

KO AOTEAROA TĒNEI

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

Te Taumata Tuarua

Volume 1



WAI 262

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*A*uē e te mate kei hea tāu wero, auē e te reinga kei hea tōu wīkītōria?

Engari anō te kai atua, purea ka ora, tēnā ko tēnei mea ko te aroha

Ka tū tonu ka tū tonu i roto rā i te whatumanawa

Nā ia kua whakaurupā te aroha ki a koutou katoa

I roto i tēnā i tēnā makīu makīu

E koro mā e kui mā i te pō ahakoa kua mate e kōrero tonu ana koutou

Ko ō koutou tinana kua maroke ko ā koutou kupu ia ka mau tonu

Tae noa atu ki ngā reanga o ngā rau tau ka tū mai.

Mō tēnei momo i a koutou he whārangi rau angiangi tā ēnei reanga

Hei whakanakonako i te pūtea kupu tuku ki tō koutou

I tō te ikeike kano i tō te rangiahua nui

Heoi e kui e koro mā, kua oti te whatu i te kākahu hei tāwharau

I tō koutou reo i whakarere iho ai, i ā koutou whakaratonga

Ki te ao i tukua iho ai ki ā koutou e ō koutou atua

Okioki i tō koutou moenga roa.

*O*h death, where is your sting; grave, where is your victory?

The vigilant can deflect the evil intentions rife in the everyday world of people.

But we know no remedy for the emptiness that remains after death's grim harvest;

For its pain is etched on our hearts, and its memory is a curse to be borne by the living.

*Aroha turns the wise words you leave behind to gravestones around which the people
will gather to mourn and remember.*

*Thus, although you, our elders, may pass into the night, your flesh to corrupt and fade,
Yet you speak still.*

And we cling to your sacred teachings, generation upon living generation,

*These few feeble words too thin to convey our love and gratitude for the legacy you have
bequeathed us, your living faces.*

*Let what follows be a cloak that keeps warm your voices and safe your contributions
to this troubled world.*

Rest now, in peace.



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



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

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



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



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

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Waitangi Tribunal

Te Rōpū Whakamana i te Tiriti o Waitangi

Kia puta ki te whai ao, ki te marama

The Honourable Dr Pita Sharples

Minister of Māori Affairs

and

The Right Honourable John Key

Prime Minister

and

The ministers listed at the end of this letter

Parliament Buildings

WELLINGTON

28 June 2011

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

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

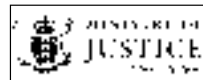
New Zealand sits poised at a crossroads both in race relations and on our long quest for a mature sense of national identity. These issues are not just important in themselves; they impact on wider questions of economic growth and social cohesion. We are propelled here by many factors: the enormous progress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

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

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

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

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

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

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

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

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

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

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

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

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

Heoi anō.



Justice J V Williams
Presiding Officer

The Honourable Bill English
Deputy Prime Minister

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

The Honourable Simon Power
Minister of Commerce

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

The Honourable Dr Nick Smith
Minister for the Environment

The Honourable Anne Tolley
Minister of Education

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

The Honourable David Carter

Minister of Agriculture

Minister for Biosecurity

Acting Minister for Economic Development

The Honourable Murray McCully

Minister of Foreign Affairs

The Honourable Tim Groser

Minister of Trade

The Honourable Dr Wayne Mapp

Minister of Science and Innovation

The Honourable Steven Joyce

Minister for Tertiary Education

The Honourable Dr Jonathan Coleman

Minister of Broadcasting

The Honourable Kate Wilkinson

Minister of Conservation

The Honourable Hekia Parata

Acting Minister of Energy and Resources

The Honourable Nathan Guy

Minister of Internal Affairs

Minister Responsible for the National Library

Minister Responsible for Archives New Zealand

The Honourable Rodney Hide

Minister of Local Government

Minister for Regulatory Reform

ABBREVIATIONS

ABS	access and benefit-sharing
AIP	agreement in principle
AJHR	<i>Appendix to the House of Representatives</i>
ANZTPA	Australia New Zealand Therapeutic Products Authority
APEC	Asia-Pacific Economic Cooperation
app	appendix
art	article
c	circa
CA	Court of Appeal
CBD	Convention on Biological Diversity
CE	common era
CEO	chief executive officer
CFR	Crop and Food Research
CGP	Conservation General Policy
ch	chapter
CHE	Crown Health Enterprise
cl	clause
CMRI	Crown–Māori Relationship Instrument
COP	Conference of the Parties
CRI	Crown Research Institute
DHB	District Health Board
DINZ	Designers Institute of New Zealand
DNA	deoxyribo-nucleic acid
doc	document
DOC	Department of Conservation
DRIP	Declaration on the Rights of Indigenous Peoples
DSIR	Department of Scientific and Industrial Research
ed	edition, editor, edited by
EEZ	exclusive economic zone
EIA	Environmental impact assessment
EIT	Eastern Institute of Technology
EPA	Environmental Protection Authority
ERMA	Environmental Risk Management Authority
ERO	Education Review Office
EU	European Union
FAO	United Nations Food and Agriculture Organization
fn	footnote
FOMA	Federation of Māori Authorities
FTTE	full-time teacher equivalent
GATS	General Agreement on Trade in Services

GATT	General Agreement on Tariffs and Trade
GM	genetic modification
GMO	genetically modified organism
GNS	Institute of Geological and Nuclear Sciences
HL	House of Lords
HFA	Health Funding Authority
HPA	Heritage Protection Authority
HRC	Health Research Council
HSNO	Hazardous Substances and New Organisms Act 1996
IBSC	Institutional biological safety committee
ILO	International Labour Organization
IP	intellectual property
IPONZ	Intellectual Property Office of New Zealand
IRMP	iwi resource management plan
J	Justice (when used after a surname)
JMA	joint management agreement
LIAC	Library and Information Advisory Commission
ltd	limited
MAF	Ministry of Agriculture and Forestry
MED	Ministry of Economic Development
Medsafe	Medicines and Medical Devices Safety Authority
MES	Māori Engagement Strategy
MFAT	Ministry of Foreign Affairs and Trade
MFE	Ministry for the Environment
MKDOE	‘Māori Knowledge and Development’ output expense
MLS	Māori Language Strategy (Te Rautaki Reo Māori)
MORST	Ministry of Research, Science and Technology
MOU	memorandum of understanding
MPDS	Māori Provider Development Scheme
MPF	Māori Potential Fund
MQS	Māori Qualification Services
MSI	Ministry of Science and Innovation
MTS	Māori Television Service
NFU	National Film Unit
NGIA	Nursery and Garden Industry Association of New Zealand
NGO	non-governmental organisation
NIA	National Interest Analysis
NIWA	National Institute for Water and Atmospheric Research
no	number
NQF	National Qualifications Framework
NZBS	New Zealand Biodiversity Strategy
NZCA	<i>New Zealand Court of Appeal</i>
NZCA	New Zealand Conservation Authority

ABBREVIATIONS

NZCER	New Zealand Council for Educational Research
NZEI	New Zealand Educational Institute
NZ–HK CEP	New Zealand – Hong Kong Closer Economic Partnership
NZIPA	New Zealand Institute of Patent Attorneys
NZLR	<i>New Zealand Law Reports</i>
NZPD	<i>New Zealand Parliamentary Debates</i>
NZQA	New Zealand Qualifications Authority
OAG	Office of the Auditor General
OECD	Organisation for Economic Co-operation and Development
p, pp	page, pages
P	president of the Court of Appeal (when used after a surname)
para	paragraph
PC	Privy Council
PCE	Parliamentary Commissioner for the Environment
PCT	Patent Cooperation Treaty
PHO	Public Health Organisation
PIC	prior informed consent
pt	part
PVR	plant variety right
QC	Queen’s Counsel
RHA	Regional Health Authority
RMA	Resource Management Act 1991
RMLR	Resource Management Law Reform project
RNA	ribo-nucleic acid
RS&T	research, science, and technology
RSNZ	Royal Society of New Zealand
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sch	schedule
SCR	Supreme Court Reports
SOI	statement of issues
tbl	table
TCE	traditional cultural expression
TEC	Tertiary Education Commission
TK	traditional knowledge
TRIPS	Trade Related Aspects of Intellectual Property Rights Agreement
TSA	Tohunga Suppression Act 1907
TTIF	Transition Toi Iho Foundation
TVNZ	Television New Zealand
UMF	Unique Mānuka Factor
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPOV	International Union for the Protection of New Varieties of Plants

US	<i>United States Reports</i>
v	and
vol	volume
VMAG	Vision Mātauranga Advisory Group
WIPO	World Intellectual Property Organization
WIPO-IGC	World Intellectual Property Organization Intergovernmental Committee
WTO	World Trade Organization

‘Wai’ is a prefix used with Waitangi Tribunal claim numbers.

Unless otherwise stated, footnote references to claims, papers, and documents are to the Wai 262 record of inquiry, a select copy of which is reproduced in appendix 11 and a full copy of which is available on request from the Waitangi Tribunal.

INTRODUCTION

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

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

—James Henare (translation by Waitangi Tribunal)



INTRODUCTION

IN.1 INTRODUCTION TO THE INQUIRY

The Wai 262 claim is one of the largest and most complex in the Waitangi Tribunal's history. It is most commonly referred to as the 'Indigenous Flora and Fauna and Cultural and Intellectual Property Claim,'¹ and it is about all of these things, but also much more. It can fairly be described as a claim about mātauranga Māori – the unique Māori way of viewing the world, incorporating both Māori culture and Māori traditional knowledge. It is no stretch to describe this claim as being about the survival of Māori culture and its ongoing place in this country.

As such, its comprehensive coverage is almost unmatched. Almost every law or policy that impacted on Māori was mentioned in the original claim and its amendments. The claim also traversed many of New Zealand's commitments in international law. Even when the historical dimension was excised (as explained below), the Wai 262 claim was still vast and became the Waitangi Tribunal's first whole-of-government inquiry, important not only for Māori and the Crown but for all of New Zealand.

For that reason, we have chosen to report on two levels. In this two-volume layer, *Te Taumata Tuarua*, readers will find a comprehensive and detailed explanation of the claim, the Crown's responses, the issues we considered, and our conclusions and recommendations. The companion layer, *Te Taumata Tuatahi*, provides a briefer account of these matters aimed at a more general readership.

In this introduction we set out the history of the Wai 262 claim and inquiry, introduce some key themes and principles that have guided our analysis of the claim, discuss the issues covered both in general and chapter by chapter, and provide some guidance on how to read our findings and recommendations. Specifically:

- ▶ In section 2, we explain the genesis of the claim and describe the initial Wai 262 statement of claim as it was filed in 1991.
- ▶ In section 3, we describe the inquiry, which took place during two phases – the first from 1997 to 2005 and the second from 2005 to this publication. There, we describe amendments to the initial claim, the Crown's responses, and the conduct of hearings and receipt of evidence. We also introduce some procedural issues on which there was disagreement between the claimants and the Crown.
- ▶ In section 4, we discuss the scope of the report, including the range of issues covered; our decision to restrict our inquiry to contemporary law, policy, and practice; and our approach to updating evidence where that was necessary. We also make clear that this inquiry, although very broad, has not included consideration of New Zealand's constitutional arrangements.
- ▶ In section 5, we place the claim in the context of New Zealand's founding cultures and the Treaty relationship between Māori and the Crown, and we briefly set out the Treaty principles and key themes that we will return to during our analysis of issues throughout the report.
- ▶ In section 6, we provide a chapter-by-chapter breakdown of the issues we will

consider in this report. We also explain how we have structured our consideration of each issue, and set out our approach to the presentation of findings and recommendations.

IN.2 THE INITIAL CLAIM

The Wai 262 claim arose from Māori concerns about the collection and use of indigenous plants, and of plants such as kūmara that had been brought from Hawaiki, for scientific research and for commercial ends. A series of events in the late 1980s, including a national ethnobotany hui² and the publication of two books about research on indigenous plants,³ sparked an awareness of these trends. Māori expressed concern about the extent of the research, collection, and commercialisation that was taking place, and the lack of Māori consent even when research drew on mātauranga Māori. Many were also concerned that mātauranga Māori concerning indigenous flora and fauna was being lost, as were the species themselves. Participants at the ethnobotany hui called for research to cease until in-depth consultation could be carried out to determine tangata whenua wishes.

Though this initial concern was about indigenous plants, the Wai 262 claim, when it was lodged with the Waitangi Tribunal on 9 October 1991, had a broader scope. The claimants were Kataraina Rimene, Tama Poata, John Hippolite, Hema Nui a Tawhaki Witana, Haana Murray, and Te Witi McMath. These six people filed the claim on behalf of Ngāti Kahungunu, Ngāti Porou, Ngāti Koata, and three iwi of Te Tai Tokerau: Te Rarawa, Ngāti Kuri, and Ngāti Wai.

In opening their case at the first hearing, claimant counsel identified a central focus of Wai 262 as ‘the customary tikanga rights inherent in and associated with the natural resources of indigenous flora and fauna me o ratou taonga katoa. Rights which the claimants say were guaranteed to them by Te Tiriti o Waitangi.’ Counsel also observed:

The claim is an opportunity to embrace an indigenous understanding of the environment and how we interact with it based on knowledge passed down through countless generations. The proper application of this knowledge can result

in benefits to the environment and to the wider community as a whole. The claim is not, therefore, something to be feared by non-Māori New Zealanders ...⁴

The claim, in brief, was that the Crown had denied Māori the full exercise of their tino rangatiratanga, or ‘absolute authority’ over many aspects of life, but particularly those relating to natural resources including indigenous flora and fauna. The claimants said that tino rangatiratanga entitled them to control and decision-making authority relating to the conservation, use, and development of those resources. This included, among other things:

- ▶ a right to development relating to these resources;
- ▶ a right to determine intellectual property rights in the knowledge and use of indigenous flora and fauna and the preservation of biodiversity;
- ▶ a right to participate in, benefit from, and make decisions about existing and future technological advances relating to the breeding and genetic manipulation of indigenous flora and fauna;
- ▶ a right to control and make decisions about

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



INTRODUCTION

propagation, development, transport, study, and sale of indigenous flora and fauna;

- ▶ a right to protect, enhance, and transmit cultural, medicinal, and spiritual knowledge and concepts relating to indigenous flora and fauna;
- ▶ a right to environmental well-being dependent on the nurturing and wise use of indigenous flora and fauna; and
- ▶ a right to recognition of the iwi interest in the continued existence of indigenous flora and fauna 'as particular species and as interconnected threads of te ao turoa' (the entirety of the natural world).

In summary, the claimants said that recognition of tino rangatiratanga 'vested in Iwi all rights relating to the protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation and restrictions upon the use of indigenous flora and fauna'.⁵

The claimants argued that almost all the laws and actions of the Crown since 1840 had had been contrary to their tino rangatiratanga in respect of natural resources and indigenous flora and fauna, and for this reason it was not possible to state all of their grievances succinctly.⁶ But where prior to 1840 the claimant iwi 'exercised te tino rangatiratanga to protect and ensure the economic, political, social and cultural welfare of their people, and to conserve and manage the resources which they controlled,' they now exercised 'very little effective authority in relation to the welfare and protection of their people, and they have been excluded from and denied access to, and control over, the resources of their whenua and kainga'.⁸

Though the claim focused on 'taonga katoa', it listed the following 'example species': kūmara; pōhutukawa; koromiko; puawānanga (clematis); various species of indigenous timbers being exported at the time; pūpū harakeke (flax snails); tuatara; and kererū (pigeons).⁹

Among other things, the claimants argued that the Crown had restricted their access to indigenous species and their ability to exercise kaitiakitanga or guardianship over the species. It had done so by alienation of their lands and waters and the creation of reserves and protected species. The claimants also said that the Crown had allowed the sale and export of indigenous flora and fauna and their genes, and the patenting and issuing of proprietary rights in these species, in a manner contrary to the



The pūpū harakeke (flax snail) is one of the example species listed in the Wai 262 claim.

Treaty.¹⁰ As a result, Māori were prevented from benefiting from development of flora species, could not conserve and protect indigenous flora and fauna nor control their use or dispersal, and were denied the ability to express or make use of the cultural and spiritual values or concepts associated with indigenous flora and fauna.¹¹

The claim was registered as the 262nd claim on the Tribunal's register in December 1991.

IN.3 THE INQUIRY

The Wai 262 inquiry took place in two distinct phases, each with its own round of hearings. The first began in 1995, with Judge Richard Kearney appointed as presiding officer in 1997. The second phase began in 2005 with then Chief Judge Joe Williams, at the time the chairperson of Waitangi Tribunal, presiding.¹²

IN.3.1 The first phase

(1) *The claim, evidence, and hearings*

The first phase of the inquiry started after an application by the claimants in August 1995 for an urgent hearing into proposed legislation on intellectual property (IP) and free trade, which the claimants argued prejudiced their interests and had been drafted without adequate consultation with Māori.¹³



Keita Walker,
Bishop Manuhua Bennett,
Judge Richard Kearney,
Pamela Ringwood, and
Roger Maaka at the
sixth hearing, November 1998.

In submissions to the Tribunal, claimant counsel made clear that they sought 'a priority hearing rather than an urgent one starting immediately.'¹⁴ The application for urgency was granted, though it was subsequently agreed that the claim would be accorded priority with all issues heard in one inquiry 'once they have been adequately identified and researched.'¹⁵ Planning for hearings and the production of evidence got under way, as did some preliminary research. In March 1997, a Tribunal panel comprising Judge Richard Kearney (presiding officer), Keita Walker, and John Clarke was appointed to hear the claim. Mr Clarke soon advised he had to withdraw from the panel, and he was replaced in August 1997 by Pamela Ringwood and Roger Maaka.¹⁶

In September 1997, the claimants filed an amended statement of claim. It was at least as comprehensive as the first, and now included the matters cited in the 1995 application for urgency, such as the General Agreement on Tariffs and Trade and IP law reform legislation.¹⁷ The claim related to:

te tino rangatiratanga o te Iwi Maori in respect of indigenous flora and fauna *me o ratou taonga katoa* (and all their treasures) including but not limited to matauranga, whakairo, waahi tapu, biodiversity, genetics, Maori symbols and designs

and their use and development and associated indigenous, cultural and customary heritage rights in relation to such taonga. [Emphasis in original.]¹⁸

The amended claim defined the term 'taonga' as all of the elements of a tribal group's estate, 'material and non-material, tangible and intangible.'¹⁹

The claimants said that tino rangatiratanga incorporated:

- (a) Decision-making authority over the conservation, control of, and proprietary interests in natural resources including indigenous flora and fauna *me o ratou taonga katoa*;
- (b) The right to determine indigenous cultural and customary heritage rights in the knowledge and use of indigenous flora and fauna *me o ratou taonga katoa*;
- (c) The right to participate in, benefit from, and make decisions about the application of existing and future technological advances as they relate to the breeding, genetic manipulation and other processes relevant to the use of indigenous flora and fauna;
- (d) The right to control and make decisions about the propagation, development, transport, study or sale of indigenous flora and fauna;



The challenge is accepted. Counsel for the Crown, Brendan Brown QC, picks up the rākau tapu during the pōwhiri before the first hearing at Tamatea Marae, Motutū, Hokianga, September 1997.

- (e) The right to protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna;
- (f) A right to environmental well-being dependent upon the nurturing and wise use of indigenous flora and fauna;
- (g) The right to participate in, benefit from and make decisions about the application, development, uses and sale of *me o ratou taonga katoa*;
- (h) The right to protect, enhance and transmit the cultural and spiritual knowledge and concepts found in *me o ratou taonga katoa*.²⁰

The first hearing began on 15 September 1997. Over four days, evidence was heard from Ngāti Kuri witnesses at the Tamatea Marae, Motutū, and from Ngāti Wai witnesses at the Ngāti Wai Trust Board Office, Whangarei. Over the next four-and-a-half years, further hearings were held at marae and other venues in Northland, the East Coast, Rotorua, Nelson, Hastings, Auckland, and Wellington. In all, 14 weeks of claimant- and Tribunal-commissioned evidence were heard, including testimony from kaumātua and tribal authorities and experts on issues as diverse as whakapapa and mātauranga Māori, rongoā Māori and the health of the Māori people, genes and genetic modification, ethnobotany, resource management, and the philosophy of science. Many of the expert witnesses discussed the relationship between mātauranga Māori and the modern world, giving evidence to assist the Tribunal, the claimants, and the Crown to conceptualise the claims and explore the types of outcome that would be beneficial for all concerned.

The hearings were supplemented by a wide range of written research on topics relevant to the inquiry. This included Tribunal-commissioned reports on laws relating to flora and fauna and intellectual property (published in 1995),²¹ Māori access to kererū (1998),²² and a set of four overview reports (2001) about Crown laws, policies, and practices from 1840 to the 1990s. The overview reports, covering both historical and contemporary aspects of the claim, focused on Māori knowledge systems and cultural practices; flora and fauna; key ecosystems and conservation (including the establishment of national parks); and environmental and resource management law, Crown research science, and new organisms.²³ The authors of these overview reports appeared before the Tribunal during May 2002.

(2) Confidential evidence

From the beginning, there were diverging views about how to proceed with the inquiry. These differences were to be expected given the unprecedented breadth and complexity of the claim. But they were also to contribute at times to difficulties in advancing the inquiry.

One of those issues concerned the confidentiality of evidence. The claimants were concerned that by giving evidence, tapu knowledge could enter the public arena.²⁴

Since one of their fundamental concerns was about the protection of indigenous knowledge, they argued that they ought to be able to have confidence ‘that their matauranga can be protected by the institution established to hear their grievances – and particularly when it is to be given on their own marae.’²⁵ In order to address this concern, they sought protocols around the use of and access to information given in evidence.²⁶ The Crown argued that the matter of confidentiality needed to be handled consistently and that the Crown had to be able to distribute evidence to those departments affected by the claim.²⁷

The Tribunal had to balance the claimants’ request to limit the distribution of confidential evidence with both the Crown’s need to respond fully to the evidence and its own reporting requirements. The matter was ultimately dealt with in a process that involved application to the Tribunal for a confidentiality order that could apply to selected evidence, rather than any blanket rules of confidentiality or openness.

(3) Scope of the inquiry

Another, deeper disagreement concerned the scope of the inquiry and the definition of issues. The claim covered every area of policy and law relating to flora, fauna, intellectual property, research science, and cultural heritage since 1840 and – as the claimants had noted in their original statement of claim – concerned grievances that were difficult to state succinctly. They wanted the Tribunal to consider the full range of issues they had raised, whereas the Crown, from the beginning, was concerned at what it saw as a lack of clarity about the claim’s scope and the particular issues to be heard. This was particularly so because the claim was being brought by six iwi rather than all the iwi affected by the issues, some of which also had (or were about to have) claims heard in district inquiries.

In response to these differences, the Tribunal attempted to rationalise the inquiry process, initially in 1997 by proposing to devise a ‘schedule of issues’²⁸ and subsequently in 2001 by making a decision to develop a ‘statement of issues’ summarising the claims and providing the key questions on which the Tribunal would hear evidence.

In order to advance the development of this statement of issues, in 2001 the Tribunal asked the claimants to file further statements of claim identifying specific

issues in their respective rohe (tribal areas). Four separate amended claims were filed during September and October 2001.²⁹ In April 2002 the Tribunal directed the Crown to provide a statement of response to the claims so that the statement of issues could also represent the Crown’s view.³⁰ The Crown duly filed its statement of response on 28 July 2002, though it noted that it saw the response as ‘a starting, rather than an end, point’ in the dialogue about the claims.³¹

It then remained for the Tribunal to complete its statement of issues. By February 2004, when this work was still ongoing, counsel for the claimants requested that the inquiry resume, noting the delays since the 2002 hearings.³² Chief Judge Williams, in his capacity as Tribunal chairperson, responded that Judge Kearney was extremely ill and unlikely to be able to resume his duties as presiding officer. Chief Judge Williams advised, however, that a draft statement of issues was being prepared.³³

After a long period of illness, Judge Kearney died in March 2005. His poor health undoubtedly contributed to the delays in finalising the statement of issues in the period after 2002.

IN.3.2 The second phase

After the death of Judge Kearney, Chief Judge Williams, acting in his capacity as Chairperson of the Waitangi Tribunal, appointed himself as the new presiding officer for the Wai 262 inquiry.³⁴

(1) The statement of issues and the scope of the claim

In December 2005, we released a draft statement of issues to the parties. (We have referred to Tribunal in the first phase of the inquiry, when Judge Kearney was presiding, in the third person; we refer to the second phase, involving the present panel, in the first person plural.) The draft statement of issues arranged the claimant concerns under five broad topics:

- ▶ intellectual property aspects of taonga works – that is, artistic and literary works such as carving, weaving, waiata, and so on that reflect the culture and identity of the work’s traditional owners;
- ▶ intellectual property in genetic resources of taonga species – that is, species that the claimants had listed as being of particular significance to them;



Justice Joseph Williams, presiding officer in the second phase of the Wai 262 inquiry.

- mātauranga Māori, te reo Māori, and transmission of cultural knowledge;
- relationship with the environment; and
- rongoā Māori – that is, Māori traditional medicine.³⁵

The draft statement of issues summarised the claimant and Crown positions in relation to each topic and asked a series of linked questions about the Crown's obligations under the Treaty, the Treaty compliance of current and proposed laws and policies, and – if a breach of the Treaty had occurred – what form any remedies should take.³⁶ As an example, it asked whether the Crown was obliged to protect taonga works from use by those who were not the customary owners, or from use in a manner that was inconsistent with the values of the customary owners. The statement then asked what protections were currently available under New Zealand law and policy. It asked a series of questions about the protections available under specific laws such as the Copyright Act 2004 and the Trade Marks Act 2002, and under relevant international

agreements. Finally, it asked whether amendments were needed to those laws.³⁷

The draft statement also identified the core Māori value of kaitiakitanga as central to the claim, and defined 'kaitiaki' as those whose special relationship with a taonga gives rise to an obligation and corresponding right to protect, control, use, preserve, or transmit the taonga itself and also the relationship of kaitiaki to the taonga.³⁸

The divergence of views over the scope of the inquiry and the precise definition of issues continued into this phase. The draft statement of issues focused the inquiry on contemporary legislation, policy, and practice rather than Crown action since 1840. The Crown supported this approach, arguing that any historical focus would create the risk of an overlap with the Tribunal's district inquiries,³⁹ and that a historical focus would significantly lengthen the time required for evidence to be heard, creating a risk of considerable delay.⁴⁰ The claimants, on the other hand, argued steadfastly that the inquiry should cover the entire period since 1840.⁴¹ Claimant counsel said that many of today's problems and issues emerge from past Crown omissions and actions in breach of the Treaty, and that the evidence on the record of inquiry focused on the past as much as the present. Counsel also argued that if historical cultural claims were not heard fully in the Wai 262 inquiry, they would not be heard anywhere.⁴²

In May 2006, we issued our final decision on this matter. We noted that 'the structure and approach of any inquiry is a matter for the Tribunal to settle' and that we wanted to report on these contemporary issues as a matter of priority.⁴³ We saw the claim as largely contemporary in character, albeit with significant historical content and context, and we remained concerned about the extra time and commitment of resources that would be required of all parties if we were to conduct a full-scale historical inquiry. This extra time would, we felt, cause further undue delay in an already overly protracted process. In our view, the overriding message from claimants at hearings had been about defects in contemporary law and policy. The claims were exceptionally attuned to – and affected by – current policy development. A contemporary focus would 'most effectively contribute to the national dialogue' over law and policy in relation to flora, fauna, intellectual property, and culture. Accordingly,

we chose to defer any full-scale inquiry into historical issues, as we were empowered to do under section 7(1A) of the Treaty of Waitangi Act. We said that this course of action would allow claimants to pursue historical grievances ‘wherever possible’ in district inquiries and through direct settlement negotiations.⁴⁴

Aside from the question of whether to include historical matters, the Crown also remained concerned that some of the topics in the draft statement of issues were expressed too broadly and, as a result, may overlap with previous Tribunal inquiries or ongoing contemporary claims. For example, it opposed the stated intention to assess the Crown’s performance with respect to the revitalisation of te reo Māori, as the claimants had not asserted any failure by the Crown to respond to the recommendations in the Tribunal’s 1986 report on te reo Māori. The Crown also noted some overlap with current contemporary claims (for example, the Wai 1315 claim, which alleged that the Crown had failed to actively protect primary health organisations in their efforts to improve Māori health). The Crown expressed its view that concepts such as ‘kai-tiakitanga’ and ‘taonga species’ needed to be explored in a practical way.⁴⁵

Our final statement of issues was released in July 2006. It included a revised definition of kaitiakitanga that placed kaitiaki obligations in the context of the concept of tino rangatiratanga. Indeed, it identified the two as inseparable – tino rangatiratanga as the right and kaitiakitanga as the corresponding obligation towards taonga. It defined tino rangatiratanga in this context as including the right of kaitiaki to make and enforce laws and customs in relation to their taonga. Other changes included an extended preambular summary of some of the claims, as supplied by counsel, and various wording changes. Crown and claimant counsel agreed to replacement questions regarding te reo Māori, reflecting a narrower ambit than that set out in the draft statement of issues.⁴⁶

(2) *Additional claimants*

Because we wanted to obtain the fullest picture of those affected by the policies and legislation at issue in the claim, we asked whether new claimants should be admitted during this second stage of the inquiry.

We received applications for claimant status from

the Federation of Māori Authorities, the Te Tai Tokerau District Māori Council, the Wairoa–Waikaremoana Māori Trust Board, and Te Waka Kai Ora (an association of Māori involved in organic farming and horticulture).⁴⁷

We also heard from counsel representing claimant groups from Ngāti Whaoa, Ngāti Hikairo, Ngāti Rangitihī, and Te Aitanga a Hauiti,⁴⁸ and groups representing Māori artists and rongoā practitioners,⁴⁹ but ultimately none of these groups decided to proceed with applications to join as claimants. However, one individual – David Potter, secretary of Te Rangatiratanga o Ngāti Rangitihī Incorporated – sought to represent himself at the inquiry.⁵⁰

Some counsel for the original claimants suggested that it would be best to hear all the new applicants as interested parties, as hearing new claims would further delay the inquiry.⁵¹ In making our decisions, we had to assess the distinctiveness of the applications and determine whether the new claims were so central to the underlying issues that they should be heard in the inquiry rather than be deferred to later district or generic inquiries.⁵²

In the end, we admitted two new claimants to the inquiry in July 2006. One of those was the Wairoa–Waikaremoana Māori Trust Board, which was concerned about the pollution of New Zealand waterways with organochlorine herbicides such as 2,4,5-T and 2,4-D, with resulting harmful effects on taonga species and on the health of tangata whenua (through contamination of food sources, in particular, fish).⁵³ The other new claimant was Te Waka Kai Ora, which was concerned about the effects of a proposed Australia–New Zealand Therapeutic Products Agreement (ANZTPA) on rongoā Māori⁵⁴ (see chapter 7) and also raised concerns about organochlorines. We regarded their claims as distinctive from those already to hand, yet linked with the flora and fauna issues carried in the original Wai 262 claims.⁵⁵ Both were admitted on the basis that their participation was restricted to matters distinct to their claims (as opposed to general participation on the same basis as the original claimants), and that their submission of evidence and any questioning of witnesses would be by leave of the Tribunal.⁵⁶ In 2006 we issued two interim reports about the ANZTPA regime.⁵⁷

We declined the applications for claimant status from



Final hearing, 13 June 2007,
Waitangi Tribunal, Wellington.

David Potter and the Te Tai Tokerau District Māori Council, on the basis that they did not raise issues that were sufficiently distinctive to justify inclusion. The Federation of Māori Authorities was admitted as an interested party.⁵⁸

(3) Interested persons and groups

Because of the scope of claim and its potential impact on a wide range of sectors, we wanted to hear evidence from interested parties. To this end, the Tribunal administration wrote to all parties who had letters of interest filed on the Record of Inquiry; many were plant nursery owners who had written to the Tribunal before the first round of hearings commenced. The Tribunal's registrar also placed advertisements in the major daily newspapers and information on its website.⁵⁹ We appointed Peter Andrew, a senior barrister with expertise in Treaty of Waitangi issues and Tribunal procedure, to represent interested parties (at no charge to them) if they wished. Many took advantage of this offer.⁶⁰

Interested persons or groups are discussed at relevant points in our report. They ranged from professional groups (such as the Designers Institute of New Zealand,

the New Zealand Institute of Patent Attorneys, and the Association of Science Educators), industry groups (such as the Nursery and Garden Industry Association), artists, designers, landscape architects, the New Zealand Vice-Chancellors' Committee (representing the research interests of universities), Crown research institutes, and research companies. Ultimately, they gave evidence about a wide range of topics, including plant research, bush restoration, sustainability, science education, biotechnology and bioprospecting, and te ao Māori.

