

THE
REPORT ON THE
CROWN'S REVIEW OF THE
PLANT VARIETY RIGHTS REGIME

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CROWN'S REVIEW OF THE
PLANT VARIETY RIGHTS REGIME

Stage 2 of the Trans-Pacific Partnership Agreement Claims

WAI 2522

WAITANGI TRIBUNAL REPORT 2020



The cover design by Cliff Whiting invokes the signing of the Treaty of Waitangi and the consequent interwoven development of Māori and Pākehā history in New Zealand as it continuously unfolds in a pattern not yet completely known

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CONTENTS

Letter of transmittal	ix
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CHAPTER 1: THE CONTEXT FOR THIS INQUIRY 1

1.1 Introduction	1
1.2 The proceedings	1
1.3 The structure of this report	5
1.4 The Crown's policy on the plant variety rights regime	5
1.5 The parties and their positions	7
1.5.1 The claimants	7
1.5.2 The Crown	8
1.5.3 The interested parties	9
1.6 The issue for this inquiry	10

CHAPTER 2: THE TIRITI /TREATY CONTEXT 11

2.1 Introduction	11
2.2 The principle of partnership	11
2.3 The principle of active protection	13
2.3.1 The importance of active protection	13
2.3.2 The standard of active protection	14

CHAPTER 3: WAS THE CROWN'S PROCESS FOR REVIEWING THE PLANT VARIETY RIGHTS REGIME TIRITI/TREATY CONSISTENT? 17

3.1 Introduction	17
3.2 The engagement process	17
3.2.1 The claimants' position	17
3.2.2 The Crown's position	18
3.2.3 The interested parties' position	19
3.2.4 Tiriti/Treaty analysis	19
3.2.4.1 The engagement process	19
3.2.4.2 Evidence of claimant concerns with the engagement process	21
3.2.4.3 Annex 18-A	23
3.2.4.4 Tribunal finding on the adequacy of the Crown's engagement process	25
3.3 Does the Crown's policy reflect the Tribunal's characterisation of kaitiakitanga?	27

**CHAPTER 3: WAS THE CROWN'S PROCESS FOR REVIEWING THE
PLANT VARIETY RIGHTS REGIME TIRITI/TREATY CONSISTENT?—continued**

3.3	Does the Crown's policy reflect the Tribunal's characterisation of kaitiakitanga? —continued	
3.3.1	The claimants' position	27
3.3.2	The Crown's position	29
3.3.3	The interested parties' position	29
3.3.4	Tiriti/Treaty analysis and finding	30
3.4	Should the plant variety rights policy review be included with Te Pae Tawhiti?	36
3.4.1	The claimants' position	37
3.4.2	The Crown's position	37
3.4.3	The interested parties' position	38
3.4.4	Tiriti/Treaty analysis and finding	38

CHAPTER 4: OVERVIEW OF FINDINGS 41

4.1	Introduction	41
4.2	Our findings	41
4.2.1	The engagement process	41
4.2.2	Does the Crown's policy reflect the Tribunal's characterisation of kaitiakitanga?	41
4.2.3	Should the plant variety rights policy review be included with Te Pae Tawhiti?	42
4.2.4	Overall issue for inquiry	42
4.3	Concluding remarks	42

APPENDIX: SELECT INDEX TO THE RECORD OF INQUIRY 45

Record of hearings	45
Tribunal members	45
The hearing	45
The claimants	45
Wai 2522 (Reid and others)	45
Wai 2523 (Baker and others)	45
Wai 1427	45
Wai 2530	46
Wai 2535	46
Wai 2888	46
Wai 2889	46
The interested parties	46
Wai 762	46
Wai 996	46
Wai 1531	46
Wai 1537	46

CONTENTS

Wai 1541	46
Wai 1673	46
Wai 1681	47
Wai 1917	47
Wai 1918	47
Wai 1940	47
Wai 1957	47
Wai 2206	47
Record of proceedings	47
1 Statements	47
1.1 Statements of claim	47
2 Tribunal memoranda, directions, and decisions	47
2.5 Pre-hearing	47
2.7 Post-hearing	47
3 Submissions and memoranda of parties	48
3.1 Pre-hearing	48
3.3 Opening, closing, and in reply	48
3.4 Post-hearing	49
4 Transcripts and translations	49
4.1 Transcripts	49
Record of documents	49
A Stage 1 documents	49
B Stage 2 documents	49



Waitangi Tribunal
Te Rōpū Whakamana i te Tiriti o Waitangi
Kia puta ki te whai ao, ki te mārama

The Honourable Nanaia Mahuta
Minister for Māori Development

The Right Honourable Winston Peters
Minister of Foreign Affairs

The Honourable Kris Faafoi
Minister of Commerce and Consumer Affairs

Parliament Buildings
WELLINGTON

15 May 2020

E ngā Minita, tēnā koutou

Ka hua ake ngā whakamoemiti ki ngā mana katoa kua whetūrangitia. Kei roto tō rātou wairua i ngā kaupapa kua whārikitia ki te aroaro o tēnei Taraipūnara, hei Kaitiaki mō ngā tūmanako e puritia nei e te Tiriti o Waitangi.

We enclose our report on the Crown's policy for the review of the plant variety rights regime, including the Plant Variety Act 1987. The report is the result of a hearing in Wellington from 4 to 6 December 2019.

The claims we address concern obligations agreed to when New Zealand was negotiating what was the Trans-Pacific Partnership Agreement (TPPA) and subsequently became the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPPA).

Reform of the plant variety rights regime and whether or not New Zealand should accede to UPOV 91 were amongst the issues we adjourned in 2016 when we reported under urgency on the adequacy of the Tiriti/Treaty exception clause in what was then the TPPA. This was because the Crown's policy on these matters was still under development.

The issue for this stage of our inquiry was: Is the Crown's process for engagement with Māori over the plant variety rights regime and its policy on

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whether or not New Zealand should accede to the Act of 1991 International Union for the Protection of New Varieties of Plants consistent with its Tiriti/Treaty obligations to Māori?

In our report, we also address the following three subsidiary questions:

- ▶ Did the Crown engage adequately with Māori when preparing its policy on whether to accede to UPOV 91, including when negotiating what became annex 18-A in both agreements?
- ▶ Does the Crown's policy on the plant variety rights regime properly reflect the Waitangi Tribunal's characterisation, in the *Ko Aotearoa Tēnei* report, of kaitiakitanga as an aspect of tino rangatiratanga? Has the Crown made any material error in its attempt to implement the Tribunal's findings and recommendations?
- ▶ Should the plant variety rights policy review be included with the whole-of-government response to *Ko Aotearoa Tēnei* and become part of the work of Te Pae Tawhiti?

After careful consideration, we find that the claims of Tiriti/Treaty breach in relation to these issues are not made out, and accordingly we have no recommendations to make.

In fact, we support certain aspects of the Crown's policy. In particular, we welcome Cabinet's decision to not only implement the relevant findings and recommendations of the Tribunal's 2011 *Ko Aotearoa Tēnei* report but in fact go further and provide additional measures to recognise and protect the interests of kaitiaki in taonga species and in non-indigenous species of significance.

Nonetheless, it is unprecedented in our experience for claimants to oppose the Crown when it seeks to implement the recommendations of this Tribunal. The fact that this is what has happened in this instance we think arises from long-standing frustration that, in the negotiation of international treaties, the Māori perspective is at the margins, required to react as best it can to timeframes and to an agenda set by the Crown (and others). We will return to these important issues in the final stage of our inquiry later this year, when we will address the issues of engagement and secrecy.

Nāku noa, nā



Judge Michael J Doogan
Presiding Officer

ABBREVIATIONS

app	appendix
CA	Court of Appeal
CPTPPA	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
doc	document
ed	edition, editor
JP	justice of the peace
ltd	limited
MBIE	Ministry of Business, Innovation and Employment
MFAT	Ministry of Foreign Affairs and Trade
NZLR	<i>New Zealand Law Reports</i>
ONZM	New Zealand Order of Merit
p, pp	page, pages
PC	Privy Council
PVA	Plant Variety Rights Act 1987
PVR	plant variety right
s, ss	section, sections (of an Act of Parliament)
TPK	Te Puni Kōkiri
TPPA	Trans-Pacific Partnership Agreement
UPOV	International Union for the Protection of New Varieties of Plants
UPOV 91	International Convention for the Protection of New Varieties of Plants
v	and
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2522 record of inquiry, a select copy of the index to which is reproduced in the appendix. A full copy of the index is available on request from the Waitangi Tribunal.

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The Tribunal would like to thank all the staff involved for their assistance with this report, especially Joy Hippolite and Ngawai McGregor. We also want to acknowledge the skills of Jane Latchem and Dominic Hurley, who copyedited and typeset the report.

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CHAPTER 1

THE CONTEXT FOR THIS INQUIRY

1.1 INTRODUCTION

This report addresses several claims about the Crown's process for reviewing the plant variety rights regime, including the Plant Variety Rights Act 1987. The impetus to these claims was provided by the obligations agreed to when New Zealand was negotiating what was the Trans-Pacific Partnership Agreement (TPPA) and subsequently became the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPPA).

New Zealand is a member of the International Union for the Protection of New Varieties of Plants (UPOV). The union is responsible for the UPOV convention, the principal international agreement relating to intellectual property protection over plant varieties. In 1991, a new version of the convention was introduced, strengthening plant breeders' rights (UPOV 91). It is a requirement of the CPTPPA that New Zealand must either accede to UPOV 91 or implement a plant variety regime that gives effect to UPOV 91, and it must do so by December 2021. Since 2016, the Government has been reviewing the Plant Variety Rights Act 1987 in order to meet this obligation. The review proper started in February 2017.¹

The claimants argued that the Crown's engagement with Māori in reviewing the plant variety regime was inadequate and not Treaty compliant. Furthermore, they asserted that the Crown's policy on whether New Zealand should accede to UPOV 91 did not sufficiently provide the opportunity for Māori to protect their rangatiratanga and their kaitiaki relationships to taonga species.² In response, the Crown argued that the engagement was extensive and that the resulting proposed plant variety rights regime not only met Treaty obligations but exceeded the relief originally sought by the claimants.³

1.2 THE PROCEEDINGS

The original claims for this inquiry were lodged on 23 June 2015, when negotiations for the TPPA were underway.⁴ Those negotiations concluded on 5 October 2015. The Tribunal decided to hear the claims in stages.⁵ Heard under urgency, stage 1

1. Memorandum 3.4.17; doc B17(d), p 86

2. Submission 3.3.44, p 14; submission 3.3.47(a), pp 8, 47; submission 3.3.49, p 2

3. Submission 3.3.48, p 4

4. Claim 1.1.1

5. Memorandum 2.5.6; Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement* (Wellington: Legislation Direct, 2016), p 3

focused on concerns that New Zealand's entry into the TPPA would 'diminish the Crown's capacity to fulfil its Treaty of Waitangi obligations to Māori'.⁶ The Crown argued that a Treaty exception clause in the TPPA (clause 29.6), did provide sufficient protection. That clause (which has been carried forward into the CPTPPA) provided as follows:

Article 29.6: Treaty of Waitangi

Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.

The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.⁷

On 31 July 2015, we granted priority to two issues for the stage 1 proceedings:

- ▶ whether or not the Treaty of Waitangi exception clause was indeed the effective protection of Māori interests it was said to be; and
- ▶ what Māori engagement and input was then required over steps needed to ratify the TPPA (including by way of legislation or changes to Government policies that may affect Māori or both)?⁸

We did not find a breach of the Tiriti/Treaty principles in that inquiry, but our report expressed some concerns and suggested further dialogue between Māori and the Crown over an appropriate exception clause for future trade agreements.⁹

We adjourned issues about the plant variety rights regime and UPOV 91 because the Crown had informed the Tribunal that it intended to undertake targeted engagement on issues relating to changes to the plant variety rights regime. We agreed to 'allow time for the [Crown's] process to be finalised and communicated to claimants and others'.¹⁰

On 13 June 2016, the Crown filed a memorandum outlining its intention to develop a process for engagement with Māori on the plant variety regime. The Plant Variety Rights Act is one of the legislative regimes in New Zealand's overall

6. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 1

7. Document A13(a), p 6096

8. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, pp 2–3; submission 2.5.9, p 17

9. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 42

10. Ibid, pp 42–43

intellectual property system and enables commercial plant breeders to gain proprietary rights over new varieties of plant species, including native species.¹¹

On 30 January 2017, the United States officially withdrew as one of the 12 parties of the TPPA, leaving 11 signatories: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.¹²

On 14 November 2017, the Crown filed an update noting that the remaining parties had agreed to progress negotiations for a new agreement, the CPTPPA, which would retain most of the original TPPA text with 20 (eventually 22) suspended provisions. The Treaty exception clause and annex 18-A would remain.¹³ We set out the terms of annex 18-A below. The 11 remaining parties reached agreement to conclude the CPTPPA negotiations in January 2018.¹⁴

On 14 February 2018, the Crown filed an update in response to directions which noted: '[s]igning the CPTPP will not cause any material changes to the high-level plan for the review of the Plant Variety Rights Act 1987 (including consideration of whether or not New Zealand should accede to UPOV 91)'. This was because the CPTPPA retained annex 18-A, a New Zealand-specific provision relating to the obligation to accede to UPOV 91.¹⁵ Annex 18-A is as follows:

Annex 18-A

1. Notwithstanding the obligations in Article 18.7.2 (International Agreements), and subject to paragraphs 2, 3 and 4 of this Annex, New Zealand shall:
 - a. accede to UPOV 1991 within three years of the date of entry into force of this Agreement for New Zealand; or
 - b. adopt a *sui generis* plant variety rights system that gives effect to the UPOV 1991 within three years of the date of entry into force of this Agreement for New Zealand.
2. Nothing in paragraph 1 shall preclude the adoption by New Zealand of measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination against a person of another Party.
3. The consistency of any measures referred to in paragraph 2 with the obligations in paragraph 1 shall not be subject to the dispute settlement provisions of this Agreement.
4. The interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Annex. A panel established under Article 28.7 (Establishment of a Panel)

11. Memorandum 3.4.17

12. Memorandum 3.4.23, p 3

13. Memorandum 3.4.33, p 2

14. 'Trans-Pacific Partnership', Ministry of Foreign Affairs and Trade, <http://www.tpp.mfat.govt.nz>, accessed 1 May 2020

15. Memorandum 3.4.42, p 5

may be requested to determine only whether any measure referred to in paragraph 2 is inconsistent with a Party's rights under this Agreement.¹⁶

On 8 March 2018, the CPTPPA was signed in Chile. New Zealand ratified the agreement on 25 October 2018.¹⁷

In November 2018, the Tribunal convened a judicial conference to discuss the remaining issues for inquiry. A further judicial conference was scheduled for 25 February 2019.¹⁸ Following that judicial conference, the presiding officer issued a memorandum that set four remaining issues for inquiry.¹⁹ These related to the Crown's engagement with Māori, the secrecy surrounding the Crown's negotiations, the plant variety rights regime, and data sovereignty.²⁰

These issues were set to be heard together, and provisional hearing dates were set for the week of 2 December 2019.²¹ However, disputes between the parties over the discovery process and claimant access to information considered confidential by the Crown arose between May and July 2019, and a judicial conference was convened on 29 July 2019 to address those matters.²²

At that time, the Tribunal raised the possibility of using the proposed hearing dates reserved in December 2019 to focus on the plant variety rights regime. This was because the Government intended to introduce a Bill amending the Plant Variety Rights Act in April or May 2020, at which point the Tribunal would lose jurisdiction over the issue until the Bill was passed. The remaining issues were deferred to be heard in 2020, allowing more time to settle outstanding disclosure issues. All parties represented at the judicial conference agreed to this approach.²³

On 20 November 2019, the Crown filed a memorandum informing the Tribunal that Cabinet had confirmed that it would adopt a *sui generis* regime – a plant variety rights regime unique to New Zealand – to give effect to UPOV 91.²⁴ That was rather than acceding to UPOV 91 itself.

