliding scale. Sometimes, it may be sufficient to inform or seek opinion from the Federation of Māori Authorities, which tends to speak for iwi business interests. But there will also be occasions in which the Māori Treaty interest is so central and compelling that engagement should go beyond consultation to negotiation aimed at achieving consensus, acquiescence or consent. DRIP would seem to be one such example. There may even be times when the Māori interest is so overwhelming, and other interests by comparison so narrow or limited, that the Crown should contemplate delegation of its role as New Zealand's 'one voice' in international affairs; negotiations over the repatriation of taonga might be an example.

The Treaty partners need to be open to all of these possibilities, not just some, and to decide which applies on the basis of the duties of good faith, cooperation, and reasonableness that each owes the other. We turn next to consider whether the Crown's current regime for decision-making about international instruments meets its Treaty obligations.

8.3.3 Do the Crown's policies and practices comply with the Treaty?

Many of the underpinnings for Crown compliance with the Treaty already exist. The Māori engagement strategy and MFAT's outreach programme were developed in good faith and with the genuine intention of informing and consulting Māori about international issues of relevance to their interests. The strategy tried to achieve early identification of specific international issues relevant to Māori, and then engagement tailored to the 'nature, extent and relative strength' of the Māori interest. To that extent, the Crown's approach is Treaty compliant. But there are conceptual flaws in the strategy.

First, the strategy is confined to consultation about legally-binding instruments only. We can see no principled reason why this should be so. Clearly, to provide a reasonable degree of protection of Māori interests in the international arena, the Crown must take account of the ways in which non-binding instruments may impact upon (or provide opportunities for) Māori. To be most effective, this needs to occur at every stage of the instruments' development, not afterwards. This was clear to us from both the claimants' and the Crown's evidence about the CBD work programme and DRIP. We note that, in practice, the Crown has not always maintained the strategy's distinction between binding and non-binding instruments. It did seek to consult about DRIP before 2003. We are not concerned here with the alleged flaws in that consultation, but rather with the point that it occurred despite the strategy, not because of it.

The second conceptual failure is that the strategy sets consultation as the maximum form of engagement. Yet,

the strategy provides for the Crown's engagement to be tailored to the 'nature, extent and relative strength' of the Māori interest. We agree with that proposition. We think, however, that there has been a failure of vision in carrying it out. Limiting engagement with Māori to consultation cannot always do justice to the full nature, extent, or relative strength of the Māori interest. Such a policy does not give effect to the Treaty partnership and the tino rangatiratanga guarantee. The evidence that we heard about DRIP and Article 8(j) of the CBD convinced us that there are times when the Crown's position on matters of core importance to Māori must be developed by consensus, and – preferably – by a negotiated agreement with Māori. Such instances will not be the norm, but they will occur. A decision-making framework that cannot accommodate such situations is not Treaty compliant.

Also, we have concerns about how the strategy is carried out in practice, in terms of providing consistent and full information to the right people at the right time, so as to consult effectively with Māori when their interests are (sometimes vitally) affected. We do not see a need to assess the details of each international instrument complained of, in terms of the quality of engagement over it. Suffice to say that sometimes there was no consultation, which the Crown's evidence confirmed. We also heard allegations of failures in process for some of the consultation that did occur. Whether or not the claimants' complaints were fully justified on this head, they hinted at poor engagement and poor relationships, either of which would be fatal to achieving the Crown's intention in engaging in the first place.

It appears to us that the combined result of the Crown's decision not to consult on non-binding instruments, and of the limits to the effectiveness of the consultation that did occur, was that Māori have sometimes been excluded from effective engagement. This includes for international instruments in areas where their interests were small but discrete (such as ANZTPA[22]), tailored but significant (such as the CBD work programme), or major and substantive (such as DRIP). Thus, the Treaty is not being kept and Māori interests are being prejudiced in the making of international instruments. But, as we have said, many of the underpinnings exist for Treaty-compliant policies and practices. The Māori engagement strategy was supposed to achieve early identification of specific international issues relevant to Māori, and then engagement tailored to the 'nature, extent and relative strength' of the Māori interest. This simply needs to happen. In order to bring it about, we propose a suite of reforms in the next section.

8.4 Reforms

What is necessary, in our view, is for the Crown to amend the Māori engagement strategy so that it covers non-binding as well as binding instruments, and to provide better for a sliding scale of engagement that will need – in some instances – to exceed consultation as its maximum. There is, of course, a huge variety of subjects and matters dealt with in international instruments. At the start, the Government needs an initial view as to whether there is a Māori interest affected by an international instrument, how strong that interest might be, and what form of engagement would therefore be appropriate. Different lead agencies can be advised by their own Māori units or advisory committees, where those exist. As a general rule we would propose that the lead agency consult with Te Puni Kōkiri so as to determine whether engagement with Māori is necessary, and the degree of engagement that the Māori interest might justify. Te Puni Kōkiri's resourcing and capacity to perform this additional or enhanced role will need to be evaluated.