(4) Hearings

During 2006 and 2007, we held 11 weeks of hearings, covering evidence from the claimants, interested parties, and the Crown.

The first of these hearings took place in August and September 2006, where we heard updating evidence from the six original claimant iwi at hearings in Māngere, Tokomaru Bay, Hastings, and Nelson. In Hastings, we also heard from the Wairoa–Waikaremoana Māori Trust Board.

In late September, we heard from the other new claimant group, Te Waka Kai Ora, and from some of the

interested parties. In the week of 11–15 December, the remaining interested parties gave evidence, including Crown research institutes and universities. These hearings were held at the Tribunal offices in Wellington.

The Crown began its evidence during that week and continued during three further weeks in December 2006 and January 2007. It provided significant evidence, as befitted the Tribunal's first whole-of-government inquiry. We heard from the chief executives, deputy secretaries, and senior staff of many Crown agencies and one state-owned enterprise. They included Archives New Zealand, Creative New Zealand, the Department of Conservation, the Ministry of Agriculture and Forestry, the Ministry for Culture and Heritage, the Ministry of Education, the Ministry of Economic Development, the Ministry for the Environment, the Ministry of Fisheries, the Ministry of Foreign Affairs and Trade, the Ministry of Health, the Ministry for Research, Science and Technology, Te Puni Kōkiri, the Museum of New Zealand Te Papa Tongarewa, the National Library, the New Zealand Medicines and Medical Devices Safety Authority, the New Zealand Qualifications Authority, and Television New Zealand.

Counsel for the claimants and Crown gave their closing submissions in the weeks of 5 to 8 and 11 to 15 June 2007. The first week was held at Ōrākei Marae, Auckland, where we heard from counsel for Ngāti Kahungunu, counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, counsel for Ngāti Koata, counsel for the Wairoa–Waikaremoana Trust Board, and counsel for Te Waka Kai Ora. The second week of closing submissions was held at the Tribunal's offices in Wellington, where we heard submissions from counsel for Ngāti Porou and counsel for the Crown. Claimant counsel's submissions in reply to the Crown's closing submissions were heard on 14–15 June and brought the hearings to a conclusion.

We then began the task of writing this report.

IN.4 SCOPE OF THIS REPORT

In this section, we discuss the scope of this report, including its contemporary focus, the range of issues covered, and how we have handled developments since our hearings were completed in 2007.

IN.4.1 Contemporary focus

As we explained in section 1.3.2(1), we chose to focus our inquiry on contemporary law and policy. That is not to say that we have ignored the past. Current relationships do not occur in a historical vacuum, but rather are influenced and shaped by past events. The current state of te reo Māori, for example, reflects many historical forces, not least the actions of the Crown in suppressing te reo in schools. Similarly, current relationships with taonga such as land, water, and flora and fauna are of course affected by the alienation of land from tangata whenua and the general environmental decline that has occurred since 1840. We agree with the claimants, therefore, that many contemporary claims have their genesis in historical processes and indeed remain interconnected with those processes. Where historical context is important to the specific issues at hand, we have acknowledged that. We have, therefore, engaged with the past. But we have not sought to make findings about colonial events or about laws or policies that no longer apply. Rather, the focus of our findings and recommendations is the current Treaty relationship, and the effects of contemporary law, policy, and practice on that relationship. We have, for example, drawn conclusions about the workings of the Resource Management Act, but not about the environmental management regime that existed prior to its enactment in 1991.

There is one important exception to this general rule. In our chapter on rongoā Māori (chapter 7), we consider the Tohunga Suppression Act 1907. We do this because it is impossible to consider rongoā in a modern context without examining the origins and impact of that legislation. The Act and its effects were key issues for the claimants.

IN.4.2 Range of issues covered

In this report we address the claimants' central concerns (see sections 1.2 and 1.3.2(1)), such as those about the protection and transmission of mātauranga Māori; kaitiaki relationships with flora and fauna and the environment; and IP and what we call taonga works. In doing so, we have focused on the Treaty compliance of overall law and policy frameworks affecting mātauranga Māori, and – where those frameworks are not compliant – on what remedies might be pursued. We consider, for example,

what protections copyright and IP laws provide for mātauranga Māori in the contexts of taonga works and indigenous flora and fauna. We also consider how environmental laws and policies affect the relationships between kaitiaki and taonga; the impacts of Crown policies on te reo Māori; how Crown agencies with responsibilities for mātauranga Māori have fulfilled those responsibilities; and what impact laws and policies have had on rongoā.

Within the context of these broad themes, a large number of more particular concerns emerged either in statements of claim or during the hearings. These related, for example, to the management of individual species of flora and fauna such as tuatara or kererū, and the lack of protection afforded specific cultural works such as individual haka by IP law, or the plight of particular dialects of te reo Māori.

Where these more particular issues were raised, we have had to determine how to proceed with them. For practical reasons alone, we have not been able to address them all specifically in this report, and nor would it necessarily have been of benefit to the claimants for us to do so. The approach we have taken to any particular issue has depended on two main factors. First, we have considered how important the particular issue is to the overall claim. If it was of central importance, we have addressed it. Secondly, we have considered whether any particular issue could be addressed by more general reform. This was often the case. For example, having considered how indigenous flora and fauna are managed under conservation legislation and how their genetic resources are protected under IP laws, we have not considered it necessary to apply our analysis to each individual species the claimants were concerned about. Rather, the general reforms we propose can be applied case by case to particular species. (We have, however, considered some individual species as examples.) Similarly, in the case of te reo Māori, while the claimants were concerned about tribal dialects, we have found it necessary to consider the overall state of the language, because – to put it bluntly – individual dialects will not survive if the Māori language is not in an overall state of health.

The scope of the claim meant that while most issues were covered in depth during hearings, some were not.

The availability or otherwise of evidence has therefore also been a factor, albeit a secondary one, in determining how we have proceeded with some issues. Where the evidence and our expertise was not sufficient to allow us to draw conclusions, we have had to consider the costs – in terms of time and resources – of obtaining that evidence, and to weigh those costs against the benefits of doing so. In some cases where evidence was lacking, for the reasons outlined in the previous paragraph (that is, because the issue was not central to the overall claim, or could be addressed through more general reform) we have decided not to consider the issue further.

One example is the Wairoa–Waikaremoana Māori Trust Board claim, which was concerned with the pollution of waterways with organochlorines.⁶¹ The evidence we heard from the claimants lacked specificity and was not comprehensive, and the Crown produced very little evidence in response. The Crown also argued that the Environment Court, as a specialist forum, was better placed than the Tribunal to consider this matter.⁶² And we ourselves did not have expertise in relation to these issues.⁶³ We did not therefore think we had heard enough on the matter from either the claimants or the Crown to make findings or recommendations. Furthermore, the issues raised, though relevant to the overall Wai 262 claim, were not crucial. We did not have to resolve this specific issue in order to draw conclusions about the resource management regime as it affects kaitiaki interests in waterways. On this basis, we did not call for additional evidence, and we do not report further on the specific issue of organochlorines in this report. We do, however, consider that our recommendations with regard to the Resource Management Act (chapter 3) provide a means to ensure that Māori interests in waterways are given appropriate priority in future, and this addresses the Wairoa–Waikaremoana claim to the extent that it relates to current law and policy. It remains open, of course, for Māori to file new and more detailed claims about this kind of very specific contemporary issue where they feel the need for further findings or recommendations.

For some issues, we ourselves did have subject-matter expertise which allowed us to consider issues even where the evidence presented to us was incomplete. Te reo

Māori was one example. For other issues, we determined that the issue was sufficiently central to the claim that further evidence should be gathered. We therefore pursued information that was on the public record. Again, te reo Māori is an example (see chapter 5), as are developments in international agreements relating to intellectual property (chapters 1 and 2). In yet other cases, we issued directions seeking additional evidence (for example, in the case of the establishment of a new national rongoā body – see chapter 7). Sometimes, a combination of approaches was used.

The need to gather additional evidence became more pressing as time passed. The inquiry's focus on contemporary matters has required us to keep up with law, policy, and environmental changes on a large number of fronts. Both domestically and globally, law and policy have developed considerably since our hearings were completed in 2007. To give one example, that period has seen significant development in respect of international instruments relating to intellectual property and the protection of indigenous rights in flora and fauna. Our target, in other words, has been perpetually moving.

Our practice of issuing directions to the Crown calling for additional evidence or for the detail of new policies drew some criticism from counsel for the Te Tai Tokerau claimants, who felt this allowed the Crown to adduce further evidence the claimants could not test via cross-examination. We did on occasion invite claimant counsel to make submissions on new material, but we were strongly of the view that opening up further hearings would cause an unjustifiable degree of delay and expense. Ultimately, we reasoned that it was in no one's interests for us to release a report that omitted issues that were central to the claim or dealt with outdated policy.

Our contemporary focus also had other implications. First, it raised the possibility of changes in the parties' positions during the course of the inquiry. As we noted in section 1.3.1(3), the Crown argued in 2002 that it saw its statement of response as 'a starting, rather than an end, point'. We have no trouble with this view and, indeed, have generally relied on closing submissions for the parties' positions on the matters covered by this inquiry.

A second implication is that as each new development has occurred in law or policy, we have sought to

incorporate it in our analysis, in order to ensure that our findings and recommendations are as relevant and current as possible. This has at times been an intensive process, but a necessary one; as we said above, there is little to be gained from findings and recommendations about laws or policies that no longer apply. But ultimately we have had to cut off our detailed consideration of new developments in order to complete this report. While we have made every effort to be as current as possible, there will inevitably have been developments in both law and policy since we completed our analysis and began the process of publication.

IN.4.3 Not a constitutional review

Though this report is very broad in focus, it is important to be clear about what it is not. This report is not a review of New Zealand's current constitutional arrangements or the place of the Treaty of Waitangi in those arrangements. The claimants were concerned with control or influence over taonga and over mātauranga Māori; we did not see it as our role to consider issues beyond those put on the table by the claimants either expressly or by necessary implication. The broader question of constitutional arrangements is for another forum at another time.

IN.5 KEY THEMES AND PRINCIPLES

Having set out the scope of the report, we now consider some of its key themes and the principled approach that we have applied to our analysis of the claim. The Wai 262 claim concerns Treaty protections for mātauranga Māori. It has therefore been necessary to consider what is meant by 'mātauranga Māori', what protections the Treaty provided for it, and what those protections might mean in a twenty-first century context. We consider these matters issue by issue in each chapter of this report, but here we provide a broad overview.

IN.5.1 A meeting of cultures

New Zealand has two founding cultures, one belonging to the people who followed Kupe to these shores, the other belonging to those who followed Captain Cook. In the introduction to *Te Taumata Tuatahi*, we have described the story of these cultures at some length. Here, the



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

important points are that each had its own distinct way of viewing and relating to the world – its own cosmology, science, law, social organisation, and so on – and that through contact, each evolved their relationships with this land.

Kupe's people, the people of Hawaiki, brought with them Hawaikian culture, science, and systems of knowledge. The defining principle of that culture was kinship – the value through which the Hawaiians expressed relationships not only with each other but also with ancestors and with the physical and spiritual worlds. The sea, for example, was not an impersonal thing, but an ancestor

deity. Kinship was a revolving door between the human, physical, and spiritual realms. This culture had its own creation theories, its own science and technology, its own bodies of sacred and profane knowledge. It emphasised individual responsibility to the collective at the expense of individual rights, yet greatly valued individual reputation and standing. It also enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) it also emphasised human responsibility to nurture and care for it (known in te ao Māori as kaitiakitanga).



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

Through contact with the environment of Aotearoa, this culture evolved. While the core kinship value remained, it came in time to be expressed in Aotearoan terms. Kūpe's people adapted old technologies to local conditions, and invented new ones. They found new names for unfamiliar plants and animals, such as kiwi, tūi, pōhutukawa, and kōwhai. They created explanations for why each species had its own unique characteristics and how those species related to each other and their human observers. They developed new art forms, responding to the resources and patterns they found in the Aotearoan environment. One example is the adoption of the spiral pattern in painting, carving, sculpting, and tattooing, reflecting the pītau or

koru form of the fern plant. Another is the development of intricate carved houses and war canoes, made possible by the abundance of tōtara. In this way, over a period of perhaps hundreds of years, Hawaikian culture became Māori culture.

New Zealand's other founding people, those who followed Cook, also brought with them their own culture, science, and systems of knowledge. With them came the idea of a single omnipotent God, and, associated with that God, the Bible – which was the catalyst for the spread of literacy. Other philosophical ideas – such as the democratic ideals of the classical Greeks, the Justinian code of the Romans, and the Enlightenment concepts of empirical science and deductive reasoning – also travelled with them. So, too, did their home-grown legal system: the common law, individual property rights, the prerogatives of the sovereign, and the separate rights of the ordinary citizen. And they also brought their technology, along with its products – including iron, textiles, and weapons.

New Zealand was founded on the relationship between these two cultures. Meeting as equals, their representatives reached an agreement, in the Treaty of Waitangi, that gave each of New Zealand's founding peoples a form of authority relevant to its culture. The Crown won kāwanatanga, the right to enact laws and make policies; iwi and hapū retained tino rangatiratanga over their lands, settlements, and 'taonga katoa'. In this way, the Treaty provided a place for each culture in the life of this country.

The claimants' concern is that this promise has not been fulfilled. Rather, to put the argument in very simple terms, mātauranga Pākehā has come to dominate national life while mātauranga Māori has been marginalised to a point where its very survival is threatened. This, the claimants argued, has occurred from the time of the Treaty right through to the present as a result of laws, policies, and practices that have put control over mātauranga Māori and taonga that are central to Māori culture and identity in the hands of others. It has occurred, they argued, through dispossession of Māori from their lands, through active suppression, and through neglect. It has occurred in some cases because laws and policies give the Crown control of taonga, such as when statutes give the Crown ownership and control of indigenous flora and fauna and do not allow Māori even to have access to those

species for cultural purposes, nor to own taonga works made from those species. It has occurred also because laws and policies allow other interests to own, control, or use taonga, or to use mātauranga Māori, such as when their language, symbols, stories, songs, and dances are turned into commodities by people who have no traditional claim on them.

This claim in other words concerns the place of mātauranga Māori in these islands, as one of our nation's two founding cultures. The claimants wished to see Māori culture, and the relationships upon which it is founded, controlled by Māori, and they argued that this was their right under the Treaty guarantee of tino rangatiratanga.

IN.5.2 Treaty principles

We will address Treaty principles where relevant throughout this report, but here it is important to set out some context.

Through the Treaty, the Crown won the right to enact laws and make policies. That proposition has been accepted time and again by the courts, as well as this Tribunal. It could hardly be otherwise in New Zealand's robust democracy. But that right is not absolute.⁶⁴ It was – and remains – qualified by the promises solemnly made to Māori in the Treaty, the nation's pre-eminent constitutional document. Like any constitutional promise, those made in the Treaty cannot be set aside without agreement, except after careful consideration and as a last resort.

Of these promises, the most important in this context is the guarantee to protect the tino rangatiratanga of iwi and hapū over their 'taonga katoa' – that is, the highest chieftainship over all their treasured things. Most speakers of Māori would render tino rangatiratanga, in its Treaty context, as a right to autonomy or self-government. The courts have found that the tino rangatiratanga of iwi and hapū is entitled to active protection by the Crown.⁶⁵

This claim requires us to consider what tino rangatiratanga means in respect of the relationships between claimants and the taonga they wish to protect, such as indigenous flora and fauna, and cultural works. The Tribunal has previously found that mātauranga Māori is a taonga and is therefore subject to the principles of rangatiratanga and active protection,⁶⁶ and this was not seriously challenged in our inquiry. The claim thus also



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

KEY CONCEPTS

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

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

We have explained elsewhere in this introduction how mātauranga Māori was a product of the interaction between the culture of settlers from Hawaiki and the environment of Aotearoa. Mātauranga Māori incorporates language, whakapapa, technology, systems of law and social control, systems of property and value exchange, forms of expression, and much more. It includes, for example, traditional technology relating to food cultivation, storage, hunting and gathering. It includes knowledge of the various uses of plants and wildlife for food,

medicine, ritual, fibre, and building, and of the characteristics and properties of plants, such as habitats, growth cycles, and sensitivity to environmental change. It includes systems for controlling the relationships between people and the environment. And it includes arts such as carving, weaving, tā moko (facial and body tattooing), the many performance arts such as haka (ceremonial dance), waiata (song), whaikōrero (formal speech-making), karanga (ceremonial calling or chanting), and various rituals and ceremonies such as tangihanga, tohi (baptism), and pure (rites of cleansing).

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

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

requires us to consider what tino rangatiratanga means in relation to mātauranga Māori, and how that mātauranga might be protected in a modern New Zealand context.

In considering these matters, we must also consider other interests. In accordance with Treaty principle tino rangatiratanga must be protected to the greatest extent practicable, but – like kāwanatanga – it is not absolute. After 170 years during which Māori have been socially, culturally, and economically swamped, it will no longer be possible to deliver tino rangatiratanga in the sense of

full authority over all taonga Māori. 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 question means other interests must take second place or, conversely, because competing interests are not sufficiently important to outweigh the constitutionally protected taonga interest.

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

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

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

Kaitiaki can be spiritual guardians existing in non-human

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

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

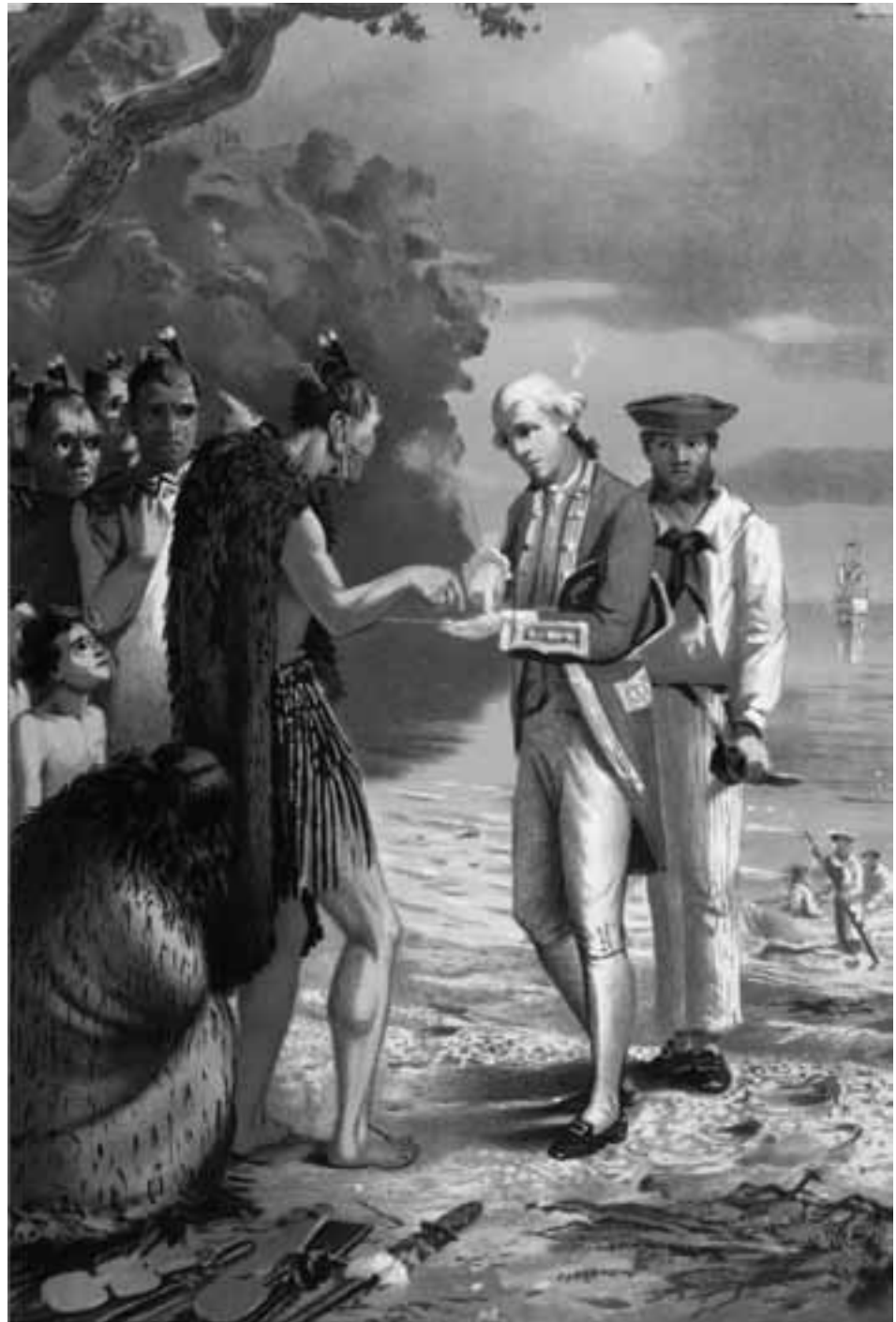
These, then, are the key concepts that readers will encounter in this report, and the core values that the claimants wish to protect, preserve, exercise, and have acknowledged.

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.

Just what *tino rangatiratanga* can or should entail will now depend on the particular circumstances of the case. But law and policy makers must always keep firmly in mind the crucial point that the *tino rangatiratanga*

guarantee is a constitutional guarantee of the highest order, and not lightly to be diluted or put to one side.

Finally, the Wai 262 claim must be seen in the context of another Treaty principle: that of partnership. Parliament, the courts, and the Tribunal have all characterised the exchange of rights and obligations encompassed by the Treaty – its provision for both *kāwanatanga* and *tino rangatiratanga* – as a partnership. Indeed, partnership can be seen as an over-arching principle beneath which others, such as *kāwanatanga* and *tino rangatiratanga*, lie. This



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

emphasis on partnership makes New Zealand unique among the post-colonial nations (such as the United States, Canada, and Australia) with which we are most often compared.⁶⁷ Those other countries, by contrast, emphasise the power of the state and the relative powerlessness of their indigenous peoples by placing state fiduciary⁶⁸ or trust⁶⁹ obligations at the centre of domestic indigenous rights law. New Zealand, by contrast, emphasises through the partnership principle that our unique New Zealand arrangements are built on an original Treaty consensus between formal equals. We do of course have our own protective principle that acknowledges the Crown's Treaty duty actively to protect Māori rights and interests. But it is not the framework. Partnership is.

The Wai 262 claim, focusing as it does on the place of mātauranga Māori in New Zealand life, is concerned with the nature of this partnership. As New Zealand evolves – as Māori play a growing role in national life and as historical grievances are settled – what might the relationship between the Treaty partners look like? Can it evolve from one based on past grievance to one that is forward-looking and based on mutual benefit? Can it find a place for each of New Zealand's founding cultures and for the cultures that have followed? Can it, in other words, become the partnership that was promised almost 171 years ago?

It is with these Treaty principles and these questions in mind that we will consider the detailed issues at stake in this claim.

IN.6 STRUCTURE AND CONTENT OF THIS REPORT

In this section, we provide a chapter-by-chapter breakdown of the issues and explain how our arguments are structured and our findings and recommendations presented.

IN.6.1 Chapter-by-chapter breakdown

Having set out the key principles and themes, we now describe the specific issues that arose in relation to intellectual property, genetic modification, the administration of the conservation estate, local government and environmental regulation, traditional Māori systems of health and healing, te reo Māori, and all other government

activity in which the Crown controls or purports to control mātauranga Māori.

In doing so, we are mindful that the claimants' issue categories did not match the work boundaries separating government or government-related agencies. For example, the claimants' concerns in respect of the protection of their traditional artistic or taonga works cross mandate demarcation lines between the Ministry of Economic Development, the Intellectual Property Office of New Zealand, the Ministry for Culture and Heritage, Archives New Zealand, Te Papa, private and state-owned broadcasters, the Ministry of Education, Creative New Zealand, and Te Puni Kōkiri. This report is structured according to issues, not according to divisions between government agencies.

Both this level of our report and the first level, *Te Taumata Tuatahi*, proceed in the following order.

In chapter 1, we consider the question of the Māori interest in taonga works – the unique artistic and intellectual expressions of te ao Māori that include the work of weavers, carvers, tā moko artists, writers, musicians, and others – and their associated mātauranga Māori. We also explore the development and nature of New Zealand's IP law – particularly copyright and trade marks – and consider whether the system accommodates the interests of kaitiaki of taonga works and mātauranga Māori. We discuss how conflicts between the interests of kaitiaki and other right holders can be balanced and resolved, recommending a set of reforms designed to strengthen protections for kaitiaki in accordance with the principles of the Treaty.

In chapter 2, we turn to the Māori interest in the genetic and biological resources of taonga species – the flora and fauna with which Māori have developed intimate and multifaceted relationships over 40 or so generations. These species, and their associated mātauranga Māori, are now of increasing interest to scientists and researchers in New Zealand and elsewhere, and the claimants were concerned that their relationships with the species would be damaged or undermined, or just treated as irrelevant. The chapter focuses on three related subject areas – bio-prospecting, genetic modification, and IP (patents and plant variety rights) – and we recommend a set of reforms



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

applicable to each of them. As for taonga works, these reforms are designed to balance the interests of kaitiaki with other right holders in accordance with the principles of the Treaty.

In chapters 3 and 4, we consider Māori interests in the environment. These, of course, centre around relationships between kaitiaki and the various taonga – landforms, waterways, plants, wildlife, and so on – among which Māori culture evolved. Chapter 3 concerns those aspects of the environment that are controlled by the Resource Management Act. The claimants argued that tino rangatiratanga entitled them to control or authority in their relationships with taonga, and said that under

current law and policy that control rested with the Crown and its delegates. In this chapter, we consider the extent to which the Treaty protects kaitiaki interests in the environment, what other interests are at play, and how these interests might be appropriately balanced. We consider whether the Resource Management Act achieves an appropriate balance, and, upon finding that it does not, recommend a suite of reforms.

In chapter 4, our focus is on those aspects of the environment that the Department of Conservation manages for conservation purposes, including land, flora and fauna, and marine reserves. DOC is unusual among the Crown agencies we considered in that its founding

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statute, the Conservation Act 1987, requires it to interpret all of its legislative responsibilities so as to 'give effect to' the principles of the Treaty of Waitangi – one of the strongest Treaty provisions anywhere on the statute books. DOC was particularly important to the claimants for this reason, but also because it has responsibility for many of the surviving examples of the environment in which Māori culture evolved. In this chapter, we ask whether DOC's legislation and guiding policies adequately reflect the principles of the Treaty as they are defined in law. We consider whether kaitiaki involvement in conservation decision-making is sufficient to protect their interests in taonga. This includes consideration of conservation decision-making in general, and in the context of two specific issues raised by the claimants: commercial activity on the conservation estate; and customary use of taonga. Finally, we recommend a series of reforms aimed at better protecting kaitiaki interests in taonga, while also providing for other interests and, in particular, acknowledging the overriding interests of the environment itself.

In chapter 5, in response to claimant concern principally about the vitality of tribal dialects, we consider government support for te reo Māori generally. We particularly examine the work of agencies mainly responsible for the Crown's Māori Language Strategy, Te Puni Kōkiri and the Ministry of Education. In carrying out this assessment we necessarily first consider the current health of te reo. We propose far-reaching reforms that reflect the near-crisis we identify in the language's fortunes.⁷⁰



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

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

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





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

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

In chapter 7, we consider the Government's support for rongoā Māori, or Māori traditional healing. We first examine the passage and subsequent impact on rongoā of the Tohunga Suppression Act 1907. Having done so, and found that the legislation breached the Treaty but could not suppress the practice of rongoā, we then turn to the Government's current support. We suggest that the narrow-minded scepticism that saw no value in Māori cultural attitudes to health, and which led to the Tohunga Suppression Act, may still influence decisions today. That is because there is no urgency to develop rongoā services, despite the benefits they are likely to bring in the prevailing contemporary Māori health crisis. We recommend that the Crown take urgent action to rectify this.

In chapter 8, we consider the Crown's policies and processes for engagement with Māori over entering into international instruments, both binding and non-binding, on New Zealand laws and policies that affect mātauranga Māori. Substantive issues relating to international instruments and their effects are considered in the relevant chapters (such as chapters 1 and 2). In chapter 8, we ask whether Māori have been consulted sufficiently on international agreements that affected their interests in taonga, and whether there are circumstances that so affect the interests protected by the Treaty that they justify a level of engagement that goes beyond consultation. Having considered these matters, we recommend reforms.

IN.6.2 How each chapter is structured

Some of the chapters in this report cover a single, broad issue, such as the question of whether the Resource Management Act provides for the tino rangatiratanga of iwi and hapū to the extent that Treaty principle requires



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

(chapter 3). Other chapters cover multiple, related issues concerning a single government agency (such as the work of the Department of Conservation in chapter 4), or the work of multiple agencies (for example, chapters 2 and 6). There can therefore be no uniform structure to our chapters; rather, each is structured according to its own internal logic, with the aim of guiding readers as effectively as possible through the issues under consideration.

There is, however, consistency in our approach to the presentation of issues. Within each issue, we have set out claimant concerns and Crown responses. We have then considered what the Treaty requires, generally with reference to the principles and themes we referred to in section 1.5. That is, we have considered what tino rangatiratanga and other Treaty principles mean for iwi and hapū control of mātauranga Māori and relationships with taonga. Where relevant, we have then considered what

other interests might be at play and how those interests might be fairly and transparently balanced alongside the Treaty-protected interests. Through this analysis, we have determined what a Treaty-compliant law or policy framework might look like in relation to the issue under consideration. We have then applied this analysis to existing laws, policies, and practices to determine whether they are Treaty compliant. Where they are not, the claimants are prejudiced by their inability to control mātauranga Māori and relationships with taonga, and we have therefore made recommendations for reform.

These recommendations can be found in the main body of each chapter, where they appear alongside important contextual information such as why a particular reform is needed, the principles it is based on, and associated measures for reform. For convenience, our recommendations are also summarised at the end of each chapter.

IN.7 CONCLUSION

This is a claim about mātauranga Māori and its place in modern New Zealand life. The claimants argued that, in spite of Treaty guarantees, mātauranga Māori has been marginalised and at times suppressed to the point where its very existence is now under threat. They seek to regain control over mātauranga Māori and the taonga upon which it relies, that control having largely been assumed by others.

In considering this claim we apply Treaty principles, with a particular focus on what tino rangatiratanga means in a modern context for the control of mātauranga Māori and taonga Māori, and how kaitiaki interests might be balanced alongside others. The principles of the Treaty, and the exchange of rights and obligations those principles enshrine, are woven together through the overarching principle of partnership. That, as we have said, is the framework for the Treaty relationship. In our consideration of the issues raised in this claim, we therefore must consider what partnership means for the relationship between Māori and the Crown, and for the place of New Zealand's two founding cultures in this land. We now turn to that task.