The hearings for stage 2 of this inquiry took place at the Waitangi Tribunal's hearing room in Wellington from 4 to 6 December 2019. The issue we considered at this hearing was issue 3 – plant variety rights and the Act of 1991 International Union for the Protection of New Varieties of Plants:

Is the Crown's process for engagement with Māori over the plant variety rights regime and its policy on whether or not New Zealand should accede to the Act of 1991

16. Document A13(a), p 5988

17. Memorandum 3.4.99

18. Memorandum 2.7.29, p [8]

19. Memorandum 2.7.30, p 2

20. Memorandum 2.7.30(a)

21. Memorandum 2.7.30, p 11

22. Memorandum 2.7.33

23. Memorandum 2.7.36, p 3

24. Memorandum 3.1.196, p 1

International Union for the Protection of New Varieties of Plants consistent with its Tiriti/Treaty obligations to Māori?²⁵

1.3 THE STRUCTURE OF THIS REPORT

In the rest of this chapter, we set out the Crown's high-level policy decisions and the parties' positions. We also set out how we considered the issue identified for this stage of our inquiry.

In chapter 2, we identify and discuss Tiriti/Treaty principles relevant to this inquiry.

In chapter 3, we discuss the central question for the Tribunal in this stage of the inquiry.

In chapter 4, we provide an overview of our findings.

1.4 THE CROWN'S POLICY ON THE PLANT VARIETY RIGHTS REGIME

The plant variety rights regime provides a system under which people who breed a new variety of plant can claim exclusive rights to benefit from that new variety. In New Zealand, plant variety rights can be granted for any variety of plant except algae. The formal requirements of the Plant Variety Rights Act 1987 are that the variety must be 'new, distinct, homogenous, and stable'. It must also have an acceptable proposed name according to international guidelines.²⁶

In this section, we set out the high-level policy decisions that Cabinet has recently made about the new plant variety rights regime, which we will discuss in more detail later. Because these policy decisions are central to this inquiry, it is necessary to set out at some length the decisions made by the Cabinet's Economic Development Committee in November 2019. The relevant Cabinet minute includes the following:

- 6 noted that one of the measures deemed necessary to meet New Zealand's Treaty obligations (implementing the Wai 262 recommendation to introduce a power to refuse a grant of a PVR if kaitiaki relationships are affected) effectively introduces an additional condition for a PVR grant that is not permitted under UPOV;
- 7 agreed that New Zealand meet its obligations under the CPTPP by adopting *sui generis* regime to 'give effect' to UPOV 91;
- 10 noted that the following four recommendations in the Wai 262 report of PVRs were taken to be the starting point for considering New Zealand's Treaty obligations in the PVR regime:
 - 10.1 the Commissioner of PVRs be empowered to refuse a grant that would affect the kaitiaki relationship;

25. Memorandum 2.7.30(a), para 5

26. Submission 3.3.48, p 1; Plant Variety Rights Act 1987, s 10

1.4

- 10.2 the Commissioner of the PVRs be supported by a Māori advisory committee;
- 10.3 a definition of 'breed' be included to clarify that a plant simply discovered in the wild would not be eligible for a PVR;
- 10.4 the Commissioner of PVRs be enabled to refuse a denomination (name) for a new variety if registration or use of that name would offend a significant section of the community, including Māori;
- 11 noted that in addition to these four recommendations, Māori emphasised the importance of:
 - 11.1 early, meaningful and ongoing engagement with kaitiaki;
 - 11.2 consideration of kaitiaki interests at all stages of the breeding and PVR process in a meaningful and mana-enhancing way;

Decision-making powers

- 17 agreed that a new power be introduced to allow a PVR grant to be refused if kaitiaki relationships would be negatively affected and the impact could not be mitigated to a reasonable extent such as to allow the grant;
- 18 agreed that the legislation set out a process for considering kaitiaki relationships, noting that this might include listing factors to be taken into account;
- 19 agreed that the Commissioner of PVRs be enabled to refuse a denomination (name) for a new variety if registration or use of that name would offend a significant section of the community, including Māori;

Māori advisory committee

- 21 agreed that a Māori advisory committee be established with a broad set of functions, including:
 - 21.1 developing and maintaining guidelines for breeders and kaitiaki on engagement;
 - 21.2 providing advice to breeders and kaitiaki before an application for a PVR is made;
 - 21.3 providing advice to the Commissioner on:
 - 21.3.1 whether the use [or] registration of a variety name is likely to be offensive to Māori;
 - 21.3.2 any information that may be relevant to the Commissioner's consideration of the five standard conditions for a PVR grant;
 - 21.4 making a determination on whether kaitiaki relationships would be affected by the grant of a PVR and, if so, whether these impacts could be mitigated to a reasonable extent so as to allow the grant;
- 22 agreed that all applications or varieties belonging to either indigenous plant species or non-indigenous plant species of significance, and denominations (names) that are derived from Māori language, be considered by the Māori advisory committee;
- 23 agreed that the members of the Māori advisory committee be appointed by the

Commissioner and be required to have a relevant expertise, including in relation to mātauranga Māori, te ao Māori, tikanga Māori and taonga species;

- 24 agreed that the determinations of the Māori advisory committee only be subject to judicial review (as opposed to appeal on merits).²⁷

Cabinet decided that, rather than defining terms such as ‘kaitiaki’ and ‘taonga’, the new legislation would refer to ‘indigenous plant species’ and ‘non-indigenous plant species of significance’ to indicate when kaitiaki interests needed to be considered. It further decided that a suitable regulation-making power should be included so that, following consultation, regulations could clarify which plant genera and species were covered by UPOV 78 and which attracted the extra protections.²⁸

Breeders would be required to indicate if they were working with indigenous species or non-indigenous species of significance and, if they were, to disclose:

- ▶ if there are kaitiaki identified, who the kaitiaki are;
- ▶ a summary of their engagement with kaitiaki and the outcome of that engagement including, where relevant:
 - an assessment from kaitiaki of the potential impact if a [plant variety right] is granted;
 - any consideration given to mitigating those impacts;
 - whether or not agreement was reached on the grant of a [plant variety right].²⁹

Cabinet agreed that the purpose and objective of a new Plant Variety Rights Act was to achieve compliance with the Tiriti/Treaty through the recognition and protection of kaitiaki relationships with taonga species and associated mātauranga Māori.³⁰

1.5 THE PARTIES AND THEIR POSITIONS

A full list of the claimants and interested parties who appeared before the Tribunal is included in the appendix.

1.5.1 The claimants

The claimants said that the Crown’s process for engagement over the plant variety rights regime and its policy on how to address UPOV 1991 were not consistent with its Tiriti/Treaty obligations of partnership and active protection.

Counsel for the claimants submitted that the Crown was not sufficiently informed to make decisions on behalf of Māori prior to and during the

27. Document B17(d), pp 86–89

28. Ibid, pp 87–88

29. Ibid, p 88

30. Ibid, p 89

implementation of annex 18-A and the plant variety rights review.³¹ Counsel argued that annex 18-A imposed constraints on the review and engagement process and predetermined what could be negotiated with Māori during the review, as well as constraining the time available and the outcome.³² Counsel submitted that, as a result, the engagement process was inadequate and culturally ill-informed and had denied Māori the opportunity to secure their tino rangatiratanga and active protection of kaitiaki relationships to taonga species.³³

The claimants considered that tino rangatiratanga and whakapapa were at the heart of *Ko Aotearoa Tēnei* (the Tribunal's report into the claims concerning New Zealand law and policy affecting Māori culture and identity).³⁴ Counsel argued that the Crown had fundamentally misinterpreted the report, seeing it through a narrow lens of Te Ao Pākehā,³⁵ and that, as a result, it had adopted a policy to implement a new plant variety rights regime that diluted and undermined the kaitiaki relationship and reduced protections for Māori.³⁶

Additionally, claimant counsel submitted that the recommendations contained in *Ko Aotearoa Tēnei* needed to be progressed together. Counsel for Reid and others (Wai 2522) submitted that *Ko Aotearoa Tēnei* was an integrated whole. They said that te ao Māori 'cannot be carved up into bits' and that it was 'inconceivable' that the Crown would attempt to deal with 'fundamental kaitiaki responsibilities now and work out what to do with other bits later'.³⁷ Claimant counsel suggested that the plant variety rights review should operate as part of Te Pae Tawhiti (a whole-of-government response to *Ko Aotearoa Tēnei*).³⁸

1.5.2 The Crown

The Crown acknowledged that the Tiriti/Treaty required the Crown to ensure that plant variety rights legislation did not allow breeders to obtain a plant variety rights grant that would interfere with the way kaitiaki related to a taonga species. The Crown agreed that the kaitiaki relationships that Māori have with taonga species required active protection. This included the ability of Māori to exercise a degree of control and authority in relation to those species. The Crown acknowledged that it was common ground that kaitiaki interests had to be protected in any plant variety rights legislation and that the current Act did not provide such protection. Therefore, it was in breach of its Treaty obligations for as long as that legislation remained in force.³⁹

31. Submission 3.3.44, p 14; submission 3.3.47(a), pp 8, 47

32. Submission 3.3.44, p 14; submission 3.3.47(a), pp 8, 47

33. Submission 3.3.44, p 11; submission 3.3.47(a), pp 8, 15, 21

34. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Te Taumata Tuarua, 2 vols (Wellington: Legislation Direct, 2011)

35. Submission 3.3.44, pp 6, 17; submission 3.3.47(a), pp 8, 46; submission 3.3.49, p 3

36. Submission 3.3.44, p 22

37. Submission 3.3.47(a), p 7

38. Ibid, p 49; submission 3.3.44, p 26

39. Submission 3.3.48, p 1

However, the Crown argued that its process for engaging with Māori to develop a plant variety rights regime unique to New Zealand, consistent with its CPTPPA obligations, was Tiriti/Treaty compliant.⁴⁰ The Crown submitted that it had carried out extensive engagement, consultation, and collaboration with Māori throughout the plant variety rights review. It asserted that the outcomes of the review met, and exceeded, the relief originally sought by the claimants in this inquiry and that it had implemented the relevant Tribunal guidance as to what was necessary to meet Tiriti/Treaty obligations.⁴¹

The Crown highlighted that the plant variety rights legislation was only ‘one small element of the regulatory complex that impacts on Māori relationships with the natural world’. It argued that, in progressing with the plant variety rights regime, it was ‘reducing the extent to which it is not in full compliance with its Treaty obligations’, and in time it intended to bring the rest of the regulatory system ‘further into line with its Treaty obligations’.⁴²

The Crown also submitted that the specific elements of this unique plant variety rights regime were consistent with, and went beyond, the Tribunal’s recommendations concerning plant variety rights in *Ko Aotearoa Tēnei*. It said that *Ko Aotearoa Tēnei* placed both Māori and non-Māori interests in the centre and encouraged that a proportional balancing approach be taken under the principle of partnership.⁴³ The Crown submitted that, to a large extent, the claimants were really asking for the Tribunal to revisit the findings and recommendations made in *Ko Aotearoa Tēnei*.⁴⁴

The Crown acknowledged the ‘holism of the Māori world view’ and accepted the interrelationships between matters considered in *Ko Aotearoa Tēnei*, but it argued that the stance the claimants were now taking – that all *Ko Aotearoa Tēnei* issues should be progressed collectively through Te Pae Tawhiti – was not practical, reasonable, or workable.⁴⁵

1.5.3 The interested parties

All the interested parties supported the claimant submissions that the Crown’s process of engagement with Māori over the plant variety rights regime was not consistent with its Tiriti/Treaty obligations.