The Crown must then decide who to talk to and how. It is difficult to engage the wider Māori voice in discussions over international matters and related national policies and programmes for domestic implementation. In practice, particularly in the absence of other mechanisms, it is easier for the Crown to approach known experts and those with particular views. This will sometimes be sufficient. But there will be occasions where it is necessary to go beyond the 'usual suspects' and ensure wide consultation with relevant Māori organisations and networks. As we said in chapter 6, true partnership comes through forums that include Māori experts and specialists alongside representatives of the wider Māori perspective. Forums should be created as sites for the necessary conversations to occur between interested Māori and the Crown, when consultation or negotiated agreement on international instruments is required.

We have recommended some such forums in the context of particular subjects in earlier chapters. If an international instrument relates to bioprospecting, for example, the Kura Taiao Council (see section 4.3.3) could be used as the forum for engagement on that issue. We recommend that the Crown identify all existing or proposed Māori bodies that could also be used as forums for dialogue about New Zealand's position on relevant international instruments. If there are areas in which no such forums exist, the Crown should develop a policy for calling together forums for consultation or negotiation, instrument by instrument. We also express our hope that Māori will assist this process by creating electoral colleges to appoint Māori representatives to partnership forums as needed. We do not make this a formal recommendation, since it is for Māori to decide, not the Crown, but we find it difficult to see how Treaty partnership is to be achieved without some such development at Māori instigation.

Also, we think the Crown needs to be more accountable than it is at present. There is little transparency as to how the Crown has determined the existence or strength of a Māori interest, how it has balanced that interest against others (where that proved to be necessary), and what it has done to protect the Māori interest. We therefore recommend that the Crown and Māori, having established effective partnership forums in which international affairs and particular instruments can be discussed, should also devise mechanisms for the Crown to report on how it has balanced interests and the choices that it has made. This will ensure that the balancing exercise is transparent and transparently fair.

A number of mechanisms could be tried. We recommend that the Crown should report its actions (and the outcomes) regularly to Māori organisations and to the Māori Affairs Select Committee. This should provide external scrutiny with expertise in te ao Māori. We also suggest that the Crown consider reporting its identification and balancing of interests, and its degree of protection for the Māori interest concerned, to relevant international forums concerned, if it does not already do so.

At the final stage of negotiating an agreement, we recommend that Parliament specifically address Māori interests and Treaty issues when it considers international agreements under standing orders. Currently, a National Interest Analysis has to be prepared, assessing the instrument's 'economic, social, cultural, and environmental effects' and reporting on consultations which have been carried out or are proposed with the community.[23] We recommend, as the Law Commission did in 1997, that the National Interest Analysis should include assessment of effects on Treaty rights and interests.[24] This would bring the National Interest Analysis into line with Cabinet requirements for domestic legislation.[25]

The Foreign Affairs Act 1988 may need to be amended to provide a legislative schema for protecting Māori interests. Other statutory enforcement might also be appropriate, and we recommend that the Crown consider situations where this may be required. True protection, however, will come from quality engagement and careful accountability rather than by legislative fiat.

Finally, we think that indigenous rights and the role of the indigenous voice in international forums are areas where New Zealand should be leading the world. The special place we accept Māori to hold in our systems of governance is a foundation for our national identity and cohesion. It is part of the reason why, despite our diversity, we do not have outright conflict between our two founding peoples or with the immigrants who came afterwards. This absence of such conflict should be a matter to be proud of and something to be held out to other states as a way forward, particularly for those states that have not been able to resolve internal differences peacefully. One way of doing this is for the Crown to assist Māori NGOs to participate directly in international forums. NGOs are known to improve the quality of international debate, and the Crown has long agreed in principle to Māori participation at that level. We recommend that the Crown adopt a set policy, following negotiation with Māori interests, for funding independent Māori engagement in international forums.

8.5 Summary of Recommendations

We summarise our recommendations in this chapter as follows:

- We recommend the MES be amended to require engagement over both binding and non-binding instruments, and that it provide for engagement

beyond consultation where appropriate to the nature and strength of the Māori interest. As a starting point for that engagement, we would propose that the lead agency responsible for an international instrument consult with Te Puni Kōkiri before coming to a view whether there is a Māori interest, the likely nature and strength of that interest, and the degree of engagement that its priority might justify.