Text notes

1. Paper 2.314 (Waitangi Tribunal, statement of issues, July 2006), p 1; claim 1.1 (Haana Murray, Hema Nui a Tawhaki Witana (Del Wihongi), and others, statement of claim, received 9 October 1991)
2. The hui occurred in 1988 and was organised by the Department of Scientific and Industrial Research.
3. SG Brooker, RC Cambie, and RC Cooper, *Economic Native Plants of New Zealand* (Christchurch: Department of Scientific and Industrial Research, Botany Division, 1988); Warwick Harris and Promila Kapoor, eds, *Nga Mahi Maori o te Wao Nui a Tane: Contributions to an International Workshop on Ethnobotany, Te Rehua Marae, Christchurch, New Zealand, 22–26 February 1988* (Christchurch: Department of Scientific and Industrial Research, Botany Division, 1990)
4. Document A26 (Counsel for the claimants, opening submission, 15 September 1997), p 2
5. Claim 1.1, pp 1–2
6. Ibid, p 3
7. Ibid, p 4
8. Ibid
9. Ibid, p 6
10. Ibid, pp 5–6
11. Ibid, pp 7–9
12. Justice Williams was appointed to the High Court bench in October 2008 but continued to preside over the Wai 262 inquiry.
13. Paper 2.4 (Counsel for the claimants, submission on urgency for hearing, 14 August 1995); paper 2.9(a) (Counsel for the claimants, further submission on request for priority hearing, 7 September 1995), p 8
14. Paper 2.9(a), p 4
15. Paper 2.14 (Deputy chairperson, memorandum-directions granting request for urgency, 11 October 1995); paper 2.18 (Member acting with the authority of the chairperson, memorandum-directions relating to issues, timing and hearing of evidence, 14 February 1997), p 1
16. Paper 2.21 (Chairperson, memorandum-directions regarding the composition of the Tribunal panel, 10 March 1997); paper 2.45 (Chairperson, memorandum-directions regarding the composition of the Tribunal panel, 6 August 1997)
17. Claim 1.1(a) (Haana Murray, Hema Nui a Tawhaki Witana, and others, amended statement of claim, 10 September 1997), pp 27–32
18. Ibid, pp 1–2

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19. Claim 1.1(a) (Haana Murray, Hema Nui a Tawhaki Witana, and others, amended statement of claim, 10 September 1997), p 2
20. Ibid, pp 2–3
21. Document A9 (Peter Dengate Thrush, *Indigenous Flora and Fauna of New Zealand*, Waitangi Tribunal Research Series, 1995)
22. Document k7 (James Feldman, ‘Treaty Rights and Pigeon Poaching: Alienation of Maori Access to Kereru, 1864–1960’, report commissioned by the Waitangi Tribunal, 2001)
23. Document k3 (David Williams, ‘Crown Policy Affecting Māori Knowledge Systems and Cultural Practices’, report commissioned by the Waitangi Tribunal, 2001); doc k5 (Cathy Marr, Robin Hodge, and Ben White, ‘Crown Laws, Policies and Practices in Relation to Flora and Fauna, 1840–1912’, report commissioned by the Waitangi Tribunal, 2001); doc k4 (Geoff Park, ‘Effective Exclusion?: An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912–1983’, report commissioned by the Waitangi Tribunal, 2001); doc k2 (Robert McClean and Trecia Smith, ‘The Crown and Flora and Fauna: Legislation, Policies and Practices, 1983–98’, report commissioned by the Waitangi Tribunal, 2001). In addition, the Tribunal authorised counsel for Ngāti Porou to commission legal historian David Williams to produce a preliminary report on issues such as mātauranga Māori, aspects of the impact of Crown policies on indigenous knowledge, IP concepts, biodiversity, and museum policy. The report was filed in 1997 and published in 2001: doc k6 (David Williams, ‘Matauranga Maori and Taonga’, report commissioned by the Waitangi Tribunal through claimant counsel, 2001).
24. Paper 2.96 (Counsel for the claimants, memorandum in response to the Crown’s memorandum of 16 March 1998, 20 March 1998), pp 2–3: some of these matters are addressed in chapter 1 (on copyright and public information) and chapter 6 (the work of National Library and Archives New Zealand); paper 2.62(a) (Counsel for the claimants, memorandum of counsel following the judicial conference of 11 September 1997, 12 September 1997), p 4
25. Paper 2.62(a), p 4
26. See, for example, paper 2.81 (Counsel for the claimants, memorandum on behalf of those claimants seeking knowledge protection, 24 December 1997). Papers relating to confidentiality of evidence include papers 2.49, 2.55, 2.60, 2.68, 2.69, 2.71, 2.73, 2.75, 2.76, 2.77, 2.78, 2.79, 2.80, 2.81, 2.82, 2.83, 2.84, 2.85, 2.86, 2.91, 2.92, 2.93, 2.94, 2.95, 2.96, 2.97, 2.98, 2.99, 2.100, and 2.102. Key submissions are paper 2.71 (Counsel for the claimants, memorandum regarding confidentiality and cross-examination, 23 October 1997); paper 2.73 (Counsel for Tama Poata of Te Whānau a Ruataupare, Ngāti Porou, and Kataraina Rimene of Ngāti Kahungunu, synopsis of submissions regarding the confidentiality of claimant evidence, 12 November 1997); paper 2.78 (Counsel for Tama Poata of Te Whānau a Ruataupare, Ngāti Porou, and Kataraina Rimene of Ngāti Kahungunu, further submissions on the confidentiality of claimant evidence, 3 December 1997); paper 2.79 (Counsel for Tama Poata of Te Whānau a Ruataupare, Ngāti Porou, and Kataraina Rimene of Ngāti Kahungunu, memorandum regarding proposed orders restricting access and use of evidence and knowledge led by claimants, 22 December 1997); doc B5 (Counsel for the claimants, ‘File Note on Tapu’, 3 December 1997); and for the Crown: paper 2.76 (Crown counsel, memorandum on Tribunal directions concerning confidentiality, 3 December 1997). Claimant counsel noted their clients would exercise discretion as to what evidence they presented: paper 2.72 (Counsel for the claimants, memorandum regarding the claimants’ position on issues of confidentiality, 12 November 1997), para 7.
27. Paper 2.68 (Crown counsel, memorandum regarding instructions on the issue of confidentiality of evidence, 10 October 1997); paper 2.76
28. Paper 2.52 (Waitangi Tribunal, schedule of issues, 3 September 1997), p 1
29. By Ngāti Kahungunu, Ngāti Porou, Ngāti Koata, and Ngāti Kuri, Te Rarawa, and Ngāti Wai: claim 1.1(d)–(g).
30. Paper 2.236 (Presiding officer, memorandum-directions, 16 April 2002), p 4
31. Paper 2.235 (Crown counsel, memorandum concerning the proposed interim report, 12 April 2002), p 8; paper 2.256 (Crown counsel, statement of response, 28 June 2002), p 5
32. Paper 2.256(b) (Counsel for the claimants, memorandum in relation to the completion of the Wai 262 claim, 19 February 2004)
33. Paper 2.257 (Chairperson, memorandum-directions in respect of the future course of the Wai 262 inquiry, 5 March 2004)
34. Paper 2.262 (Chairperson, memorandum-directions, 20 December 2005)
35. The subject matter of the chapters in this report, which are set out in section 1.6.1, very broadly aligns with these topics.
36. Paper 2.262 (Chairperson, memorandum-directions attaching a draft statement of issues, 20 December 2005); paper 2.261 (Waitangi Tribunal, draft statement of issues, 20 December 2005)
37. By and large, in their closing submissions the claimants preferred not to specify what legislative amendments would be needed, but rather the idea of sharing with the Crown a post-Wai 262 inquiry process of identifying remedies. We return to this matter in the report’s conclusion.
38. Paper 2.261, p 4
39. Paper 2.266 (Crown counsel, memorandum in response to the memorandum-directions of the presiding officer dated 16 February 2006, 15 March 2006), pp 2–3
40. Paper 2.275 (Crown counsel, memorandum in response to issues raised at the judicial conference on 22 March 2006, 24 March 2006), pp 2–3

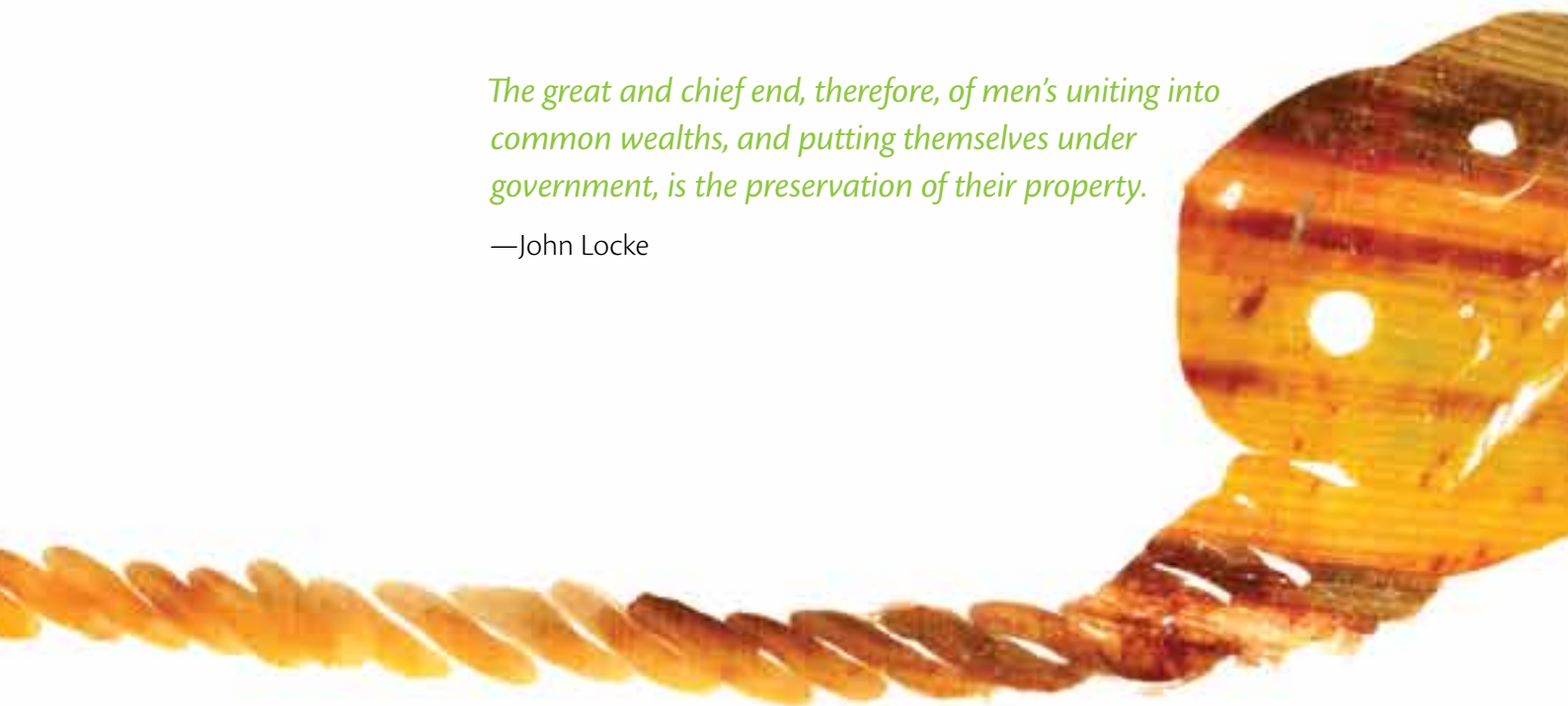
41. Claimant counsel made a number of submissions in response to the draft statement of issues: papers 2.267–2.274, 2.278, 2.283–2.286, 2.288, 2.303.
42. For example, paper 2.267 (Counsel for Ngāti Kuri, Te Rarawa, and Ngāti Wai, memorandum on the draft statement of issues, 17 March 2006), pp 5–6; paper 2.269 (Counsel for Ngāti Kahungunu, memorandum in relation to completion of the inquiry and draft statement of issues, 17 March 2006), p 4
43. Paper 2.279 (Presiding officer, memorandum-directions in respect of historical claims, 2 May 2006), p 3
44. Ibid, pp 4–7. In that memorandum, we said that once our report on contemporary claims was completed, parties wishing to have historical claims heard under the rubric of the Wai 262 claim should be able to make applications to do so. We made this comment with particular reference to Ngāti Koata, which had chosen not to have its historical claims relating to Wai 262 issues considered during the Te Tau Ihu inquiry.
45. Paper 2.282 (Crown counsel, memorandum in response to the memorandum-directions of the presiding officer dated 13 April 2006, 3 May 2006)
46. Paper 2.289 (Presiding officer, memorandum-directions concerning various issues, 12 May 2006), p 2; paper 2.291 (Crown counsel, memorandum in response to the memorandum-directions of the presiding officer dated 12 May 2006, 26 May 2006); paper 2.293 (Counsel for Ngāti Koata, submissions regarding additional claimants, summaries of statements of claim, and te reo Māori, 26 May 2006); paper 2.294 (Counsel for Ngāti Kuri, Te Rarawa, and Ngāti Wai, memorandum regarding the application by the New Zealand Māori Council, claimant summaries, and te reo Māori, 26 May 2006); paper 2.308 (Joint memorandum of parties regarding te reo issues in the draft statement of issues, 21 June 2006); paper 2.309 (Counsel for Ngāti Porou, memorandum regarding te reo Māori, 22 June 2006); paper 2.313 (Presiding officer, memorandum-directions concerning various issues arising from judicial conference on 16 June 2006, 6 July 2006)
47. Paper 2.295 (Counsel for Federation of Māori Authorities, Tai Tokerau District Māori Council, and Wairoa–Waikaremoana Māori Trust Board, memorandum seeking leave for claimants of Wai 621 and Wai 861 to have full claimant status in the Wai 262 inquiry, 26 May 2006)
48. Paper 2.305 (Counsel for Ngāti Whaoa, Ngāti Rangitihi, and Te Aitanga a Hauiti, memorandum regarding additional claimants and issues of interest, 14 June 2006), pp 5–6; paper 2.310 (Counsel for Ngāti Whaoa, Ngāti Hikairo, and Te Aitanga-a-Hauiti, memorandum, 30 June 2006); paper 2.315 (David Potter and Andre Paterson, submission regarding the application by the Ngāti Rangitihi Wai 996 claimants to join the Wai 262 inquiry, 1 July 2006), p 1
49. Paper 2.310
50. Paper 2.315, p 1; paper 2.310, p 6; paper 2.305, p 5
51. Paper 2.293; paper 2.294; paper 2.299 (Counsel for Ngāti Porou, memorandum regarding the joinder of the Tai Tokerau District Māori Council et al, 7 June 2006)
52. Paper 2.313, p 3
53. Document s7 (Counsel for the Wairoa–Waikaremoana Māori Trust Board, closing submissions, 18 April 2007), p 12; claim 1.1(h) (Wairoa–Waikaremoana Māori Trust Board, amended statement of claim, 24 July 2006), p 16
54. The Agreement also concerned the regulation of certain medical components, such as artificial hip joints, and would replace Medsafe New Zealand with a trans-Tasman regulatory agency.
55. Paper 2.313, pp 3, 4
56. Ibid, p 4
57. Waitangi Tribunal, *The Interim Report of the Waitangi Tribunal in Respect of the ANZTPA Regime* (Wellington: Legislation Direct, 2006); Waitangi Tribunal, *The Further Interim Report of the Waitangi Tribunal in Respect of the ANZTPA Regime* (Wellington: Legislation Direct, 2006)
58. Paper 2.313, pp 3, 4
59. This notice was published in the *New Zealand Herald*, the *Dominion Post*, the *Christchurch Press*, and the *Otago Daily Times*. It was also posted to those on the Wai 262 distribution list: Waitangi Tribunal registrar, ‘Indigenous Flora and Fauna and Intellectual Property Inquiry: Notice to Interested Persons or Groups’ (public notice, Waitangi Tribunal, 24 July 2006)
60. Some parties, such as the Nursery and Garden Industry Association of New Zealand and Horticulture New Zealand, employed their own counsel.
61. Claim 1.1(h)
62. Document T3 (Crown counsel, closing submissions, appendix 2, 21 May 2007), p 3
63. In coming to this view, we were mindful of past Tribunal decisions about claims relating to the use of PCPs in sawmilling (Wai 888) and genetic modification (Wai 1003). In Wai 888, Judge Wainwright declined an application for urgency on the grounds that the Tribunal, although competent to inquire into questions of Treaty breach, ‘is not competent to adjudicate between scientists and doctors. The membership of the Tribunal does not include the necessary expertise, because we are not constituted to inquire into specialist subject matter of this kind.’ (Wai 888, doc 2.6, p 3).
64. See Waitangi Tribunal, *The Ngai Tahu Report*, 3 vols (Wellington: Brooker and Friend, 1991), vol 2, p 237
65. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 (CA)
66. For example, the Waitangi Tribunal’s *Wananga Capital Establishment Report* said: ‘There can be no doubt that te reo

Maori and matauranga Maori are highly valued and irreplaceable taonga for New Zealand. These taonga exist nowhere else. The Crown has a duty actively to protect these taonga': Waitangi Tribunal, *The Wananga Capital Establishment Report* (Wellington: Legislation Direct, 1999), p 50.


67. See, for example, section 4(2A)(a) of the Treaty of Waitangi Act 1975, which sets out that in making appointments to the Waitangi Tribunal the Minister of Māori Affairs 'shall have regard to the partnership between the 2 parties to the Treaty'. See also *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA); Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Government Printer, 1985), pp 69–70; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Waitangi Tribunal, 1987), p 210
68. *Guerin v the Queen* [1984] 2 SCR 335
69. *United States v Kagama* 118 US 375, 384 (1886); *Choctaw Nation v United States* 119 US 1, 28 (1886); Felix S Cohen, *Handbook of Federal Indian Law* (Florida: Five Rings Corporation, 1986), pp xxv, 172
70. We released this chapter in pre-publication format in October 2010.

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

—John Locke



TAONGA WORKS AND INTELLECTUAL PROPERTY



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

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



CHAPTER 1

TAONGA WORKS AND INTELLECTUAL PROPERTY

1.1 INTRODUCTION

In the 1,000 years or so in which Māori have lived on the islands of Aotearoa, they have developed – among countless other things – artistic and cultural traditions that are uniquely of this place. The underpinnings of these traditions are found in the environment itself – mountains, rivers, sea and sky, plants and animals – and their expression takes many forms, ranging from the architectural achievements of the great meeting-house and canoe builders, to the works of weavers, carvers, tohunga tā moko, musicians, and the like, as well as in te reo Māori, the language itself. These works, founded in and reflecting the body of knowledge and understanding known as mātauranga Māori, are what we call taonga works. Some of them are ancient, others not, but those who are responsible for safeguarding them, whether or not they are the original creators of the works, have a very particular relationship with them. We call this the kaitiaki relationship.

The claimants in this inquiry say that these relationships must be protected, and that New Zealand's intellectual property law, founded on Western notions of individual ownership and private property rights, is inadequate to safeguard them. The Crown, for its part, acknowledges that Māori have longstanding and special associations with taonga works and their underlying mātauranga Māori, but argues that most of the current settings of New Zealand's IP law accommodate the Māori interest sufficiently. The Crown argues that to provide special protection for the Māori interest in taonga works would stifle innovation and deprive others of access to the knowledge and ideas which underpin or inspire the creation of new works. A number of interested parties who also gave evidence before us brought different perspectives to the issue, suggesting that the boundaries of Māori and Pākehā art and design are more permeable. While it is important to protect those things that are most precious to Māori, they said, it is also vital to encourage the free flow of ideas and cultural influences so artists, designers, and others may continue to produce works that speak to all cultures, including an increasingly self-confident 'New Zealand' one.

This chapter explores all those perspectives. Very broadly, it is about the fit between the obligations of kaitiaki of taonga works on the one hand and the IP system on the other. It is not concerned with the protection of taonga works as objects in themselves (aspects of that are discussed in chapter 6, along with the implications for mātauranga Māori). Together, these two chapters effectively address two sides of the same story – who should create, protect, own, and transmit mātauranga? How should this happen, and in whose interests?

Rather, its focus is the dissonance between two very different ways of recognising cultural interests in the products of artistic and intellectual endeavour, and the options

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

for bringing those different ways together in twenty-first-century New Zealand. We note that debate around these issues is not confined to this country – there is considerable international momentum around finding ways to protect what the World Intellectual Property Organization (WIPO) calls traditional knowledge and traditional cultural expressions – what we call mātauranga Māori and taonga works. We refer to and draw on that as appropriate. However, New Zealand may well be the first Western country to address these issues directly. That is not something we should shrink from. New Zealand has led the world in recognising the indigenous place in its constitutional, political, and cultural institutions in the past. Finding ways to protect the Māori interest in taonga works and mātauranga Māori while also acknowledging the interests of others in free access to knowledge and ideas is potentially another milestone in that history.

The main elements of the IP system that are relevant to this chapter are copyright (including moral rights, performers' rights and the related area of registered design rights) and trade marks (and the related areas of geographical indications, and protection for flags, emblems, and names). We consider other major elements of the system – patents and plant variety rights – in the next chapter. In truth, there is some overlap between the subject matter of these chapters: for example, an industrial process can be patented but its plans will be subject to copyright. And the Māori interest is always founded in the strength of the kaitiaki relationship. We make a distinction between the two not because they are completely severable, but because of the subject matter of the claim. There is a natural division between taonga works and taonga species.

Our starting point here, as in several other chapters in this report, is to attempt to bring to life those aspects of Māori culture that are central to the debate around taonga works. Given the complexity of the legal framework around intellectual property, we also spend some time describing those aspects of it that are relevant to the wider issues. We have therefore structured the chapter around the following major headings:

- ▶ *Te ao Māori and taonga works* (section 1.2), in which we explore aspects of the Māori world that affect the relationship between kaitiaki and taonga works. We

discuss the experiences of claimant communities in attempting to retain and protect these things, and describe a small number of the works that were discussed in evidence. These demonstrate in practical ways claimants' sense of the shortcomings of New Zealand IP law for protecting their taonga works and underlying mātauranga Māori.

- ▶ *Te ao Pākehā and intellectual property* (section 1.3), in which we explore some aspects of Western cultural development that led in turn to the evolution of the Western IP system. We also introduce IP in modern New Zealand and discuss the internationalisation of IP law. We end with a comment that the issues relevant in this claim are now the subject of a great deal of discussion and negotiation in international forums.
- ▶ *Copyright, trade marks, and related rights in New Zealand* (section 1.4), in which we discuss the detailed legal requirements of the various relevant IP forms in this country, together with the views some claimants took in respect of some of those requirements. We conclude that the current law does not protect the interests of kaitiaki in mātauranga Māori or taonga works, either in New Zealand or in other countries.
- ▶ *Claimant, Crown, and interested parties' arguments* (section 1.5), in which we outline the claims as articulated by the claimants, the Crown's response to them, and the views expressed by some of the interested parties who appeared before us in hearings.
- ▶ *The rights of kaitiaki in taonga works and mātauranga Māori* (section 1.6), where we address three basic questions:
 - Are the principles of the Treaty of Waitangi relevant to the interests of kaitiaki in taonga works and mātauranga Māori?
 - What is the nature of the relationship between kaitiaki and their taonga works and mātauranga Māori?
 - How should the needs of that relationship be balanced against the interests of others?

We also refer to some of the international perspectives that may be brought to these questions. We conclude that the Treaty is relevant to the question

of protecting kaitiaki interests in taonga works and mātauranga Māori, and we suggest an analytical framework around which conflicts between the interests of kaitiaki and of others can be balanced and resolved.

- *Reforms* (section 1.7), in which we propose a set of reforms designed to strengthen protections for kaitiaki in accordance with the principles of the Treaty of Waitangi without interfering unduly in the interests of other right holders.

We have said that the issues raised in this chapter are not unique to New Zealand. That being the case, we also think New Zealand is in a remarkably strong position to develop its own very particular policies for protecting the interests of Māori in their taonga works and mātauranga Māori without unduly inhibiting the rights of access to knowledge and information that are so crucial to innovation and creativity. One of the ways in which it can do this is to recognise that the guiding principles of kaitiakitanga on the one hand and property rights on the other are really different ways of thinking about the same issue – that is, the ways in which two cultures decide the rights and obligations of communities in their created works and valued resources. That is the story at the heart of this and the following chapter.

1.2 TE AO MĀORI AND TAONGA WORKS

1.2.1 The forging of te ao me te mātauranga Māori

The people who arrived in Aotearoa from Hawaiki some 1,000 years ago embedded themselves in the new environment, changed it, and were in turn changed by it. Nowhere were these changes more evident than in technology and the arts. They reflected the incremental development of a new and unique culture.

New technologies were required to cultivate, hunt, and gather food. New stories and traditions had to be built up to explain to succeeding generations why some methods worked and others didn't, and why some behaviours were good and others not. Methods had to be invented to cultivate and store canoe crops such as taro and kūmara in a climate that permitted only one planting cycle per year, and traditions were required around those methods to ensure adherence to conduct most likely to produce a

successful harvest. Unfamiliar plants were tested for their utility as food, medicine, fibre, or building material, and then catalogued within an entirely newly constructed whakapapa. As in Hawaiki, this whakapapa had then to be given texture and meaning through story and tradition that explained relationships. These relationships helped to ensure that the integrity of the catalogue could be maintained in memory, and they explained the value (and the dangers) of each species, as well as inter-species compatibility. Birds, fish, and shellfish were tested and ordered in the same way. This time whakapapa, supplemented by story and song, would explain habitat, growth cycle, sensitivity to environmental change, and edibility.

The arts and technology flourished hand in hand in response to the new possibilities offered up by these islands. Pounamu (greenstone or nephrite) was abundant in the rivers of Te Wai Pounamu (the South Island), and mataa (obsidian) was available mainly from Tūhūa (Mayor Island), as well as other northern North Island sites. These were perfectly suited for weapons, carving, and cutting tools. They were used to decorate timber constructions and were themselves decorated with designs evoked by the new environment. Most particularly, the carvers and engravers abandoned the linear styles of tropical Polynesia, preferring the unfurling spiral form of the pītau or koru. Song-stories and whakapapa were found to explain where these precious minerals were found, and why.¹

The tough fibre of harakeke also changed things. The leaf could be stripped to produce the fine silky fibre known as muka to weave into the finest clothing, rope, and fishing line or nets, or it could be cut and treated for kete (baskets), thatch, whāriki (mats), waterproof clothing, and just about any other material in daily use. Once again, song-stories and whakapapa explained the importance of harakeke, its uses, and proper conduct when handling it.

The unprecedented size of the great forest giants (and probably the cooler climate) drove innovation in construction and transport. The tōtara tree in particular made it possible to build and carve single-hulled canoes and large enclosed ancestral meeting houses, just as the cedar-based cultures of the American north-west coast had done. These were highly functional works of art, and



◀ Interior of Te Whare Rūnanga, Waitangi. The giant trees of Aotearoa's forests provided Kupe's people with new building opportunities, and drove innovations in construction and design. The great carved meeting houses were highly functional works of art that reflected in every aspect the values and priorities of their makers. Te Whare Rūnanga (left, below) was built to commemorate the Treaty's centenary. This national marae gathers key ancestral figures from those tribes whose ancient carving styles were still practised in 1940.



► Te Whare Rūnanga, Waitangi. The carved figure at the apex of Te Whare Rūnanga is the Pacific explorer, Kupe. The whare tupuna or ancestral house was the focal point for important community events. The ancestors that people its walls evoke memories and lessons for today, binding the living and the dead in a continuum of story and connection.

they reflected in every aspect the values and priorities of their makers. Meeting houses or whare tupuna operated as community gathering points – as the places leaders were held to account, people were galvanised into action, rites of passage were completed, and students were taught. Form followed function in the size and layout of the whare tupuna and the marae or courtyard in front of it. They could accommodate large gatherings, withstand Aotearoa's winds, and they were both heated and insulated. In short, whare tupuna were the places where anything of any importance in the life of a community occurred. By and large, that is still the case today.

But the whare's highly ornate decorations also signified its practical and symbolic roles. Almost everything about a whare tupuna was ancestral. It would be named after an ancestor, and the image of that ancestor would be placed at the apex and most forward point of the gabled roof. The maihi or barge boards leading down from the ancestral image to the walls were thought of as the arms of that ancestor; the carved images on each side holding up the barge boards represented important ancestors closely related to the ancestor depicted by the house itself. All through its walls and pillars were carved images depicting important ancestors in the whakapapa and history of the tribe, each of them evoking a story – not just a memory, but invariably a lesson to guide the living. Between the carvings were tukutuku or woven panels and rafters decorated in painted kōwhaiwhai spiral patterns. These often depicted the environment – star patterns, plants, birds, and marine life, or the land itself. These too held lessons for the community by reflecting seasonal cycles for hunting, fishing, gathering, and planting, or by highlighting resources of particular importance to that community in context. Thus the whare tupuna was far more than just a gathering-place for the community. It was also a record of its history and whakapapa, a reflection of its environment, and it epitomised the idea that the living and the dead exist in the same space and time. And it was a symbol of the community's mana or prestige.

If the whare tupuna was the height of Māori technology and art on land, then the waka taua or war canoe was its equivalent on the water. Waka taua functioned as a means of mass transport, particularly for conflict, but

were employed whenever the community was on the move. Waka taua ranged between 10 and 30 metres long, and carried a complement of up to 100 paddlers.² Despite their size, they were very fast, and the single-hull design meant they were extraordinarily manoeuvrable and could be easily portaged. In fact, they were probably faster and definitely more manoeuvrable than the traditional Polynesian outrigger, yet they were still stable enough for the much rougher waters of Aotearoa. They were also ornately and beautifully carved with the images of gods for the protection of the crew, and of ancestors whose bravery would inspire them. Like whare tupuna, waka taua too were symbols of a community's mana.

These innovations in art and technology were the result of a remarkable flowering of knowledge and creativity triggered by the new environment. That body of knowledge and ideas, and its underlying values, has come to be called mātauranga Māori.

The defining principle of mātauranga Māori was and remains whanaungatanga or kinship. Whanaungatanga apportions rights and obligations among the living, and affirms active connections to the dead. It explains people's relationships with the myriad elements of creation, animate or inanimate, and justifies their conditional exploitation. It categorises and catalogues those elements of creation, explaining thereby the character, habits, and uses of each. For example, John Patterson drew on the philosophy of Erenora Puketapu-Hetet, who, in her lifetime was one of the country's finest exponents of Māori weaving, to explain the relationship between Māori and harakeke in these terms:

The most commonly used material in traditional Maori weaving is *harakeke* or flax. To a Pakeha, *harakeke* is simply a plant. To a Maori, it is a descendant of the great god Tane-mahuta . . . The myths recorded his exploits: how he separated his father Rangi-nui (the sky) from his mother Papa-tuanuku (the earth), clothed his mother with trees and other plants, fought with and was defeated by his brother Tu-mata-uenga, the warlike ancestor of man. Tane proceeded to form and breathe life into the first woman and with her produced the Maori race. Thus today's Maori are related to *harakeke* and all the other plants: Tane is their common ancestor.



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

Indeed, a Maori will refer to plant life simply as Tane, and in that respect regards the trees and other plants as ancestors, requiring respect. On the other hand, as a descendant of the victorious Tu, a Maori is able to make use of the descendants of Tane. Use is permitted, sanctioned by Tu's defeat of Tane, but it must be respectful use, for Tane too is an ancestor of the Maori people.³

Another example recorded from Tūhoe sources by the nineteenth-century ethnographer Elsdon Best was cited by Professor David Williams, who collated Best's description in this way:

An example of this in matauranga Maori would be the use of whakapapa to describe the different forms of stone and

their groupings. Best describes the following classification (abridged): 'From the tenth period of Chaos sprang Papa the Earth Mother already mentioned, and then appeared Papa-matua-te-kore (Papa the parentless) who mated with Rangi-a-Tamaku and had a firstborn Putoto, whose sister was Parawhenuamea (personified form of water). Putoto took his own sister, Parawhenuamea, to wife, and she bore Rakahore, who mated with Hineuku (the Clay Maiden), who bore Tuamatua (all kinds of stones found on sea coasts . . .), from whom came gravel and the [sic] stone. The younger brother of Tuamatua was Whatuahoe (greywacke, chert, etc), next came Papakura (origin of volcanic stone, kauwhanga, whatukura, waiapu . . . kinds of stone), then Taurakarapa (greenstone of different kinds), whose sisters were Hine-taurira (a stone that has abnormal offspring . . .) and Tuahoanga . . . Now Tuahoanga represents another kind of stone, such are the wawatai, papanui . . . [all these pertaining to Tuahoanga are different kinds of sandstone].'⁴

And:

The origin of shellfish is often credited to Hine-moana . . . In one version we are told that Hine-moana produced all forms of seaweed, and these were attached to Rakahore and Tuamatua . . . in order to provide shelter for the other offspring of Hine-moana ie: shellfish, etc. So we are told of nine kinds of mussels being placed . . . that is among seaweed and rocks. The following are the different kinds of seaweed produced by Hine-moana, sister of Kawerau: . . . This seaweed family ever clings to the foster parents, Rakahore and Tuamatua . . . The nine kinds of mussels placed among the sheltering seaweeds clinging to Rakahore and Tuamatua were . . . The offspring of Te Awarua and Kaumaihi were the pipi or cockle family, their names are as follows . . .⁵

These examples show that whanaungatanga-based taxonomy reflects a detailed understanding of the natural world of Aotearoa. But the idea of whanaungatanga in mātauranga Māori goes even further than this. It categorises and it catalogues ideas themselves, showing relationships between, and seniority among, different fields of knowledge. In this sense, whanaungatanga, through the technique of whakapapa, is not just a way of ordering

humans and the world; it is an epistemology – a way of ordering knowledge itself.