Counsel for the Waitaha (Te Korako and Harawira) claim (Wai 1940) submitted that the Crown had failed to ensure that it had consistent Māori guidance when designing the Māori engagement process and that it had failed to sufficiently support Māori engagement during the plant variety rights review.⁴⁶ Counsel for the other interested parties (Wai 762, Wai 1531, Wai 1957, and Wai 2206) submitted that the Crown also failed to adequately consult and engage with Māori on the

40. Ibid, p 4

41. Ibid

42. Ibid, p 2

43. Ibid, pp 6, 11, 12

44. Ibid, pp 6–7

45. Ibid, p 9

46. Submission 3.3.45, pp 3–5

‘sharing of the benefits of commercialisation’ because it did not consider that issue fell within the scope of the review.⁴⁷

All the interested parties supported the claimants’ submissions that the recommendations of *Ko Aotearoa Tēnei* were misinterpreted and that the unique plant variety rights regime, as developed, did not meet the principle of active protection and damaged the guarantee of tino rangatiratanga.

1.6 THE ISSUE FOR THIS INQUIRY

As noted above, for this stage of our inquiry, the issue we considered was:

Is the Crown’s process for engagement with Māori over the plant variety rights regime and its policy on whether or not New Zealand should accede to the Act of 1991 International Union for the Protection of New Varieties of Plants consistent with its Tiriti/Treaty obligations to Māori?⁴⁸

For the purposes of our report, we have found it helpful to consider three subsidiary questions:

- ▶ Did the Crown engage adequately with Māori when preparing its policy on whether to accede to UPOV 91, including when negotiating what became annex 18-A in both agreements?
- ▶ Does the Crown’s policy on the plant variety rights regime properly reflect the Tribunal’s characterisation, in *Ko Aotearoa Tēnei*, of kaitiakitanga as an aspect of tino rangatiratanga? Has the Crown made any material error in its attempt to implement the Tribunal’s findings and recommendations?
- ▶ Should the plant variety rights policy review be included with the whole-of-government response to *Ko Aotearoa Tēnei* and become part of the work of Te Pae Tawhiti?

We address these questions in chapter 3. In the next chapter, we discuss the Tiriti/Treaty principles we identify as relevant and applicable to this inquiry.

47. Submission 3.3.46, p 17

48. Memorandum 2.7.30(a), para 5

CHAPTER 2

THE TIRITI / TREATY CONTEXT

2.1 INTRODUCTION

In this chapter, we identify the Treaty of Waitangi principles we see as relevant to the issue before us. Our discussion focuses on the principle of partnership (and the duties it gives rise to) and the principle of active protection, in particular as it has been developed in *Ko Aotearoa Tēnei*. This discussion lays the foundation for chapter 3, where we consider whether the Crown's actions were consistent with these Tiriti/Treaty principles.

2.2 THE PRINCIPLE OF PARTNERSHIP

In *New Zealand Maori Council v Attorney-General* (1987), the Court of Appeal found that the Tiriti/Treaty signified a partnership between the Crown and Māori, which required each party to act reasonably and with the utmost good faith towards the other.¹ Expanding on the duty of good faith, the Waitangi Tribunal in the *Napier Hospital and Health Services Report* stated that this duty established 'the general character of the relationship' between Māori and the Crown.²

In the *Tē Whanau o Waipareira Report*, the Tribunal explained that 'the gift of kōwhiri was in exchange for protection and the guarantee of rangatiratanga in all its forms'.³ The report acknowledged that 'Partnership serves to describe a relationship where one party is not subordinate to the other but where each must respect the other's status and authority in all walks of life'.⁴ Furthermore, the Tiriti/Treaty partnership should be founded on 'reasonableness, mutual cooperation and trust'.⁵ Implicit in the Tiriti/Treaty partnership, then, was the notion of reciprocity and the acknowledgement that neither kōwhiri nor tino rangatiratanga was unqualified or absolute.

1. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 667

2. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 66

3. Waitangi Tribunal, *Tē Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 27

4. *Ibid*, pp 27–28

5. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), p 517 (Waitangi Tribunal, *Maori Electoral Option Report* (Wellington: Brooker's Ltd, 1994), p 15); Waitangi Tribunal, *The Mohaka ki Ahuriri Report* (Wellington: Legislation Direct, 2004), pp 22–23 (referencing *New Zealand Maori Council v Attorney-General* [1987]); Waitangi Tribunal, *The Offender Assessment Policies Report* (Wellington: Legislation Direct, 2005), p 10 (referencing *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA))

The *Report on Claims concerning the Allocation of Radio Frequencies* emphasised this point, noting, ‘the ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources . . . Maori interests in natural resources are protected by the distinctive element of tino rangatiratanga.’⁶

The premise that a successful partnership involves the need for compromise and requires multiple interests to be balanced – kāwanatanga with tino rangatiratanga, the national interest with Māori interests, the Crown’s right to govern with its duty to protect – has been explored repeatedly in Tribunal reports. The *Report on the Crown’s Foreshore and Seabed Policy* stated: ‘The Treaty envisaged a future for both peoples, sharing resources and developing them . . . In the balancing of interests required for a successful partnership, we think that there is a place for both peoples and their interests in the foreshore and seabed.’⁷

Ko Aotearoa Tēnei acknowledged the limitations of tino rangatiratanga, saying:

it will no longer be possible to deliver tino rangatiratanga in the sense of full authority over all taonga Māori. It will, however, be possible to deliver full authority in *some* areas. That will either be because the absolute importance of the taonga interest in questions means other interests must take second place or, conversely, because competing interests are not sufficiently important to outweigh the constitutionally protected taonga interest. [Emphasis in original.]⁸

The Tribunal went on to say:

Where ‘full authority’ tino rangatiratanga is no longer practicable, lesser options may be. It may, for example, be possible to share decision-making in relation to taonga that are important to the culture and identity of iwi or hapū. And where shared decision-making is no longer possible, it should always be open to Māori to influence the decisions of others where those decisions affect their taonga. This might be done through, for example, formal consultation mechanisms.⁹

Expanding on this, the report noted:

The Crown must do what is reasonable in the circumstances. The reasonableness line is, in our view, to be drawn after careful consideration of the impact such rights might have on the rights and interests of others. That is, the answer will in each case depend on a balancing process.¹⁰

6. Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims concerning the Allocation of Radio Frequencies* (Wellington: GP Publications, 1990), p 42

7. Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p 131

8. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, p 16

9. *Ibid*, pp 16, 17

10. *Ibid*, p 86

The obligations arising from the Tiriti/Treaty partnership, particularly the duty to consult, have also been extensively commented on. The *Ngawha Geothermal Resource Report 1993* affirmed this duty:

Before any decisions are made by the Crown . . . on matters which may impinge upon the rangatiratanga of a tribe or hapu over their taonga, it is essential that full discussion take place with Maori. The Crown obligation actively to protect Maori Treaty rights cannot be fulfilled in the absence of a full appreciation of the nature of the taonga including its spiritual and cultural dimensions. This can only be gained from those having rangatiratanga over the taonga.¹¹

2.3 THE PRINCIPLE OF ACTIVE PROTECTION

2.3.1 The importance of active protection

The courts and the Tribunal have also identified the Crown's duty to actively protect Māori rights and interests. The Court of Appeal in *New Zealand Maori Council v Attorney-General* (1987) affirmed the importance of active protection as a central Tiriti/Treaty principle, describing the Crown's duty as 'not merely passive but extend[ing] to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.¹² In the *Report on the Manukau Claim*, the Tribunal found that 'the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights'.¹³

The Tribunal has stressed in various reports that the duty imposed on the Crown extends beyond actively protecting Māori rangatiratanga of land, waters, and property interests and encompasses 'interests in both the benefit and enjoyment of their taonga and the mana or authority to exercise control over them'.¹⁴ Further, active protection encompasses 'tribal authority, Māori cultural practices, and Māori themselves'.¹⁵

In *Ko Aotearoa Tēnei*, the Tribunal also said that the exchange of kāwanatanga included a guarantee to protect the tino rangatiratanga of iwi and hapū over their 'taonga katoa' – that is, 'the highest chieftainship over all their treasured things'. The Tribunal has previously found that mātauranga Māori is a taonga and is

11. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 101–102

12. *New Zealand Māori Council v Attorney-General*, p 664

13. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 70

14. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: GP Publications, 1993), p 33

15. Waitangi Tribunal, *The Offender Assessment Policies Report*, p 12. This references the following Tribunal reports: *Te Whanganui-a-Orotu Report 1995* (Wellington: Brooker's Ltd, 1995), *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), *Te Whanau o Waipareira Report* (Wellington: Legislation Direct, 1998), and *Ngawha Geothermal Resource Report*.

therefore subject to the principles of rangatiratanga and active protection.¹⁶ In *Ko Aotearoa Tēnei*, the Tribunal stated:

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.¹⁷

The report discussed the relationship between kaitiaki and taonga and concluded:

The Treaty of Waitangi obliges the Crown to actively protect the continuing relationship of kaitiaki to taonga in the environment, as one of the key components of te ao Māori. . . . Without those ongoing relationships, an integral part of Māori culture will be lost.¹⁸

2.3.2 The standard of active protection

The Tribunal in *Ko Aotearoa Tēnei* noted that, even without the Treaty, ‘there is great power in ensuring [that] the kaitiaki relationship with taonga species and mātauranga Māori is protected to a reasonable degree’:

It is in all of our interests that the law should, as far as reasonably possible, reflect rather than diminish the cultures of those it rules and, within broadly accepted norms, prevent injury to any culture, particularly that of an indigenous minority. Failure to provide such protections risks further marginalising those who are already aggrieved, and that threatens the whole society. There would need to be strong arguments indeed to justify such a result.¹⁹

The Tribunal asked how the interests of kaitiaki and others should be weighed:

Here we say that the level of protection for kaitiaki relationships with taonga species and mātauranga Māori must be calibrated by reference to two core questions. First, what is the kaitiaki relationship with the taonga in question? And, secondly, how should the needs of that relationship be balanced against the valid interests of

16. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, p 15; see also Waitangi Tribunal, *The Wananga Capital Establishment Report* (Wellington: Legislation Direct, 1999), p 50

17. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, *Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 188

18. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, p 340

19. *Ibid*, p 197

others? We conclude that these questions can only be answered within the framework we propose on a case-by-case basis.²⁰

The Tribunal went on to say:

Once the kaitiaki relationship and the effects of the proposed use of taonga species are properly understood, the next step is to identify the interests of the wider community and to weigh them alongside the kaitiaki interest. Whether those uses will affect the kaitiaki relationship, and whether those effects might be offset by the wider benefits claimed, should be the subject of a careful balancing process.

To determine which interests should take priority in a particular case, two key issues need to be addressed. The first relates to the relationship between kaitiaki and taonga species itself. What protection does the relationship need to keep it safe and healthy? The second issue concerns external interests. Are there other valid interests in the genetic and biological resources of taonga species whose protection is so important that the kaitiaki relationship should be compromised? These other valid interests will include, for example, the research and development sector and [intellectual property] right holders.

It is inherent in this two-stage balancing process that there is no single answer to fit all circumstances. If conflict between competing and valid interests cannot be avoided, then those interests must be weighed fairly and transparently.²¹

The Tribunal also stated that the ability of kaitiaki to protect their relationships with taonga species serves the interest of all New Zealanders in helping to preserve New Zealand's biodiversity: 'Protecting the kaitiaki interest and conserving indigenous flora and fauna are two sides of the same coin.'²²

The courts have found that the duty of active protection, like the guarantee of tino rangatiratanga, is not absolute and unqualified. Whilst the obligation is consistent, the Crown is not required to go beyond what is reasonable in the prevailing circumstances. What is reasonable will change depending on the circumstances existing at the time.²³

The Tribunal in *Ko Aotearoa Tēnei* stated that, where there is a risk that will affect kaitiaki relationships with taonga species or mātauranga Māori, those relationships are entitled to 'a reasonable degree of protection'.²⁴ However, the Tribunal also said that this right is not absolute and can be overridden in appropriate circumstances. The decision about how much protection kaitiaki relationships should receive will require 'a proper balancing of kaitiaki and competing interests'.²⁵

20. Ibid, p189

21. Ibid, p195

22. Ibid, p197

23. *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC), p 517

24. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, p 91

25. Ibid, p197

The importance of balancing kaitiaki relationships with competing interests was a central issue in *Ko Aotearoa Tēnei* and one we see as particularly relevant to this inquiry:

First, the kaitiaki relationship with taonga species is important to Māori identity and should be respected. Secondly, the provisions put in place to protect that relationship must be more than token. Thirdly, the interests of [intellectual property] holders, the public good in research and development (whether conducted by public or private researchers), knowledge itself, and the species are also very powerful. It must follow that no single interest in this mix should be treated as an automatic trump card.²⁶

The primary argument between the parties here was whether these standards had been met when developing the Crown's plant variety rights regime. The claimants said that the standards had not been met. The Crown said that it had gone over and above the standards. This is what we now consider.

26. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, p 196

CHAPTER 3

WAS THE CROWN'S PROCESS FOR REVIEWING THE PLANT VARIETY RIGHTS REGIME TIRITI / TREATY CONSISTENT?

3.1 INTRODUCTION

In this chapter, we analyse our overarching question for this stage of our inquiry in more detail. As matters were argued before us, we found it helpful to break that question down into three subsidiary questions: whether the Crown engaged adequately with Māori; whether the Crown's policy properly reflects the Tribunal's recommendations and its characterisation of kaitiakitanga in *Ko Aotearoa Tēnei*; and whether the plant variety rights policy should be combined with Te Pae Tawhiti.

3.2 THE ENGAGEMENT PROCESS

In this section, we look at whether the Crown engaged adequately with Māori when preparing its policy on whether to accede to UPOV 91, including the negotiations on what became annex 18-A in both the TPPA and the CPTPPA.