- To enable consultation or negotiation to take place, we recommend that the Crown develop a policy to identify relevant bodies that already exist which could also serve as partnership forums for the discussion of international instruments, and to call forums together as necessary (instrument by instrument) where they do not exist. We also suggest that Māori consider the appointment of electoral colleges so that such forums may be readily constituted on matters of specialised interest.
- We also recommend that the Crown adopt a set policy, following negotiation with Māori interests, for funding independent Māori engagement in international forums.
- In order to ensure that quality engagement takes place and is effective, we recommend that the Crown adopt a series of mechanisms to ensure accountability. These include regular reporting to iwi and Māori organizations, as well as to Parliament's Māori Affairs Committee. When Parliament considers an international agreement under standing orders, we recommend – as the Law Commission did before us – that the National Interest Analysis include consideration of whether the instrument has any effect on Treaty rights and interests. Statutory enforcement might also be appropriate, and we recommend that the Crown consider situations where this may be required. Finally, we suggest that the Crown consider reporting its engagement with Māori, and the outcomes, to the relevant international body or forum, where it does not already do so.

Text notes

1. Rodolfo Stavenhagen, 'Making the Declaration Work', *The United Nations Declaration on the Rights of Indigenous Peoples*, ed Claire Charters and Rodolfo Stavenhagen (Copenhagen: International Work Group for Indigenous Affairs, 2009), p 356
2. Document T1, p 70
3. Document P13, pp 6–11
4. Gerard van Bohemen, under cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 22 January 2007 (transcript 4.1.21, pp 68–70, 73); doc R34, pp 88, 94; doc R34(zz); doc P13, pp 6–8
5. Document P30(a), pp 7, 18
6. Document P30(f), p 7
7. Document R34, pp 49, 55–56, 101
8. Claim 1.1(a) (Haana Murray, Hema Nui a Tawhaki Witana, and others, amended statement of claim, 10 September 1997), pp 27–30; doc A17, p 11
9. Document R16, pp 22–24
10. Ibid, pp 17–18
11. Document R34, pp 16–18; doc R34(oo) (Ministry of Foreign Affairs and Trade, Kaupapa Māori Division, 'Maori Outreach Strategy', Ministry of Foreign Affairs and Trade, 2003); see also docs R34(nn)–(vv) (Ministry of Foreign Affairs and Trade, documents relating to its outreach activities)
12. Document R34(ff)
13. Document R34(ff); doc R34, p 13; Gerard van Bohemen, oral evidence on behalf of the Ministry of Foreign Affairs and Trade, 21st hearing, 22 January 2007 (transcript 4.1.21, p 11); paper 2.256, p 28
14. Document R34(ff), p 5
15. Ibid, pp 5–7
16. Document S2, p 23; doc S3, p 22; doc S6, p 54; doc S4, pp 90–93
17. Document S4, pp 90–91
18. Ibid, pp 92–94
19. Paper 2.256, pp 27–28; doc R34, p 8
20. Document R34, p 10
21. Document R34, pp 16–18; Gerard van Bohemen, oral evidence on behalf of the Ministry of Foreign Affairs and Trade, 21st hearing, 22 January 2007 (transcript 4.1.21, p 9); Gerard van Bohemen, under cross-examination from counsel for Ngāti Kurī, Ngāti Wai, and Te Rarawa, 21st hearing, 22 January 2007 (transcript 4.1.21, p 23); paper 2.256, pp 23–28

22. See Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, sec 7.3.7
23. Standing Orders of the House of Representatives 2008, SO 389(1)
24. Law Commission, *The Treaty Making Process: Reform and the Role of Parliament* (Wellington: Law Commission, 1997), p 73; see also doc K2, p 37
25. Cabinet Office, *Cabinet Manual 2008* (Wellington: Department of the Prime Minister and Cabinet, 2008), p 95