Other values are also important. The value of tapu underscores the presence of spirit in all things. And the concept of mauri expresses the Māori view that everything, whether animate or inanimate, contains a living essence that cannot be easily destroyed. The idea that all of creation is alive and inter-related is hardly surprising given the supremacy of the whanaungatanga principle. Another important value in mātauranga Māori is utu. Though it is often rendered in English as revenge, its true meaning is the use of reciprocity in the pursuit of balance. To put it in another way, in the web of kinship every action demands an equal and opposite reaction in order to maintain balance. This idea underpins rules of positive conduct (hospitality, generosity, and so forth) as well as negative conduct (punishment and retribution).

Finally, and crucially, there are the twin concepts of mana and kaitiakitanga. We would explain these ideas as follows. Mana is the authority and standing a person derives from a combination of kin status and personal attributes. Mana gives that person the right to lead and to argue for the loyalty of the community. It also has a spiritual aspect. It can involve the authority to speak to elements of the environment or to those who reside in the spirit world. Mana also has a communal dimension. A community – a hapū or iwi – is said to have mana. This collective mana reflects the extent to which a community behaves according to the dictates of mātauranga Māori – whether te reo and tikanga are maintained, whether individual members are protected, whether good relationships are maintained with the environment.

If mana is the authority to do these things, then kaitiakitanga is both the rationale for that authority and the parameter within which it is to be exercised. The root word 'tiaki' means to nurture or care for, so kaitiakitanga is the responsibility to nurture or care for something or someone. It too has a spiritual aspect. Kaitiaki can be spiritual guardians existing in non-human form. They can include particular species that are said to care for a place or a community, warn of impending dangers and so on. Every forest and swamp, every bay and reef, every tribe and village – indeed, everything of any importance

at all in te ao Māori – has these spiritual kaitiaki. In the human realm, those who have mana must exercise it in accordance with the values of kaitiakitanga – to act unselfishly, with right mind and heart, and with proper procedure. Mana and kaitiakitanga go together as right and responsibility.

Together, the new environment and the explosion in mātauranga Māori that it triggered produced taonga works. These works were, as we have said, related to but distinct from their Polynesian antecedents. They included whare tupuna, waka taua, tā moko, mōteatea, haka, mahi raranga or traditional weaving – indeed, all the technologies and arts associated with traditional Māori life. They had, and still have, mauri – life of their own – though some had more than others. Kaitiakitanga was both the value and the legal principle that regulated the relationships between the communities who made them and the works themselves. This principle emphasised community responsibility toward taonga works rather than rights.

Here are some examples that we heard in evidence of taonga works and the kaitiakitanga responsibilities they created.

1.2.2 Taonga works and the rights and responsibilities of kaitiaki

Tamatea Pokaiwhenua was renowned as a navigator and discoverer. He travelled most of the coastline of these islands, naming as he went. On his way down the east coast, he stopped at the long stretch of sandy beach now known as Porangahau in central Hawke's Bay, probably because it was one of the few good landing-places along that stretch of coastline. The story goes that he, his brother Uhenga-Ariki, and the crew of his waka became embroiled in a conflict with those who already lived in that place. In the hostilities Uhenga-Ariki was killed. Grief stricken, Tamatea climbed to the top of a nearby peak and played a lament to his brother on his nose flute. The tune was so haunting and his grief so complete that the peak from that moment came to be known as Te Taumatawhakatangihangakoauauotamateaurehaeaturipukakapikimaungahoronukupokaiwhenuakitanatahu in memory of the event. Rerekohu Robertson translated the name for us as: 'the hill on which Tamatea with his big knees who roamed the country played his lament on his flute to

the memory of his brother.'⁶ That name is now famous as the longest place name in the world.⁷

Tamatea's descendant Ross Scott, along with Mrs Robertson and Piri Sciascia, all of Ngāti Kere, told us of a number of ways in which the name has been used in advertising, in pop song lyrics, on mugs and tee-shirts, and even on a wine bottle label, without the consent of the kaitiaki.⁸ They seek to prevent use of that name without such authorisation. But Mr Scott also told us that it is important for his people's economic survival that kaitiaki are able to use taonga such as Te Taumata respectfully for their own commercial benefit.⁹ He and other witnesses told us that if Māori culture is to survive and even flourish, Māori must be able to use their culture as a source of economic development. For this to happen, there must be legal protection for taonga works.¹⁰

Mataora lived in te ao kōhātu – the time beyond memory. He ill-treated his wife, Niwareka, who was no ordinary human. She was the daughter of Uetonga, and through him the great-granddaughter of Rūaumoko, the unborn child of Rangi and Papa, and the god of earthquakes and geothermal activity. Uetonga was a great leader of the spirit world, a place where right forms of behaviour and good values were paramount. As a result of Mataora's abuse, Niwareka fled in fear and shame to her father's realm. There people wore images on their faces and bodies. These images reflected the shapes and rhythms of the natural environment around the spirit people, or depicted their ancestors, kaitiaki, and important values. They did not wash off but remained with the bearer forever.

Mataora, now overcome with remorse, travelled to the spirit world in search of his wife. He asked that Uetonga forgive him and allow Niwareka to return with him. Mataora made Uetonga a promise. He said, 'If you mark me with the sign of Uetonga it will show the world that from this day forward I will live by the values and right behaviours of the spirit people, and my promise will be as permanent as Uetonga's mark.' This is the mark we have come to know as tā moko, although one of its ancient names was te peha o Uetonga, or the skin of Uetonga.¹¹ It is so revered in Māori culture that some of the chiefs who signed the Treaty of Waitangi in 1840 showed their acceptance by replicating a small aspect of their facial tā



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

moko in ink on the paper of the Treaty. By doing so, they signified the solemnity of the agreement and their personal commitment to it far more powerfully than they could with a signature. Each tā moko is of course unique and personal, but a chief's facial tā moko is also extraordinarily tapu. By transferring an aspect of it to the paper of the agreement, the agreement too became imbued with the chief's tapu.

Mark Kopua, a modern tohunga tā moko, spoke to us of the revival of this once-fading discipline. He explained that Māori people today are increasingly choosing tā moko as a sign of their own commitment to Māori culture and values, just as Mataora did. He said that a handful

of tohunga tā moko are working full time to meet this demand. They use both traditional and modern tools, and their work is either wholly traditional or derived from tradition. In all cases, these tā moko reflect the whakapapa of the bearer, or kōrero of relevance to his or her iwi, hapū or whānau life. This work requires exceptional knowledge of iwi history and whakapapa, as well as rigid adherence to the values and protocols of the art form. It is not tattoo. As Mr Kopua said:

Moko is a birthright that is both inherited and earned. Everyone with a genealogical descent from Ruaumoko inherits the right to bear moko. There are various symbols that



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

are exclusive and can only be inherited by birth, and then there are symbols that are earned and identify each individual's value within their kin groupings.

Moko is a reflection of one's Māori identity, through their ancestry, and as such is extremely cherished, just like, according to our tradition, we cherish and worship our beloved dead. The depth of this reverence reaches into every sector of our art culture, none more than the carving of personalised jewellery and weaponry, traditional transportation, and dwelling structures which are traditionally created as a personification of ancestors . . . It is . . . through this extraordinary set of traditions and morals that I believe moko will be a serious form of salvation for the Māori from the negative consequences of colonisation.

I design moko for each client founded on their whakapapa and their own life experiences. So, that a fisherman from Te Aitanga a Hauiti could expect a moko that might represent Hauiti the fisherman himself or perhaps one of his nets. Whatever each individual might be, the to-be wearer and I collectively pinpoint some ancestor from their whakapapa that supports them in their personal life activities. In many cases we might take the option to visualise their colloquial sayings that affiliates them to a set of geographical land

marks and thus affiliates them to the tribal groups of that region. It is my belief that it is these examples of traditional practice that affirms tā moko as a cultural art form that finds, as it always has, its direction and development within the tribal circumstance.¹²

Mr Kopua is opposed to tā moko being given to people who are not descendants of Rūaumoko. He says tā moko is an expression of identity, whakapapa, and tribal culture, and it is inappropriate for people who do not have these things to wear that expression. Similarly, he is opposed to unauthorised reproduction of tā moko on clothing, in books, and so forth. He says the kaitiaki of tā moko images are the tohunga, those who are entitled to wear them, and, ultimately, the iwi whose ancestors developed both the art form and its distinctive tribal styles. The maintenance of tā moko and the protection of its integrity are in the end a collective tribal responsibility. They should have control over its use and dissemination.

Te Rauparaha, leader of Ngāti Toa Rangatira (also known as Ngāti Toa), was one of the greatest military tacticians this country has produced. But in the early 1800s he was running for his life. As Ngāti Te Aho chased him and his people through the central North Island, Te Rauparaha sought the protection of his distant relative, Te Heuheu of Ngāti Tūwharetoa. Te Heuheu sent him to Lake Rotoaira, the home of a chief named Wharerangi. With Ngāti Te Aho nearly upon him, Wharerangi hid Te Rauparaha in a kūmara pit, then Wharerangi had his wife, Te Rangikoea, straddle the pit to conceal him. Te Rauparaha lay quietly in the pit beneath the kuia while Ngāti Te Aho searched the village. It must be understood that to place a woman's genitals above the head of a chief was unthinkable, but this action saved his life. When Ngāti Te Aho passed through Rotoaira without finding him, Te Rauparaha burst from the pit and performed his now famous ngeri, which he composed on the spot and eventually rendered in the traditional Māori way.¹³ The last stanza of his piece is as follows:

Ka mate! Ka mate!

Ka ora! Ka ora!

Ka mate! Ka mate!

Ka ora! Ka ora!

*Tēnei te tangata pūhuru hūru
Nāna i tiki mai whakawhiti te rā
A, hūpane, kaupane
Hūpane, kaupane, whiti te rā!*

*It is death! It is death!
It is life! It is life!
It is death! It is death!
It is life! It is life!
Here is this hairy person
Who has made the sun shine upon me!
One step up, another step up
One step up, another step up, the sun shines!*

At some point in the early twentieth century, this tribally held *ngeri* began to evolve into what is now seen as the national ‘haka.’¹⁴ Today it is performed with pride and intensity by many of our national sporting teams, and is seen as deeply symbolic of New Zealand’s identity.

Te Ariki Kawhe Wineera, a direct descendant of Te Rauparaha, is concerned about the misuse of *Ka Mate* in various New Zealand and overseas commercial ventures. While some renditions of the haka are respectful, many simply ignore the cultural values inherent in the composition, and some are unquestionably offensive – including, for example, an Italian television advertisement for Fiat cars in which a group of women perform a mock haka.¹⁵ Mr Wineera wishes to protect the integrity of *Ka Mate*, as well as the values that underlie it. He also wishes to ensure that in circumstances where *Ka Mate* is performed respectfully and with the consent of his *iwi*, Ngāti Toa receives at least some of the commercial benefits that might flow from that use. He argued that Ngāti Toa’s *kaitiakitanga* in respect of *Ka Mate* should be recognised in law.

In te ao Māori, *waiata* or *mōteatea* are the songs-poems-stories that record and transmit the narrative of a people from generation to generation. Until the arrival of literacy in the early nineteenth century, *mātauranga* Māori was without exception transmitted orally. Much *mātauranga* Māori has now been recorded in written and other form, but oral transmission is still an important mechanism for cultural retention. In oral cultures, little distinction is drawn between song, poem, and story,

probably because stories can be more accurately remembered if they are arranged in poetic form, and the task of retention is easier if the poems are supplemented by rhythm and melody. Without these oral narrative forms, the past becomes a random collection of heirlooms and artefacts; its potential to bequeath wisdom to the present is lost. The term *waiata* is more generic than *mōteatea*, and has come to include some Māori songs with Pākehā melodies in the modern style. *Mōteatea* is now applied exclusively to *waiata* in the old style – what might be called classical Māori chants. In any event, ‘*mōteatea*’ is a more evocative term, since its root meaning is to grieve or lament. We will use *mōteatea*.

Mōteatea come in many forms. Professor Te Ahukaramū Charles Royal provides the following useful (but even he admits, not exhaustive) list of sub-categories:

pātere, songs composed by women as a reply to jealousies and/or slander
apakura, laments
pao, short chanting songs
ruri, songs of an amorous nature
oriori, lullabies
matakite, songs of visions
mata, prophetic songs
kaioraora, cursing songs

In addition to these types of songs, there are many others which are prefixed with the term *waiata*:

waiata tangi, laments for the dead
waiata aroha, love songs
waiata whaiāipo, lovers’ songs
waiata whakaaraara pā, sentinels’ songs
waiata karakia, ritualistic songs

Further still, there are songs whose descriptions arise from their subject matter rather than their form. For example:

waiata whakautu tono pākūwhā, songs to answer marriage proposals
waiata mō te moe punarua, songs for marriage to two wives
waiata nā te tūrehu, songs from the ‘fairy folk’
waiata whakautu whakapae, songs replying to statements made about a person
waiata wawata, songs expressing a desire for another.¹⁶

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

Among the great legacies of the Māori scholar and statesman, Sir Apirana Ngata, is *Ngā Mōteatea*, a two-volume collection of more than 500 *mōteatea* from around the country published in 1959. Ngata contributed to it for more over 30 years, and was assisted in later years by his equally scholarly protégé, Pei Te Hurinui Jones. Quite simply, Ngata and Jones feared that unless these *mōteatea* were recorded, they would be lost. Ngata wrote his introduction to the collection in 1928. In it he anticipates the apprehension of his Māori audience:

Ko etahi o koutou tera e whakatoi mai; ko etahi e ki ka hokona nga taonga a o tatau tipuna ki te moni. Ina ra kua korerotia i runga ake ra, e hara i te mea kaore i hoatu e ngā kaumatua ra ki te pakeha i o ratau na ra. Tera kua tuhituhia ki nga pukapuka maha, ngaro ake ko nga whakamarama. Tera ano pea kei te korerotia atu e ratau, engari kaore i kitea ake. Engari te waiho tonu atu kia takoto he ana, kia hapa ana, kia tapepa ana i a o koutou tipuna i mohio ai?¹⁷

Jones's translation of this introduction in the 1959 edition (nine years after Ngata's death) is as follows:

Some of you may deride; some will say the precious heritage of our ancestors will be sold for money. But it has already been stated above that these things were not withheld from the Europeans by the elders. They have been recorded in many books, but the explanations are missing. They may have given them at the time but they cannot be traced. Would you rather have it that they remain wrongly recorded, incomplete, or in an erroneous form from what your ancestors knew?¹⁸

Although the collection represents but a small proportion of the traditional *mōteatea* composed and sung up until that time, it is rightly seen as the seminal work in this field. After two further editions in 1988 and 2004, *Ngā*



Mōteatea now comprises four volumes and a CD collection of some of the old ethnomusicological, gramophone, and phonograph recordings.¹⁹ Such is the importance of this collection, there would be few modern exponents of *mōteatea* who do not own or have access to it.

Each of these *mōteatea* is subject to the *kaitiakitanga* of the community who are the descendants of the composers. They are expressions of tribal knowledge and identity. They were handed down orally within the tribal community, and served the purpose of transmitting that knowledge across generations. As such, they may be seen as the equivalent of some key written texts that serve the same purpose in literate societies. They now exist within a culture that is not only literate but also participates in a global exchange of information.

The question that arises in this context is whether the law recognises the rights of *kaitiaki* in respect of such highly valued taonga such as *mōteatea*.



Apirana Ngata leads a haka at the Centennial celebrations at Waitangi in 1940. After the haka, tribal leaders spoke in the new whare tupuna, declaring their determination to maintain and strengthen their Māoritanga through the next 100 years.



Apirana Ngata (foreground) and performers at the hui in Ruatōria to posthumously award the Victoria Cross to Te Moananui-a-Kiwa Ngarimu. The role of performance remains a vital element of public celebrations of this kind.

1.2.3 Summary: some observations about the place of taonga works in te ao Māori

Whether it is a story in a name or a song-poem, a performance piece, tā moko, a whare tupuna, or waka taua, each of these examples is a taonga work. By this we mean that it is two things. First, it is a creation of the pre-existing and distinctive body of knowledge, values, and insights we call mātauranga Māori. Secondly, it is a result of the effort and creativity of actual people whether in modern times or the distant past. Each taonga work has kaitiaki – those whose lineage or calling creates an obligation to safeguard the taonga itself and the mātauranga that underlies it. In the case of the name telling the story of Tamatea's grief, the kaitiaki are the Ngāti Kere hapū of Porangahau. In the case of *Ka Mate*, it is Ngāti Toa. For the traditional art of tā moko, the tohunga themselves are the primary kaitiaki of the mātauranga, although once the tā moko is done, responsibility transfers to the wearer just as it did for Mataora. And as tohunga tā moko Mark Kopua told us, once a particular style becomes associated with an iwi, then the iwi also takes on kaitiaki responsibilities.

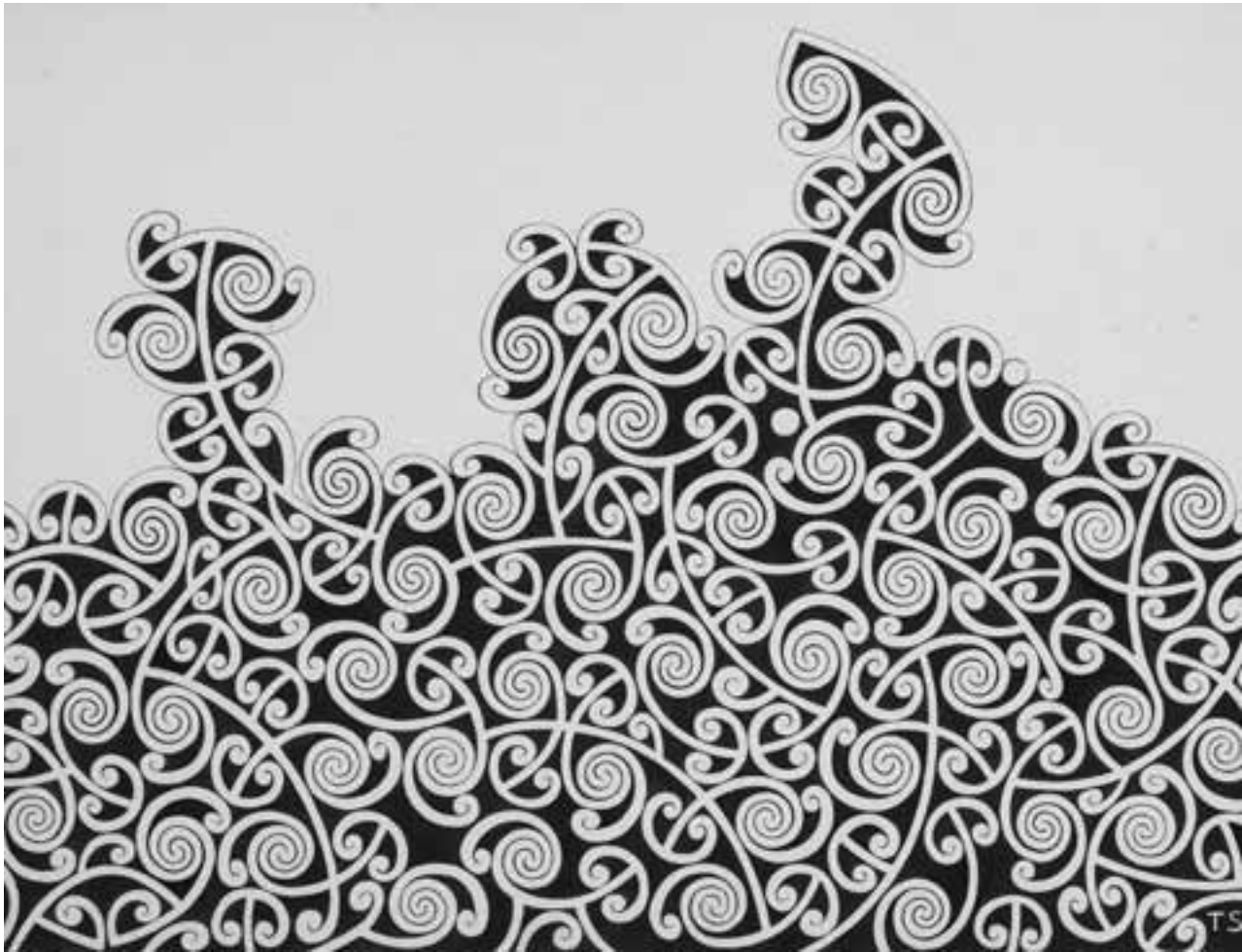
There are countless examples of these taonga works. In Māori thinking they are the physical or intellectual

creations of mātauranga Māori made possible through the medium of human industry and imagination. As such they usually depend, in the case of physical taonga works, on access to the traditional resources necessary to produce them. Similarly, in the case of written, spoken, or performed taonga works, they depend on the well-being of the language that is their vehicle – te reo Māori.

There is also another category of works that are hybrids that sit somewhere between te ao Māori and te ao Pākehā. These are works with a distinctly Māori flavour, but they incorporate elements from Western and other cultural traditions. We have already referred to modern tattoo designs that Mr Kopua says fall into this category. Other examples include the Air New Zealand koru; the work of prominent Pākehā artists such as Theo Schoon, Gordon Walters, and Dick Frizzell; and even songs such as 'Pōkarekare Ana' that have Māori lyrics and themes but Pākehā melodies. Also in this category is the wide range of contemporary jewellery, textile, ceramic, and graphic-design works by both Māori and non-Māori artists and craftspeople. Some are produced for the tourist and overseas markets, others for increasingly identity-conscious local buyers. The level of Māori content in these works

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





Untitled drawing by Theo Schoon, circa 1963. Schoon was an early innovator in the interaction between Māori and Western art forms. Raised in Indonesia, he learnt aspects of gourd carving with master carver Pine Taiapa in the early 1960s and was open to the idea of cross-cultural innovation.

varies widely, but are they in any sense taonga works? Do the same issues arise in respect of them, or are they a separate body of works with their own very different stories and concerns? Later in this chapter we also confront this question.

Broadly speaking, our discussion is focused around the ‘fit’ between the obligations of kaitiaki in respect of taonga works and mātauranga Māori on the one hand and the requirements of New Zealand’s IP laws on the other. One of the fundamental questions the claimants raised was

whether the IP system should recognise kaitiakitanga in respect of taonga works and mātauranga Māori. They are concerned that aspects of IP such as copyright and trade marks are not equipped to cater for the protection of the kaitiaki relationship with taonga works and mātauranga Māori. That, they say, is particularly apparent when those things are used in a culturally offensive way by non-kaitiaki, or when non-kaitiaki have claimed IP rights over particular taonga works and are deriving commercial benefit from them. The question that arises in the latter

case is whether kaitiaki should be involved in this process and, if so, to what extent. What, indeed, of the participation of kaitiaki themselves in the commercial exploitation of taonga works and mātauranga Māori?

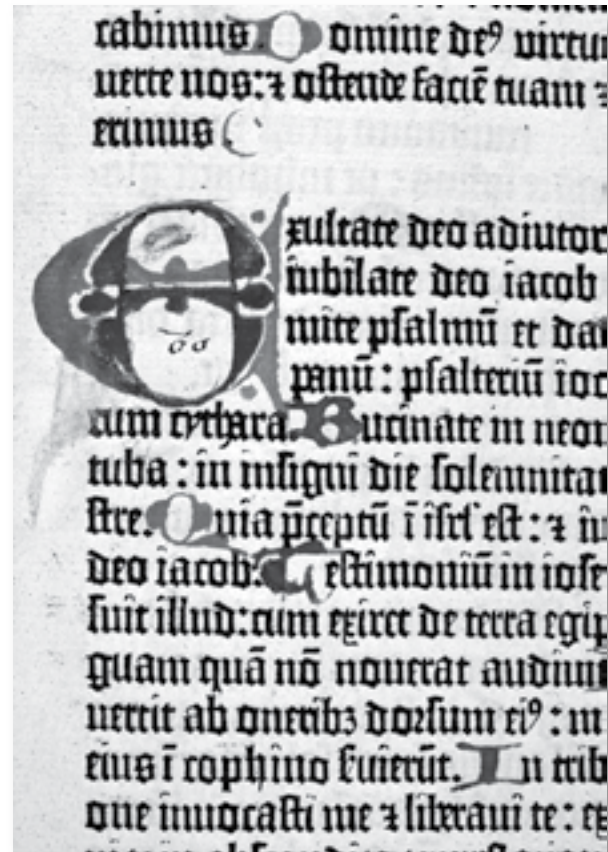
Before we can answer these questions, we think it important to explore some of the perspectives that underpin the IP system itself. We are aware that in separating out some fundamental elements of te ao Māori and te ao Pākehā in respect of IP in this way, we are risking an overly simplified approach to the issues. In truth, there is always room for mixing and overlap between the two. Our aim, however, is to highlight differences to show how the guiding principles of kaitiakitanga in te ao Māori and of property in te ao Pākehā might be brought together in ways that bring benefits to both.

We also acknowledge that for all their differences in perspective, there was a great deal of goodwill among the parties with an interest in this subject. Perhaps that is because all of them recognised that IP law and tikanga Māori share a common interest in the growth of culture and identity. The guiding principles of kaitiakitanga on the one hand and property on the other may even be seen as different ways of thinking about the same issue. In this context, they are the ways in which two cultures decide on the rights and obligations of communities in their created works. Kaitiakitanga focuses on obligations and relationships arising from kinship; property focuses on the rights of owners. Central to this chapter, therefore, is the question of whether and how the interests of kaitiaki in taonga works and mātauranga Māori might be protected within or alongside the IP framework.

1.3 TE AO PĀKEHĀ AND INTELLECTUAL PROPERTY

1.3.1 The origins of intellectual property law

The concept of intellectual property in te ao Pākehā is as much a product of culture, history, and economics as kaitiakitanga is in te ao Māori. The Wai 262 report is hardly the place for a detailed analysis of Western culture, and we are certainly not qualified to offer it. We acknowledge that our approach here is rudimentary. However, we do think it useful to point to some key historical developments that, at the very least, illustrate some of the ways in



The Gutenberg Bible (circa 1455–56), the first substantial book printed with movable type. The printing press spread literacy and encouraged an interest in antiquity and humanism, making culture more accessible. Within a century, Europe was grappling with both book piracy and the notion of intellectual property in products of the mind.

which the Western approach to property rights in knowledge, information, and ideas evolved into forms we recognise in New Zealand today – and why the Western and Māori approaches to the subject are so different.

It can be argued that perhaps no single innovation had greater impact on the growth and dissemination of new ideas than Johann Gutenberg's printing press. Within 50 years of its invention in southern Germany in about 1436, most of the important classical texts had been printed and

distributed on what, for the time, could be called a mass scale. These texts were filled with the humanism of the Greeks and Romans that had been 'forgotten, ignored or suppressed for centuries'.²⁰ Literacy spread rapidly, especially among the new urban mercantile classes, and with it access to these new ideas.

Alongside these developments came changes in the economic and social order: the rise of banking and commerce, and of powerful new cities, and the growth of private patronage in the arts, science, and education. New humanist notions encouraged self-expression and imagination – a love for individual genius. Artists and later writers no longer needed to rely solely on ecclesiastical or regal backing. If good enough, they could attract unprecedented wealth and status thanks to the patronage of educated and wealthy urban elites.

These changes loosened the bonds between individuals and the church, and between individuals and their communities. Wealth as well as title came to define social class; and, to some extent at least, wealth could be seen as the result of individual effort and skill, rather than birth. Brought together, these historical streams created a shift in the balance of power between individual and community. Over the following centuries, a new conviction emerged that individuals had innate rights, including rights in the products of their labour, and that these were worthy of protection.

The printing press also performed another role. It forced lawmakers in Europe – usually kings and queens – to consider for the first time whether the idea of property, traditionally attaching only to land and the products of physical labour, should now be extended to products of the mind. The printing press had made it possible for one publisher to exploit those products with or without the consent (or even knowledge) of the writer or the original publisher. As book publication became an increasingly lucrative commercial enterprise, this proprietorial vacuum was filled by the invention of IP rights.

In England, the first such protections were issued to members of the printers' trade association, or guild,²¹ in the form of printing privileges. Only members of the guild (for printers and publishers) were entitled to hold such privileges, and members were also authorised to



A sixteenth-century illustration depicting the printing process of the time. Many of the ideas of the Renaissance and developments in science relied upon rapid dissemination through print.

enforce their monopolies. These early forms of rights protected the interests of the printer rather than those of the author. They were a way of controlling competition, but they were equally a method of enforcing censorship for works that spoke out against the mainstream might not be printed.

The Stationers' Company lost its printing privileges in the late seventeenth century when its members lobbied for control over printed works on its register. This was a lengthy process but it eventually led to the creation of the

first copyright statute – the Statute of Anne 1709 – which gave exclusive rights over written works to the author, the creator of the work.²² Copyright protection was now available to the general public independently of guild membership. Under the Statute of Anne (the preamble to which states that it was ‘An Act for the encouragement of learning’), the author or the purchaser of the author’s right was granted the sole right to control the printing of the work. The right was limited to 28 years from the date of publication. After that, the work entered the public domain, meaning that anyone could print or distribute it without the author’s permission. Based on these concepts, other European countries developed similar laws in the late eighteenth and early nineteenth centuries.²³

When searching for a way to maximise the economic benefits of reproduction of printed material, the British fell back on familiar concepts around individual property rights and applied them to the literary world. In this way, the Statute of Anne placed the author and the printer at the centre of the system as a statement of general principle. As commerce and technology developed through the industrial revolution and into the twentieth century, this general principle came to apply to new types of creative works, including photography, film, sound recordings, computer software, and communications such as broadcasts and internet communications. The protections of copyright now extend well beyond printing to protect performance, communications to the public, and even some methods of distributing copyright works.

The development of modern trade mark law took a different path. In the cities of pre-industrial Europe, the guilds formed by many artisans used specific physical marks or symbols to identify that their members had made particular products: an example is the Sheffield symbol applied to knives.²⁴ The rules of the guild governed the way in which these marks could be used. The industrial revolution and the trade in goods over distances, however, meant that guild marks were no longer an effective means of identifying the artisans concerned. Products could easily be copied and the marks either imitated or simply not used at all. As a result, merchants advocated that the law be required to protect trade marks.

This would ensure that the correct maker or manufacturer of a product was identified and, in turn, that purchasers of those products knew the true origin of what they bought. This protection initially arose through the court system. Trade mark registration, as a result of laws made by Parliament, first emerged in Britain late in the nineteenth century.

Alongside the development of copyright and trade mark protection, and in accordance with the same principle, property came to be recognised in the inventiveness underpinning industrial inventions. This form of IP is known as patents. We consider this category in more detail in the next chapter.

The important point here is that the popular rise of arts and technology, combined with the availability of goods for the general populace, fuelled the creation of an entirely new form of property, now known as intellectual property.

1.3.2 What is the purpose of intellectual property rights?

The broad term ‘intellectual property’ refers to a group of exclusive rights which protect specific creations of the human mind. Such creations include everything from an inventive activity that has industrial or commercial application, to a work of art or literature, a symbol, or a design.²⁵ IP rights relate not to the physical machine, painting, book, or logo. Rather they confer certain privileges over aspects of the ideas, expressions, knowledge, or information contained in these things. As will be seen, the law imposes important limitations over both the nature of those privileges and the kinds of ideas to be protected.

As the term implies, IP rights use a classic Western legal technique to express the interest of the creator in the creation – that is, by vesting in the creator a right of property over the creation. As we have said, this may be contrasted with the kaitiakitanga right which tikanga Māori bestows on the kin group having obligations towards the creation. The word ‘property’, whether applied to real or personal property, automatically evokes certain understandings in Western legal systems. It means that the owner can exclude others from it, sell it, and allocate more limited

rights in it either spatially (such as a subdivision if it is land) or in time (such as by renting). These understandings apply equally to *intellectual* property.