3.2.1 The claimants' position

Claimant counsel submitted that the Crown's consultation and engagement process for its plant variety rights review and giving effect to UPOV 91 was not Tiriti/Treaty compliant because the Crown should have engaged adequately with Māori before the review process; that is, prior to and during the development of the CPTPPA, including with respect to the continued inclusion of annex 18-A.¹ Counsel further submitted that the Crown did not adequately adopt the Tribunal's recommendations in *Ko Aotearoa Tēnei* about engaging with Māori on international instruments.²

Counsel argued that the engagement process for the plant variety rights review was flawed because staff employed by the Crown were not adequately trained in tikanga Māori and could not properly understand the te ao Māori perspective and represent Māori views.³ Counsel argued, 'the conceptual and substantive boundaries they put around the [review] meant they were deaf to what was said in the

1. Submission 3.3.47(a), pp 8–9; submission 3.3.44, pp 11–13; submission 3.3.49, pp 4–5

2. Submission 3.3.54, p 14

3. Submission 3.3.49, p 5

3.2.2

consultation.⁴ Further, counsel submitted that there was no embedded Māori adviser involved in the engagement process.⁵

Counsel also submitted that the three-year deadline for implementing New Zealand's obligations under annex 18-A was unreasonable, constraining both the scope and the timeframes available for engaging adequately with Māori.⁶ The claimants argued that the Crown had predetermined the scope and the framework of engagement 'without the benefit of sitting down with their Treaty Partner to explore how Mātauranga Māori would inform the process'.⁷

3.2.2 The Crown's position

The Crown submitted that it had worked with Māori over the course of three years to make a fully informed decision as to whether it was possible for New Zealand to accede to UPOV 91 and also comply with its Treaty obligations. The Crown decided that it was not possible and therefore decided to enact a regime unique to New Zealand, consistent with the result it negotiated in the CPTPPA.⁸

The Crown agreed that there was no direct engagement with Māori in relation to the UPOV obligation during the negotiation of the CPTPPA. However, it argued that its decision not to undertake engagement at that stage was necessary and appropriate in the circumstances:

the Crown had already identified the Māori interests in relation to the UPOV 91 obligation, and had secured a specific exception alongside the General exception. The Tribunal had made its finding that Treaty interests were reasonably protected. The Crown's job was now to ensure that the protections were not lost in the new round of negotiations.⁹

The Crown submitted that the continued inclusion of annex 18-A in the revised agreement demonstrated that the domestic policy space was protected to enable a Tiriti/Treaty-compliant domestic review process to be undertaken.¹⁰ 'It is significant', the Crown said,

that the policy space preserved is explicitly acknowledged internationally through direct reference to the Treaty of Waitangi. It is not for international parties to determine or influence what is necessary in this regard – that is a matter for New Zealand alone.¹¹

4. Submission 3.3.47(a), p 18

5. Submission 3.3.47, p 20

6. Submission 3.3.47(a), p 17; submission 3.3.44, p 13; submission 3.3.49, p 5

7. Submission 3.3.47(a), p 19

8. Submission 3.3.48, p 2

9. Ibid, p 21

10. Ibid, p 17

11. Ibid, p 20

The Crown argued that the timeframe for implementing UPOV 91 did not constrain the scope of the review or predetermine the outcome, as further changes to the policy could be made in the future if necessary. The CPTPPA did not prevent further changes to the plant variety rights legislation.¹²

The Crown referred us to the evidence of Ema Hao'uli, a former senior policy adviser at the Ministry of Business, Innovation and Employment, to demonstrate the scale, structure, and conduct of the engagement process during the review. According to the Crown, at an early stage officials sought advice from Māori as to how best to engage. Officials provided multiple opportunities for Māori to be involved in the pre-consultation stage and throughout the engagement process, and they developed 'authentic relationships'. The Crown stated that the communication was honest and that problems were worked through. This early engagement had contributed to genuine input, which had a direct effect on the options developed and Cabinet's subsequent decisions.¹³

The Crown rejected the argument that Māori involvement in the review was limited to that of the various contracted advisers. Instead, it said, the advisers had significant input scheduled at key stages of the review, but significant and consequential input was also received from a wide range of participants – including guidance from the Tribunal itself – from the 'pre-review preparation' phase to the final stages.¹⁴

3.2.3 The interested parties' position

The interested parties supported the claimants' position. Counsel for the Waitaha claim (Wai 1940) submitted that the Crown failed to employ Māori advisers, prior to and throughout the review, to guide it in understanding te ao Māori priorities in engaging with Māori and in designing the Māori engagement process for the review.¹⁵

3.2.4 Tiriti/Treaty analysis

It is helpful to begin with a more detailed outline of the engagement process and the concerns raised by the claimants and interested parties. We then turn to consider the evidence we heard concerning annex 18-A.

3.2.4.1 The engagement process

Ms Hao'uli explained to us the engagement process that the Crown undertook from April 2016 to September 2019. It was a four-phased process: the pre-review preparations stage; the review and pre-consultation engagement stage; the issues stage; and the options stage.¹⁶

12. Ibid, p 25

13. Ibid, pp 30–34

14. Ibid, p 34

15. Submission 3.3.45, p 5; submission 3.3.46, p 14

16. Document B18, p 14

The ‘pre-review preparations’ stage, from April to August 2016, involved getting advice from experts and officials about Māori interests in the intellectual property system in order to set the framework, scope, and appropriate process of engagement with Māori. This included having discussions with Te Puni Kōkiri and the Ministry of Business, Innovation and Employment’s Māori Economic Development Unit. Ms Hao’uli also said that the Crown looked to both the Tribunal’s stage 1 report of this inquiry and *Ko Aotearoa Tēnei*.¹⁷ Officials then developed process options that were put to Ministers across several briefings from June to August 2016.¹⁸

In August 2016, Cabinet decided that the review would begin with targeted, technical workshops with industry, Māori intellectual property, and plant variety rights experts. Cabinet further decided that engagement should include consideration of the four *Ko Aotearoa Tēnei* recommendations relating to the plant variety rights regime and the two additional recommendations on the patents regime relating to the mandatory disclosure of origin and the consideration of Māori traditional knowledge examiners.¹⁹

As instructed by Cabinet, the ‘pre-consultation engagement’ phase, which took place from August 2016 to May 2017, involved targeted engagement with Māori experts, as well as hui with several of the claimants who had indicated their interest in participating in the review.

From May to December 2017, as part of the issues stage, the Crown met several times with advisers to build a consultation process and to prepare for the range of perspectives, feedback, and information it would receive from Māori at the consultation stages of the review. Ms Hao’uli noted that the advisers were not intended to act in any ‘representative function for Māori or any sector of Māori interests’ and they were not a substitute for consultation with Māori but they did lay the foundations for the Crown’s Māori engagement plan. The advisers also helped clarify the Crown’s engagement objectives and informed the drafting of the *Ko Aotearoa Tēnei* section in the issues paper.²⁰

The issues paper was intended to facilitate engagement on Tiriti/Treaty issues and to further the Crown’s understanding of Tiriti/Treaty considerations in the plant variety rights context, including the perspectives of plant variety rights users.²¹ A draft of the issues paper was sent to Ministers for consultation. Cabinet approved the release of the paper on 10 September 2018, and it was made available during the Taonga Tuku Iho Conference the following week.²² The Crown stated that it notified as many as possible about the issues paper and the opportunity to participate in the consultation or to provide submissions.²³

17. Document B18, p 14

18. Ibid, p 17

19. Ibid, p 21

20. Ibid, pp 34–35

21. Ibid, p 43

22. Ibid, pp 52–53

23. Ibid, p 55

In November and December 2018, a series of eight regional consultation hui was held to address matters in the issues paper and to seek Māori views on those matters. The Crown collated summaries of what it heard through the regional hui and added them to the written submissions that were received up until December 2018.²⁴

Following the conclusion of the issues phase, Ms Hao'uli stated to us that officials had several briefings with Ministers regarding the proposed next steps on engagement, a summary of submissions, and a timeline for the review.²⁵ A targeted options development hui was also held in Wellington in April 2019.²⁶

An options paper was subsequently released in July 2019 setting out the recommended package of proposals for Treaty compliance. A national hui (rather than regional hui) was held in August 2019 to discuss the options paper. Invitations were sent out to all the individuals and organisations that had been actively engaged in the review. The Ministry provided funding for the travel and accommodation of those who registered an interest by the advertised date.²⁷ The options phase consultation closed in September 2019.

Throughout the process, the Ministry gave updates on its website about what developments had been made and the papers the Crown was engaging on.²⁸

3.2.4.2 Evidence of claimant concerns with the engagement process

We heard a range of evidence from claimant witnesses concerned about their experience of the Crown's engagement process. In particular, they referred to the timing of the engagement, whom the Crown engaged with, its methods of engagement, and the cultural competency of those involved in the engagement process.

Claimant Moana Jackson stated:

one of the key Māori concerns that this Tribunal must confront in addressing this issue is simply that consultation is often carried out too late, is too brief and that, on occasion, isolated individuals have been expected to respond on behalf of one or more hapū or iwi, or sometimes on a national basis.²⁹

Mr Jackson said that the claimants had the 'almost impossible task of speaking on behalf of Māori within Crown [prescribed] processes and timelines with the added pressure of resource constraints because most of the work that we do is done as obligations to be fulfilled for our people.'³⁰

Matthew Tukaki, the executive director of the New Zealand Māori Council, presented evidence in support of this view and argued that Māori are usually engaged or consulted only after the fact, which leaves them 'stuck between a rock

24. Ibid, p 59

25. Ibid, p 62

26. Ibid, p 6

27. Ibid, pp 73–74

28. Ibid, pp 57, 70–72

29. Document B9, p 3

30. Ibid

and a hard place'. He further told us that the plant variety rights regime fundamentally conflicted with tikanga Māori, a view all the claimants shared.³¹

We heard from claimants Cletus Manu Paul and Des Ratima, also from the New Zealand Māori Council, who said that the process by which the hui they attended were run was contradictory to tikanga. They said that the hui should have been facilitated not by a private consultant but by a Crown representative, as the Crown is 'who our Tiriti partner is'.³²

We heard from Jane Ruka, a claimant from the Grandmother Council of the Waitaha Nation, who told us that, while those at the engagement hui repeatedly sought to advise the Crown of the Māori world view and to convince the Crown that it was as legitimate as a commercial position, they felt they were not taken seriously. She argued that there was 'never any real intention of the Crown to sincerely consider accepting a Māori world view of the rights a plant has'.³³ Ms Ruka further explained to us that she believed Māori who did engage in the process 'became suffocated by it', were pigeonholed, and were unable to truly advocate for what is best for Papatūānuku.³⁴

Ms Ruka also told us of concerns about the choice to hold a national hui instead of regional hui. She acknowledged that participants at the Hamilton hui had decided in favour of a national hui rather than a regional hui and she agreed with this view to some extent, but she stated that this stance 'may have been detrimental in hindsight as it cut short what could have been a comprehensive [regional] engagement identifying . . . and "nutting out" issues important for Māori'.³⁵

Robert 'Pā' McGowan, who gave evidence for the Waitaha claimants, told us that he believed that the Crown's engagement process was genuine and well-intentioned and that significant progress had been made 'at a much greater depth than has been the Crown's previous practice'. However, he felt that the engagement process had not succeeded in addressing key issues that would ensure the new plant variety rights legislation would empower a Tiriti partnership. He argued that the Crown's approach to engagement was based on a domestic and international legal framework and could not accommodate a te ao Māori perspective and framework.³⁶

We also received evidence that participants at one of the targeted engagement hui in April 2019 had expressed dissatisfaction with what they saw as a lack of genuine partnership in developing policies. They said that Māori should not 'just be in an advisory role' and needed to be co-designing, instead of 'reacting to what the Government has designed'. They were also concerned that, if they did not have a partnership, then they would 'just fall back into the same patterns'.³⁷

31. Document B19, p 2

32. Document B6, p 6

33. Document B14, p 11

34. Ibid

35. Ibid, p 6

36. Document B13, p 3

37. Document B18(a), p 1514

Claimant witness Professor Jane Kelsey described to us how one of the Māori advisers who had been involved in the issues stage, Aroha Mead, had left the advisory group because their recommendations were not being considered by the Crown.³⁸ In an email to Ms Hao'uli and others, Ms Mead registered her personal concerns, stating, 'Despite many good intentions, I have not found the association with MBIE to be a culturally safe one.'³⁹ Ms Mead had, nonetheless, expressed her opinion that the team from the Ministry were the 'first who were willing to go out publicly' since *Ko Aotearoa Tēnei* had been released, and she added, 'Even though TRK leads, they've never held meetings.'⁴⁰ The Crown saw Ms Mead's comment as a positive endorsement of its engagement process.⁴¹

Ms Hao'uli acknowledged before us that the Plant Variety Rights Act is a regime based on Western conceptions of private property rights that sits in some tension with te ao Māori perspectives. She argued that the key objective of the issues stage for the Crown was to better understand what a te ao Māori perspective on the regime would be.⁴² The purpose of consulting with Māori was to allow for a Māori perspective to be considered within the regime and to ensure that the granting of plant variety rights would be consistent with the Tiriti/Treaty.⁴³

3.2.4.3 Annex 18-A

Chapter 18 is the intellectual property chapter of the CPTPPA. The chapter covers a range of obligations concerning, among others, copyright, patents, trademarks, and domain names. Article 18.7.2(d) requires every party to the CPTPPA to ratify or accede to the 1991 version of the International Convention for the Protection of New Varieties of Plants (UPOV 91).⁴⁴

Under annex 18-A, New Zealand has a specific exception to the obligation in article 18.7.2(d). New Zealand can choose between acceding to UPOV 91 or adopting a plant variety rights regime unique to New Zealand to protect indigenous plant species in fulfilment of the Crown's obligations under the Treaty of Waitangi. No other party has a specific exception to the requirement to accede to UPOV 91.⁴⁵

Article 18.7.2(d) and annex 18-A were originally negotiated in the TPPA and were continued into the CPTPPA. It is to the Crown's credit that it was able to achieve, and then retain, annex 18-A in the CPTPPA. We acknowledge the concerns expressed by several of the claimants about the process by which it was negotiated and the level of protection it achieves. However, Crown witness Mr Vitalis was right, in our view, to point to the fact of annex 18-A and the Treaty exception clause as evidence of the importance that New Zealand placed on the constitutional

38. Document B8, p 32; doc B8(a), pp 26–27

39. Document B18(b), p 15

40. Document B8(a), p 26

41. Submission 3.3.48, p 3

42. Document B18, p 54

43. Document B18(a), p 1514

44. Document B4, p 2

45. Ibid

significance of the Tiriti/Treaty.⁴⁶ Annex 18-A has provided policy space for the adoption of a New Zealand-specific regime. This is to be welcomed and is clearly preferable to the simple adoption of UPOV 91.