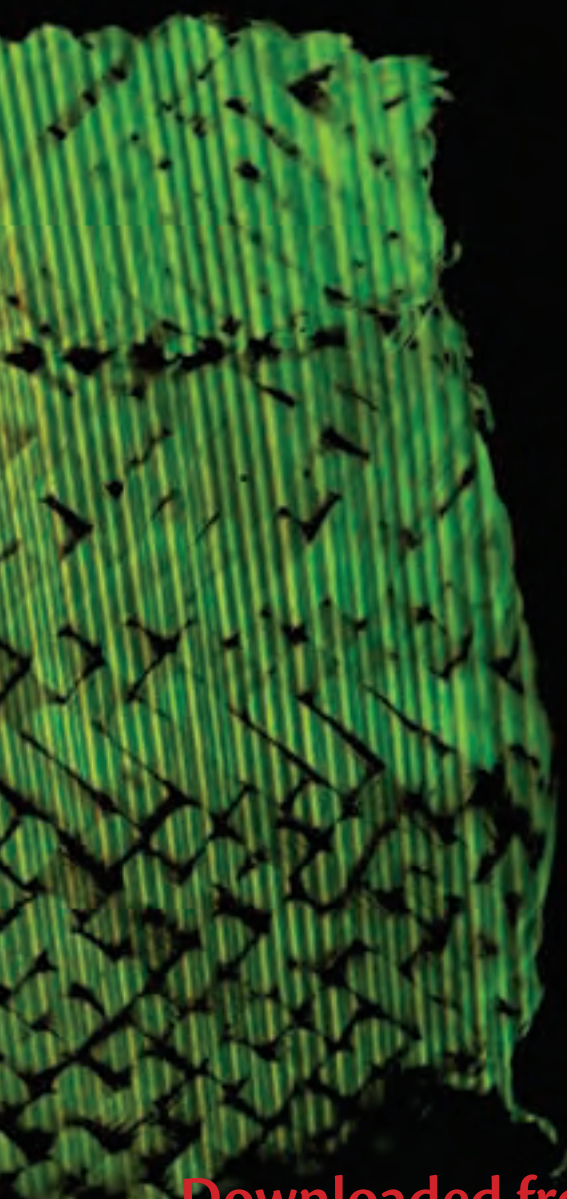
Whakataukī notes

Page 230: 'Churchill Urges Patience in Coping with Red Dangers', *New York Times*, 27 June 1954, p 1. Harold MacMillan may have said this in Canberra in 1958 rather than Churchill in 1954.

Page 231: Source unknown

9

CONCLUSION



Kia mau ki ngā kīwei o te kete kōrero a Tūroa.

Grasp the handles of this basket,
for it is filled with the insights of long deliberation.

CHAPTER 9

CONCLUSION

Over the 171 years since the Treaty of Waitangi was signed, paving the way for two peoples to live side by side in New Zealand, the Crown has largely supported and promoted one of our two founding cultures at the expense of the other. At times, the official attitude to Māori culture has been suppressive; at others it has been simply neglectful. Steady changes in the way the Crown regards its Treaty obligations over the last few decades have begun to turn these attitudes around. But on any reading there are still many areas – IP law, cultural harvest, traditional healing, to name just a few – where Māori cultural perspectives are on the outer. The key problem for kaitiaki is that they have little or no control over their relationships with taonga. Sometimes, the Crown exercises that control; sometimes, it is others such as commercial interests or property owners; only very rarely is it kaitiaki. In short, there is little room in current New Zealand law and policy for mātauranga Maori and for the relationships upon which it is founded.

We have in this report suggested ways in which this can and should change. Sometimes we propose the formation of a new entity; at other times we recommend legislative amendments to give greater recognition to kaitiaki interests or clarify Māori roles in decision-making. But on many occasions what we believe is needed more than anything is a change in mindset – a shift from the 'old' approach that valued only one founding culture to one in which the other is equally supported and promoted, and the advantage New Zealand would hold by its embrace of both (along with newer cultures from other lands) is widely recognised.

In taking such steps the Government would be fulfilling its Treaty duties while also acting in the best interests of all. In some cases, it would be falling into line with international trends (exemplified by the world-wide adoption of the Declaration on the Rights of Indigenous Peoples). In others – particularly in the accommodation of indigenous interests in contemporary IP law – it has an opportunity to be truly innovative. Resolution of this claim is actually a chance for New Zealand to be recognised as a world leader in the challenging arena of indigenous peoples' rights.

In making this shift, the Crown will need to accept its own core role in the preservation and transmission of mātauranga Māori. While it is Māori who must keep their culture alive, the Crown has a great responsibility too. This stems only partly from its past failures to protect mātauranga Māori. It relates also to the accepted role of the State in educating the nation's young and the fact that few opportunities exist today for Māori to learn their culture in the settings where it was traditionally handed down. Moreover, it arises from the fact that Māori culture is our *national* culture – it helps give all New Zealanders a sense of who they are. It may well also be that Māori live healthier and more

productive lives when they are secure in their own cultural identity, and when their identity has a secure place in the national story.

In accepting this role the Crown can no longer view Māori culture as 'other'. It must embrace the idea that it represents Māori too, and be prepared to take on more of a Māori complexion and outlook. Doing so will of course not lessen the need for the Crown and iwi to engage as Treaty partners. In fact, the adoption of true forms of partnership is crucial to the protection of mātauranga Māori and the exercise of kaitiakitanga. Partnership requires an acceptance of shared responsibility through the Crown bringing its support to the table and Māori their motivation. In other words, kaitiaki communities must be empowered through their joint efforts with the Crown; grassroots commitment must not be stifled by official control.