IP rights were designed to encourage and reward creativity and innovation in science, technology, and the arts. In return, the creator receives a bundle of exclusive rights to exploit the creation or invention for a limited period of time. Thus, a major justification for IP law is economic. IP rights reward the creator's or the inventor's individual effort and the investment of those who finance such works. Broadly, IP law rests on the theory that without this system of incentive and reward, creativity and innovation will suffer. Having said that, there is and always has been vigorous debate about whether IP rights encourage or stifle creativity and innovation.

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

Both sides of the equation are recognised in the Universal Declaration of Human Rights, which provides that: 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' But it also provides that: 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.'²⁶ We will return to this crucial balancing process below.

While wealth creation is clearly an important rationale for IP rights, it is not the complete story. IP also protects and promotes culture as it is contained in books, music, drama, and so forth. It encourages and rewards writers, musicians, and actors in a way that has led to cultural growth and evolution. Thus, while rewarding New Zealand musicians financially, New Zealand music also contributes to the evolving sense of New Zealand culture

and identity. Both IP law and tikanga Māori share a common interest in the growth of culture and identity.

IP rights are divided into several distinct but often overlapping categories. Traditionally, they comprised patents, copyrights, trade marks, and industrial designs. Over time, the categories have extended to include plant breeders' rights, geographic indications, trade secrets, and even layout designs for computer chips. Some categories have been developed by judges in case law over many generations, but most now are set out in statutes. There is every reason to believe that modern technological developments will continue to encourage even more protection of IP rights. Our focus in this chapter is whether and how the interests of kaitiaki in taonga works and mātauranga Māori might also be protected within or alongside the IP framework.

1.3.3 The internationalisation of IP law

One of the striking features of IP is that international developments have influenced domestic law. New Zealand's IP law is no exception. Indeed, the first influx of British copyright law came after the Treaty of Waitangi was signed, and it, in turn, became the law of New Zealand. In 1842 the first domestically created copyright law was passed. This took the form of 'an Ordinance to secure the Copyright of Printed Books to the Authors thereof'.²⁷ Interestingly, given our interests in this chapter, the rationale for enactment of the ordinance was 'that it would protect the Rev. Maunsell's impending book – "a copious and compendious Grammar of the New Zealand language" – that is, te reo Māori'.²⁸

Internationally, IP rights and their protection became the subject of negotiations and agreements at a very early stage. As technology became more sophisticated and international trade accelerated, it was inevitable that IP issues would cross national borders, because creative works are able to be instantly copied, transmitted, and sold worldwide. Domestically focused IP law was quickly found to be insufficient. During the eighteenth century, for instance, authors saw their works being reproduced in other countries without their permission and without their receiving royalties. The result was that in the later

part of the late nineteenth century, several European countries came together to negotiate a multilateral treaty that would set international benchmarks for the protection of IP.

This process culminated in the Berne Convention for the Protection of Literary and Artistic Works of 1886.²⁹ The Berne Convention is based on three core principles: minimum standards, national treatment, and automatic and independent protection. That is, while specific details of copyright law will vary among member states, the Convention obliges those states to enact minimum copyright standards in their national law. Crucially, it extends copyright protection under national law to works created by foreigners within member states (national treatment).³⁰ In addition, the Convention ensures that an author automatically acquires copyright in his or her work without the need of any formal registration (automatic protection).³¹ The Berne Convention is now administered by WIPO, which was established in 1967 to encourage creative activity and to promote the protection of IP 'throughout the world'.³²

Similar considerations lie behind the development of international protection standards for industrial IP (including trade marks and patents). These were prompted by the refusal of foreign exhibitors, particularly from the United States, to attend the International Exhibition of Inventions in Vienna in 1873 because they were afraid their ideas would be stolen and exploited commercially in other countries. The first major international treaty to provide for protection of industrial property beyond national borders was the Paris Convention for the Protection of Industrial Property (1883).³³

The most significant development in the internationalisation of the protection of IP rights is the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights, known as the TRIPS Agreement.³⁴ It was concluded during the Uruguay round of the General Agreement on Tariffs and Trade (GATT) negotiations (1986–94), the same round that led to the formation of the World Trade Organization (WTO) in 1995.³⁵ The TRIPS Agreement is administered by the WTO TRIPS Council.³⁶ It sets international minimum standards for the protection of IP, and

provides the framework for New Zealand's domestic IP law.

One of the main objectives of the TRIPS Agreement is set out in its preamble. That is:

to reduce distortions and impediments to international trade, promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.³⁷

Each of the main elements of minimum protection is prescribed in the Agreement. Some of these minimum standards are incorporated by reference to parts of the Berne and Paris Conventions. The minimum standards include: the subject matter to be protected, the rights to be conferred, permissible exceptions, and the minimum duration of protection. The only exceptions to this incorporation by reference are the Berne provisions relating to moral rights (see section 1.4.1 below).³⁸ Under the TRIPS Agreement, the principles of national treatment, automatic protection, and independence of protection also bind those WTO members which are not party to the Berne Convention. The Agreement also imposes an obligation of 'Most-Favoured-Nation Treatment', under which advantages accorded by a WTO member to the nationals of any other country must be accorded to the nationals of all WTO members.³⁹ Every one of the WTO's state members (currently 153, representing more than 95 per cent of total world trade)⁴⁰ must now comply with the TRIPS Agreement standards. We will come back to the work of the WTO TRIPS Council in section 1.6.3(3).

New Zealand has been a party to the TRIPS Agreement from the outset. The claimants told us of their misgivings about the way in which the Agreement constrains their particular interests in respect of taonga works and mātauranga Māori. They are concerned, for example, that the compulsory requirements under TRIPS prevent New Zealand from responding to the needs of kaitiaki at the domestic level. We discuss this in section 1.5.1.

It is, however, important to understand that the TRIPS Agreement (and the Berne and Paris Conventions) do not

provide a uniform IP law standard. Instead these agreements stipulate a set of minimum standards that may be differently implemented in member states, and the Agreement leaves (within certain limits) many aspects to the discretion of national law.⁴¹ It allows members to impose protections that are greater than or additional to those minimum standards. Consequently, it is said that the TRIPS Agreement imposes a floor, not a ceiling, on IP law.⁴² Additional protections are known as *sui generis* (stand alone): they are beyond the scope of the TRIPS Agreement, and therefore are not regarded as being in conflict with it.

Sometimes these additional protections are contained in free trade agreements between countries. For example, New Zealand has concluded free trade agreements that include a clause preserving New Zealand's right to comply with the Treaty of Waitangi.⁴³ In addition, one of these free trade agreements, the Trans-Pacific Strategic Economic Partnership Agreement, provides that the parties may 'establish appropriate measures to protect traditional knowledge'.⁴⁴

Disputes between member states as to the compliance of national law with the TRIPS Agreement and other WTO trade rules are adjudicated by panels or (if an appeal is made from a panel) the Appellate Body, both of which are part of the WTO's Dispute Settlement Body.⁴⁵ The Dispute Settlement Body can recommend that member states bring their laws into compliance with the panel's or Appellate Body's recommendations, but it cannot force them to. If a member does not comply with such recommendations within a 'reasonable period of time', the Dispute Settlement Body can authorise the complainant member state to suspend commitments and concessions to the violating member state.⁴⁶

1.3.4 Other international efforts relevant to the claim

In addition to the agreements described above, there are a number of other international agreements and negotiations aimed at recognising indigenous interests that may be relevant to this claim.

All of them stem from an understanding that the IP system is generally considered inadequate to meet the

needs and expectations of traditional knowledge holders. In fact, in January 2010, a United Nations report on the state of the world's indigenous peoples found that the international IP regime often fails to recognise indigenous customary law. This is because the regime is founded on Western legal and economic rationales. Those reflect understandings of property law which focus on exclusivity and private ownership, and so reduce cultural expressions to commodities that can be privately owned.⁴⁷

By contrast, indigenous peoples create and own or protect traditional knowledge collectively, and the responsibility for using and transferring knowledge is guided by traditional laws and customs. These laws and customs are often not recognised in the wider national legal system:

There are therefore concerns that the IPRS [intellectual property rights] regime, grounded in Western concepts of individualism and innovation, does not . . . protect the collective or perpetual interests of indigenous forms of cultural expression.⁴⁸

We will now briefly outline the relevant international developments that seek to accommodate the indigenous interest in traditional knowledge, traditional cultural expressions, and genetic resources.

In 1992, the Convention on Biological Diversity, acknowledged the contribution of indigenous and local communities' traditional knowledge to the conservation and sustainable use of biological diversity in its article 8(j):

Each Contracting Party shall, as far as possible and as appropriate, subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

The provision is strongly linked to an access and benefit sharing mechanism (article 15). We discuss these provisions in more detail in the context of genetic resources and mātauranga Māori in chapter 2.

In 2000, WIPO established a committee to review legal and policy options for the protection of traditional cultural expressions and traditional knowledge.⁴⁹ The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGC) has since developed draft principles and objectives for the protection of traditional cultural expressions and traditional knowledge. Traditional cultural expressions include an array of tangible and intangible creative expressions including, for instance, stories, songs, instrumental music, dances, plays, rituals, drawings, paintings, sculptures, textiles, pottery, handicrafts, and architectural forms. Their key characteristics are that they are 'integral to the cultural and social identities of indigenous and local communities, they embody know-how and skills, and they transmit core values and beliefs. Their protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage'.⁵⁰ We discuss the work of the IGC in section 1.6.3(3). The members of WIPO have given the IGC a mandate to draft a treaty in order to reach agreement on and give effect to the draft principles.⁵¹ Whether any treaty will emerge and exactly what it will contain remain to be seen. The work is controversial and there is no guarantee that any draft will be accepted, but obviously much progress has been made. It is clear that the WIPO principles emphasise the need to actively involve indigenous people in decisions about the use of traditional knowledge in accordance with their customary laws and procedures – the kind of involvement that the claimants in this inquiry were seeking. These draft principles will undoubtedly feed into the IGC treaty drafting process. That is why the WIPO principles are important: they point to mechanisms and procedures that could be applied to resolve disputes of the kind that arise in the Wai 262 claim.

In 2007, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions came into force. This Convention is run by the United Nations Educational, Scientific and Cultural Organisation (UNESCO), and has the declared aim to promote and

protect cultural expressions.⁵² It does not, however, speak directly to indigenous people's interests.

In the same year, a more significant development was the adoption by the United Nations General Assembly of the Declaration on the Rights of Indigenous Peoples (DRIP).⁵³ The Declaration also addresses individual and collective rights of indigenous peoples in relation to their culture, identity, language, employment, health, education, and other issues.⁵⁴ Most importantly, article 31(1) speaks directly to the issues at the heart of the Wai 262 claim:

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

The vital link between the protection of traditional knowledge and economic development is widely acknowledged. In 2001, the WTO Doha Declaration specified that the TRIPS Council should assess the relationship between the patent requirements in the TRIPS Agreement and the access and benefit sharing mechanism in the Convention on Biological Diversity.⁵⁵ Most recently, within the TRIPS Council, WTO member states discussed proposals on disclosing the source of biological material and traditional knowledge that had been used in an inventive activity. We address the disclosure debate in more detail in the next chapter (see section 2.5.2(3)).

In addition to international agreements and negotiations, there have been other international efforts to address indigenous interests in IP law. Most IP regimes provide only limited protection for the interests of indigenous communities, so in 1982 WIPO and UNESCO developed the UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. Among



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

other things, it suggests imposing criminal penalties for 'failing to acknowledge the source of folklore; failure to acquire written consent to use protected folklore, misrepresenting the origin of expressions of folklore; and distorting works of folklore in any manner considered prejudicial to the honour, dignity, or cultural interest of the community from which it originates'.⁵⁶ There is also a Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture.⁵⁷ There is no obligation to adopt either of these model laws; rather, they were developed to assist lawmakers in countries that might choose to adopt them. New Zealand has adopted neither of them.

The claimants also referred us to the Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples from 1993.⁵⁸ The Crown contested the standing of this declaration, as it was drafted by non-governmental organisations and not negotiated by and for states' governments.⁵⁹

1.3.5 Summary

For present purposes it is important to emphasise that the issues that arose during the hearings of this claim are not

unique. These matters are being debated cogently in various international forums, and it is important that those debates are taken into account in any local consideration of the issues. But they are also important for another reason. We are mindful of the risk that unless New Zealand formulates policies that are based in its own particular circumstances, standards for the protection of traditional knowledge that may not adequately protect the interests of all New Zealanders might be imposed from outside. Moreover, if New Zealand is at the forefront of creating relevant protections in domestic law, it can play a significant role in developing international standards that might benefit New Zealand interests internationally.

We will pick up that international debate in section 1.6.3(3). We turn now to a summary of the major elements of New Zealand's domestic IP regime as they relate to the protection of taonga works and mātauranga Māori. Copyright and trade marks are the most important of these, but performers' rights, registered design rights, and protections for flags, emblems, and names are also relevant. Where appropriate, we also make reference to the extent to which each or any of these rights provides for the interests of kaitiaki.

1.4 COPYRIGHT, TRADE MARKS, AND RELATED RIGHTS IN NEW ZEALAND

1.4.1 Copyright

People perceive the practical effects of copyright on a daily basis, but we almost never think of its conceptual underpinnings. For example, the creator of an original work, whether in word, sound, or image, can decide whether to keep the work to him or her self or to share it with others and make it public. Copyright law gives creators of works a bundle of exclusive rights. The central exclusive right is to prevent others from making copies of those works. If a painter exhibits his painting, for example, copyright law prohibits others from making postcards of it without the painter's permission. Similarly, copyright law says that only the author can authorise publication of her book. If the author allows a particular company to publish and sell the book, copyright law prevents anyone else from doing so. If a record company puts a song on the internet, copyright law says it must not be copied without permission. Copyright law also gives the creator of an original work the right to authorise publication in another medium. An author, for example, can allow his book to be transformed into a screen play and then a film. All of these situations, and many more, are governed by the Copyright Act 1994 and case law about that Act.

Under the Copyright Act 1994, copyright is a property right in original literary, dramatic, musical and artistic works, sound recordings, films, communication works,⁶⁰ and typographical arrangements of published editions.⁶¹ The Act sets out the rights that subsist in these creations, their duration, and who owns them.

Unlike other forms of IP, copyright does not require registration to take effect. Copyright vests in its owner as soon as the work is created, provided the work:

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

Provided these criteria are satisfied, rights to exploit the work will vest in the copyright owner for a limited period.⁶² In addition to these transferable economic rights, the Act gives the creator certain other rights, generally known as moral rights. Unlike copyright, these

rights cannot be transferred for another person to exercise, but they can be and frequently are waived in commercial transactions. They include, for example, rights of attribution and protection against derogatory treatment.⁶³

Because copyright is conceptualised in the Act as property, the person who created the work does not have to be the copyright owner. For example, an employer will usually own copyright in a work created by an employee.⁶⁴ Or a creator who is not an employee can sell copyright in her work to someone else, such as a publisher.

We will now explore each of the core elements of originality, fixation, exclusive rights, permitted uses, and ownership/authorship in more detail. We do so because these elements control the extent of protection available to taonga works and their associated mātauranga Māori. Once we have summarised the essential characteristics of each element of copyright, we will turn to consider relevant related rights such as performers' rights.

(1) Originality

For a work to be protected by copyright, it must be original. The statute provides that a work is not original if it is merely a copy of another work.⁶⁵ The leading test for originality adopted in New Zealand courts⁶⁶ is that there must be sufficient skill, labour, and judgement applied for a work to qualify as an original copyright work.⁶⁷ The exact amount of labour, skill, or judgement required has never been clearly defined by the courts. Subsequent courts have recognised, however, that the threshold for originality under section 14(1) of the Copyright Act is very low.⁶⁸

The scope of originality is not defined by international agreement either. However, clues about originality are found in the Berne Convention.⁶⁹ This is why the threshold for originality can be low, as it is in New Zealand.⁷⁰

Ngāti Kahungunu noted that the originality requirement can inhibit protection for taonga works such as traditional stories, mōteatea, or whakapapa which are in the public domain and no longer qualify for copyright protection.⁷¹ On the other hand, third parties can draw from Māori knowledge that is freely available in the public domain and create new collections and editions of historic taonga works.⁷² Such new collections containing mātauranga Māori and taonga works often qualify for copyright protection – although we note that protection

relates to the selection and arrangement of the collection and not to the works in the collection individually. The claimants referred to the republication of Elsdon Best's various ethnographic works. Te Papa Press, the publisher of these new works, claimed copyright ownership of them, though the original kaitiaki could not have qualified for copyright protection.⁷³

Another example relates to the first *Ngā Mōteatea* texts that we referred to in section 1.2.2. Potential copyright in the original *mōteatea* has long expired. However, a reprinted edition of Sir Apirana Ngata's work may qualify for copyright protection insofar as the collection itself is an original selection and arrangement of *mōteatea*.

(2) Fixation in material form

The Copyright Act provides a way of protecting the products of human creativity when they are no longer solely in a creator's mind but have found expression in a physical form. It requires that literary, dramatic, and musical works must be fixed in material form to receive copyright protection.⁷⁴ Thus, it is the creator's choice and arrangement of words, musical notes, colours, and shapes that attracts copyright, not the idea of them. For example, the fact that a painter decides to paint a yellow flower does not stop all others from painting yellow flowers, even the exact yellow flower the painter pictures in her mind. It is that painter's particular rendition of the yellow flower that cannot be copied. This distinction in the law is a way of balancing the interests of the copyright owner against the public interest in the creation of new works and the flow of information and knowledge contained in those works. This balance is found in the TRIPS Agreement (see section 1.3.3) which provides 'copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such'.⁷⁵ Both interests must be protected if creativity is to flourish – though drawing the line between idea and expression is not easy. Judges are fond of citing the late Professor Joad: 'It all depends on what you mean by "ideas"'.⁷⁶ Is the idea, for example, the name of a character in a book or play, or is that the particular expression? Copyright law decides each case on its facts.

The claimants raised concerns about the fixation requirement and the inability of copyright law to protect

taonga works that are handed down orally from generation to generation.⁷⁷

New Zealand has adopted this requirement from British law, and it is found throughout the Commonwealth and in other common law jurisdictions. Strictly speaking, however, if New Zealand wanted to protect unfixed oral works such as *mōteatea* as copyright works, there is nothing in international law to prevent it from doing so.

(3) Exclusive rights

The Copyright Act 1994 confers economic rights (section 16) and moral rights (sections 94–110).

Economic rights allow the copyright owner to exclude others and thereby control almost all uses, particularly copying, of the copyright work. This enables copyright owners to commercially exploit the value of the work. The copyright owners' rights include rights to:

- (a) Copy the work;
- (b) Issue copies of the work to the public, whether by sale or otherwise;
- (c) Perform the work in public;
- (d) Play the work in public;
- (e) Show the work in public;
- (f) Communicate the work to the public;
- (g) Make an adaptation of the work.⁷⁸

Because copyright is property, these exclusive rights can be can be licensed, transferred, and assigned.

It would be wrong to think that copyright is only about economic rights. Influenced by the French 'right of the author' (*droit d'auteur*), copyright law also protects the moral rights of the creators of copyright works.⁷⁹ Moral rights protect the integrity of the relationship between the author and his or her work. They are not assignable,⁸⁰ except to the creator's successors on death,⁸¹ because they are based on the idea that an original work is an extension of the personality of its creator. That is, creators invest something of themselves and their reputation in their work. While moral rights are not assignable, they can be waived.⁸²

The most important moral rights are the right to be identified as the author of a work and the right to object

to derogatory treatment. Authors also have the right not to have the authorship falsely attributed.

The right to be named as an author is vested in the authors of literary, dramatic, musical, and artistic works, and in film directors.⁸³ This right vests in an author only if that author has asserted the right in writing.⁸⁴ Once this is done, the author has, for example, the right to have his name on a book he has written. There are numerous exceptions to the right found in the Copyright Act.⁸⁵

The Act defines derogatory treatment narrowly as ‘addition to, deletion from, alteration to, or adaptation of’ a copyright work.⁸⁶ Such treatment is derogatory if ‘whether by distortion or mutilation of the work or otherwise, the treatment is prejudicial to the honour and reputation of the author or director.’⁸⁷ In New Zealand there have been few moral rights cases brought to the courts and none have been successful claims of derogatory treatment. In one case a company tried to claim that the placing of stickers on its advertising brochure constituted derogatory treatment of the brochure. The Court of Appeal held the company was not an author and therefore could not claim moral rights.⁸⁸

In Canada, where moral rights legislation is similar, one successful moral rights action was *Snow v The Eaton Centre*.⁸⁹ The artist Michael Snow was commissioned to create a work entitled ‘The Flight Stop’ for the atrium of a Toronto shopping centre (the Toronto Eaton Centre). The work consisted of a number of fibreglass Canada geese in flight. During the Christmas season of 1981, the Eaton Centre placed red ribbons around the necks of the geese. Snow argued that the ribbons offended the integrity of the sculpture and distorted his work. The court agreed with Snow, and held that distortion caused prejudice to the honour and reputation of the artist. There is at least some similarity between the moral right of an author to protect the integrity of his work and the obligation of kaitiaki to protect the integrity of taonga works and mātauranga Māori.

The TRIPS Agreement does not require the protection of moral rights in its minimum standards. Rather it leaves it up to individual states to decide.⁹⁰ Moral rights are required under the Berne Convention.⁹¹ Moral rights were adopted in New Zealand law in 1994 in substantially the same form as found in British law.⁹²

(4) Duration

Both economic and moral rights are limited in time. The duration varies depending on the type of copyright work. For literary, artistic, musical, and dramatic works, duration is the life of the author plus 50 years. For more recent technological advances – sound recordings and films – tenure is set much shorter, at 50 years from the work’s creation. The tenure of copyright is limited in time because an indefinite term of property rights could overly reward the creator at the cost of the wider community’s interest in the use of creations of those who have gone before. As Bernard de Chartres and Isaac Newton put it, one can then stand on the shoulder of giants and create or invent something better.

The claimants referred to the haka *Ka Mate* to exemplify the shortcomings of copyright law in this respect. If created today, they argued, *Ka Mate* would probably qualify for copyright protection for a finite period of time – the life of the author plus 50 years. They pointed out that if copyright protection had been available for taonga works created a long time ago, it would have long since expired.⁹³ Since *Ka Mate* has not been protected by any IP rights, it has been treated as part of the public domain, which means that it has been used and performed without permission.⁹⁴ (For discussion of further developments in respect of Ngāti Toa’s interest in *Ka Mate*, see section 1.5.1).

(5) Permitted uses of copyright works

As we have said, IP law has to strike a balance between the rights of private property holders and the rights of the general public (which includes Māori, as we discuss in chapter 6) to access knowledge and information. Thus, even if a work qualifies for copyright protection, the vested rights are still subject to some limitations to take account of the wider interests of the public.

The Copyright Act contains a considerable number of permitted uses of copyright works. Many are technical and of limited interest to a general audience – for example, abstracts of scientific articles can be copied in full without breaching copyright. Most of the important exemptions are grouped under the heading ‘fair dealing’. They include use of a work for private purposes or study, or for criticism, review, or journalistic purposes. A second

important exemption relates to the use of works for educational purposes. This allows teachers to copy entire articles and up to 50 per cent of a complete book for distribution to students, provided the students are not charged.

Specific exemptions also apply to librarians,⁹⁵ public readings of written works, public showings of films or programmes where the audience has not paid to view, the playing of sound recordings in pursuit of a charitable purpose, certain government publications, and some IT applications such as copying a program for back-up purposes. Another exception allows publication of images of buildings or works that are permanently fixed in a public place.⁹⁶ Such works must be three-dimensional artistic works such as a building or sculpture.⁹⁷ It is worth noting at this point, because we will take it up later, that this exception would apply to some whare whakairo and other publicly displayed taonga works if those works were protected by copyright and considered to be in a public place.⁹⁸ Taonga works that are displayed in a public place but not protected by copyright can and have been freely copied anyway.

All of these exemptions reflect the view of those who designed (and indeed continue to develop) copyright law that in these particular areas the public interest in free access is greater than the private interest of the copyright owner.

(6) Authorship and ownership

The creator (or what the Act calls the author⁹⁹) and the owner have different rights under the Act, even though they may be one and the same person. Copyright can vest in natural or legal persons (such as companies). However, the first owner of a copyright work will be the natural person who created it, although the author of a film or a sound recording can be a corporate entity.¹⁰⁰ The primary rule is that the author is the creator of the work and its first owner, unless the creator is an employee¹⁰¹ or the work is a named category of commissioned work.¹⁰² That category includes artistic works, sound recordings, and films.¹⁰³ The first owner of such commissioned works and works made in employment is the commissioner and employer respectively.

Often what is perceived by the lay person as a single work will in fact contain many works, each of them

attracting their own copyright. The owner of copyright in a sound recording, for example, may hold that right subject to the rights in the musical work that is embodied in the sound recording. The owner of copyright in a book may hold that subject to copyright held by others in the images on the cover or within the book.¹⁰⁴ Any restricted use¹⁰⁵ of these collateral works will require the consent of their respective copyright owners.¹⁰⁶

The claimants said that some taonga works that were collectively created by iwi, hapū, or whānau cannot receive protection under the Copyright Act because there is no identifiable person(s) to whom the copyright could be attributed.¹⁰⁷

As we will discuss below, copyright law as a whole was not designed for, and does not protect, all of the claimants' interests.

1.4.2 Other copyright-related rights

(1) Performers' rights

The Copyright Act not only protects original works. It also gives limited independent rights to performers, no doubt on the basis that performance itself is a separate act of creativity. Performances include dramatic performances, musical performances, readings and recitations of literary works, and performances of a variety act. The Act provides performers with certain limited rights to control the public use of their performance. Performers' rights are infringed if a performance, or a substantial part of a performance, is recorded or played in public for non-private purposes without the performer's permission.¹⁰⁸ As with copyright, performers' rights are not absolute and certain acts in relation to a particular performance are allowed for the sake of the public interest without the performer's consent. For instance, the showing of a sound recording or film is allowed for educational purposes.¹⁰⁹ So is the showing of performances for criticism, review, and news reporting.¹¹⁰

Performers' rights subsist for 50 years from the end of the calendar year in which the performance takes place.¹¹¹

Performers' rights recognise only the interests of the individual performer. Collectively held or communal performers' rights are not recognised. And, unlike in Australia, for example, performers in New Zealand are not awarded moral rights in their performance.¹¹²

An example of performers' rights was given in evidence by Tanara Whairiri Kitawhiti Ngata, on behalf of TVNZ. When counsel for Ngāti Koata asked him what TVNZ does when it is filming performances by Māori groups and images of a number of individuals are captured, Mr Ngata explained that TVNZ has had to get the consent of each group. He explained that some groups did not give consent and that this meant TVNZ had refrained from filming those groups' performances.¹¹³ Seeking consent for use of this sort of performance results from the operation of performers' rights that have been part of New Zealand law since 1994. The claimants expressed their disappointment that performances by kaitiaki recorded prior to 1994 cannot receive protection.¹¹⁴

In 1996, WIPO created a treaty called the Performances and Phonograms Treaty, which gives performers' rights particularly in relation to sound recordings.¹¹⁵ New Zealand is not a signatory to this treaty.

(2) Registered designs

IP law also protects a category of work known as registered designs, under the Designs Act 1953. Registered designs can encompass a vast array of possibilities, from the design of Lego bricks to the shape of furniture to the way in which a chocolate bar is wrapped and presented. The focus of registered designs is on the 'appeal to the eye' of a physical product, and it is this that distinguishes them from copyright works (where the focus is on originality) and trade marks (where the focus is on distinctiveness in trade). To qualify for registration, a design must have features of shape, configuration, pattern, or ornament applied to an article through an industrial process. The finished product must appeal to the eye, but this requirement is very general in nature and does not call for any subjective judgement about beauty or aesthetic quality.¹¹⁶ The product must also be new or original.¹¹⁷ Once the criteria are met, the Commissioner of Designs can register the design.¹¹⁸

Rather confusingly, when a design is registered the Act describes its owner as having copyright in the design.¹¹⁹ According to section 11(1), the effect of registration is to give the registered proprietor 'the exclusive right in New Zealand to make or import for sale or for use for

the purposes of any trade or business, or to sell, hire, or offer for sale or hire, any article in respect of which the design is registered'. While this commercial monopoly is extremely broad, it lasts only for five years.¹²⁰ Registration can be renewed for a maximum of two further terms of five years after the expiry of the first period, giving it a total tenure of 15 years provided the procedural requirements of the Act are complied with.¹²¹

Because New Zealand copyright law protects design drawings and prototype models that are used in industrial design processes, copyright law is more frequently relied on for protection than the registered design right. This is especially the case because, unlike registered designs, copyright does not require formal registration or payment of fees. In order to make the two systems roughly equivalent, copyright works that have been 'industrially applied' have a shorter duration of protection than other copyright works.¹²² Their duration is equivalent to that of registered designs. However, some businesses still prefer registered designs to copyright protection because of the certainty of registration.

Like copyright law, the system of registered designs does not protect the kaitiaki interest in taonga works.

1.4.3 Trade marks

The main purpose of modern trade mark law is to avoid consumer confusion and to maintain the quality of goods and services. Trade marks are used by traders to distinguish the origin and quality of goods or services they provide from similar products or services offered by their competitors. The aim is to create a distinctive trade mark that customers associate with the quality of certain products or services. Satisfied customers will be more likely to buy the same goods or services again and to refer others to those goods or services. A strong trade mark helps a business both gain and retain its customers.

Hence, trade mark law prevents competitors in the same business from copying these trade marks to help them sell their own goods and services. This is seen as misappropriating what the first trader has earned. Without these protections, businesses might be able to deceive consumers into thinking that the product they are buying is genuine when it is not.¹²³

(1) The requirements for trade mark registration

The law in relation to trade marks is governed by the Trade Marks Act 2002. The Intellectual Property Office of New Zealand (IPONZ) is the place where trade mark registrations are granted.¹²⁴ For an application for a trade mark to be registered, the proposed trade mark must be:

- ▶ a sign capable of being represented in graphic form; and
- ▶ capable of distinguishing the goods or services of one person from those of another person.¹²⁵

In addition, there must be no statutory grounds for refusing registration.¹²⁶

The term 'sign' is given a broad meaning in the Act. It can be a word, name, or logo, but it can also include a sound, shape, or even a smell or taste.¹²⁷ Thus, for example, advertising jingles, the Coca-Cola bottle, and distinctive perfumes have been registered as trade marks for their sound, shape, and smell respectively.

The requirement of distinguishing the goods or services of one person from those of another is sometimes called the distinctiveness test. A trade mark can be distinctive because it was designed that way, or because use has made it distinctive. Words or logos that are merely descriptive of a product will not qualify. For example, 'Potato chips' is unlikely to be distinctive of a trader's chips because it simply describes the product.

Trade marks are registered in relation to particular categories of goods or services. The trade mark owner has the rights to use the registered trade mark and authorise others to use it. Registration is effective for 10 years, but can be renewed indefinitely at 10-year intervals. There is no limit on the number of times a registration may be renewed.

The Commissioner of Trade Marks *must* refuse an application for registration of a trade mark if there is what the statute describes as an absolute ground for doing so. The commissioner *may* refuse an application for registration if there is relative ground for not registering the trade mark application. Absolute grounds include that:

- ▶ the trade mark's use would be likely to deceive or cause confusion; or
- ▶ its use is contrary to New Zealand law; or
- ▶ its use or registration would, in the opinion of the

commissioner, be likely to offend a significant section of the community, including Māori; or

- ▶ it has no distinctive character; or
- ▶ it consists only of signs that serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographic origin, or other characteristics of the goods; or
- ▶ consists only of signs that have become customary in the current language or established practices in trade.¹²⁸

Ross Scott of Ngāti Kere had experience of some of these grounds when he applied to register the longest place name as a trade mark. In rejecting the application, IPONZ advised him that 'In light of the geographical significance and fame of . . . [that name], other traders are likely to want to use the same or a similar mark in connection with their own goods and services.'¹²⁹ In particular, the word (that is, the place name) was not adapted to distinguish the goods or services of one trader from those goods or services of another.¹³⁰

(2) The Māori Trade Marks Advisory Committee

Under section 17(1)(c) of the Act, the Commissioner of Trade Marks must refuse to register a trade mark where 'the use or registration of which would, in the opinion of the commissioner, be likely to offend a significant section of the community, including Māori'. All trade mark applications that involve a Māori word, image, or text ('Māori sign')¹³¹ are referred to the Māori Trade Marks Advisory Committee established under section 177 of the Act.¹³²

The advisory committee's function is to advise the Commissioner of Trade Marks whether the proposed use or registration of a Māori sign is, or is likely to be, offensive to Māori.¹³³ The advice of the committee is not binding on the commissioner. (See chapter 2 for discussion of advisory committees in relation to ERMA New Zealand.)