At the same time, some important questions remain about the process by which the Crown achieved the Treaty clause and annex 18-A in the TPPA and the CPTPPA. We intend to address these issues more fully once we have heard from all the parties in the final stage of our inquiry, where we will address the issues of engagement and secrecy. The core complaint is captured in the following passage, which Professor Kelsey attributed to Moana Jackson:

The difficulty around this agreement, and PVA, and every international agreement, is that the Crown assumes its Treaty obligation is fulfilled when it engages with Maori in a time frame and terms that the Crown sets. After the fact. That is not a Treaty relationship. One doesn't unilaterally do something and say to the other, we have done it now is that OK? It puts Maori in an impossible position. The Crown denies the nature of the Treaty relationship, tino rangatiratanga of Maori, mana motuhake, not a subsidiary right to be exercised when the process is beyond change. It's the same discussion we have had for the last 30 years or more. Apart from broader difficulties of the neoliberal ethos, which is contrary to Tiriti, there seems an unwillingness or inability to see what a meaningful Treaty relationship entails. It's not good enough for one to say trust us, the Treaty exception clause is fine. You had no input, you weren't there, but trust us. Protestations of trust by the Crown are only worth dubious consideration, if any at all. Disappointed we are still in this position. The Crown had the opportunity in the tribunal [to] fix this and here we are again.⁴⁷

For now, it is important to note that the Crown and claimants have significant differences of opinion over the interpretation and operation of annex 18-A. These are set out in detail in the evidence of Professor Kelsey⁴⁸ and in closing submissions, including by way of appendix B to the closing submissions of the Crown⁴⁹ and appendix A to the reply submissions of counsel for Reid and others (Wai 2522).⁵⁰

Unfortunately, we did not have the benefit of advice from independent counsel to assist as we did in stage 1 (from Associate Professor Amokura Kāwharu). The Crown did not call expert evidence on the interpretation of annex 18-A but said that substantial weight should nonetheless be placed on Mr Vitalis's evidence, given his practical expertise and the fact that he operates with the support of a team of international law experts. Professor Kelsey gave evidence for the claimants,

46. Transcript 4.1.6, p 316. Mr Vitalis is the deputy secretary of the Trade and Enterprise group of the Ministry of Foreign Affairs and Trade.

47. Document B8, p 33

48. Documents B8, B21

49. Submission 3.3.48(b)

50. Submission 3.3.54(a)

but the Crown cautioned against relying on her evidence as that of an independent expert because, it said, she has been acting as an advocate for the claimants.

While it is true that Professor Kelsey has been a consistent critic and sceptic of aspects of international trade and investment treaties, that is a legitimate part of her role as a leading academic. It is also something we are capable of distinguishing from her role as an expert witness before us. We have found her evidence and analysis helpful and insightful.

We have also found Mr Vitalis's evidence to be of considerable assistance. It was clear from that evidence that maintaining the general Treaty exception clause and securing what became annex 18-A were high-priority negotiating positions, which reflected the constitutional importance of the Tiriti/Treaty. The Crown was right to take this position. It was also clear that reopening the negotiation around the wording of these clauses was considered high risk. This in turn highlights the importance of the quality of the Crown's engagement with Māori before provisions such as this are drafted and adopted as part of its negotiation brief.

Professor Kelsey has raised a number of matters that go to this wider question. We will return to these when we hear from the parties during the final stage of our inquiry.

Notwithstanding these issues, what annex 18-A has achieved is a domestic policy option that would not otherwise be available under CPTPPA to implement the relevant recommendations from *Ko Aotearoa Tēnei*. We consider this to be a positive development, as is the Crown's commitment to extend the protection of the kaitiaki interest in the plant variety rights regime beyond that recommended by the Tribunal in *Ko Aotearoa Tēnei*.

3.2.4.4 Tribunal finding on the adequacy of the Crown's engagement process

In assessing whether the Crown has followed an adequate engagement process, we are guided, primarily, by the standards of good engagement outlined in *Ko Aotearoa Tēnei*. There, the Tribunal recommended that the Crown should work with Māori to build partnership forums to improve engagement over the Crown's position on particular international instruments. This would hold the Crown accountable to an engagement process based on a deeper understanding of the strength of the kaitiaki interest. However, the Tribunal also noted that Māori owe the Crown Treaty duties of reasonableness and cooperation:

The result, we trust, will be effective dialogue, improved relationships, and the degree of protection of Māori interests that is reasonable in the circumstances. This will depend on relationship-building and quality processes on the ground, and cannot simply be legislated into existence.⁵¹

51. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Te Taumata Tuarua, 2 vols (Wellington: Legislation Direct, 2011), vol 2, p 688

We note that some of the witnesses acknowledged to us that the Crown's process for engagement had improved. We also acknowledge the concerns of the claimants about the absence of Māori personnel within the Ministry and the absence of what they considered to be a properly mandated and representative voice for Māori.

In our view, the presence or absence of Māori officials does not of itself determine whether a policy process and outcome will be Tiriti/Treaty consistent, although we acknowledge that the presence of Māori officials will increase the likelihood that the Māori voice will be heard and understood. Securing a mandated voice on issues such as this is not straightforward, as the impacts of the plant variety rights policy will vary considerably across hapū and kaitiaki. The Tribunal in *Ko Aotearoa Tēnei* acknowledged this and noted that it would be necessary to live with a level of ambiguity:

The Crown, Māori, the private sector, and the courts have learnt to live with a level of ambiguity rather than let mandate disagreements halt progress. Some ambiguity is probably also unavoidable in the area of the genetic and biological resources of taonga species. But techniques for creating clarity are available, and others will evolve.⁵²

In the context of the plant variety rights review, the Crown was aware of the limitations of its in-house capacity, and it took pragmatic steps to seek advice from Māori individuals with recognised expertise in this field. More fundamentally, as we point out later in this report, we do not think that the Crown has misunderstood or misapplied in any material way the findings and recommendations from *Ko Aotearoa Tēnei* that it now seeks to implement. An error of that kind would certainly lend support to a finding of poor engagement, but we see no such error.

It is also appropriate to add an observation about the scale of impact. Crown counsel were right to point out that neither UPOV 91 nor the Plant Variety Rights Act affects the entirety of kaitiaki relationships with taonga species or the range of issues arising from the intersection of mātauranga Māori and the intellectual property regimes considered in *Ko Aotearoa Tēnei*. Crown counsel also noted that the plant variety rights regime grants property rights over new plant varieties. In New Zealand, new varieties of introduced plant species comprise over 90 per cent of current plant variety rights grants. The Crown estimated that, at present, only five to 10 applications per year are made for varieties developed from indigenous plants. Taonga species are not affected by the bulk of plant variety rights applications.⁵³

Furthermore, neither the Plant Variety Rights Act nor UPOV 91 allows intellectual property rights over plant species discovered in the wild. They do not regulate matters such as bioprospecting, patenting, copyrighting, or genetic modification. While we can well understand the more general concerns expressed by several claimants about these matters and their wish for a more central place for the

52. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, p 207

53. Submission 3.3.48, p 10

kaitiaki interests of Māori across all spheres, the question before us is whether the Crown's engagement process on this particular review has been so deficient as to lead it into otherwise avoidable error, with resulting prejudice to Māori. In the relatively narrow ambit of this review, we can see no such fundamental error.

Neither do we think it fair to characterise the outcome of the Crown's plant variety rights review as a case of the Crown getting it right by chance or a 'fluke'.⁵⁴ Leaving to one side the lack of engagement with Māori in the negotiation of the TPPA and CPTPPA, we find that the subsequent engagement over whether or not to adopt a *sui generis* regime was, in our view, conducted in good faith and was reasonable in the circumstances.

We are not persuaded in the context of the plant variety rights review that the Crown has failed to meet its Tiriti/Treaty obligations. In part, this is because some of the criticisms raised by the claimants are essentially broader critiques of Crown process generally and, in particular, the process of engagement (or lack thereof) associated with the negotiation of the TPPA and what then became the CPTPPA. These wider issues remain to be considered in the final stage of our inquiry and we express no further view on them at this point.

3.3 DOES THE CROWN'S POLICY REFLECT THE TRIBUNAL'S CHARACTERISATION OF KAITIAKITANGA?

In this section, we discuss whether the Crown's policy on the plant variety rights regime properly reflected the Waitangi Tribunal's characterisation, in *Ko Aotearoa Tēnei*, of kaitiakitanga as an aspect of tino rangatiratanga. We also look at whether the Crown made any material error in its attempt to implement the Tribunal's findings and recommendations.

3.3.1 The claimants' position

The claimants argued that the Crown had misinterpreted the *Ko Aotearoa Tēnei* findings on the nature of the Tiriti/Treaty guarantee of tino rangatiratanga in respect of taonga species and the Crown's obligation to protect kaitiaki relationships with taonga species and mātauranga Māori.

Counsel for Reid and others (Wai 2522) submitted that whakapapa and tino rangatiratanga lay at the heart of *Ko Aotearoa Tēnei*. They stated that whakapapa connected the claimants to their taonga and that tino rangatiratanga (in all its dimensions of rights and obligations) enabled the claimants and those whom they represented to give full expression to their relationships with these taonga.⁵⁵ Counsel argued that the proposed legislation failed to provide effective recognition of their tino rangatiratanga or active protection of their kaitiaki relationships to taonga katoa and relied on a 'narrow Pākehā (mis)understanding' of *Ko Aotearoa Tēnei*.⁵⁶

54. Submission 3.3.44, p 2

55. Submission 3.3.47(a), p 4

56. Ibid, p 8

Counsel further submitted that the scope of annex 18-A was limited to ‘indigenous plant species’, which destroyed ‘the integrity of taonga species and kaitiaki relationships to them, sourced in whakapapa’. It made an artificial distinction between ‘indigenous plant species’ and ‘non-indigenous plant species’, which imposed a ‘Westernised binary’ on taonga species that denied their essential origins in whakapapa.⁵⁷

Claimant counsel further argued that the Crown had taken a ‘de-contextualised and instrumental reading’ of *Ko Aotearoa Tēnei*, which meant that kaitiaki had no power to make decisions related to their taonga.⁵⁸

Counsel for Baker and others (Wai 2523) argued that the Crown had failed to undertake a review of *Ko Aotearoa Tēnei* until now and thus it could not adopt a regime that would protect Māori ‘in the here and now’. Further, when the Crown began its review, it started not with that report but with ‘its interpretation’ of the report, ‘an interpretation that was based on and protected western preconceptions of knowledge and industry’ (emphasis in original).⁵⁹

Counsel also submitted that the Māori advisory committee and its granting rights had been diluted by the added ‘mitigation requirement’. This proposed that a grant of a plant variety right could be refused if the kaitiaki relationship would be affected but only if the impact ‘cannot be mitigated to a reasonable extent’. Counsel argued that the terms ‘reasonableness’ and ‘mitigation’ were not defined and that the requirement watered down the kaitiaki relationship to such a degree that it was superficial and illusory. The committee, in effect, would be expected to support action in favour of a grant.⁶⁰

In reply submissions, counsel for Baker and others (Wai 2523) noted that the Crown omitted from its submission any reference to the Tribunal’s report *He Whakaputanga me te Tiriti/The Declaration and the Treaty*. This omission, counsel argued, meant that the Crown’s definition of tino rangatiratanga did not begin to approach its proper status. Accordingly, counsel said, the Crown, relying as it did on a weak definition, would perpetually misjudge the Māori interest whatever kaupapa it undertook. While the Crown sought to apply the sliding-scale test, it could not effectively judge the Māori interest as it misunderstood the calibration of the scale.⁶¹

Counsel for the Trans-Pacific Partnership Agreement (Durie) claim (Wai 2888) also submitted that the Crown had adopted a watered-down reading of *Ko Aotearoa Tēnei* and that its interpretation was devoid of perspectives from te ao Māori. They argued that this was evident in the Cabinet paper, which did not give effect to kaitiakitanga in a proper and meaningful way.⁶²

57. Submission 3.3.47(a), p 17

58. Ibid, p 31

59. Submission 3.3.44, p 17

60. Ibid, pp 21–22

61. Submission 3.3.55, p 3

62. Submission 3.3.49, p 2

3.3.2 The Crown's position

The Crown acknowledged that all the parties considered the Tribunal's findings in *Ko Aotearoa Tēnei* to be relevant and meaningful, but it argued that they differed in their interpretations of the report and whether relevant findings and recommendations were reflected in Cabinet's decisions.⁶³

The Crown stated that the review of the Plant Variety Rights Act was the first policy process to publicly and explicitly attempt to respond to the relevant findings and recommendations in *Ko Aotearoa Tēnei*. The Crown acknowledged that the current Act's silence on Tiriti/Treaty matters was an imbalance that required correction, and it argued that it had, in conjunction with the review participants, developed policy consistent with *Ko Aotearoa Tēnei* guidance to address that silence.⁶⁴

The Crown further submitted that the elements of the regime that had been decided upon were consistent with, and went beyond, the recommendations made by the Tribunal in *Ko Aotearoa Tēnei* specific to plant variety rights. It argued that the outcomes of the plant variety rights review met and exceeded the relief originally sought by the claimants in this inquiry and implemented relevant Tribunal guidance as to what was necessary to meet Tiriti/Treaty obligations.⁶⁵

The Crown explained that the policy Cabinet decided on aimed to incentivise breeders to engage early with kaitiaki, in the hope that mutually beneficial agreement could be reached between the parties, even before an application for a plant variety right was filed. Further, the policy was designed to ensure that the Māori advisory committee was primarily responsible for identifying and assessing any risks likely to occur from balancing interests.⁶⁶

The Crown submitted that the claimants' position reflected dissatisfaction with *Ko Aotearoa Tēnei* and argued that, in effect, the claimants wanted to relitigate the Tribunal's findings in that report.⁶⁷

3.3.3 The interested parties' position

Counsel for the Waitaha claim (Wai 1940) submitted that the Crown had breached its duties under the Tiriti/Treaty by misinterpreting the recommendations of *Ko Aotearoa Tēnei* and the Crown's Tiriti/Treaty obligations. Counsel further submitted that, because the Crown interpreted *Ko Aotearoa Tēnei* from a Western lens, its conceptual framework deprived Māori of the opportunity as Tiriti/Treaty partners to effectively pursue the *Ko Aotearoa Tēnei* recommendations in a holistic way founded in te ao Māori. Counsel argued that the Crown's constrained reading of *Ko Aotearoa Tēnei* had effectively subordinated tino rangatiratanga to a Western paradigm.⁶⁸

63. Submission 3.3.48, p 3

64. Ibid, pp 3–4

65. Ibid, p 4

66. Ibid, p 12

67. Ibid, p 5

68. Submission 3.3.45, p 8

3.3.4 Tiriti/Treaty analysis and finding

The review of the Plant Variety Rights Act has been significantly delayed over the last 20 years, largely due to recognition by successive governments that complex issues concerning Māori Tiriti/Treaty rights were still before the Waitangi Tribunal panel hearing the indigenous flora and fauna and cultural intellectual property claim (Wai 262). Successive governments delayed a policy review so that they could consider the outcomes of that inquiry, which ultimately became available with the publication of *Ko Aotearoa Tēnei* in 2011. The Crown has now completed a policy process and proposes to adopt a *sui generis* plant variety rights regime – a plant variety rights regime unique to New Zealand – that gives effect to UPOV 1991. The Crown has, in our view, adopted all the relevant recommendations in *Ko Aotearoa Tēnei*, as well as some additional measures. In the table opposite, we compare the *Ko Aotearoa Tēnei* recommendations regarding plant variety rights with Cabinet's policy decisions.