The Treaty interest must of course be balanced with other interests, such as those of regional museums, copyright holders, mountain clubs, and nurserymen. But to a large extent those other interests are already taken into account in current law, policy, and practice; it is high time to elevate the Treaty interest to its rightful place alongside them. It is also important to acknowledge that Treaty interests are as often as not in alignment with those of other sectors of the community. To protect the kaitiaki interest in taonga is in many cases also to protect the taonga for all New Zealanders.

We acknowledge that there will be some unavoidable cost in our proposals for new bodies and regulatory frameworks. We accept that the Government's coffers are not full after the combined effects of worldwide recession and a devastating earthquake. The expense of making good the damage wrought by overseas banks and the movements of Rūaumoko, however, need not scupper a project as important as the safeguarding of mātauranga Māori. Much can be achieved, for example, through attitudinal shifts and reprioritisation. Creating a greater role for kaitiaki communities in the care of taonga could well reduce costs rather than increase them.

In any event, the new bodies and frameworks we propose will provide no more than the platform for the conversation the Treaty requires in IP, conservation, the arts, and other areas. Experience shows us that without such a platform, these conversations simply do not occur and we revert to the invisible Māori dimension of the 1950s.

We would also be neglecting our duty to issue a report that called for a lesser standard of compliance with Treaty obligations given the straitened financial conditions. The vulnerability of taonga and of mātauranga Māori requires commensurate action, and it is our job to point that out. The fact is that a lack of support for mātauranga Māori now will have serious consequences down the track. Every year the number of kaumātua raised in village communities and taught by tohunga diminishes. It was not uncommon for us to hear reference to an elder being the last to practise a particular skill. In these circumstances the task of protecting Māori culture is urgent and cannot wait yet another decade. It is the Government's prerogative to set priorities, but it is its Treaty duty to actively protect taonga.

In fact, experience shows that the Crown is prepared at times to share control of taonga with kaitiaki, protect mātauranga Māori, and support the transmission of that mātauranga to future generations. But that will is strongest by far when its exercise is directed to the settlement of historical Treaty claims. These settlements today are delivering to iwi joint management of rivers, lakes, and Crown land; title to areas of Crown land, including areas of cultural significance within the conservation estate; rights of cultural harvest and fossicking on conservation land; accords over the care of physical taonga works, both when held by the national museum and as re-found and subject to the Protected Objects Act; lump sum gifts towards the building of whare taonga; the restoration of traditional place names; a promise to record the authorship and significance of *Ka Mate* to Ngāti Toa; the restoration and redevelopment of marae; relationship agreements with a variety of government departments and ministers; and indeed the facilitation of access to services and work programmes across the whole of government.

In the context of historical Treaty settlements, therefore, the Crown is delivering to kaitiaki at least some of what claimant iwi are pursuing through this claim. Indeed, the range of cultural redress available under the settlement process has clearly expanded as the political urgency to settle claims has increased. This raises the

question as to what would happen if the settlement process did not exist. The failure ever to invoke sections 33 and 188 of the Resource Management Act in favour of iwi suggests that there would be little on offer. No one should infer from this that recognition of kaitiaki interests should be contingent on the existence of a historical grievance: the very existence of these unused provisions shows that Parliament itself does not believe this.

The fact that historical Treaty settlements have become the principal vehicle for protecting mātauranga Māori and taonga through historical Treaty settlements leads to inevitable inconsistencies. It seems random and iniquitous, for example, that a haka might gain protection but a mōteatea such as 'Pō Pō' might not. We say this not from any ignorance of Ngāti Toa's great concern over the commercial exploitation of *Ka Mate*, but because we believe that all taonga works should be entitled to the same kinds of protection. We also see the likely unfairness of some settled groups missing out on forms of cultural redress which are now a standard feature of Treaty settlements, but which were strictly off the table at the time of their own negotiations, or smaller iwi missing out because they lack the political leverage to strike a good deal.

A key issue arising in Wai 262, therefore, is how and whether the kind of provision for kaitiakitanga and mātauranga Māori to be found in the settlements process can be normalised before that process is over. As policy thinkers have observed, settlements offer a 'relatively protected environment' in which to negotiate the ongoing Crown–Māori relationship. But how will the nation cope when 'the convenient levers for establishing these new relationships will be gone'?[1] The ideal solution is to begin that process of normalisation now. For one thing, this will help ensure the durability of earlier (and possibly less generous) historical settlements. Moreover, the lesson of settlements is that there is nothing to fear from supporting mātauranga Māori and according kaitiaki interests appropriate recognition. The ongoing level of bipartisan parliamentary support for settlement legislation is proof enough of that.