(3) Certification Trade Marks – Toi Iho

There is a category of trade marks which the trade mark owner can use to protect quality and authenticity for more than one trader. The matter of authenticity arises in the sale, manufacture, and representation of poor copies of Māori carvings or adornments, among them copies of



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

taonga works that are made in China and shipped to New Zealand for sale in souvenir shops. In order to recognise and promote authentic Māori art and artists, the Toi Iho 'Māori-made mark' is available to some 215 Māori artists.

Claimant counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa suggested the collaborative process used to set up this mark, where Māori and the Crown worked side by side to develop policy from the beginning, could be seen as a model for collaboration on many of the matters raised by Wai 262.¹³⁴ In October 2009, Creative New

Zealand announced that it would no longer invest and manage Toi Iho because allegedly it had not delivered the predicted economic benefits to Māori artists.¹³⁵

1.4.4 Geographical indications

Geographical indication systems register a geographical name for use in relation to a particular product, because the place has over time developed a reputation in respect of the quality of the product. Geographical indications (names connected to a place, in lay language) do not

usually qualify for trade mark protection because they do not distinguish one trader's goods from another, but may be used by any producer of a product from a particular geographical area.

In 2006, legislation was passed to create the basis for registering geographical indications limited to wines and spirits where a given quality, or reputation, or other characteristic of the wine or spirit is attributable to its geographical origin.¹³⁶ The law of passing off¹³⁷ may provide protection for geographical indications in some circumstances. Passing off may prevent a person who is not associated with a geographical area from representing that their products come from that geographical area. In New Zealand, for example, the Court of Appeal has held under the law of passing off that sparkling wine that does not come from the area of France known as Champagne and is not made according to the champagne method cannot be labelled champagne.¹³⁸

Internationally, there is vigorous debate around whether geographical indications offer a possible solution for the protection of traditional knowledge. In this area, there is potential for New Zealand to extend the protection of geographical indications to products other than wines and spirits.

1.4.5 The protection of flags, emblems, and names

Under the Flags, Emblems, and Names Protection Act 1981, certain names and symbols are absolutely protected, either to prevent the impersonation of those exercising public authority or, more relevantly, because the names and symbols are national cultural icons. These include the flag of New Zealand, various emblems, insignia, and governmental names.¹³⁹ The Act also specifically protects other names such as ANZAC.¹⁴⁰ Interestingly, 'ANZAC' was first prohibited in 1916 on the basis that its use in relation to any trade or business 'may be offensive to public sentiment'.¹⁴¹ The Act also makes special provision in respect of international institutions of which New Zealand is a member. These prohibit, for example, the use of 'United Nations' and its emblem. It is a criminal offence to use these names and symbols for certain commercial purposes.

General information and 'rules' are promulgated under section 10(2) of the Act governing such things as folding,

raising, or flying the New Zealand flag. These rules are no more than a suggested code of conduct and do not have the force of law. As far as we are aware, they are nonetheless greatly respected and usually followed.

A range of purpose-made statutes also protect certain names from misuse. Examples include prohibition on the use of 'Te Papa Tongarewa' in section 23 of the Museum of New Zealand Te Papa Tongarewa Act 1992.¹⁴²

All of the foregoing protections are perpetual. As with copyright, New Zealand could grant perpetual official marks protection for some forms of taonga works.

1.4.6 Internet domain names

Trade marks are not the only area in which names have value. Internet domain names have become extremely important trade and identity markers, and for that reason can have enormous value. There is a system of registration of domain names administered by a central authority, but its purpose is efficient administration of the internet rather than intellectual property or cultural interest in these names. Minimal control is exercised over the choice of name.

In New Zealand, InternetNZ has authority to issue top-level domain names that end in '.nz'. The registration process does not prevent the acquisition of domain names that are Māori tribal, ancestral, or place names, for example. Names are issued on a first-come-first-served basis. Applicants are not required to prove entitlement to use the name. Disputes over entitlement can be dealt with in the ordinary courts, or through InternetNZ's dispute resolution process.¹⁴³ A dispute before the courts requires the objector to establish a prior legal right (such as a trade mark) to the disputed name. The internet dispute resolution policy requires that the complainant prove it has rights to the name and that the registration of the domain name is unfair.¹⁴⁴ There is a non-exhaustive list of what amounts to unfair.¹⁴⁵ We do not know of anyone objecting to a domain name on the basis that it should not be used by anyone other than kaitiaki. However, that could arguably be an example of unfairness.

These dispute procedures alone are inadequate to prevent the use of Māori names in which there is a kaitiaki interest as internet domain names.

1.4.7

1.4.7 Images of people

IP law generally does not provide protection for use of images of people unless, coincidentally, those images are copyright works or trade marks themselves. An exception to this is a special protection against certain commercial uses of pictures of the royal family.¹⁴⁶ A photograph may be a copyright work, but any rights in the photograph are owned by the copyright owner, who is usually not the person in the image. The Copyright Act does provide a limited privacy-style right to people whose images are in photographs, allowing them to prevent others using the photographs, but this applies only to commissioned photographs such as for weddings.¹⁴⁷ It does not apply to photographs taken in public, or photographs taken before the 1994 Act came into force, or photographs that are out of copyright. So if, for example, a person's image is used because of its 'Māoriness', the law does not prevent this – although we note that if an image is offensive it may not be registered as a trade mark (see discussion above).

Several claimants told us of their concern about photographs of Māori being used in a commercial context without permission. In one instance, we were told of an unauthorised portrait of a witness's mother for sale in a shop; in another instance, a claimant had seen the portrait of a tupuna used on a biscuit tin. It should be recalled that the association of taonga and food is highly offensive.

1.4.8 The public domain

As we have said, IP systems are designed to strike a balance between the interests of property right holders and the public interest in encouraging the creation of works and access to information and knowledge. The rationale behind IP rights is to promote creativity by providing an avenue for the creator to exclusively exploit his or her creations. The protection enables the knowledge and the works of creativity to be disseminated. The time limit on that protection means that eventually others will be able to use not only the ideas, knowledge, or information contained in the work but also the work itself. This in turn promotes the economic and social development of society as a whole. In fact, IP rights are aimed at offering an incentive for creative people to share their knowledge and creations with the world. While the economic justification



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

for IP is undoubtedly important, it is not the only justification for IP law. It is also said that it protects and promotes culture through the proliferation of creative works. In order to safeguard the flow of ideas and to ensure that new works are being created, the IP system aims to ensure that information and knowledge are available for anyone to use – and that the specific expressions of knowledge and information which IP protects are at some stage available for others to incorporate into new creations.

This free zone is often referred to as the commons

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

None of this is expressed in New Zealand law. Rather, it is implied in the statutory limits and exceptions to the private rights those Acts create. As we have seen, the primary limitations in copyright are related to originality and time. After expiry of the protection period, the copyright work will fall into the public domain. The statutory exceptions include the circumstances in which a copyright work can be copied without infringement, such as for research or private study. In trade mark law, exceptions include for honest practices and using a trade mark descriptively.

That said, there is by no means any agreement amongst IP practitioners and scholars about the parameters of the public domain. In short, it is a hotly debated topic. The fact that IP law gives private rights over things in the public domain means that setting its boundaries is an ongoing balancing act between public and private interests. There are no principles that render the line immutable or unmovable, or that dictate that it must be drawn here or there. For example, in 1981 the Flags, Emblems, and Names Protection Act (discussed above) ring-fenced from the public domain various cultural symbols perceived to be of national and international importance. Thus, balancing what is in the public domain with what is not – or, put another way, determining what should and should not be protected in law (including IP law) – is a policy choice. And it is a balance that must constantly be recalibrated as circumstances change.

Just where to draw the line is a central issue in the Wai 262 claim. The claimants ask that it be redrawn in two respects. First they want to prevent those who are not kaitiaki from acquiring private rights in taonga works and in their associated mātauranga Māori. Secondly, they seek recognition of their own kaitiakitanga over these things and the right to object in any case of offensive treatment.

1.4.9 Summary: some observations about the IP regime and the kaitiaki interest

The foregoing descriptions of the various elements of the IP regime make it clear that IP law protects the kaitiaki interest in taonga works or mātauranga Māori only to a very limited extent. It does so only when those things fall within and meet specific requirements of certain categories of IP law.

Copyright, for example, is fundamentally designed to protect works of authorship so that they can be exploited, not to protect customary rights. Indeed, the requirements of originality and fixation in copyright law show that the system was not designed to protect kaitiakitanga. Copyright originality is not a measure of quality or merit. It simply means that skill, judgement, and labour have been used in creating the work, and that the work is not a copy of another. Many taonga works will be original in copyright terms, but many more will be copies in whole or in part of pre-existing works. This is because the survival of mātauranga Māori in an oral culture depends upon exact copying in order to carry that knowledge forward for future generations. Originality is not seen as a priority in taonga works. Indeed, it can sometimes represent a real threat to the survival of the mātauranga contained in the work. Thus, stories and songs must be repeated verbatim through the generations, and carving or tā moko styles must be faithfully followed by each succeeding generation of tohunga. The effect is that change is extraordinarily slow and the integrity of the mātauranga Māori is maintained through millennia.

Even where copyright law does protect a taonga work, it does not protect the mātauranga Māori embodied in the work. This is because, as we have said, copyright does not protect the underlying ideas, knowledge, or information contained in the copyright work. It protects only the particular way in which those things are expressed in the work. There is no way to prevent misuse or appropriation of that unprotected mātauranga under the current framework.

Similarly, while some mātauranga Māori is fixed in the physical form of a taonga work, much is not. Oral traditions, including whakapapa, traditional kōrero, or mōteatea that, by their very nature, have not been written

down or recorded by their kaitiaki will fail the fixation test. Ironically, when nineteenth- and twentieth-century ethnographers came with their equipment to record and publish these taonga works, it was the ethnographers who obtained copyright in them.

IP rights are not designed to prevent uses of taonga works that are culturally offensive. Moral rights are recognised in the context of copyright only, and they are very limited in scope. They apply only in a narrow range of circumstances and they are limited in duration.

As to the permitted uses under the Act, potential conflicts may arise in respect of section 73 of the Copyright Act which permits the commercial exploitation of three-dimensional artistic works that are permanently situated in a public place. Under this section, it might therefore be permissible to reproduce images of, for example, marae buildings or the waka in the Treaty grounds at Waitangi on a tee-shirt, and sell it, even if these works are protected by copyright. If the works are not protected by copyright, it is possible to do this anyway.

Copyright authorship and ownership are very different from the Māori concept of kaitiakitanga, which is founded in concepts of communal responsibility. In the context of mātauranga Māori and taonga works, the task of the so-called 'author' is often to collect and replicate in his or her work the teachings of generations that have gone before. It is the reputation of the kin group that must be protected, not just the reputation of the author.

Performers' rights are related to copyright, but in New Zealand were not recognised as a separate set of rights until 1994. They do not include moral rights. Nor do they recognise the kaitiaki interest in a performance. As with copyright, the limited duration of performers' rights does not align with the obligations of kaitiakitanga.

Registered design rights do not protect the kaitiaki interest either.

Even when a taonga work or mātauranga Māori falls within a recognised IP category,¹⁴⁸ the law does not recognise the perpetual nature of the kaitiaki relationship with them. In particular, IP law does not support kaitiaki in their role as the guardians of mātauranga Māori – a role that carries responsibilities to safeguard and protect the integrity of taonga across generations. Moreover, once a right has expired, the respective taonga work becomes

part of the public domain, which means it becomes available for others to use and is potentially laid open to inappropriate use. This concept may run counter to the responsibilities of kaitiakitanga when kaitiaki are not in a position to protect the underlying relationship, which does not expire at a particular time.

When it comes to protecting words, the IP regime operates on the principle that giving private rights to words (the building blocks of language) unduly restricts others from using that language. Copyright law deals with this by purporting to protect the particular use of language, not the language itself. Trade mark law also protects words, but it does so on the basis that the words are relevant to commerce. Thus, while both copyright law and trade mark law may protect Māori words in certain circumstances, this is not because they are mātauranga Māori and/or taonga works – nor because they have value in themselves.

Where mātauranga Māori is embodied in a taonga work such as a symbol or a word, the law will protect its use in trade. Symbols or words may qualify for registration as trade marks, but the Trade Marks Act 1953 does not address the kaitiaki relationship with them – it is interested only in commerce, and provides protection only in that specific context. However, as we noted, section 17(1)(c) of the Act effectively prevents the registration of offensive Māori words, images, or texts. The Māori trade marks advisory committee also provides non-binding advice to the Commissioner of Trade Marks as to the offensiveness of a specific mark. These are worthwhile provisions that give some weight to the Māori perspective.

The law relating to the protection of place names, known as geographical indications, is likewise limited in terms of its protections. If the 2006 Act comes into force, it will be limited to the use of place names in the sale of wines and spirits. Names like the longest place name that kaitiaki regard as taonga would not qualify for protection as geographical indications, because they do not relate to specific goods or services as required by the Act. Moreover, place names that are descriptive or generic in nature cannot be registered as trade marks because they are not distinctive.

Interestingly, New Zealand law does recognise perpetual cultural rights in some names and symbols. These

include, as we have said, the New Zealand flag, the use of the acronym ANZAC, and other important names or symbols protected by international agreement. This is not seen as controversial. Neither taonga works nor mātauranga Māori receive this kind of protection.

Internet domain names have in recent years become particularly important in commerce and as markers of identity. The registration process for the top-level domain ‘.nz’ does not prevent third parties from acquiring domain names that are of cultural importance to Māori such as tribal, ancestral, or place names.

And when it comes to the reproduction of images of Māori people, the law provides no protection, even against offensive or inappropriate uses.

In summary, IP law protects the kaitiaki interest in mātauranga Māori or taonga works but only to a very limited extent. It is only when they meet the specific requirements of one or other of the categories of IP law, and even then protection will usually be for a limited time only. There is no recognition of the perpetual kaitiaki relationship with mātauranga Māori or taonga works. Nor does IP law reflect the guardianship role that is essential to kaitiakitanga. This means that IP law is not focused on the kaitiaki obligation to safeguard and protect the integrity of mātauranga Māori and taonga works. In addition, the law does not prevent derogatory or offensive use of mātauranga Māori and taonga works. Rather, the focus of IP law is on facilitating commercial exploitation.

Having said that, these limitations are not set in stone. New Zealand’s international treaty obligations arising under the TRIPS Agreement, for example, do not prevent this country from developing a new system of protection that more effectively meets the needs of kaitiaki. As we have said, TRIPS sets minimum standards. It is not a straitjacket.

1.5 CLAIMANT, CROWN, AND INTERESTED PARTIES’ ARGUMENTS

1.5.1 The claimants’ concerns

The claimants brought a range of specific issues to our attention. These can be broadly characterised as relating to the misuse and misappropriation of taonga works and mātauranga Māori by non-kaitiaki, and the inability of

kaitiaki to benefit commercially from the use of their own cultural creations. The claimants wish to retain a level of control over taonga works that would allow them to exercise their kaitiaki obligations. They say that because mātauranga Māori and taonga works are creations of Māori culture, those things are central to Māori identity and ought to be legally protected.

One of the claimants’ major concerns is the fact that mātauranga Māori and taonga works are not protected from misuse by non-kaitiaki.

We have said that Rerekohu Ahiahi Robertson, Piri Sciascia, and Tamatea’s descendant, Ross Scott, all of Ngāti Kere, gave evidence of their concern about misuse of the longest place name, not just in New Zealand but around the world. Mr Sciascia’s evidence demonstrated the powerful effect the name has on Ngāti Kere identity:

We reserve the right as we have always done to determine which particular version is appropriate to which situation. The name is unique and of great significance to Ngāti Kere because it is a taonga which we hold not only for ourselves but for the whole of the nation, iwi Maori, iwi Pakeha. The manawhenua has rested with us for many generations because within our whakapapa lies every connection to the name, the ancestors, and to the land. No significance lies outside our mana. It is a wahi tapu, it is taonga and Ngāti Kere are the kaitiaki.¹⁴⁹

Mrs Robertson, Mr Sciascia, and Mr Scott said that Te Taumata is more than just a place name. It is a story about their ancestors. They said Ngāti Kere are the kaitiaki of this name-story, because they are the descendants of Tamatea and have mana whenua – traditional authority – over the place itself. Mr Scott said that only the kaitiaki should have authority to use the name and to allow others to use it. This is how, in his view, the kaitiaki can ensure that the name is used with proper respect while also providing economic benefits to the iwi. Both he and Mr Sciascia argued that a system should be devised to deliver these outcomes, with Mr Sciascia observing that ‘there does seem to be a real opportunity to provide an interim body to represent Maori in the vacuum of ongoing development/commercialisation which is largely hidden from view.’¹⁵⁰

Mr Scott and Mrs Robertson pointed to examples of ‘unauthorised’ use of Te Taumata on tee-shirts, mugs, and tea towels; as a hook in television advertisements;¹⁵¹ and even in the lyrics of a song by a British band called Quantum Jump. Mr Scott told us that in an attempt to prevent such unauthorised use of the name, he applied for a trade mark over it. This application was rejected by IPONZ on the basis that a geographical name should be treated as available for all to use because it is essentially descriptive of the origin of goods or services.¹⁵² Mr Scott then added the personal name ‘Nopera’ to the place name, and the trade mark application was registered in relation to arranging and conducting tours,¹⁵³ as well as in relation to advertising; promotions; marketing; business management; publicity; and wholesale and retail of clothing, printed matter, alcohol, textiles, stone, bone, food, furniture, glass windows, glassware, sporting equipment, and stationery.¹⁵⁴ The paradoxical effect of this is that the law provides protection for an incorrect version of the name but not for the correct version. Meantime, use of the latter without permission of the kaitiaki continues unabated. Mr Scott also told us how a local publican uses the name on a bottle of wine, even after he was asked by kaitiaki not to do so. Because of the general prohibition in Māori culture of placing things with mauri close to food or drink, he described such use as extremely offensive.¹⁵⁵

Mr Scott also told us how a Levin-based outdoor clothing company uses Te Taumata on items of its clothing. His solicitor wrote to the company advising it of Mr Scott’s trade mark and asking it to stop using the name. The clothing company claimed it was using the name before the date of Mr Scott’s trade mark registration and claimed that, therefore, it had a better right than Mr Scott to use it. Mr Scott told us that he found ‘it hard to believe that a company that starts using the name in 2005 has a better right to it than me or my whanau, hapu or iwi, especially seeing as the site of the longest place name is on my whanau/hapu/iwi’s land.’ He correctly concluded that his trade mark registrations neither protect the mātauranga Māori nor assist his people in their role as kaitiaki of the name.¹⁵⁶

We have also already referred to *Ka Mate*. Te Ariki Kawhe Wineera, a direct descendant of Te Rauparaha, told us of his concerns about the misuse and commercial

exploitation of his ancestor’s composition.¹⁵⁷ Examples we have seen include a Chinese-made pen that plays the words of the haka in sped-up, high-pitched form, and a television advertisement for Fiat cars in which Italian women perform a poor version of it.¹⁵⁸ There are many other examples, both in New Zealand and overseas. Only some of them are respectful.

We put it to Mr Wineera that the All Blacks’ correct performance of *Ka Mate* had increased the renown and standing of the haka. He agreed, and noted the iwi did not wish to prevent spontaneous performances of it in the correct way and in the appropriate forums. He said that his iwi was proud to have their haka used by New Zealanders as a unique expression of emotion – for example, when national teams win at sport. Most other uses of *Ka Mate*, however, reflect an ignorance of the cultural values inherent in it; occasionally they are downright insulting. Mr Wineera wished to protect the cultural values and integrity of *Ka Mate*. He said that Ngāti Toa should decide how *Ka Mate* is exploited and, when exploitation occurs, that at least some of the commercial benefits derived from its use flow to the iwi. He argued for the recognition in law of Ngāti Toa’s kaitiakitanga in respect of the work.¹⁵⁹

There is another dimension to this stance which has as much to do with New Zealand identity as it has to do with Māori kaitiakitanga. Mr Wineera told us, ‘I think we are in a unique position in our country to lead the world like we did with the nuclear issue, and just say that we value what makes us unique and we want to protect it, and we want to see its use determined by ourselves and not by others.’¹⁶⁰

Within the existing IP framework, *Ka Mate* is considered to be in the public domain, and is therefore freely available for anyone to use. Had copyright law existed when it was first created, its lyrics would have qualified for copyright protection. However, such protection would have been only for a limited period of time – that is, the life of the author plus 50 years. The claimants say that the limited duration of copyright runs counter to the perpetual nature of the kaitiaki relationship. Copyright law therefore provides inadequate protection for their interests in taonga works such as *Ka Mate*.

We were told that in February 1999, a member of Ngāti Toa filed with IPONZ an application to trade mark



28th (Māori) Battalion members who had fought in Greece perform a haka for the King of Greece at Helwan, Egypt, on 24 June 1941. On both the battlefield and the sporting field, the haka has come to symbolise Māori martial prowess, New Zealand identity, and team unity.

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



Ka Mate in order to circumvent the limited duration of copyright protection.¹⁶¹ To date, IPONZ has not granted that application, although IPONZ has now accepted an application in the name of Te Runanga o Toa Rangatira Incorporated for the registration of the trade mark 'KA MATE'. It is not yet registered. The application has been opposed.¹⁶² Other applications have been made for trade marks relating to the ngeri, and have also been opposed. They include a stylised logo using the words 'KA MATE KA ORA'¹⁶³ and the phrase 'KA ORA'.¹⁶⁴ The register records three 'Cancelled/Declared Invalid/Revoked/Abandoned' applications for the whole ngeri.¹⁶⁵

In 2009, after the completion of our hearings, the Crown and Ngāti Toa settled a number of Treaty claims in principle. In the settlement letter, the Crown promised that it would 'record the authorship and significance of the haka' to Ngāti Toa.¹⁶⁶ This does not amount to a promise to protect Ngāti Toa's interest in *Ka Mate*, but it

does acknowledge that there is a significant issue to be addressed.

Some claimants raised similar issues in respect of the unauthorised use of images of Māori people and taonga. One of the original claimants, Te Witi McMath of Ngāti Wai, recounted how he:

once saw my tupuna's photo on the top of a biscuit tin. My aunty was extremely angry. No permission had been given by our family for the photo let alone putting it on a tin of food. The photo of our ancestor, a fighting chief, on the lid of a biscuit tin was killing the mana of that person. Kai or food takes away the dimension of sacredness.¹⁶⁷

Another witness, Angeline Greensill, told us of an occasion when she stopped at an antiques shop in Bulls which had for sale several pictures of old kuia with moko. She said she:

asked the shopkeeper if she had a portrait of Eva Rickard [a noted hapū leader who gained national prominence in the return of Māori land at Raglan Golf Course] for sale . . . I told her that I was a daughter and asked her to remove the portrait from sale as it was a fraudulent copy, given the fact my mother hadn't sat for it and it had been copied from a *Waikato Times* photograph.¹⁶⁸

Apirana Mahuika of Ngāti Porou told us of his concerns about the photographic reproduction of images of taonga such as Mt Hikurangi, which is sacred to his iwi. It was not the intention of Ngāti Porou to deny anyone the right to reproduce the image of Hikurangi. However, the iwi wished to control the 'commercial exploitation of the images and symbols of Hikurangi Maunga'. Dr Mahuika noted: 'We cannot of course, prevent members of the general public taking a photo of Hikurangi for their photo album collection or other private use and nor would we wish to do so.'¹⁶⁹

At the heart of such concerns is the claimants' wish to exercise some measure of control over those things that are most precious to them, whether that be a right to prohibit inappropriate use or a right to have some say in how those things are exploited commercially.

A significant aspect of all these examples is the claimants' inability to prevent the offensive or derogatory use of their taonga works and mātauranga Māori – for example, as illustrations on food packaging or cooking utensils. The moral rights provision in the Copyright Act offers very limited protection against derogatory use, as it applies only to works that are copyrighted. Outside copyright protection, there is no mechanism for Māori to inhibit such uses.

Moana Maniapoto gave evidence about her documentary entitled *New Zealand Up for Grabs* which features numerous examples of the use of taonga works without consultation with or the consent of kaitiaki.¹⁷⁰ One example was a Sony video game in which tā moko was mixed with other markings to form a generic warrior-style character. Another example was the proposed use of culturally significant Māori names on the Lego Bionicle toy series. In the latter example, a spokesperson for Lego expressed regret at causing offence, and said that the company, in

conjunction with Māori representatives, had changed some of the names. The documentary also included examples of the use of taonga works with kaitiaki consent, including the use of Māori symbols on 'Moontide' swimwear.

We have referred in section 1.2.2 to the evidence of Mark Kopua, a contemporary tohunga tā moko. He told us tā moko expresses the wearer's whakapapa and tribal identity. He said it is inappropriate for people who do not have these things to wear tā moko. However, he acknowledged that modern tā moko designs in a more generic Māori style can be made available to all. He called this kirituhi – skin marks or etchings. He said this is not tā moko because it lacks whakapapa and kōrero. He regarded it as offensive for international celebrities and companies to co-opt tā moko without regard for its deep personal and cultural significance:

There is a need for regulation to prevent non-Māori who want to wear the moko as a fashion statement or to help sell records or magazines or branded apparel. This is because their motivation differs radically from those descendants of moko wearers in the past . . . I want a law that would prevent a Mike Tyson or a Robbie Williams or large non-Māori companies from wearing and exploiting the moko.¹⁷¹

In much the same way that French champagne makers object to the use of the name champagne for sparkling wine, Mr Kopua is opposed to kirituhi imitations being given the credibility of the name tā moko.

Te Warihi Hetaraka of Ngāti Wai put the broad issue to us this way. He said that current IP law gives others the licence to run rough-shod over what Māori hold sacred. He explained that:

There are many designs that relate to all aspects of knowledge and when arranged onto a poupou, poutokomanawa or maihi, told the history of a particular ancestor or our cosmic understanding of how different species of plants and animals came into being or how we acquired the technology to build meeting houses, canoes, fishing nets etc etc.

In fact they are more than just designs or just art. They are stories in themselves – in this regard they are akin to

calligraphy. They are our form of writing and are therefore beyond just design. They are our written form of our history and one of the reasons why whakairo is considered sacred.

There are designs that could only be used for certain purposes eg: The Taratara-a-kai is a pattern that should only be carved on panels specifically made for a Pataka and should not be carved on Taiaha, or any of the other weapons or on Poupuu and Tekoteko meant for a meeting house.¹⁷²

Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa summed up claimants' desire to prevent the offensive use of their taonga works in this way:

The Crown must actively protect taonga works from use by persons other than the kaitiaki, unless the kaitiaki has given prior informed consent to such use. There is increasing evidence of the use by unauthorised third parties of taonga works in a manner inconsistent with and often offensive to customs and values of the Tai Tokerau claimants. For example, the use of the carved lintel of Te Rarawa (used by Te Rarawa as their logo) in a restaurant in Hawaii.¹⁷³

Another matter the claimants raised was the fact that non-kaitiaki are able to use and even acquire rights in taonga works and mātauranga Māori without the consent of, or any benefit accruing to, kaitiaki. That is, third parties can use works and knowledge that are the creations of Māori culture and acquire IP rights in those uses. These new right holders may even, in turn, exclude kaitiaki from some uses of the IP protected work, such as making a copy of that work, without permission of the IP right holder.

The republication of Elsdon Best's various works in book form exemplifies one of the ways in which a third party rather than the original kaitiaki may acquire copyright protection over traditional stories and knowledge. We have referred to Best's works above, and they were described to us in the claimants' closing submissions. These new publications from Te Papa Press state that: 'Where copyright applies the copyright owner is Te Papa Press.' They give no indication that copyright is claimed by Te Papa Press on behalf of the original kaitiaki of the information.¹⁷⁴

As far as orally transmitted works are concerned, we have already indicated that the person who first writes or records a mōteatea, for example, will be able to claim copyright, although the mōteatea itself, and its underlying mātauranga Māori, may have existed for many generations.

The claimants also seek to use mātauranga Māori and taonga works to enhance Māori culture and Māori economic development. But the existence of mātauranga Māori and taonga works in the public domain does not entitle others to use them in any way they wish. The evidence of musician and songwriter Moana Maniapoto addressed this point. She spoke of how she had copyright protection in her musical works, but that protection did not extend to the mātauranga Māori in her songs. She regarded such protection as vital for her people because the mātauranga Māori could otherwise be inappropriately used.¹⁷⁵

Counsel for the Crown asked Ms Maniapoto, 'Don't you think that the people who have the knowledge have a responsibility to avoid it getting in the public domain?'¹⁷⁶ Ms Maniapoto replied:

Well how on earth are you going to stop that? I mean, you know, 'Ka mate, Ka mate' is a classic example, so what, does Ngāti Toa just do Ka mate around its marae and then hope there is not a camera around there to record it, and so you are all doing the haka secretly in your meeting house? . . . that is a ridiculous scenario . . . We are not saying that we don't want our information and our waiata and things to be exposed, you know, for people to hear them, I mean that is my job as a musician, I write songs, I sing songs in Māori, I take them round the world, I try and make people buy my CDs, but what we are saying is that we want to have some role in controlling the use of those taonga . . . we want to have some role in authorising the use of things that are very important to us that go [to] the heart of ourselves as Māori people.¹⁷⁷

Ms Maniapoto stressed that this is not about trying to hermetically seal Māori culture and prevent others from enjoying what it has to offer. Rather, it is about recognising the ongoing nature of the kaitiaki interest in taonga

works and mātauranga Māori. This means preventing others from free-riding on Māori culture by acquiring private rights in it; and giving kaitiaki control over the use of taonga works and mātauranga Māori and receiving benefits from any commercial use. That benefit might be in the form of acknowledgement of the source of the taonga work and embodied mātauranga Māori, or the benefit might be a financial one, or both.

Dr Darrell Posey also addressed this point. He argued that, 'There are ways . . . in which publication of traditional knowledge may proceed with the prior informed consent of the holders of that knowledge and with certain other conditions attached.'¹⁷⁸

From a legal perspective, the claimants were concerned that the minimum standard requirements of the TRIPS Agreement prevent New Zealand from providing protection for the kaitiaki interest in taonga works. In their 1995 applications for an urgent hearing, claimant counsel argued that the TRIPS model failed to recognise and protect Māori interests. They also argued that consultation with Māori over negotiation of the TRIPS Agreement had been inadequate.¹⁷⁹

A critique of the TRIPS Agreement prepared for claimants contextualised opposition to the Agreement from indigenous groups, environmental groups, and developing countries:

Of particular concern was its perceived role in extending the power and influence of industrialised countries over developing countries and indigenous peoples, undermining national sovereignty and widening the scope of international intellectual property law to the social, cultural and economic detriment of developing countries and indigenous peoples.¹⁸⁰

In closing, counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa noted claimant opposition had not dimmed:

The key issue for the claimants is that the IPR [intellectual property rights] system is limited to the protection of *economic and commercial* rights. It was not designed to protect *cultural values and identity* associated with mātauranga Māori.¹⁸¹

1.5.2 The Crown's response

The core of the Crown's position was that protecting what the claimants seek is impractical, and has consequences for New Zealand and New Zealanders that must be considered.