Cabinet has gone further and decided to:

- ▶ Incorporate a new purpose statement in the plant variety rights legislation referencing the benefits of innovation, compliance with international obligations, and 'compliance with the Treaty through the recognition and protection of kaitiaki relationships with taonga species and associated mātauranga Māori'.⁶⁹
- ▶ Provide for the recognition and protection of kaitiaki relationships with species of significance. Whilst the terms 'kaitiaki' and 'taonga' are not defined, the objective is to provide for kaitiaki and the Māori advisory committee to determine what those interests are in relation to each application. Regulation-making powers are to be included so that, following consultation, the regulations can clarify which plant genera and species attract the extra Treaty protections.⁷⁰
- ▶ Provide process measures that incentivise early and consistent engagement by plant breeders with kaitiaki (including requirements that an application disclose whether kaitiaki interests are involved and what engagement has been undertaken).⁷¹
- ▶ Impose an enhanced disclosure requirement.⁷²

Cabinet has also agreed to a stronger role for the Māori advisory committee, such that:

- ▶ All applications or varieties belonging to either indigenous or non-indigenous species of significance will be referred to the committee.⁷³
- ▶ All denominations (names) that are derived from te reo Māori will be considered by the committee.⁷⁴

69. Document B17(d), p 89

70. Ibid, p 87

71. Ibid, p 88

72. Ibid

73. Ibid, pp 88–89

74. Ibid, p 89

Ko Aotearoa Tēnei recommendations regarding plant variety rights

1. That any new plant variety rights legislation include a power to refuse a plant variety right if it would affect the kaitiaki relationships with taonga species.
2. That a Māori committee be established. In order to understand the nature of kaitiaki relationships and the likely effects on them and to balance the interests of kaitiaki against those of the applicant and wider public, the commissioner of plant variety rights should be supported by the Māori advisory committee.
3. That 'discovered' plant varieties that are already known to Māori not qualify for a plant variety right.
4. That the commissioner of plant variety rights be precluded from approving a name for a plant variety if the name is likely to offend a significant section of the community, including Māori.

Cabinet policy decisions

1. A new power is to be introduced to allow a plant variety right grant to be refused if kaitiaki relationships would be negatively affected and the impact could not be mitigated to a reasonable extent.
2. A Māori advisory committee is to be established to advise the commissioner on any information that may be relevant to the commissioner's consideration for a plant variety right grant.
3. Any plants simply discovered in the wild are not to be eligible for a plant variety right.
4. The commissioner is to be empowered to refuse a denomination (name) for a new plant variety if use of that name would offend a significant section of the community, including Māori. The Māori advisory committee is to provide advice to the commissioner on whether the registration of a variety name is likely to be offensive to Māori.

Comparison of Ko Aotearoa Tēnei recommendations regarding plant variety rights and Cabinet policy decisions

Sources: Submission 3.3.43, pp 2–5; doc B17(d), pp 86–95; Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Te Taumata Tuarua, 2 vols (Wellington: Legislation Direct, 2011), vol 1, pp 175, 206, 212

- The committee (rather than the commissioner) will make the determination on whether kaitiaki relationships will be affected by a plant variety right grant and, if they will, whether those impacts can be mitigated to a reasonable extent.⁷⁵ If the committee determines that the grant will impact on that relationship and that this cannot not be mitigated to a reasonable extent, the grant has to be refused.⁷⁶
- In recognition that the committee is best placed to make the substantive determinations on kaitiaki relationships, there will be no appeal on merits. However, the process for arriving at the committee's determination will still be subject to judicial review.⁷⁷

75. Ibid, pp 88–89

76. Ibid, p 13

77. Ibid, p 89

Claimant counsel pointed to what they considered to be serious flaws in the Crown's policy. In particular:

- ▶ there is no power for Māori to appoint members to the Māori advisory committee;
- ▶ there is no obligation on breeders to secure consent from kaitiaki and is instead a reliance on 'incentives' on breeders to engage early with kaitiaki; and
- ▶ there is no monitoring mechanism or provision for penalties or enforcement against breeders for breaching undertakings made to kaitiaki.⁷⁸

The claimants and interested parties expressed concern with what they saw as a 'watering-down' of their kaitiaki relationships to taonga species and the greater rights extended to plant breeders. The claimants saw the proposed regime as substantially eroding the already tenuous ability of Māori to protect kaitiaki relationships and associated mātauranga Māori. In their view, the exercise of kaitiakitanga had been diluted to a consideration of kaitiaki interests.

Claimant Angeline Greensill stated that the options paper seemed to be prioritising plant breeders' interests over iwi, hapū, and whānau. It also lacked detail about 'exactly how the interests of Māori in respect of use, ownership and protection of either the existing species or any cultivars will be recognised'.⁷⁹

Professor Kelsey told us that the Crown had reconceptualised tino rangatiratanga and mana to 'justify the downgrading of the Crown's Tiriti obligations', as well as the mitigation requirement. In her view, the obligation on the Crown to protect kaitiaki relationships by conferring a degree of control became an 'implied presumption that permission will be granted, except where there is a negative assessment that the impacts cannot be mitigated "to a reasonable extent"'. Professor Kelsey stated that this was not rangatiratanga as she understood it, nor did 'kaitiaki relationships apply only where impacts cannot be "reasonably" mitigated'.⁸⁰

Rongoā practitioner Donna Kerridge explained to us that the proposal to grant a plant variety right where risks to kaitiaki relationships could be mitigated to a reasonable extent actually 'incentivises' greater risk to taonga species than would otherwise occur. For example, hybridised New Zealand and Australian mānuka species would

likely involve future mass plantings across New Zealand and easily hybridise with taonga species, impacting on our biodiversity . . . The only way to manage that risk responsibly is by allowing Māori to veto [plant variety rights] that they believe present additional risk to their traditional practices, use and obligations of protection of taonga species.⁸¹

78. Submission 3.3.47, p 31

79. Document B12, p 9

80. Document B8, p 23

81. Document B22, p 9

Professor Kelsey told us that, despite officials saying that they wished to understand te ao Māori and to seek to resolve the tension between the Māori and Western paradigms, in order to make the plant variety regime Tiriti/Treaty consistent, annex 18-A had the effect of confining the legislative response to this aspect of *Ko Aotearoa Tēnei* to the Western paradigm.⁸²

In our view, this is the very issue that the Tribunal grappled with in *Ko Aotearoa Tēnei*. There, the Tribunal found that none of the current regimes concerning bioprospecting, genetic modification, patents, and plant variety rights adequately protected kaitiaki interests in the genetic and biological resources of taonga species. It went on to find:

This lack of recognition for kaitiaki interests should not come as any surprise. In each of these areas, the legal and policy frameworks are established principally to serve the interests of research and commerce (and in the case of GMOS, also the environment), as viewed through the lens of te ao Pākehā. This lens, as we explained in sections 2.2 and 2.3, blinds its wearer to the holism of te ao Māori and to that world's fundamental values – whanaungatanga, mauri, and the web of obligations associated with kaitiakitanga. For that reason, where Māori interests are recognised at all, they are seen as mere factors to be 'taken into account' among many others, as distinct from being concerns that are central to any decision. In this way, mātauranga Māori has become a peripheral consideration at best, because the laws, policies, and processes in place reflect only the faintest awareness that it exists.⁸³

We consider that the findings and recommendations in *Ko Aotearoa Tēnei* that relate to plant variety rights are specific and practical and do not seek to resolve this tension by way of a complete paradigm shift. Rather, the kaitiaki interest is to be introduced, recognised, and provided for within the existing Western paradigm.

Ko Aotearoa Tēnei acknowledges the need to balance tino rangatiratanga and mātauranga Māori with other valid interests, and, in our view, this is what the Crown's policy on the plant varieties regime has attempted. *Ko Aotearoa Tēnei* states:

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

82. Document B8, p10

83. Waitangi Tribunal, *Ko Aotearoa Tēnei*, *Te Taumata Tuarua*, vol 1, p 192

claims presented New Zealand with an opportunity to be first mover in international law reform, with all of its attendant advantages to national interest.⁸⁴

Ms Hao'uli explained the Crown's understanding of the need for balancing interests in the following way. She said that *Ko Aotearoa Tēnei* acknowledged that the Tiriti/Treaty did not guarantee exclusive ownership in taonga species, or mātauranga Māori relating to taonga species, but that it did guarantee tino rangatiratanga. The principle of tino rangatiratanga is to be preferred over the rigid concept of exclusive and undisturbed possession and requires recognition and protection of kaitiaki relationships with taonga species and mātauranga Māori.⁸⁵ Therefore, Ms Hao'uli argued, genuinely balancing the interests of kaitiaki with those of breeders was likely best to align with the Treaty.⁸⁶ We agree. As we noted in our discussion of relevant Tiriti/Treaty principles in chapter 2, the Tribunal in *Ko Aotearoa Tēnei* found that the kaitiaki interest was entitled to a reasonable degree of protection. However, neither the kaitiaki interest nor any other valid interest could be regarded as holding a trump card. A balancing was required.

We acknowledge Cabinet's decision to go beyond the *Ko Aotearoa Tēnei* recommendations regarding plant variety rights. We welcome, in particular, the additional strengthened role for the Māori advisory committee. While the committee is called an advisory committee, based on what is outlined in the Cabinet minute it will have more power than that and will be a decision-making body in its area of interest and expertise. We see that role as consistent with *Ko Aotearoa Tēnei*'s findings on the balancing required to give effect to the applicable Tiriti/Treaty principles of partnership and active protection.

We now turn to the claimants' argument that the mitigation requirement dilutes the impact of the kaitiaki interests and the role of the advisory committee.⁸⁷ The ability to refuse a plant variety right – where prejudice to the kaitiaki interests cannot be mitigated by reasonable means – is contrary to UPOV 1991. It is one of the reasons a plant variety rights regime unique to New Zealand is being implemented, and we think that it is the right thing to do in terms of the Crown's Tiriti/Treaty obligations to Māori. Further, we note that the committee's decisions are not subject to appeal, effectively answering the claimants' concerns about the efficacy of the mitigation clause. Once again, we see it as to the Crown's credit that it was able to retain the ability to establish a New Zealand-specific regime that allows the policy space to respond in this way to domestic Tiriti/Treaty obligations.

We also have regard to the fact that the current and future regimes are not mandatory. Breeders will be able to undertake their activities outside of the future regime and its associated protections for kaitiaki interests. The regime needs to strike a balance so that it is not so difficult for breeders to get a plant variety right

84. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, p xxv

85. Document B18, pp 40–41

86. Ibid, p 63

87. Submission 3.3.44, pp 21–22

that they elect not to use the regime. The protections for the kaitiaki interests available through the regime do not apply where breeders operate outside it.

We now address the claimants' case that the Crown had failed to understand or had taken a narrow interpretation of what the Tribunal had said in *Ko Aotearoa Tēnei*. The claimants also argued, to a certain extent, that the Tribunal had not gone far enough in that report. Ms Greensill stated that using the recommendations in *Ko Aotearoa Tēnei* was 'not a sufficient method alone' for ensuring that the interests of Māori were being taken into consideration in the Crown's proposal on taonga species, because the report's recommendations did not 'reflect the full concerns raised by the claimants'.⁸⁸

The Crown referred to evidence provided by Professor Kelsey where participants at a hui in February 2018 (some of whom are claimants or gave evidence at this hearing) had claimed that the Tribunal, in *Ko Aotearoa Tēnei*, had 'emasculated what the claimants were saying' and had not engaged with the views of the original claimants. They felt that the review process gave them the opportunity to go back to 'what the claimants [had] said'.⁸⁹

Claimant counsel argued that *Ko Aotearoa Tēnei* and its recommendations were high level and that their implementation required judgements about what was needed to deliver them.⁹⁰ While that may be true of a number of the findings and recommendations in the report, the recommendations with respect to plant variety rights are clear and practical in nature.

It is apparent that, in protecting the interests of Māori in respect of non-indigenous taonga species, the Crown may have to rely on article 29.6. That said, the Crown's reasons for not attempting to renegotiate annex 18-A with the other 10 nations involved in the CPTPPA are persuasive.