It is time to move forward. As a nation we should shift our view of the Treaty from that of a breached contract, which can be repaired in the moment, to that of an exchange of solemn promises made about our ongoing relationships. It is the process of historical settlements itself that allows us to shift our attention in this way from the past to the future. Wai 262 is fundamentally a claim about how that future should look. The timing of our report's release may thus prove propitious. After decades of profound social and political change, and a generation-long focus on the resolution of past grievances, we are now ready to enter a new stage in the relationship.

Altered demographics mean we must do this in any event. In the life of the nation Māori are now much more to the fore, and there is no turning back from that. So, while the Treaty makes it a constitutional responsibility to adjust the Crown–Māori relationship, even without the Treaty the country would have a social and political responsibility to do so. The number of Māori is predicted to rise to over 800,000 by 2026,[2] which suggests that the total will nudge one million by mid-century.

But two centuries of interaction, as well as the rapid growth of Pacific and Asian populations, mean that demographic change is not simply about greater numbers of Māori. The nation is becoming more ethnically diverse than ever before, while at the same time some of the lines between Māori and Pākehā have become blurred. Inevitably, the Treaty relationship will become more complicated. This does not lessen its relevance, however: in societies such as Australia and Canada the issue of aboriginal rights is no less important for their broad multiculturalism. And, despite the 'blur' in the middle, our two founding cultures remain distinct. Through the Treaty they provide us with a shared identity, giving us, on the one hand, our sense and right of place in the Pacific, and, on the other, the legacy of the West. Their gravitational pull will remain strong enough to draw newer cultures to them.

We acknowledge that some New Zealanders feel a sense of unease about these ideas. After all, they require us to jettison some long held assumptions about who and what we are. But these assumptions are becoming more and more difficult to sustain anyway. History and the future both demand that we make the leap to acceptance of Māori culture and identity as a founding pillar of our national project. This is not just a matter of justice (though it is that, of course). Demographics, economics, and geo-politics suggest it is now a matter of necessity.

The signs are generally positive that we are now ready. There is a deep reservoir of goodwill between our cultures, and much commonality. Māori culture is increasingly being embraced in the Pākehā mainstream, in ways that would have seemed almost inconceivable a generation ago. There is a growing community realisation that New Zealand wins when Māori culture is strong. We have the opportunity now to take this a stage further through genuine commitment to the principles of the Treaty. This implies not only kaitiaki control of taonga where that is justified; it also implies a genuine infusion of the core motivating principles of mātauranga Māori – such as whanaungatanga and kaitiakitanga – into all aspects of our national life.

Such a commitment will not only fulfil – at last – the promise that was made when the Crown and tangata whenua entered their partnership at Waitangi. It will also pave the way for a new approach to the Treaty relationship: as a relationship of equals, each looking not to the grievances of the past but with optimism to a shared future. It is, in other words, time to perfect the partnership.

Text notes

1. Institute of Policy Studies, 'Post-Treaty Settlements Issues', Victoria University of Wellington, http://ips.ac.nz/events/completed-activities/Emerging%20Issues%20Programme/Post-Treaty%20settlements.html (accessed 8 March 2011)
2. Statistics New Zealand, 'National Ethnic Population Projections: 2006 (Base) – 2026 Update', *Hot Off the Press* (Wellington: Statistics New Zealand, 22 April 2010), p12; Statistics New Zealand, 'Tables, National Ethnic Population Projections: 2006 (Base) – 2026 Update', Excel spreadsheet, 22 April 2010, tbls 1m, 3m

Dated at Wellington this 28th day of June 2011

J V Williams, presiding officer

R C A Maaka, member

P E Ringwood, member

K W Walker, member

THE SEAL OF THE WAITANGI TRIBUNAL

GLOSSARY

The following list of words and terms excludes those defined where they occur in the text. In addition to evidence put before this inquiry, the following principal sources were consulted: 'Te Aka Māori-English, English-Māori Dictionary and Index', Auckland University of Technology, http://www.maoridictionary.co.nz; 'Ngata Dictionary', Learning Media Ltd, http://www.learningmedia.co.nz/ngata; Herbert W Williams, *Dictionary of the Maori Language*, 7th ed (Wellington: GP Print, 1997); 'The Encyclopedia of New Zealand', Ministry for Culture and Heritage, http:www.teara.govt.nz; and *Oxford Dictionary of English*, 2nd ed (Oxford: Oxford University Press, 2003).