Counsel for the Crown argued that 'One of the notable aspects of this claim has been the wealth of evidence of publication by, or with the assistance, approval or endorsement of, Māori of material which would fall within the claimants' definition of mātauranga Māori'.¹⁸² On several occasions counsel suggested that because the claimants were responsible for making the taonga works publicly available they must have anticipated that they were there for everyone to use. The Crown's view was that taonga works and mātauranga Māori have been freely available for others to use because they are in the public domain, and it is now too late to pull them out of the public domain and re-impose IP rights on them.¹⁸³

The Crown also argued that once mātauranga Māori is in the public domain it is difficult to control its use. The Crown submitted that there is neither a practical way nor any need to protect mātauranga Māori once it is published. Further, the Crown said that trying to pull mātauranga Māori back from the public domain would undermine other interests. Those interests include the people who have and continue to make use of taonga works in the public domain, and other rights such as freedom of expression.¹⁸⁴

Mark Steel, who gave evidence on behalf of the Ministry of Economic Development, focused on the economic policy and rationale of IP. He told us that these policies were designed to encourage the economic development of New Zealand. This included 'fostering entrepreneurship and innovation in New Zealand firms', developing 'policies to ensure that New Zealand firms are well placed to take advantage of international opportunities', and 'attracting international investment in creative business endeavour'.¹⁸⁵

Without the protection that copyright provides, other people could take a free ride on the creator's or owner's efforts. Creators, including, artists, authors, and musicians, often create their artistic and literary works for the personal satisfaction of making such expressions

Elders wait to welcome home the taonga works in the *Te Maori* exhibition on 16 December 1987.

Professor Hirini Mead told us that *Te Maori* was a 'watershed' in the treatment of Māori art and 'a voyage of rediscovery'. 'One outstanding feature of *Te Maori*, was that for the first time, Māori people had a measure of control over their artistic heritage.'



for others' enjoyment and entertainment. Without the economic protection that IP law provides, creators of paintings, books, music, films, and other creative works will have reduced or perhaps no incentive to make their works available for others. Publishing companies, recording companies, and other distributors of IP works, who are also often owners of copyright works, would not have an incentive to invest in making creative works widely available.

Mr Steel conceded that international trade law (including the TRIPS Agreement) has not foreclosed the Crown's ability to 'provide mechanisms to protect Maori traditional knowledge from misappropriation and misuse within the IP regime'.¹⁸⁶ He acknowledged the importance of mātauranga Māori for New Zealand's economy as a whole, and noted that it is 'used to a significant extent by a range of Maori and some non-Maori businesses' in areas such as 'media, entertainment, tourism, food products and health'.¹⁸⁷ Counsel for the Crown agreed that copyright legislation has limitations in respect of mātauranga Māori: 'It does not provide the protection sought by claimants. It was not intended to.'¹⁸⁸ Mr Steel told us that changes to the IP system were only part of the solution and 'unlikely to have a significant bearing on

further Maori economic development utilising traditional knowledge'.¹⁸⁹

Mr Steel also gave evidence about the Ministry of Economic Development's Traditional Knowledge Work Programme, which was launched to consider the relationship between IP rights and traditional knowledge systems, as well as the economic potential of mātauranga Māori. According to a study commissioned by the Ministry to assess the economic significance of mātauranga Māori, the revenue generated by the six case-study businesses was in excess of \$15 million. The study found that mātauranga Māori was used in many different ways and across all stages of product life, from production to marketing. At whatever stage mātauranga Māori was used, it had 'economic potential, especially for Maori'. The Ministry's response to the study was that it 'reinforced MED's focus on traditional knowledge as an economic development initiative'.¹⁹⁰

The Crown also speculated that providing additional protection for taonga works might undermine creativity and economic development in New Zealand. It was concerned that businesses should not be put off investing in New Zealand because protecting taonga works would make that too hard or risky.



Te Waka Huia perform in St Mark's Square as part of the Venice Biennale, 2009. The live Māori cultural performances that accompany New Zealand delegations and events abroad have become important identifiers and points of difference for 'New Zealand Inc.' overseas. Māori are proud of the role their traditions play in the nation's cultural life, but the claimants were keen to ensure that these are presented respectfully and with proper acknowledgement.

The Crown emphasised the importance of complying with international agreements in respect of intellectual property. Gerard van Bohemen, then director of the Legal Division and international legal adviser for the Ministry of Foreign Affairs and Trade, stressed the importance of trade agreements to the economic progress of New Zealand. This importance means that complying with the TRIPS Agreement, as an agreement of the WTO, is vital.¹⁹¹ In addition to the WTO agreements, New Zealand has entered into various free trade agreements, known as FTAs, which include provisions on IP.¹⁹² The FTAs that New Zealand has entered into most recently contain clauses preserving the Crown's position in relation to Treaty of

Waitangi issues, and it is current Government policy to include similar clauses in all FTA negotiations.¹⁹³ Mr van Bohemen made it clear to us that because of the importance of New Zealand's membership of the WTO and commitments to its FTA partners, any measure to protect the claimants' interests in taonga works must comply with the TRIPS Agreement. In this regard he acknowledged the minimum standards approach of the TRIPS Agreement.¹⁹⁴

As we have said, the claimants were concerned that the TRIPS Agreement might prevent New Zealand from responding to the needs of kaitiaki. The Crown's acknowledgement that there can be protections over and above TRIPS recognises that it is theoretically possible to protect

the claimants' interests in New Zealand law and to comply with the TRIPS Agreement, as long as there is will to do so. However, as Mr van Bohemen contended, those protections must either be outside of the scope of the TRIPS Agreement (often called *sui generis* or stand-alone protection) or, if covered by the Agreement, must be additional to its minimum provisions (see also section 1.3.3).

1.5.3 Interested parties' concerns

Several of the interested parties who gave evidence approached the issues before us in quite a different way from either the claimants or the Crown. Among them was Michael Smythe, who spoke both for his own company, Creationz Consultants, and with Kathy Veninga and Carin Wilson on behalf of the Designers Institute of New Zealand Incorporated. Mr Smythe was the convenor of the Institute's special Wai 262 working group, Mr Wilson its president, and Ms Veninga the Institute's executive officer.

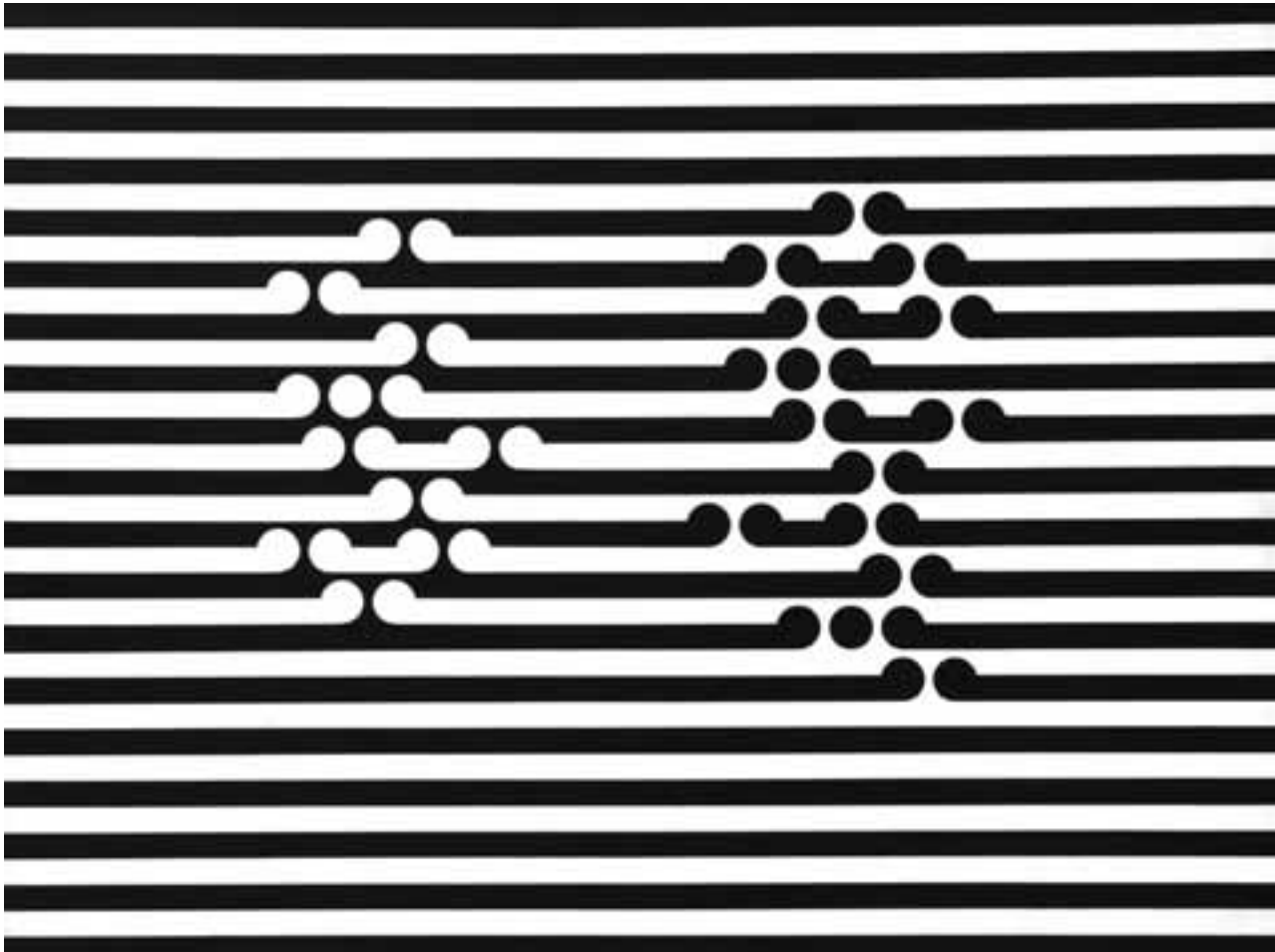
They described for us some of the ways contemporary designers incorporate aspects of Māori design into their work to produce innovative, identifiably 'New Zealand' designs – in logos, corporate branding, architectural design, and so on. They also provided us with a number of examples of such works. One of the most celebrated was Gordon Walters' *Painting No 1*, 1965. Mr Smythe also discussed the widely recognised stylised koru created for Air New Zealand by Bernard Roundhill Studios in 1965 as a way of blending Māori culture, the sternpost of a canoe, and modern jet-age travel in a single design.

Mr Smythe argued that artists and designers must have freedom to use and develop Māori symbols and designs as they see fit. He used Gordon Walters' *Painting No 1* as an example:

Walters was vilified for a period as an appropriator, though his work now enjoys the respect I believe it deserves. I have always argued that he was honouring the artistic heritage of the country he was working from as he engaged in international discourse. By using Maori imagery as his starting point, rather than directly copying, he was 'being inspired by' rather than plagiarising.¹⁹⁵

Logos by Michael Smythe. Mr Smythe considered that 'biculturalism requires clarity about its components rather than blending'. In regard to the PrimeHealth logo he consulted the Māori Language Commission and obtained the views of various iwi. Tangata whenua strongly supported the Māori elements in the design.





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

Instead of seeing such work as a misappropriation of Māori culture, he argued that it can be seen as important to national identity – ‘an eloquent representation of an integrated bi-cultural nation.’¹⁹⁶

In his view, ‘the least helpful approach is for Pakeha designers to put referencing Maori designs in the “too hard basket” – that will lead to mono-cultural representations of New Zealand in areas such as social services, tourism and popular culture.’¹⁹⁷

The free flow of ideas and traditions in art is a topic with a vast scholarly literature.¹⁹⁸ Other witnesses were also alive to these debates. Jacob Scott, a tutor in Visual Arts and Design at the Faculty of Arts and Social Sciences at the Eastern Institute of Technology, appearing as a witness for Ngāti Kahungunu, spoke to us at some length not only about how the creative flow of ideas can enrich national culture but also about the dangers of restricting Māori art and design to a limited range of expressions:

Often we mistake particular colours like red black and white and shapes like the koru fern frond form, and design solutions like tuku tuku panels and house shapes or waka as the tradition. Culture needs to be able to evolve. We now have a new indigenous mix of people who belong to Aotearoa. We really have no right to lock images onto a group of people and expect them to conform.¹⁹⁹

He too referred to Gordon Walters' work:

There has been considerable debate over the images of Gordon Walters, a Pakeha artist who has explored the composition and use of particular graphic forms that can be seen as developments of some of the images we have grown up with. I mean who really cares – isn't he developing the image? Are they not anyway like words in a language there to be used and developed? And isn't it what you say with those words that is important anyway? It is the stuff around the words that has to be there . . . I say go and use them – adapt them – apply them – contribute to the evolution. What we need to be able to think about and build is the next step into the future.²⁰⁰

Neither Mr Smythe nor Mr Scott was suggesting that those wanting to incorporate elements of traditional Māori design into their work should ride roughshod over the values that underpin those traditions. But, said Mr Smythe, 'I do believe that "treading on eggshells" is as counter-productive as "wading in with hobnail boots". Designers need to professionally confront issues of cultural identity and expression and take full responsibility for the work they produce.'²⁰¹

That said, the boundaries around what might be called appropriate cultural mixing are not always easy to pin down. As part of his submission on behalf of the Designers Institute of New Zealand, Mr Smythe showed us, for example, several images of tiki that designers have used on a range of high-fashion goods from shoulder bags to tee-shirts, cushion covers, and contemporary jewellery. He asked: 'Is this offensive appropriation or celebratory iconography? Is it okay if it is done by Maori designers and not okay if it is done by non Maori?'²⁰²

One way of answering this kind of question, he said,

would be to establish clear and accessible forums for discussion and consultation among all those with an interest in a particular work or design project. Artists would appreciate easy access to authoritative advice on consultation and collaboration, as well as on offensive and inappropriate uses of taonga works and mātauranga Māori. 'A willing, equitable and inclusive exchange between Maori and Taiwi in creative industries would be a constructive approach.'²⁰³ In many cases, the problem is simply that many people find it difficult to know who to consult.

The Designers Institute of New Zealand laid out for us their experience of working collaboratively with Māori on several major design projects which only confirmed 'the necessity and value of entering consultative processes with kaitiaki at the point of initiation or conception – in order to honour the role of kaitiaki in allowing them to determine the extent and nature of any relationship or involvement they may seek.'²⁰⁴

The consultation issue was also raised by graphic designer and lecturer Victoria Campbell, of Ngāti Haua and Whanganui. Ms Campbell is a quiltmaker who incorporates the symbol of the koru into her designs. She is, however, uncertain whether and from whom she should obtain consent to use the koru in her work. She also told us of her concern that her patterns not be used in an inappropriate way on commercial products such as underwear or toilet paper. She favoured the concept of practical guidelines for artists wishing to use Māori designs in their work so as to be certain that appropriate consent has been given, and of new legal sanctions against the offensive misappropriation of Māori images.²⁰⁵

In essence, then, these witnesses emphasised the importance of recognising and respecting the place of traditional Māori design in contemporary art, design, and architecture, but urged that these elements not be constrained by an overly protective IP system. They also stressed the need for clear and accessible guidelines for all those with an interest in this field – only in that way, they said, can:

designers (Māori and non-Māori), clients and Mana Whenua . . . work productively together to increase the integration

and visibility of our culture – our taonga – as a vital and central element of our national cultural fabric and informer of our national design culture and aesthetic.²⁰⁶

1.5.4 Summary

We have seen that the claimants raised a number of concerns in respect of the use and misuse of taonga works and mātauranga Māori. At one end of the spectrum some claimed rights of control over any use of taonga works and mātauranga Māori, irrespective of whether those things are in the public domain or not. They opposed any allocation of IP rights over such works to anyone other than kaitiaki. At the other end of the spectrum, the complaint was not an absence of control, but rather the various ways in which some taonga works have been used in an offensive way. These claimants said that such uses must be prohibited. The common element in these arguments was the desire of kaitiaki to maintain their longstanding relationships with particular taonga works and their underlying mātauranga Māori.

The Crown acknowledged that the IP regime does not protect the kaitiaki interest in taonga works and mātauranga Māori, nor does it guard against the misappropriation or offensive use of them. Indeed, the Crown accepted that it was never designed to do so. Instead, IP law treats taonga works and mātauranga Māori that do not or no longer qualify for IP rights as part of the public domain. They are therefore freely available for anyone to use as they see fit. The Crown argued that to provide greater protection for taonga works and mātauranga Māori within the IP system could inhibit research and cultural development. On the other hand, the Crown also accepted that New Zealand is not prevented by the international IP framework from providing some protection for taonga works, and the law could accommodate the kaitiaki interest if the Government so wished.

Interested parties such as the spokespeople for the Designers Institute of New Zealand and designer and witness for the claimants Mr Scott took a different view again. They argued that overly restrictive protections for taonga works and mātauranga Māori would ‘lock up’ Māori culture, discourage innovation, and hamper the creativity of the numerous contemporary artists and

designers whose work expresses a uniquely ‘New Zealand’ aesthetic. They urged, however, that the important role of kaitiaki be recognised in formal consent and consultation processes, and acknowledged that offensive uses of taonga works and mātauranga Māori are inappropriate in any circumstances.

All the parties before us acknowledged that the IP system in relation to copyright, trade marks, and related rights is designed primarily to encourage commercial exploitation of a creator’s work, and not to accommodate the interests of kaitiaki in their taonga works or mātauranga Māori. For that reason, the kaitiaki interest is not taken into account in the various legal settings of that system, and there is not enough guidance available for those wishing to use taonga works or mātauranga Māori in their work to know how to do so appropriately. Before we look (in section 1.7) at whether and how these two sets of interests might be brought together, we turn to a more detailed discussion of the extent, nature, and relevance of the kaitiaki interest.

1.6 THE RIGHTS OF KAITIAKI IN TAONGA WORKS AND MĀTAURANGA MĀORI

So far, we have suggested that domestic IP law provides only very limited protection for Māori cultural expressions. In particular, it fails to prevent the misappropriation and offensive use of taonga works and mātauranga Māori. We have emphasised that international IP law does not constrain New Zealand’s ability to address such inappropriate use through domestic law. We have also said that our national debate is far from unique. In fact, various international institutions have developed frameworks to prevent unauthorised exploitation of traditional cultural expressions and to give effect to customary rights and responsibilities.

In the following section, we ask whether the Treaty of Waitangi is relevant at all to the protection of taonga works and mātauranga Māori. We analyse whether the effect on taonga works of the current law of copyright and trade marks (and related rights), with its emphasis on commercial use through property rights, is Treaty compliant. We will also consider whether the principles of the

Treaty of Waitangi go so far as to recognise Māori rights in taonga works.

1.6.1 The Treaty of Waitangi

As the Ngāi Tahu land claim Tribunal so clearly set out 20 years ago, the cession by Māori of sovereignty to the Crown was in exchange for the protection by the Crown of Māori rangatiratanga. The Tribunal said:

This concept is fundamental to the compact or accord embodied in the Treaty. Inherent in it is the notion of reciprocity – the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands and all other valued possessions.

Each party to the Treaty gained, but not without each making a major concession to the other. While, as we have seen, legal sovereignty is exclusive and exhaustive, this is not to say it is absolute. It is clear that cession of sovereignty to the Crown by the Maori was conditional. It was qualified by the retention of tino rangatiratanga.²⁰⁷

Here the Ngāi Tahu Tribunal affirms that the Treaty contained the template for a central authority with a mandate to make laws governing everybody – an entirely new idea to Māori. This is the sovereignty ceded by Māori in article 1 of the English text and the kāwanatanga which they ‘tuku’ in article 1 of the Māori text. But this was not an unconditional cession. It was made on condition that certain fundamental Māori rights would be protected by the new authority.

The relevant parts of article 2 of the English text of the Treaty are as follows:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

The crisp and concise guarantee to Māori of exclusive and undisturbed possession of their property is consistent with the British legal tradition. The choice of the concept

of property as the vehicle through which Māori rights would be recognised is entirely predictable. In British history, law, and commerce, almost all rights of any importance were property rights – including, by this time, IP rights. But we speak of intellectual *property* rights in this way because they are a relatively narrow and precise category of rights. As we have seen, for example, copyright does not exist in the ideas underlying a creative work, still less in the culture or knowledge base from which the ideas have come. Copyright is an exclusive right only in the work itself. The style of a painting or the ideas in a book can be copied freely, but the painting or the book cannot. The language of exclusive rights is not apt for cultural knowledge or ideas – their boundaries are too elusive and they are in a constant state of change. Exclusive possession of mātauranga Māori in a modern context is impossible. Nor can any culture – Māori culture included – be exclusively possessed. These things are not like land or other physical resources. Nor are they like the fixed words and images of copyright and trade marks. They exist in the hearts and minds of the communities that created them. In fact, even if it were possible to grant exclusivity to a people’s cultural and intellectual tradition so that only they could have access to it, we think the act of doing so would be the death knell of that tradition. These things grow and evolve at the margins, in response to external stimuli. We saw that kind of cultural growth after Māori arrived in Aotearoa. And although British colonisation inflicted deep injuries on Māori society, the introduction of literacy, iron tools, and Christianity generated a wave of intellectual and artistic innovation that is still being felt today. Building a legal wall around mātauranga Māori would choke it.

On the other hand, taonga works themselves can be exclusively owned. If it is a physical work like a tribal wharenui, there will be a whānau, hapū, or iwi with traditional rights of ownership. A mōteatea is not an inherently physical thing, but it too will have a traditional owner. It seems no great stretch to recognise that traditional owners should also be able to control reproduction and publication of images of these taonga works. There are certainly dissonances between Māori concepts of ownership and IP law: copyright does not recognise kaitiakitanga or perpetual rights, and the work must be

fixed. But taonga works are not so different from books, paintings, and sculptures, and IP law has long held them to be entitled to exclusive rights.

The corresponding Māori text of the Treaty provides: 'Ko te Kuini o Ingarani ka wakarite ki wakaae ki nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.' This text takes a completely different tack. It does not speak of exclusive and undisturbed possession or of ownership. Instead, it refers to te tino rangatiratanga – literally, the greatest or highest chieftainship. In substance, this conveys the idea that the rights of authority and control then exercised by the tribal leaders will be protected. Those rights are said to apply to 'o ratou taonga katoa' – all the treasured things of Māori tribes ('nga hapu') and all Māori people ('nga tangata katoa').

There can be no doubt that taonga works are treasured things – taonga within the meaning of article 2 of the Māori text. Thus, the relevant Treaty guarantee to Māori is one of authority and control over their taonga works. It might be said that this guarantee is less precise than its English counterpart. Exclusive and undisturbed are absolute ideas, while authority and control are matters of degree. But in the area of taonga works and mātauranga Māori, authority and control are much more useful concepts. They speak more directly to the issues of particular concern to the claimants, who by and large did not seek exclusive and undisturbed possession of their taonga works or mātauranga Māori. Being proud of Māori culture and identity, the claimants wanted to share these things with the world. But they also wanted sufficient control to protect their taonga from misuse and to derive economic benefits where they considered this to be culturally appropriate.

From both the terms and the underlying purpose of the Treaty bargain, we can discern two propositions. First, taonga works are covered by the Treaty reference to taonga. Secondly, the approach of the Māori text, which emphasises authority and control in pursuit of a Treaty-consistent objective, is to be preferred over the more absolute approach of the English text.

We are aware that the English text is wide enough to cover exclusive rights akin to IP rights in taonga works. By 1840 English law protected such rights and, as we have

said, the exclusivity guarantee in article 2 of the Treaty was also present in IP law at the time. In addition, the English text recognises that such rights can be 'collectively . . . possess[ed]' and that they can endure 'so long as it is their wish and desire to retain the same in their possession'. These are, we admit, powerful guarantees. But in the context of mātauranga Māori and taonga works, they have serious limitations. Exclusive and undisturbed possession is an inflexible idea in that it permits only black or white. As we have said, mātauranga Māori, which is the foundation of taonga works, cannot practicably be possessed in this way. Much of it is already in the public domain. If at some point in the past the possession of mātauranga Māori was exclusive and undisturbed, it is no longer possessed that way but is now shared. The only logical construction of this guarantee is that when exclusivity is lost, it can never be regained. Once mātauranga Māori is put into the public domain, it is not possible to retrieve it, for that would require a mechanism by which people could be made to 'un-know' what they have learned.

Even in the area of taonga works, exclusive possession can be seen as overly rigid. Sometimes possession of a taonga work will have been given up voluntarily for valuable consideration in an earlier generation. Sometimes there are disputes about historical transactions but the passage of time makes it difficult to resolve who is right. Sometimes possession has long been lost and no one remembers how. In these cases, Māori tend not to get caught up in the winner-takes-all approach of arguments over who is entitled to exclusive possession of the work and its associated IP. They will simply say they retain kaitiakitanga over them.²⁰⁸ This may involve, for example, non-possessionary rights to be consulted over how the work is displayed, copied, performed, broadcast, or otherwise exploited commercially. Such rights are not contemplated in the English text of article 2, but they can be easily accommodated within the far more flexible concept of rangatiratanga.

Finally, it is important to remember that the claimants did not argue for IP-style rights in their taonga works in order to maximise the economic value of these works. Many of the claimants did not reject out of hand the notion of economic development or deny that taonga works could contribute to that development (though we

acknowledge some did). For most, their point was rather that both economic development and the recognition of rights in taonga works are means to a more important end, and not ends in themselves. The underlying objective was the survival and growth of Māori culture and identity, and with it iwi and hapū identity.

Once again, these ideas fit perfectly with rangatiratanga. We have said that rangatiratanga conveys concepts of authority and control – but, in truth, there is more to rangatiratanga than this. Its root word is rangatira, meaning tribal leader – literally, one who weaves together (ranga) a group of people (tira). So rangatiratanga carries expectations about right behaviour, appropriate priorities, and ethical decision-making that are deeply embedded in Māori culture. For example, rangatira would be expected to value kinship, respect the tapu and mauri of the natural elements surrounding the community, and above all be the embodiment of kaitiakitanga. Rangatira who behave in this way are said to have great mana. Thus rangatiratanga is imbued with ‘proper’ values. To this extent, it can be seen as similar to ‘sovereignty’, its English counterpart. The root word of sovereignty is sovereign, and it too comes laden with expectations, born of its history and culture, that the incumbent will rule wisely, justly, and fairly. The point is that the underlying objective of the claimants in respect of taonga works – the survival and growth of their culture – is also the underlying ethos of the rangatiratanga guarantee. Exclusive and undisturbed possession, on the other hand, does not convey these values. In short, the Māori text implies that control is more important than possession. In the context of taonga works and mātauranga Māori, we think that approach is entirely appropriate.

We consider therefore that the English-language guarantee of exclusive and undisturbed possession of ‘their . . . properties’ lacks the flexibility necessary to address Māori interests in taonga works and mātauranga Māori. We prefer the more accommodating, if less precise, language of the Māori text’s recognition of Māori rangatiratanga over ‘o ratou taonga katoa’ – all of their treasured things.

In the context of modern IP law, the principle of tino rangatiratanga applied to ‘o ratou taonga katoa’ must mean simply that the legal framework should deliver to

Māori a reasonable measure of control over the use of taonga works and mātauranga Māori. Such a standard is obvious and easily stated, but the more difficult question is how far that rangatiratanga authority should go and what is reasonable in this complex subject. Is it now too late, as the Crown argued, for any more than the limited protections already in place; or, as the claimants said, should the law go further?

We think these questions can be answered only after a careful three-stage assessment. An initial step is to understand the relationship between the kaitiaki and the particular taonga work or mātauranga Māori in question. Once that relationship is properly understood in its cultural context, the next step is to identify any other valid interests in the taonga work or mātauranga Māori, and then to balance them against those of the kaitiaki. It is inherent in this process that there is no generic answer to fit all circumstances. Kaitiaki relationships with their taonga and mātauranga will all be different. They will vary according to the priorities of kaitiaki, the nature of the taonga or mātauranga, and the history of the relationship. Some taonga and some mātauranga will be more important than others, and some relationships will admit the exercise of non-kaitiaki interests while others will not. Similarly, other interests will sometimes conflict with those of kaitiaki and sometimes they will not, and so on. This means inevitably that the nature and extent of kaitiaki rangatiratanga can be properly resolved only on a case-by-case basis. We acknowledge that this approach creates less certainty of outcome, but it has the important advantage of maximising flexibility and requiring interest holders to explore ways in which all interests can be accommodated to the greatest extent possible. We think that a system like this, rather than a system of generalised solutions, will limit conflict and increase cooperation.

1.6.2 A question of relationship

(1) *The characteristics of taonga works*

We have referred several times in this chapter to the longest place name and its kaitiaki, Ngāti Kere; the discipline of tā moko and the tohunga who are its kaitiaki; Te Rauparaha’s haka *Ka Mate* and its kaitiaki Ngāti Toa; and the revered collection of mōteatea or song-poems

compiled by Sir Apirana Ngata. We heard evidence of many other taonga works – for example, the famous carved ancestral house at the Museum of New Zealand Te Papa Tongarewa called Te Hau ki Tūranga and its kaitiaki, the iwi of Rongowhakaata.²⁰⁹ Most examples are taonga works; some, like *Ngā Mōteatea*, contain taonga works; a few, like Te Hau ki Tūranga, encompass both.

All are products of mātauranga Māori, but they have certain other key characteristics in common. The obvious one is that they are the intellectual creations of Māori, whether living or dead. A related characteristic is that all of them have kaitiaki. That is, there are living individuals or communities who must care for these works in accordance with the directives of tikanga Māori. Taonga works have kaitiaki for very important reasons. First, they have whakapapa – the quintessential element of anything important in te ao Māori. By this we mean taonga works bring ancestors to life. The ancestors may be the composers or artists who created the works or, more usually, the ancestors will be embedded in some way in the work. Te Hau ki Tūranga is one of the most celebrated examples of this, though there are thousands more. The general point was explained to us by Professor Hirini Moko Mead, acclaimed Māori leader, academic, art expert, kaumatua, and now a member of the Waitangi Tribunal.²¹⁰ He said:

One of the reasons why there is a high spiritual aspect to some taonga is because they represent an ancestor who is related by whakapapa (genealogy) to a group of descendants. For the living relatives the taonga is more than a representation of their ancestor; the figure is their ancestor and woe betide anyone who acts indifferently to their tipuna (ancestor). It became a commonplace phenomenon during Te Māori to see Māori elders and many of the young guides embracing their ancestor, or bringing green leaves to place at their feet, or speaking to them. This sort of behaviour towards taonga whakairo [carved taonga] indicates an entirely different attitude to art objects from that of most in western countries.²¹¹

The second reason is these ancestors are brought to life in a context – that is, the taonga work tells an important story or teaches an important lesson, using the ancestor

as its fulcrum. In Māori terms, taonga works have kōrero. It is these characteristics that cause Māori to say that taonga works have mauri – they live – and that the primary obligation of kaitiaki is to protect the mauri of the taonga work. Professor Mead explained the mauri element in this way:

The most telling attribute of taonga is their spiritual essence or force. This is a quality which is described in the korero associated with a taonga and which one accepts or rejects according to one's experience and faith. Many people who visited Te Māori said that they could feel the spiritual force of some of the taonga. Over the four years of showing Te Māori it soon became known which pieces in the exhibition were 'scary', which ones were always treated with great respect by the guides and the public alike, and which ones elicited strong responses from their tribal trustees. Today we speak of 'taha wairua' that is the spiritual aspect and it is generally acknowledged that a major difference between 'artefact' and 'taonga' is that there is a taha wairua to the Māori concept.²¹²

Most taonga works are old, and if they are still in Māori hands they will be physically (or orally) passed down like heirlooms from one generation to the next. The greater the antiquity, the greater the mana of the taonga work because of its closer connection in time to the ancestors who provide the community with its identity, and because of the number of generations who will have cared for and revered it.

Having said that, age is not a precondition for taonga work status. Modern taonga works are constantly being created – for example, in the composition of modern mōteatea or haka, or in the work of living tohunga whakairo and tohunga tā moko. It is not age that gives a work mauri – although, as we have said, age intensifies it. Rather, it is the invocation of ancestors and the embedding of kōrero that imbues a taonga work with mauri. For example, in our view Rongomaraeroa, the modern stylised marae on the fourth floor of Te Papa Tongarewa, and its wharenui Te Hono ki Hawaiki, have mauri, even though the materials used in their construction are new and their styles innovative.²¹³



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

(2) *Protecting the kaitiaki relationship*

Whether the taonga work is ancient or new, kaitiaki have important responsibilities to discharge. They must protect the whakapapa and kōrero of the work from misuse. If it is an object, they must protect its physical integrity, and they must pass it on intact to succeeding generations. But there is more to the relationship than responsibility. Kaitiaki are entitled to the benefit of the cultural and spiritual sustenance the taonga works provide to their communities; and, where appropriate, in accordance with mātauranga Māori, those communities should be able to derive economic benefit as well.