We are not convinced that the Crown has misunderstood or misapplied the findings and recommendations in *Ko Aotearoa Tēnei* concerning plant variety rights. We see some force in the Crown's submission that, at least to some extent, a number of claimant counsel appeared to be arguing for outcomes or findings that differed or went further than those recommended by the Tribunal in *Ko Aotearoa Tēnei*. That, they are entitled to do. Such a position, however, gives rise to an entirely different set of questions. Given the breadth of evidence before the Tribunal in *Ko Aotearoa Tēnei* and the evidence before us, we do not consider it appropriate to depart from the relevant findings and recommendations of that Tribunal in this instance.

We also recognise the creation of Te Taumata, a group of recognised leaders in Māori socio-economic and cultural development areas who have been chosen by Māori to engage with the Ministry of Foreign Affairs and Trade on trade policy and related matters. The working group was established in April 2019 to look at an

88. Document B12, pp 7–8

89. Document B8(a), pp 25–26

90. Submission 3.3.54, p 31

engagement mechanism with the Ministry, and this relationship was formalised with the signing of a memorandum of understanding in October 2019.⁹¹

Te Taumata aims to assist the Crown in identifying and understanding Māori interests in relation to trade negotiations and directly related issues, including specific *Ko Aotearoa Tēnei* trade linkages, and to ensure discussion to help inform New Zealand's position at the international level when those interests are affected.⁹² This appears to us to be a genuine effort on the part of the Ministry to develop its international treaty-making process and related domestic engagement in a way that aligns with the Tiriti/Treaty principles of partnership and active protection. This is to be welcomed.

We note the importance of good process around appointments to the Māori advisory committee, given its pivotal role. We see value in further engagement with Māori, including by way of initiatives such as Te Taumata, if appropriate.

3.4 SHOULD THE PLANT VARIETY RIGHTS POLICY REVIEW BE INCLUDED WITH TE PAE TAWHITI?

In September 2019, almost 30 years after what was then known as the 'flora and fauna' claim (Wai 262) was received by the Tribunal and a decade after *Ko Aotearoa Tēnei* was issued, the Crown announced that it would address the recommendations made in the report in a comprehensive and holistic way under a work programme known as Te Pae Tawhiti.⁹³ This approach involves creating a process to enable the Crown and Māori to discuss how to move forward on the issues identified in the report in a 'spirit of partnership'. The Government also intends to create a ministerial group to oversee the work programme as a whole and to consider cross-cutting issues.⁹⁴ Sitting under the oversight group will be three ministerial groups consisting of Ministers with portfolio links to the following three broad kete of issues:

- ▶ kete 1: taonga works me te mātauranga Māori;
- ▶ kete 2: taonga species me te mātauranga Māori; and
- ▶ kete 3: Kawenata Aorere/Kaupapa Aorere (with an international focus).

Kete 2 is of immediate relevance. The review of the Plant Variety Rights Act 1987 would fall within its proposed scope, which includes considerations on how to better enable kaitiaki to more fully exercise kaitiakitanga over taonga species and mātauranga Māori.⁹⁵

91. Document B12, p 16

92. Document B12(a), p 33

93. Document B8, p 28

94. Te Puni Kōkiri, *Wai 262 – Te Pae Tawhiti: The Role of the Crown and Māori in Making Decisions about Taonga and Mātauranga Māori* (Wellington: Te Puni Kōkiri, 2019), pp 11–12

95. Ibid, p 13

3.4.1 The claimants' position

Claimant counsel submitted that the adoption of the three-year timeline in annex 18-A had resulted in the fracturing of a holistic approach to taonga species. As counsel for Baker and others (Wai 2523) submitted: '[A] piecemeal review will produce a piecemeal protection scheme.'⁹⁶ Counsel argued that the Crown should instead defer the current plant variety rights review and address taonga species holistically in kete 2 of Te Pae Tawhiti through a Tiriti-compliant process whose engagement and outcomes are jointly designed.⁹⁷

Claimant counsel argued that, although the Crown had suggested that it could change the terms of the regime even after Te Pae Tawhiti was complete, there was no certainty of this. Counsel argued that it was vital that the task be done once and done right.⁹⁸ Counsel further submitted that, even if there were a revisiting of the Plant Variety Rights Act as a result of Te Pae Tawhiti, the Crown would be asking Māori to go back through this process all over again.⁹⁹

3.4.2 The Crown's position

The Crown argued that the plant variety rights review had been underway for three years and had been substantially progressed when Te Pae Tawhiti was announced and that the review had already been delayed for almost 30 years. Further, the Crown highlighted that Te Pae Tawhiti has no confirmed process or timeline in place as yet. Nor did the announcement of Te Pae Tawhiti create an obligation on the Crown's part to further delay the plant variety rights review.¹⁰⁰

The Crown argued that, if the introduction of the plant variety rights legislation were to wait for Te Pae Tawhiti consultation and response to begin, it would cause more prejudice to Māori because the current regime was not Tiriti/Treaty consistent and Māori interests were not directly provided for in the current Act.¹⁰¹ The Crown submitted that, the sooner the legislation is passed, the less opportunity there would be for further breaches in this regard.¹⁰² It pointed out that the plant variety rights review actually provided the impetus for initiating Te Pae Tawhiti.¹⁰³

Further, the Crown submitted that the reforms arising from the current review would not be set in stone and that there was nothing to stop it updating the legislation if Te Pae Tawhiti, or any other consultation process, were to come to the view that the Treaty of Waitangi required a different regime.¹⁰⁴ The Crown argued that, while opportunities for further improvements through Te Pae Tawhiti would

96. Submission 3.3.44, p 17

97. Submission 3.3.47(a), p 49; submission 3.3.44, p 26; submission 3.3.49, p 6

98. Submission 3.3.44, p 14

99. Submission 3.3.47(a), p 33

100. Submission 3.3.48, p 13

101. Ibid, p 14

102. Ibid, p 26

103. Ibid, p 4

104. Ibid, p 26

be available, this should not be taken as an indication that the current policy decisions were incomplete or inadequate; rather, the policy decisions were fully informed and Tiriti/Treaty compliant.¹⁰⁵

The Crown submitted that, in progressing the plant variety rights legislation, it was reducing the extent to which it was not in full compliance with its Tiriti/Treaty obligations. Over time, including through the proposed Te Pae Tawhiti process, it intended to bring the rest of the regulatory system relating to Māori relationships with the natural world further into line with its Tiriti/Treaty obligations. The Crown acknowledged that the process would take significant time and resources and that, as the parts come together, the picture may change and it may be necessary to adjust the plant variety rights regime. The Crown asked the claimants and the Tribunal to support it in taking this one step forward, as the path to a full resolution of these issues is a long one.¹⁰⁶

3.4.3 The interested parties' position

Counsel for the Waitaha claim (Wai 1940) supported claimant submissions that the Crown should halt the review and instead transfer and progress it through Te Pae Tawhiti.¹⁰⁷ Counsel submitted that the current regime being offered undermines tino rangatiratanga and instead Te Pae Tawhiti provides an option that will progress the plant variety rights review in a holistic and tika way.¹⁰⁸

3.4.4 Tiriti/Treaty analysis and finding

As we have said earlier, the recommendations in *Ko Aotearoa Tēnei*, as they relate to plant variety rights, are specific and practical. We see no compelling reason why they should not now be implemented with regard to the plant varieties regime.

The claimants told us that the current plant variety rights regime is a fractured approach and that the review should be halted and progressed holistically through Te Pae Tawhiti.¹⁰⁹ Claimant witness Professor Kelsey told us that integrating the current review into Te Pae Tawhiti was necessary for the 'integrity of both initiatives'.¹¹⁰ She stated that, once the Crown, on behalf of New Zealand, informed the other parties about the new regime adopted under annex 18-A, it would not be able to go back and seek to change the regime – especially if it wished to adopt a stronger regime of protections for Māori on the ground that it now had a better understanding of the context or its Tiriti/Treaty obligations.¹¹¹ Further, undertaking a separate review of the Plant Variety Rights Act would limit what the holistic and integrated process of Te Pae Tawhiti could achieve, which Māori have consistently called for during the review process.¹¹²

105. Submission 3.3.48, pp 14, 24

106. Ibid, p 2

107. Submission 3.3.45, p 13

108. Ibid, p 14

109. Document B12, p 18; doc B8, p 14

110. Document B8, p 4

111. Ibid, p 14

112. Ibid, p 29

In response to Professor Kelsey's arguments, the Crown submitted that, though a compliant regime had to be adopted within three years, 'There is no prescription as to how compliance is to be achieved, nor prescription as to how it is to be maintained over time . . . there is no obligation to freeze every element of that system thereafter.'¹¹³

Susan Hall, a manager in the Ministry of Business, Innovation and Employment, stated in evidence that it was the Ministry's understanding that there was nothing in the CPTPPA that would prevent further policy changes to the plant variety rights regime, 'as long as they are either consistent with UPOV 91 or are deemed necessary to meet our Treaty obligations.'¹¹⁴

We have considered these arguments but see no value in expressing a view on the matter beyond making some general observations for the benefit of the parties before us. Although we heard argument both ways, the point is necessarily speculation as to what other nations may or may not do in response to actions the Crown might take at some time after the intended plant varieties legislation is enacted or what the Crown may be reluctant to do because of a perceived risk of challenge.

We do not know which elements will be in an Act and which will be in regulations or powers conferred on Ministers, other office holders, or officials. While there is no doubt that a power to make regulations or to exercise powers can, as a matter of domestic law, be exercised on more than one occasion (see sections 15 and 16 of the Interpretation Act 1999), we are not an international law tribunal and we express no view on what might be the outcome in any dispute resolution process under the CPTPPA.

The debate is even more speculative, or hypothetical, because we would be being asked not what the outcome might be but rather first to predict how one or more of the 10 other parties might react should New Zealand attempt to rely on annex 18-A more than once, be it by amendment to an Act, the making or amending of regulations, or a change in the way powers are exercised.

Those nations, or one or more of them, may be sufficiently motivated to initiate the CPTPPA dispute resolution process, and whether or not they did could well be determined as much by political or geopolitical considerations as by legal arguments. If, at some point in the future, the present claimants, or other Māori, perceive and wish to pursue a Tiriti/Treaty claim against the Crown, either because of actions taken and challenged under the CPTPPA or because of an alleged 'chilling effect' (as was debated before us in stage 1), the matter can become the subject of a fresh claim to the Tribunal at that time.

We stress, as we did during our hearings, that this panel is not a standing commission with broad oversight over the Crown's conduct in relation to international agreements generally. Alleged Tiriti/Treaty breaches and alleged failures by the Crown in respect of its Tiriti/Treaty obligations must be raised as they arise or are in reasonable contemplation.

113. Submission 3.3.48(b), p 1

114. Document B17, p 11

Moreover, although the evolution of Te Pae Tawhiti is uncertain as to timing, it seems inevitable that it will evolve. The discussion paper is titled, in part, 'Preliminary Proposals for Crown Organisation'. The Minister's preface concludes: 'This discussion paper is a step towards a new future – the journey itself will evolve over the next few years. I welcome your thoughts on how we can start well.'¹¹⁵

During cross-examination, Mr Vitalis strongly advised against delaying the review of the plant variety rights regime to link it into Te Pae Tawhiti, saying it risked damaging New Zealand's credibility. He argued that asking the other parties to the agreement for extra time was technically possible but there was

no guarantee that others would agree and frankly I would see no reason if I was in their place to agree. Please do remember that this was a unique exception for us. If we then went back to say, 'we need additional time'. Well, I do know what my colleagues [will] say, and it will not be comfortable listening. Now, it's not about my discomfort. It's about the damage that it does to us reputationally, in terms of our interest, and our interest in live and on-going negotiations, not least with the European union.¹¹⁶

We see merit in the Crown's argument. In our view, there are good reasons that this policy should proceed and be implemented on the current proposed timeframes. We find the Crown's submission in this case compelling in that, by progressing the plant variety rights legislation, it is reducing the extent to which it is not in full compliance with its Tiriti/Treaty obligations.¹¹⁷ We also see significant countervailing risk should these policy proposals be delayed. It is by no means clear when the Te Pae Tawhiti work will be complete or, once complete, what the outcomes may be in terms of policy actually adopted or implemented by the government of the day.

We recall here also the following observation from *Ko Aotearoa Tēnei*: 'The scale of international developments is such that New Zealand should act quickly and decisively in its own interests, lest solutions that do not fully reflect the unique place of Māori in New Zealand are imposed from outside.'¹¹⁸

We are not persuaded that the policy outcomes of the plant variety rights review are so deficient in any material respect that they ought to be 'parked' or delayed pending wider consideration as part of the Te Pae Tawhiti process. The plant variety rights policy proposals not only are consistent with the relevant recommendations in *Ko Aotearoa Tēnei* but also go further and provide additional protections for the interests of kaitiaki.

115. Te Puni Kōkiri, *Wai 262 – Te Pae Tawhiti*, p 3

116. Transcript 4.1.6, p 264

117. Submission 3.3.48, p 2

118. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, p 210

CHAPTER 4

OVERVIEW OF FINDINGS

4.1 INTRODUCTION

In this chapter, we summarise our findings. We have no recommendations to make as we have not found a breach of the Tiriti/Treaty or its principles.

4.2 OUR FINDINGS

We record our findings, first by reference to the three subsidiary questions we formulated for this report and then by reference to the issue for inquiry.

4.2.1 The engagement process

Did the Crown engage adequately with Māori when preparing its policy on whether to accede to UPOV 91, including when negotiating what became annex 18-A in both agreements?

We noted that annex 18-A has provided for a domestic policy option that would not otherwise be available under the CPTPPA to implement the relevant recommendations from *Ko Aotearoa Tēnei*. We consider this to be a positive development, as is the Crown's commitment to extend protection of the kaitiaki interest in the plant variety rights regime beyond that recommended by the Tribunal in *Ko Aotearoa Tēnei*.

We find that the subsequent engagement over whether or not to adopt a *sui generis* regime was, in our view, conducted in good faith and reasonable in the circumstances.