Te Reo Māori Terms

ariki senior leader, first born in a high ranking family, paramount chief
atua the gods, spirit, supernatural being
awa river, stream

haka a vigorous dance accompanied by actions and words, performed by a group
hapū clan, section of a tribe
harakeke *Phormium tenax* and *P cookianum* – New Zealand flax
Haumia-tiketike one of the children of Rangi-nui and Papa-tū-ā-nuku
Hawaiki ancestral overseas Māori homeland
hei tiki carved figure worn around the neck
hui meeting, gathering, assembly

iwi tribe, people

kai food
kaihautū leader, helmsman
kaimoana seafood
kāinga home, village, settlement
kaitiaki guardian, protector; older usage referred to kaitiaki as a powerful protective force or being
kaitiakitanga the obligation to nurture and care for the mauri of a taonga; ethic of guardianship, protection
kaiwhakahaere supervisor, manager
kanohi ki te kanohi in person, face to face
kapa haka group performance of traditional and contemporary Māori song and dance; includes waiata, poi, and haka
kapu tī cup of tea
karakia prayer, ritual chant, incantation
kaumātua elder
kaupapa topic, policy, programme, agenda
kauri *Agathis Australis* – New Zealand's largest native tree, found naturally only in the Far North
kawakawa *Macropiper excelsum* – pepper tree
kāwanatanga government, governorship, authority
kea *Nestor notabilis* – mountain parrot

kēhua ghost
kererū *Hemiphaga novaeseelandiae* – New Zealand wood pigeon, known as kūkupa in the Far North
kiekie *Freycinetia baueriana* ssp *Banksii* – epiphytic plant vital to the practice of weaving
kina *Evechinus chloroticus* – sea urchin or sea egg, a spiny invertebrate
kirituhi skin etching in a generic Māori style that lacks the spiritual or whakapapa elements of tā moko
kiwi *Apteryx* spp – flightless nocturnal bird
kōhanga reo language nest; pre-school aimed at immersing pupils in Māori language and culture
kōiwi tangata human remains
kōkako *Callaeas cinerea* – one of the endemic wattlebirds
komiti committee
kōrero story, stories; discussion, speech, to speak
kōrero tuku iho body of inherited knowledge
koromiko *Hebe salicifolia, H stricta*, and other species
korowai cloak, a mark of rank and honour
koru spiral form; shaped like an unfolding fern frond
kōura *Paranephrops planifrons* and *P zealandicus* – crayfish
kōwhai *Sophora* – a small tree with several New Zealand species
kōwhai ngutukākā *Clianthus puniceus* – kaka beak, a low-growing spindly shrub with clusters of beak-shaped flowers
kōwhaiwhai decorative scroll patterns painted on rafters in wharenui
kūkupa see *kererū*
kūmara *Ipomoea batatas* – sweet potato
kura school
kura kaupapa Māori primary schools where te reo Māori is the principal medium of instruction

mahi work, effort
mamaku *Cyathea medullaris* – black tree fern
mana authority, prestige, reputation, spiritual power
mana whenua, manawhenua customary rights and authority over land and taonga; the iwi or hapū which holds mana whenua in an area
mānuka *Leptospermum scoparium* – a variety of tea tree
Māoritanga Māori culture, practices, and beliefs
marae enclosed space or courtyard in front of a wharenui where formal welcomes and community discussions take place; also the area and buildings surrounding the marae
mātauranga knowledge, wisdom, ways of knowing
mātauranga rongoā traditional knowledge of healing and the healing qualities of plants
mate atua injuries or illnesses without an obvious physical cause and attributed to supernatural causes
mate tangata injuries or illnesses with obvious physical causes
mauri the life principle or living essence contained in all things, animate and inanimate
mere a short flat club, usually made of wood, bone, or greenstone
mirimiri massage, called romiromi when the fingers are used and takahi when feet are used
mokopuna grandchildren, descendants
moko mōkai preserved skin-etched Māori heads

mōteatea song-poem; traditional Māori chant, lament
ngeri a rythmic chant with actions

noa ordinary, not restricted, a state of relaxed access

oranga health

pā fortified village, or more recently, a village
Pākehā New Zealander of European descent
pakiwaitara legend, ancient story, myth
Papa-tū-ā-nuku earth mother deity, partner of Rangi-nui
pātaka storehouse
pātaka komiti Māori committees which manage iwi access to plants and animals on DOC land for cultural harvest purposes
pātere a song or chant of contempt composed in response to a derogatory comment
patu weapon, club
pāua *Haliotis* spp – abalone, a univalve shellfish
pepeha saying, proverb
pītau unfurling spiral form of a fern frond; perforated spiral carving design
piupiu traditional flax skirt made from strips of prepared and dyed harakeke, now used mainly for kapa haka performances
pōhutukawa *Metrosideros excelsa* and other species – the 'Kiwi Christmas tree'
pōkeka a rhythmic chant, often poetic, without actions
poroporo *Solanum aviculare* and other species – a member of the nightshade family
pou pole, support; pole in a meeting house
pōwhiri welcoming ceremony, especially onto a marae
puawānanga *Clematis paniculata* – New Zealand clematis
pūpū harakeke *Placostylus ambagiosus* – flax snail
pūrākau legend, ancient story, myth