4.2.2 Does the Crown's policy reflect the Tribunal's characterisation of kaitiakitanga?

Does the Crown's policy on the plant variety rights regime properly reflect the Waitangi Tribunal's characterisation, in Ko Aotearoa Tēnei, of kaitiakitanga as an aspect of tino rangatiratanga? Has the Crown made any material error in its attempt to implement the Tribunal's findings and recommendations?

The Tribunal in *Ko Aotearoa Tēnei* found that the kaitiaki interest was entitled to a reasonable degree of protection. However, neither the kaitiaki interest nor any other valid interest could be regarded as holding a trump card. A balancing was required.

We acknowledge Cabinet's decision to go beyond the *Ko Aotearoa Tēnei* recommendations regarding plant variety rights. We welcome, in particular, the additional strengthened role for the Māori advisory committee. While the committee

4.2.3

is called an advisory committee, based on what is outlined in the Cabinet minute it will have more power than that and will be a decision-making body in its area of interest and expertise. We see that role as consistent with *Ko Aotearoa Tēnei*'s findings on the balancing required to give effect to the applicable Tiriti/Treaty principles of partnership and active protection.

We are not convinced that the Crown has misunderstood or misapplied the findings and recommendations in *Ko Aotearoa Tēnei* concerning plant variety rights.

4.2.3 Should the plant variety rights policy review be included with Te Pae Tawhiti?

Should the plant variety rights policy review be included with the whole-of-government response to Ko Aotearoa Tēnei and become part of the work of Te Pae Tawhiti?

We are not persuaded that the policy outcomes of the plant variety rights review are so deficient in any material respect that they ought to be 'parked' or delayed pending wider consideration as part of the Te Pae Tawhiti process.

4.2.4 Overall issue for inquiry

For the above reasons, we find that the Crown's process for engagement over the plant variety rights regime and its policy on whether or not New Zealand should accede to the Act of 1991 International Union for the Protection of New Varieties of Plants is consistent with its Tiriti/Treaty obligations to Māori.

4.3 CONCLUDING REMARKS

It is unprecedented in our experience for claimants to oppose the Crown when it seeks to adopt and implement recommendations of the Waitangi Tribunal. The fact that this is what has happened in the context of a long-delayed reform to a plant variety rights regime – which all parties accept does not meet the Crown's Tiriti/Treaty obligations – speaks to a number of important issues.

These issues range from important world view or paradigm conflicts to more practical concerns about process. The common foundation seems to be frustration that the Māori perspective is at the margins, always required to react as best it can to an agenda and timeframes set by the Crown (and others).

We will return to these concerns during our final hearings, when we will address the issues of engagement and secrecy. In the meantime, it is important to recall that contemporary progress in mitigating Treaty breaches and advancing the Tiriti/Treaty relationship has often been incremental in nature. Seen in this light, partial progress is still progress.

There is also potential for further progress in building and maintaining a constructive relationship between the claimants and Crown officials. Te Taumata is one such example.

We see merit in all parties directing energy and resources to initiatives such as these, and we hope that our proceedings in no way retard or hinder that progress.

Dated at Wellington this 15th day of May 2020



Judge Michael Doogan, presiding officer




David Cochrane, member



Professor Sir Hirini Mead DCNZM, member



Kim Ngarimu, member



Tania Te Rangiangana Simpson, member



APPENDIX

SELECT INDEX TO THE RECORD OF INQUIRY

RECORD OF HEARINGS

TRIBUNAL MEMBERS

The Tribunal constituted to hear the Trans-Pacific Partnership Agreement claims comprised Judge Michael Doogan (presiding), David Cochrane, Kim Ngarimu, Professor Sir Hirini Mead, and Tania Te Rangingangana Simpson.

THE HEARING

The claims were heard at the Waitangi Tribunal's offices in Wellington from 4 to 6 December 2019.

THE CLAIMANTS

Wai 2522 (Reid and others)

Moana Jackson, Angeline Ngahina Greensill, Hone Pani Tamati Waka Nene Harawira, Rikirangi Gage, and Moana Maniapoto.

Wai 2523 (Baker and others)

Natalie Kay Martin, on behalf of herself and the Waimate Taiamai Alliance.

Hone Tiatoa, on behalf of himself and Te Waimate Taiamai.

Maia (Connie) Pitman, on behalf of herself and her whānau.

Ani Taniwha, on behalf of herself and Te Uri o Te Pona, Ngati Haiti, Ngati Kawau, Ngati Kawhiti, Ngati Kahu o Roto Whangaroa, Ngāitupango, Te Uri o Tutehe, Te Uri Mahoe, Te Uri Tai, and Te Uri o Te Aho.

Pouri Harris, on behalf of himself and Ngāti Toro.

Owen Kingi, on behalf of himself and Ngāti Uru and other Whangaroa hapū.

Justyne Te Tāna on behalf of herself and Ngāi Te Whiu and Ngāti Tautahi, and Ngāi Te Wake o Waoku, Ngāi Te Wake Tua Whenua, and Ngāi Te Wake o Takutai Moana.

Lorraine Norris, on behalf of herself and Te Uriroi, Te Parawhau, and Te Mahurehure ki Poroti.

Wai 1427

Titewhai Harawira, on behalf of herself and Team Patuone.

REPORT ON REVIEW OF PLANT VARIETY RIGHTS REGIME

App

Wai 2530

Rihari Richard Takuira Dargaville, chairperson of Te Tai Tokerau District Māori Council, on behalf of himself and Te Tai Tokerau District Māori Council.

Wai 2535

Cletus Maanu Paul, on behalf of himself, Nga Kaiāwhina a Wai 262, and the Mataatua District Māori Council.

Wai 2888

Edward Taihākurei Durie and Matthew Tukaki, on behalf of the New Zealand Māori Council.

Kereama Pene, on behalf of Ngāti Rangiteaorere in relation to geothermal interests.

Tamati Cairns, on behalf of the Wellington District Māori Council, the Pouakani Claims Trust, and the Waikato River Claims Settlement Trust, in relation to freshwater interests.

Anthony Toro Bidois, on behalf of the Te Arawa District Māori Council.

Wai 2889

Cletus Maanu Paul ONZM, JP, Titewhai Harawira, Desma Kemp Ratima ONZM, JP, and Rihari Richard Takuira Dargaville.

THE INTERESTED PARTIES

Wai 762

Evelyn Kereopa, on behalf of Te Ihingarangi, a hapū of Ngāti Maniapoto.

Wai 996

David Potter and Andre Paterson (deceased), on behalf of themselves, and Ngāti Rangitihi as represented by the Ngāti Rangitihi Raupatu Trust.

Wai 1531

Te Enga Harris, on behalf of Wiremu Hemi Harris, Meri Otene whānau, Ngāti Rangi, Ngāti Here, Ngāti Tupoto, Ngāti Hohaitoko, Ngāti Kopuru, Te Rarawa, and Ngāti Uenuku.

Wai 1537

Ruiha Collier, Hineamaru Lyndon, and Amiria Waetford, on behalf of themselves and the descendants of Wiremu Pou.

Wai 1541

Louisa Te Matekino Collier and Frederick Collier junior, on behalf of themselves and Hinewhare and her descendants.

Wai 1673

Ruiha Collier and Rihari Dargaville, on behalf of themselves and Ngāti Kawau.

Wai 1681

Ruiha Collier and Popi Tahere, on behalf of themselves, Te Waiariki Ngati Korora, Nga Uri o Te Aho, and Nga Hapū o Ngāpuhi.

Wai 1917

Lucy Dargaville (deceased) and Rihari Dargaville, on behalf of themselves and the descendants of Ngata Tangihia.

Wai 1918

Ruiha Collier and Mataroria Lyndon.

Wai 1940

Jane Mihingarangi Ruka Te Kōrako, on behalf of the Grandmother Council of the Waitaha Nation, including the three hapū of Ngati Kurawaka, Ngati Rakaiwaka, and Ngati Pakauwaka.

Wai 1957

Wiremu Reihana, on behalf himself, his whānau and members of Ngāti Tautahi ki Te Iringa.

Wai 2206

Charlene Walker-Grace, on behalf of Te Hokingamai e te iwi o te Motu o Mahurangi.

RECORD OF PROCEEDINGS

1 STATEMENTS

1.1 Statements of claim

1.1.1 Kathy Ertel, Annette Sykes, and Robyn Zwaan, statement of claim on behalf of Associate Professor Dr Papaarangi Reid, Moana Jackson, Angeline Greensill, Hone Harawira, and Rikirangi Gage concerning policies, practices, acts or omissions of the Crown concerning the Trans-Pacific Partnership Agreement, 24 June 2015

2 TRIBUNAL MEMORANDA, DIRECTIONS, AND DECISIONS

2.5 Pre-hearing

2.5.6 Judge Michael Doogan, memorandum concerning urgency and requesting comment from parties, 14 July 2015

2.5.9 Judge Michael Doogan, David Cochrane, the Honourable Sir Douglas Kidd, Sir Tamati Reedy, and Tania Simpson, memorandum granting urgency, 31 July 2015

2.7 Post-hearing

2.7.29 Judge Michael Doogan, memorandum concerning submissions received on jurisdictional issues and remaining issues for inquiry, 19 February 2019

REPORT ON REVIEW OF PLANT VARIETY RIGHTS REGIME

App

2.7.30 Judge Michael Doogan, memorandum responding to oral submissions, confirming remaining issues for inquiry, and setting out provisional timetable, 2 April 2019

(a) Waitangi Tribunal, 'The Tribunal's Statement of Issues for Stage Two of the Trans-Pacific partnership Agreement Inquiry', no date

2.7.33 Judge Michael Doogan, memorandum responding to oral submissions and Crown memorandum and setting out process to address remaining disclosure issues, 1 July 2019

2.7.36 Judge Michael Doogan, memorandum responding to submissions and Crown memorandum and setting out process to address remaining disclosure issues, 2 August 2019

3 SUBMISSIONS AND MEMORANDA OF PARTIES

3.1 Pre-hearing

3.1.196 Daniel Hunt, memorandum concerning Cabinet consideration of policy options and recommendations from review of Plant Variety Rights Act 1987, filing further material, and updating filing of timetable, 20 November 2019

3.3 Opening, closing, and in reply

3.3.43 Rachael Ennor, opening submissions on behalf of the Crown, 3 December 2019

3.3.44 Bryce Lyall and Linda Thornton, closing submissions on behalf of Wai 2523 claimants, 11 December 2019

3.3.45 Clare Maihi and Genevieve Davidson, closing submissions on behalf of Wai 1940 claimants, 11 December 2019

3.3.46 Darrell Naden, Matthew Hill, and Amro Mohamed, closing submissions on behalf of Charlene Walker-Grace, Evelyn Kereopa, Te Enga Harris, and Wiremu Reihana, 11 December 2019

3.3.47 Annette Sykes, Jordan Bartlett, Kalei Delamere-Ririnui, and Danielle Marks, closing submissions on behalf of Moana Jackson, Angeline Greensill, Hone Harawira, Rikirangi Gage, and Moana Maniapoto, 11 December 2019

(a) Annette Sykes, Jordan Bartlett, Kalei Delamere-Ririnui, and Danielle Marks, closing submissions on behalf of Moana Jackson, Angeline Greensill, Hone Harawira, Rikirangi Gage, and Moana Maniapoto, 11 December 2019

3.3.48 Rachael Ennor, closing submissions on behalf of the Crown concerning issue 3, 18 December 2019

(b) 'Right to Regulate Preserved – Analysis and Further Submissions', printout, no date

3.3.49 Eilish O'Connor, closing submissions on behalf of the New Zealand Māori Council, 11 December 2019

3.3.54 Annette Sykes, Jordan Bartlett, and Kalei Delamere-Ririnui, submissions in reply on behalf of Moana Jackson, Angeline Greensill, Hone Harawira, Rikirangi Gage, and Moana Maniapoto, 23 December 2019

(a) Annette Sykes, Jordan Bartlett, and Kalei Delamere-Ririnui, 'Response to the Crown's Appendix B', printout, no date

3.3.55 Bryce Lyall and Linda Thornton, submissions in reply on behalf of Wai 2523 claimants, 23 December 2019

3.4 Post-hearing

3.4.17 Rachael Ennor, memorandum seeking extension for update concerning UPOV91, 13 June 2016

3.4.23 Rachael Ennor, memorandum updating Tribunal on planned UPOV 91 engagements, 1 March 2017

3.4.33 Rachael Ennor, memorandum updating Tribunal on developments concerning Comprehensive and Progressive Trans-Pacific Partnership Agreement, 14 November 2017

3.4.42 Rachael Ennor and Gillian Gillies, memorandum concerning effect of Comprehensive and Progressive Trans-Pacific Partnership Agreement on Crown plan of engagement, application of *res judicata*, and appropriate time for inquiry, 14 February 2018

3.4.99 Rachael Ennor and Gillian Gillies, memorandum concerning ratification of Comprehensive and Progressive Trans-Pacific Partnership Agreement, 25 October 2018

4 TRANSCRIPTS AND TRANSLATIONS

4.1 Transcripts

4.1.6 National Transcription Service, transcript of hearing week one, 4 February 2020

RECORD OF DOCUMENTS

A STAGE 1 DOCUMENTS

A13 Martin Harvey, affidavit, 9 November 2015

(a) Martin Harvey, comp, supporting documents to document A13, 9 November 2015
pp 1–6251 Trans-Pacific Partnership Agreement, pre-legal verification version,
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B STAGE 2 DOCUMENTS

B4 Evangelos Vitalis, affidavit, 1 October 2019

B6 Cletus Manu Paul and Desma Ratima, joint brief of evidence, 15 October 2019

REPORT ON REVIEW OF PLANT VARIETY RIGHTS REGIME

App

B8 Professor Elizabeth Jane Kelsey, affidavit, 17 October 2019

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B9 Moana Jackson, brief of evidence, 17 October 2019

B12 Angeline Greensill, affidavit, 17 October 2019

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B13 Robert McGowan, brief of evidence, 15 October 2019

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B21 Professor Elizabeth Jane Kelsey, affidavit, 25 November 2019

B22 Donna Kerridge, affidavit, 25 November 2019