rāhui temporary ban, closed season, or ritual prohibition placed on an area, body of water, or resource
rākau rongoā herbal remedies
rangatiratanga chieftainship, self-determination, the right to exercise authority; imbued with expectations of right behaviour, appropriate priorities, and ethical decision-making
Rangi-nui, Ranginui-te-pō sky father deity, partner of Papa-tū-ā-nuku
raranga weaving
raupō *Typha orientalis* – bulrush
rawa property, wealth; development and use of resources
ritenga rituals
rito the young centre of the flax bush
rohe traditional tribal area, territory
rongoā traditional Māori healing; medicinal qualities
ruatau dual helix formation sometimes seen in kōwhaiwhai patterns, representing the interwoven nature of different forms of knowledge

tā moko the Māori art form of skin-etching, which expresses the wearer's whakapapa and tribal identity and its spiritual significance
taha wairua spiritual dimension
tamariki children
Tāne-mahuta male personification of the primordial forest ecosystem, one of the children of Rangi-nui and Papa-tū-ā-nuku
Tangaroa god of the sea
tangata whenua indigenous people of the land; local people with strong whakapapa links to the area
tangi, tangihanga funeral rites for the dead
tāniko weaving style used especially for cloak borders, made by finger weaving muka thread held between two vertical pegs into rectilinear patterns
taonga a treasured possession, including property, resources, and abstract concepts such as language, cultural knowledge, and relationships
taonga tuku iho treasured possessions handed down, heritage
taonga tūturu artefacts, moveable cultural heritage, cultural objects
tapu sacred, sacredness, separateness, forbidden, off limits
tātai genealogy, lines of ancestry
tau kōura traditional method for catching crayfish
tāwhara the fruit of the kiekie
te ao mārama the world of light
te ao tūroa world, Earth, nature, light of day, the entirety of the natural world
te reo ake o Ngāti Porou language of Ngāti Porou
te reo, te reo Māori the Māori language
Te Rerenga Wairua departing place of spirits, Cape Reinga
Te Tiriti o Waitangi the Treaty of Waitangi
tikanga traditional rules for conducting life, custom, method, rule, law
tikanga Māori Māori traditional rules, culture
tiki carved figure
tino tangatiratanga the greatest or highest chieftainship; self-determination, autonomy; control, full authority to make decisions
tītī *Puffinsus griseus* – muttonbird, sooty shearwater
tohorā whale
tohunga expert
tōtara *Podocarpus totara* and other species – tall forest tree
tuatara *Sphenodon* spp – a reptile unique to New Zealand
tūī *Prosthemadera novaeseelandiae* – a native bird
tukutuku woven lattice-work panels
tupuna ancestor, forebear

wāhanga section, division
wāhi tapu sacred place
waiata song
wairākau leaf medicine, herbal remedy
wairua spirit, soul
waka canoe

waka taua war canoe
wānanga tertiary institution; traditional school of higher learning
wehi dread, fear, awe
whaikōrero traditional oratory on the marae; formal speech-making
whakairo carving, carved object; to ornament with a pattern
whakamā embarrassment, shyness, shame
whakamana to give authority to, enable, empower, authorise, legitimise
whakapapa genealogy, ancestral connections, lineage
whakaruruhau the act of protection or oversight
whakataukī proverb, saying
whānau family, extended family
whanaungatanga ethic of connectedness by blood; relationships, kinship; the web of relationships that embraces living and dead, present and past, human beings and the natural environment
wharekai dining hall
wharenui meeting house
wharepaku toilet
whare pora weaving school
whare tupuna ancestral house, meeting house
whare whakairo carved house
whenua land, placenta

Scientific and Technical Terms

DNA deoxyribonucleic acid, a self-replicating material which is present in nearly all living organisms as the main constituent of chromosomes, the carrier of genetic information
ex situ refers to genetic and biological resources located outside their natural habitat
in situ refers to genetic and biological resources within their natural habitat
ordre public public policy, referring in particular to threats to social order in relation to moral principles
RNA ribonucleic acid, present in all living cells, its principal role being to act as a messenger carrying instructions from DNA for controlling the synthesis of proteins
sui generis stand alone, unique, or particular to itself

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Plate xxii: Humpback whale
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Plate xxiii: Mānuka tree
Photograph by Dmitri Krasnokoutski (http://www.flickr.com/photos/25986885@N04/4261145055/)

Plate xxiii: Pōhutukawa tree

Photograph by Terry Greene; reproduced by permission of the Department of Conservation (10052201)

Plate xxiv: Awatea and Manaia Haenga planting rongoā trees, September 2009

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