It follows that the language of the Treaty requires that kaitiaki must have enough authority and control over their taonga works to enable them to meet the obligations and enjoy the benefits of the relationship. And as we have implied, this must extend to the mātauranga Māori behind the taonga, because it is the mātauranga that makes the taonga live.

As a starting point, this suggests a framework should be established that allows kaitiaki to prevent derogatory or offensive public uses of taonga works and their associated mātauranga. By this we mean kaitiaki should be empowered to prevent uses of taonga works and their



▲ Artist Rangi Kipa at work. Taonga works are constantly being created. It is not age but the invocation of ancestors and the embedding of kōrero that give a taonga work mauri.

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

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





Tinakori by Ngataiharuru Taepa (2004). For Taepa, *kōwhaiwhai* is 'an expression of the way our ancestors saw the world in their time ... it's achieving excellence through simplicity'.

associated mātauranga Māori where they can establish that such uses are inconsistent with the integrity or mauri of either the work or mātauranga. Examples of this might include offensive uses of haka in advertisements, the association of important ancestors with food products, and so forth. But the kaitiaki relationship with taonga works is not a purely defensive one, and the language of the Treaty is not cast in that narrow compass. These taonga works exist now in a modern Western context. They sit at the interface between the traditional world from which they came and the contemporary world in which they sometimes have prominent roles. Yet many are exploited commercially without the consent of, or consultation with, kaitiaki. As we have said, the kaitiaki relationship ought to apply to the entire life of the taonga work, and kaitiaki should be able to derive benefits from that relationship. The benefits could range from the simple satisfaction of being acknowledged as kaitiaki, to direct economic advantage where kaitiaki feel this is appropriate in accordance with mātauranga Māori. In this way, the mauri of a taonga work is not just a thing to be protected against mistreatment. It can also be a positive force in the life of the communities who are its kaitiaki: the mauri of the work can contribute to the mauri of the people, and vice versa.

(3) *The characteristics of taonga-derived works*

There is another, more amorphous category of works. These are works that have a Māori element to them, but that element is generalised or adapted, and is combined with other non-Māori influences. We described some specific examples in section 1.5.3.

Works like these are inspired either by taonga works or by the mātauranga Māori underlying those works, but the connection to mātauranga Māori is far more tenuous than is the case for taonga works themselves. We call these taonga-derived works. We put them into a different category because they are so generic or derivative they have no whakapapa and no kōrero except at a generalised level. Most importantly, taonga-derived works have no kaitiaki. By this we mean there is nothing about the Māori element of the work that would lead one to conclude that the responsibilities of kaitiakitanga in respect of it belong



Tiny Tiki with Diamonds, by Jane Vile. This painstaking reconfiguration of an old halfpenny coin is one of a variety of hybrid works that incorporate found Māori imagery within other artistic traditions.

to a particular community or kin group. In short, there is no natural connection with a kaitiaki community.

That is not to say that taonga-derived works lack significance, have no stories of their own, and have no one who feels close to them. All works have these things in differing measure, whatever their cultural base. The point is rather that taonga-derived works tend to evoke modern personalities rather than ancestors, tell contemporary stories rather than ancient ones, and attract new communities of followers rather than the ancient hapū and iwi of te ao Māori. However powerful and influential they may be in the modern world, taonga-derived works do not have the mauri that is the distinguishing feature of works sourced entirely in mātauranga Māori.

In our view, the framework of rights and protections around taonga-derived works ought to be more limited than that for taonga works. There is often a sufficiently Māori element in taonga-derived works to justify a mechanism to prevent offensive or derogatory public use of that element. Māori should be able to prevent derivative but obviously Māori designs being painted on toilet bowls, for example. But the absence of a kaitiaki in taonga-derived works suggests to us that the protection should stop there. If there are no ancestors and no kōrero, then there is no

basis upon which anybody can say, 'I have responsibility for this and you may not use it without my consent'. To insert such authority would require the law to create a kaitiaki where one does not exist naturally. We think that would go too far.

(4) Protecting mātauranga Māori

What then of the position of mātauranga Māori as a separate consideration? It is more difficult to develop a framework of protections for the intangible intellectual basis for taonga works and at least some aspects of taonga-derived works. As we said earlier, mātauranga Māori cannot be exclusively possessed. Today much of it is shared, consensually or not, with the wider non-Māori world in scholarly or popular publications. It would be idle to suggest it can be 'un-known'. Yet the same kaitiakitanga principle applies. On the one hand, mātauranga Māori can have universal significance for Māori as a whole or be particular to communities and kin groups. The story of the separation of Ranginui (the male sky) and Papatūā-nuku (the female earth) is an example of the former. So are the stories of the demigod Māui-tikitiki who fished up the North Island of New Zealand, slowed the sun, and tried, but failed, to cheat death itself. These stories are well known both within and outside te ao Māori. On the other hand, there is community-based mātauranga Māori – that is, it attaches to particular iwi and hapū. This will include local whakapapa; kōrero about historical and prehistoric ancestors and events; mōteatea; local kōrero about the environment, flora, and fauna; and so on. This mātauranga is intimate in its nature and closely held. Unlike the more generalised form of mātauranga Māori, local mātauranga Māori will have living kaitiaki. It will be the role of these kaitiaki, as it is for the kaitiaki of taonga works, to protect the integrity of that mātauranga and to ensure that it is maintained for the current and succeeding generations. These same kaitiaki will be entitled to the cultural, spiritual, and economic benefits that such mātauranga might provide. Whatever the case, all mātauranga Māori – whether particular or general, whether it has living kaitiaki or not – will be entitled to a basic level of protection against offensive or derogatory public use.

Examples were provided to us in evidence of books that record and explain mātauranga Māori. We were shown *Te Whatu Taniko: Taniko Weaving* by Professor Hirini Mead, whom we have already mentioned; *The Art of Piupiu Making* by Ngapare Hopa, a former member of this Tribunal; *Haka: A Living Tradition* by Wira Gardiner, a former chief executive of the Iwi Transition Agency and Te Puni Kōkiri, and inaugural director of this Tribunal; and *Haka: The Dance of a Noble People* by Professor Timoti Kāretu, a former Māori Language Commissioner. These books were obviously designed to preserve mātauranga Māori and to encourage respect for it within the Māori community and more widely. It would do Māori and the country a disservice if the law were to discourage distinguished authors from writing them. By and large, the mātauranga Māori contained in these books is of broad application. We do not think there are kaitiaki for the generic skill of tāniko- or piupiu-making. It is only where styles or designs particular to hapū or iwi are included that there is an argument for the need for consultation or consent. The same proposition applies to a treatise on the art form of haka. Particular haka will give rise to kaitiakitanga responsibilities; the art form as a whole will not. We apprehend that the authors whose work was brought to our attention are well connected within the Māori world and almost certainly did consult with and, where necessary, obtain the consent of kaitiaki for the use of closely held hapū and iwi mātauranga Māori used in their books. We do not see that protecting kaitiakitanga in mātauranga Māori will discourage genuinely scholarly work.

(5) Summary

In a nutshell, therefore, we have reached four conclusions. Whether the work in question is a taonga work or a taonga-derived work, Māori are entitled to prevent derogatory and offensive public uses of it. And if it is a taonga work, then the kaitiakitanga relationship that comes with it justifies more extensive rights in Treaty terms. These would include rights to consultation and, where necessary, to give consent to the commercial use of such works. Similarly, all mātauranga Māori is entitled to protection against derogatory and offensive public use; and where kaitiaki can be identified for closely held

mātauranga Māori, they too will be entitled to be involved in decisions over the use of that mātauranga.

We would reiterate that the rights we have set out here are Treaty rights derived from the rangatiratanga guarantee in article 2. They are in their nature constitutional rights, and the Crown must take all reasonable steps to accommodate them within the framework of IP law. But the Crown's obligation is not absolute. The Crown must do what is reasonable in the circumstances. The reasonableness line is, 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 in which the importance of the kaitiaki relationship will be weighed against other interests. Those other interests include the wider community interests in free access to information and ideas and the flourishing of creativity, and the interests of IP right holders in that creativity. It is to this crucial balancing process that we now turn.

1.6.3 A question of balance

In the area of taonga works and mātauranga Māori, there are two categories of non-Treaty interest which should be taken into account in the balancing exercise we advocate. The first comprises the property rights bestowed by the IP law system; the second comprises the interests of the wider community in free access to knowledge and information and in encouraging creativity.

In respect of the first category, right holders include, for instance, authors and publishers who hold copyright in books containing taonga works or mātauranga Māori, photographers who capture images of taonga works, businesses that incorporate taonga works into their registered trade marks, film-makers whose work contains taonga works or mātauranga Māori, and so forth. They have legally enforceable rights in the things they have created. There is also the question of whether such people should be able to incorporate taonga works or mātauranga Māori into their works in the future.

In New Zealand, property rights will always be seen as important, and they are usually given priority over other interests. Nonetheless, most forms of property are subject to the overriding interests of the wider community. Private land can be taken for public works, and

landowners are always limited in what they can do on their land by the reasonable interests of their neighbours and the needs of the environment. Similarly, IP rights are never absolute. Parts of a book can be copied for research or private study even if the book is copyright, and a trade mark can in some circumstances be used by others not engaged in the relevant trade. These rights will also be subject to other competing private rights, such as the right to one's reputation. As discussed above (see section 1.4.1), copyright law provides for a limited so-called moral right to object to derogatory treatment that is prejudicial to the author's reputation. Similarly, writers and artists are limited in what they can do by legally enforceable community standards. They may not publish, broadcast, or display works that are offensive, indecent, defamatory, or contrary to public policy, irrespective of IP rights they may have in such works. As we have said, just where a society draws these lines between property in creative works and the public domain or public interest is fundamentally a question of policy. These choices involve balancing the interests of the wider community on the one hand and the individuals or corporations who create works on the other. These interests are valid, and must be taken into account. The balance is constantly shifting.

The second category is the important but less well-defined interest of the wider community in the area of access. This includes access to information and ideas contained in protected works, and access to that which is freely available in the public domain. As we have said, the public domain is the term used to describe that which is available to the public and not otherwise owned or controlled privately, or regulated in some way. It includes created works for which IP rights have expired, as well as knowledge and information that never attracted such protection. Because these things are freely available to be co-opted, reinterpreted, and exploited, they are a constant source of inspiration for fresh ideas and new creations. Although many argue that private IP rights are making increasing inroads into the public domain, that domain is still vast. It is one of the important foundations of any creative, innovative, and democratic society.

The interest of kaitiaki in taonga works and mātauranga Māori arises from the fact that Māori created these things and Māori communities sustain them intellectually,

culturally, and spiritually, even where they no longer own them. This interest can be seen as both a part of the wider community interest and distinct from it. That is, the interest belongs to tribal communities and is therefore public rather than private in nature. That interest competes with the private rights of IP right holders. However, there is a wider national or even global interest in both protecting property interests and having an accessible public domain of knowledge and ideas. In our view, all these interests are important and entitled to a reasonable level of protection. The question is how the balance should be struck between them.

(1) *Derogatory or offensive public use of taonga works and mātauranga Māori*

We begin with the question of derogatory or offensive public use of mātauranga Māori, taonga works, and taonga-derived works. The essential point is that we do not think anybody, even an IP owner, should be able to use mātauranga Māori, taonga works, or taonga-derived works in a derogatory or offensive manner. Although New Zealand is a Western country that places great value on the right of free expression, laws that prohibit offensive or derogatory expressions are generally accepted as necessary to protect social cohesion and community standards. Of course, there is a great deal of controversy about just what is derogatory or offensive, but the



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

1.6.3(1)

principle is generally accepted. For example, as we have said, New Zealand law protects certain flags, emblems, words, and symbols under the Flags, Emblems, and Names Protection Act 1981. In many cases this is because the things protected are culturally important symbols for New Zealanders. Similarly, our general law imposes limits on social behaviour and expression in laws relating to censorship, voluntary industry codes in broadcasting and advertising, and even the criminal law. The only intellectual leap required here is to accept that there are distinctive standards of appropriate treatment in respect of mātauranga Māori and taonga works that, since they are cultural symbols or reflect community standards, deserve just as much protection as the 'mainstream' equivalent. For instance, it would probably be seen as offensive to put a chief's tā moko on toilet seats for sale, or to broadcast a tribal mōteatea interspersed with English expletives. Nor do we think Ngāti Toa would support printing the words of *Ka Mate* on a dinner plate, given the aversion in Māori culture to placing taonga with mauri close to food.

Determining just what is derogatory or offensive use of mātauranga Māori, a taonga work, or a taonga-derived work is probably best left to the appropriately constituted authorities which, under any new system of protections, would be responsible for adjudicating on the basis of actual facts and arguments in context. Whether the examples we have posited here, or any other examples, should be prohibited would be for such a body to consider.

It is clear to us that that balance should generally be struck in favour of protecting the cultural integrity of mātauranga Māori, taonga works, and the Māori elements of taonga-derived works. In our view it is reasonable for the Crown to establish a system that enables Māori to prevent any derogatory or offensive public use before it happens, and to stop such use if it is happening. Of course, whether any particular use of mātauranga Māori, taonga works, or taonga-derived works is derogatory or offensive may well be the subject of much argument, as will the question of what remedial action should be taken if either is proved. If the use has already taken place, it will need to be seen in its proper context. For example, older derogatory interpretations of taonga works could be seen today as simply the harmless relics of a bygone era, and modern interpretations that challenge our sensitivities may



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



nonetheless be seen as necessary social commentary and entitled to protection. What is important is that Māori should have recourse to an appropriately qualified forum to seek redress if they have concerns. The finer judgement calls will need to be made by that forum.

In our experience, most offensive or derogatory use of mātauranga Māori, taonga works, or taonga-derived works is not deliberate at all. It is done in ignorance of the correct values or conduct. The law should encourage those who use mātauranga Māori or taonga works to learn correct values and conduct.

(2) Non-derogatory and non-offensive uses of taonga works and taonga-derived works

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

We begin with the use of taonga-derived works. As we have said, we do not think that a limitation on the non-offensive or non-derogatory use of taonga-derived works in order to protect Māori interests is reasonable. A distinguishing feature of these derivative works is that they have no kaitiaki, so there is no specific relationship to protect. Rather, the relationship is between the work and mātauranga Māori at a high level of abstraction. The relationship is more generalised and less easily pinned down. In other words, while taonga-derived works have clear Māori characteristics, they have no obvious kaitiaki to whom someone wanting to make use of the work might feel a natural sense of obligation, however ill defined. This lack of a natural kaitiaki is the reason why there is no justification for any rights in addition to the current IP regime. Air New Zealand's stylised koru fits this description.

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

those rights can be justified, even to protect Treaty interests. Nor do we think that the legal framework should retrospectively curtail pre-existing uses of taonga works drawn from publicly available works, information, and ideas. Again, users have relied upon the existing framework and should not now be retrospectively penalised for doing so. That is, our proposed approach is not designed to impinge on or challenge private property rights that have already been vested.

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

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

mātauranga Māori and taonga works, and this is the area on which the law should focus.

(3) *The international perspective*

So far we have focused on the perspective that the Treaty of Waitangi brings to the protection of the kaitiaki interest in taonga works and mātauranga Māori. We indicated in section 1.3.4 that in recent years the world has become more aware of the need to protect indigenous interests. We highlighted some developments in the United Nations Human Rights Council, WIPO-IGC, the WTO TRIPS Council, the Food and Agriculture Organization, the conference of the parties of the Convention on Biological Diversity, and other relevant forums.

In this section we focus on the most advanced initiatives – the draft principles of the WIPO-IGC and the United Nations Declaration on the Rights of Indigenous Peoples (DRIP).

We have said that for the last 10 years the WIPO-IGC has launched a series of studies and attempts to protect against the misappropriation of traditional knowledge, genetic resources, and traditional cultural expressions. This process culminated in a near breakdown until, in 2009, the WIPO-IGC developed draft provisions for an international instrument for the protection of traditional cultural expressions.²¹⁴

The IGC's mandate is to submit to the 2011 General Assembly of WIPO the text of an international legal instrument (or instruments) which will ensure the effective protection of traditional knowledge and traditional cultural expressions, as well as genetic resources.²¹⁵ The draft objectives are based on the common understanding that traditional cultural expressions and traditional knowledge have 'intrinsic value' that benefits not only indigenous communities but also 'all humanity'.²¹⁶ According to the draft principles, the following acts require the prior informed consent of the relevant community:

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

expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;

- ▶ any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and
- ▶ the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof.²¹⁷

The draft objectives and principles provide a framework for implementation of national laws, but are not intended to provide a prescription for those laws – they are sufficiently flexible for national laws to meet local needs.

Meanwhile, WIPO has established a voluntary fund that supports indigenous and other community representatives to travel to attend WIPO-IGC meetings.

Like the WIPO-IGC process, the DRIP negotiations were lengthy and complex. However, on 13 September 2007, the General Assembly of the United Nations adopted the Declaration.²¹⁸ DRIP reflects the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, but expressly applies these rights to indigenous peoples, and acknowledges that they are both individual and collective rights. It is DRIP's recognition of the collective nature of indigenous rights that can be seen as groundbreaking. It is considered a milestone achievement that promotes 'harmonious and cooperative relations between the State and indigenous peoples based on principles of justice, democracy, and respect for human rights, non-discrimination and good faith'.²¹⁹ New Zealand endorsed the Declaration in April 2010.

In the context of taonga works and mātauranga Māori, article 11 and 31 of DRIP are particularly important. First, article 11 recognises that 'Indigenous peoples have the right to practise and revitalize their cultural traditions and customs'. This includes the right to 'maintain, protect and develop . . . manifestations of their cultures, such as artefacts, designs, ceremonies, technologies and visual and performing arts, and literature'.

Secondly, article 31 recognises that 'indigenous peoples

have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions', and the right to 'maintain, control, protect and develop their intellectual property over such cultural heritage . . . and traditional cultural expressions'.

Although the Declaration is a non-binding agreement, these aspirations speak directly to the issues at the heart of this claim. The standards they contain reflect in many ways our own conclusions with respect to the Treaty of Waitangi. As we have said, these issues are not unique to Māori or to New Zealand, and neither are the struggles in reaching an agreement on how to resolve them. Our Treaty analysis does not give rise to anything that, in the international context, is maverick or extravagant. Indeed, it is entirely mainstream.

1.6.4 Summary

In light of the fact these issues are complex, we think it appropriate to summarise our conclusions before moving to the next section.

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

We also concluded that the Treaty does not provide for exclusive ownership of mātauranga Māori, at least where the knowledge is already publicly known. However, where some forms of mātauranga Māori – for example, distinctive tribal knowledge or other forms of tikanga Māori – have identifiable kaitiaki, they too are entitled to a reasonable degree of protection.

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

public use. We also concluded that while it is inappropriate to interfere in pre-existing vested rights, any future use of taonga works for commercial purposes should occur only after consulting and, in appropriate cases, gaining the consent of kaitiaki. In section 1.7.1 below we consider when consultation is sufficient and when consent ought to be required. We think a legal framework that gives effect to these principles would strike a fair balance between the Treaty rights of kaitiaki, the private rights of IP owners, and the interests of the public in use of publicly available works and access to the public domain.

The introduction of this legal framework is important. It would create, for the first time in New Zealand's history, a legal environment conducive to the long-term survival of mātauranga Māori and the kaitiaki relationship. If this were the only advantage, it would be amply justified. In truth, the benefits gained by kaitiaki will also accrue to the country as a whole. Taonga works are not just about Māori identity – they are about New Zealand identity, and a regime that delivers kaitiaki control of taonga works will also deliver New Zealand control of its unique identity. That is an outcome with which none can argue, for it is the legal foundation of the cultural partnership the Treaty itself foresaw. As we have said, the subject has considerable international momentum. Extensive and dynamic international debate has produced several guidelines and model laws to assist domestic lawmakers in giving more weight to indigenous rights. In respect of copyright, performers' rights, registered designs, derogatory treatment, domain names, and photographs, these efforts appear not to have been adopted in New Zealand. The international proposals are clearly more advanced and are now rapidly outpacing developments in New Zealand. This is not a good look. In the field of indigenous rights, New Zealand should be an enthusiastic and fair-minded leader, not a reluctant follower.

1.7 REFORMS

One of the most important challenges for us has been how to provide a reasonable degree of protection for kaitiaki relationships with taonga works and mātauranga Māori without producing a collateral chilling effect on innovation and creativity generally. Cultures must be allowed

to grow and evolve, and it can be argued that they do so most vigorously where and when they come into contact with new stimuli, including the ideas and perspectives of other cultures. The extraordinary response of early Māori to the new environment of Aotearoa and, much later, of Māori to British settlement demonstrates this. Building a legal wall around mātauranga Māori would, as we have said, choke it.

It is easy to recommend a domestic legal framework containing the basic protections we describe. It is quite another thing to design the legal mechanisms capable of delivering them in day-to-day commerce and social discourse. Whatever mechanisms are used, they must be able to interface with the existing IP framework.

We present here one set of mechanisms for protecting the kaitiaki interest in taonga works and mātauranga Māori. There may be various other ways of achieving a similar result through making piecemeal changes within the existing IP regime. For instance, geographical indications could be deployed to protect products other than wines and spirits. But we do note that even geographical indications do not necessarily protect the kaitiaki relationship. Instead, they might protect one aspect: that is, the geographical indication itself. This might provide an indirect mechanism for protecting the relationship, but we think that it is the relationship that deserves protection, not the geographical indication isolated from that relationship. A category of collective marks could be created for products based on mātauranga Māori, as they are, for example, for products with the Toi Iho mark. But, like geographical indications, collective marks do not necessarily protect the kaitiaki relationship. Rather, they can be a tool for economic development. Certain labelling requirements could be imposed in order to prevent derogatory use of mātauranga Māori on food and other commercial products. Perpetual moral rights could be put in place to prevent offensive uses of taonga works. But again these tools alone are inadequate to protect the kaitiaki relationship with taonga works and mātauranga Māori, and they are not a holistic response.

Whatever the preferred measures, they should be deployed to produce the following practical changes to

the current system. The first is to introduce a general objection mechanism in respect of derogatory or offensive public use of taonga works, taonga-derived works, and mātauranga Māori. The second is a mechanism by which kaitiaki can prevent any commercial exploitation of taonga works or closely held mātauranga Māori unless and until there has been consultation and, where found appropriate, kaitiaki consent. The third change is to establish a commission whose job it will be to administer these new objection processes, maintain a register of kaitiaki and their mātauranga Māori or taonga works, and publish best-practice guidelines for the use, care, protection, and custody of mātauranga Māori, taonga works, and taonga-derived works.

This approach is not intended to create a new category of proprietary right, but is rather a way of recognising the relationship of kaitiaki with taonga works and some aspects of mātauranga Māori where it is proposed to exploit those things commercially. The kaitiaki right is inherently inalienable and is therefore not a proprietary right in the orthodox Western sense. Rather it would be a statutory participatory right in respect of decisions around proposals to exploit taonga works or mātauranga Māori commercially. It may in appropriate cases amount to a right of veto, and it must be perpetual.

We turn now to describe these recommendations in more detail.

1.7.1 New general standards

The primary reform is designed to establish new standards of behaviour in respect of the use of mātauranga Māori, taonga works, and taonga-derived works. We recommend an objection-based approach to this standard-setting in preference to imposing a general obligation on the community. Our approach would place the onus on those most concerned about the use of mātauranga Māori or taonga and taonga-derived works to take the step of objecting. This is an area in which there will be ambiguity and multiple perspectives, even if the basic principles are clear. It would therefore be impractical to impose a prior abstract standard of general application that unknowing members of the public might breach innocently. We

think it best in these circumstances for the issues to be confronted on a case-by-case basis so that decisions can be made about actual disputes over specific taonga or mātauranga. An objection-based approach ensures that the issues will arise only where they really matter.

We consider that anybody should be entitled to object to the derogatory or offensive public use of any mātauranga Māori, taonga work, or taonga-derived work. This is not an area that should be left to kaitiaki alone, or even to Māori for that matter. The commission we recommend below (see section 1.7.2) will be the forum to which objections are brought, and it will be empowered to enjoin the offending use or representation if the objection is made out. Sanctions for breach of an order of the commission should be available through the courts in the usual way.

In addition, kaitiaki (and only kaitiaki) should be entitled to object to any non-derogatory or non-offensive commercial use or proposed commercial use of mātauranga Māori or taonga works in respect of which they have an obligation of kaitiakitanga. Once again, any objection will be brought to the commission. If the objector can prove kaitiaki status and that the subject of the objection is mātauranga Māori or a taonga work for which they have an obligation of kaitiakitanga, the commission will be empowered to require the respondent to consult with the kaitiaki. Where appropriate, the commission will also be empowered to require the kaitiaki's consent for all use, or all further use, as the case may be.

In order to avoid the problem of people not knowing whether a certain item is a taonga work, or contains mātauranga Māori, and whether a particular use of it is offensive or derogatory, mechanisms that provide certainty must be put in place. As a start, we recommend a process that allows for any person who wants to use a taonga work to apply to the commission for a kind of declaratory ruling that the use of the taonga work or mātauranga Māori is permissible, or that it might be derogatory or offensive and the use of the work might give rise to an objection. We say 'might' because the objector has to step up and object. However, for those wishing to use taonga works or mātauranga Māori, this kind of

declaratory ruling process can give guidance on whether kaitiaki rights might be infringed. The process should be quick, informal, and inexpensive. We also recommend that the commission produce advance guidelines in this area to give maximum assistance to kaitiaki and users.

These broad propositions raise a number of questions. How is a taonga work to be defined and even identified? How is it to be distinguished from a taonga-derived work? How are kaitiaki to be identified? In what circumstances will kaitiaki consent be necessary, rather than the lesser standard of consultation? While we consider these issues below (see section 1.7.3), such questions will also be confronted by the commission we have proposed.

It is important to understand that our recommendations do not represent a wholesale change to the current system of IP protection, particularly copyright and trade mark protection. Nor would they grant perpetual copyright to kaitiaki. These recommendations are *sui generis* in that they would operate outside the Copyright Act 1994, the Trade Marks Act 2002, the Designs Act 1953, the internet registration system, and any other relevant Acts which protect IP or related rights. They would have independent legal enforceability in their own right. However, as we noted above, this *sui generis* system must effectively interface with the IP system so that no irresolvable conflict arises between them. The commission should provide that point of interface.

1.7.2 The commission

These new standards will not make any difference unless there is a body to interpret and enforce them. There is a strong argument that this is a job for experts, rather than the general courts. We recommend the establishment of a commission with specific adjudicative, administrative, and facilitative functions.

(1) *Adjudicative functions*

The adjudicative functions will be its most challenging. As we have presaged, the commission should be empowered to receive objections from anyone alleging derogatory or offensive public use of mātauranga Māori, taonga works, or taonga-derived works. The commission will need to

decide what steps must be taken to remedy the situation if the case is made out. This will cover a wide range of possibilities. That is one adjudicative function. The other is that the commission should also be empowered to receive objections from kaitiaki about non-derogatory or non-offensive commercial use of mātauranga Māori and taonga works. If the commission considers that the respondent is using or proposing to use mātauranga Māori or a taonga work for which the objector has a kaitiaki responsibility, it will need to decide whether consultation between the kaitiaki and user is sufficient, or whether consent must precede any further use.

Because our proposal allows only kaitiaki to take steps over non-offensive and non-derogatory commercial use of taonga works, the commission will need to determine who is a kaitiaki. We see this as a partly adjudicative and partly administrative function. We explain the details of our recommendation for a kaitiaki register in section 1.7.2(3) below. In contrast, as we have said, anybody should be able to object to derogatory or offensive public use because it is in the public interest for the law to provide a general mechanism for discouraging such behaviour.

The adjudicative tasks we have outlined here must operate independently of the existing adjudicative powers vested in the Commissioner of Patents, Trade Marks and Designs and the High and District Courts. However, the rights of any IP owner must not derogate from any rights found by the commission to be vested in kaitiaki. Accordingly, if the objection of a kaitiaki is upheld by the commission, the owner of copyright in a reproduction of a taonga work (such as a photograph) will not be able to use it without either consultation with, or consent of, the kaitiaki. Similarly, if such an objection is upheld there should be no registration of any IP right that are contrary to the rights of kaitiaki. Additionally, if an objection is related to an internet domain name, the commission should be able to order that domain name be removed or assigned as appropriate.

Finally, we recommend that the commission replace the trade marks advisory committee currently operating within IPONZ. It should also add to that role a function in relation to registered designs. We recommend that if the commission upholds an objection based either on

offensive or derogatory public use, or on the existence of a kaitiaki relationship which therefore means consent or consultation of some kind is required, the Commissioner of Trade Marks and Designs at IPONZ will be required to refuse registration of the trade mark or design or, if it has been registered, to revoke the trade mark or design. Of course, if kaitiaki consent is given, the registration may stand.

In addition, it makes sense to maintain the Commissioner of Trade Marks' proactive function in respect of offensive marks (see section 1.4.3). We recommend a minor change whereby the Commissioner of Trade Marks and Designs would be required to refer any trade mark or design application relating to a taonga work or containing some aspect of mātauranga Māori to the commission instead of to the existing IPONZ internal advisory committee. The commission's view would be final, and would bind the Commissioner of Trade Marks and Designs so that an IP right could not be registered in contravention of the commission's finding of offensive or derogatory use, or if consent of kaitiaki had not been obtained and was required. This would have the effect of shifting the offensive or derogatory use decision prior to trade mark registration from the Commissioner of Trade Marks and Designs, where it currently resides, to the new commission.

(2) Facilitative functions

Interested party witnesses often made two points. First, they accepted the need to be respectful of Māori sensitivities and had no wish to give offence. Secondly, they needed guidance on what the issues were, who to consult with over them, and so forth. As we have said, Mr Smythe and Ms Veninga filed evidence on behalf of the Designers Institute of New Zealand Incorporated (see section 1.5.3). They said:

Many non-Maori professional designers and their clients do wish to be culturally inclusive and to honour Maori culture as intrinsic to New Zealand identity. They have no desire to cause offence and would welcome access to reliable information and advice on consultation and collaboration, early in the design process. The working party proposes a pragmatic and inclusive approach through the development of

protocols with Maori experts, accepting, however, that the advice of tohunga and kaumatua will be invaluable where no clear guidelines point to a way forward.²²⁰

Elsewhere in the submission they said:

DINZ also recognises that the absence of effective guidelines defining appropriate or inappropriate use of taonga risks offence. This is a matter of increasing concern to some professional designers. The DINZ working group advocates the development of a comprehensive information programme to actively promote clarification and definition of principles and values in this domain.²²¹

We agree that information, guidelines, and assistance are needed for those whose work requires them to ‘handle’ mātauranga Māori, taonga works, or taonga-derived works. This assistance will help those who lack basic understanding and develop the partial understanding of others. Indeed, we think many of the difficulties and uncertainties around this subject would be ameliorated if help of this kind were available. This is an important role for the commission we recommend.

This function would obviously be more proactive than the adjudicative functions above. We think it would be helpful for the commission to establish best-practice guidelines for the use, care, protection, and custody of mātauranga Māori, taonga works, and taonga-derived works, as well as for consultation with relevant kaitiaki and tohunga. The guidelines could also help users with culturally appropriate practices if they wish to adopt them, and explain why the practices are followed. They should be designed to assist rather than direct.

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

(3) *Administrative functions*

Apart from the mātauranga Māori and the works themselves, the key ingredient in the framework we recommend is the kaitiaki themselves. How can they be identified?

We recommend that the commission operate a register of kaitiaki in respect of particular mātauranga Māori and taonga works. For example, kaitiaki would be empowered to apply to be recorded on the register for particular haka, mōteatea, carvings, and so forth. Applicants may be iwi, hapū, whānau, or individuals. We see registration as a technique kaitiaki can use to give fair warning to the world of their interest. In addition, registration may lend at least some credibility to their claim, in the sense that it takes commitment and resources to move proactively to protect an item of mātauranga Māori or a taonga work prior to any issue of its use arising.

Having said that, we do not support compulsory registration. Kaitiaki may choose, for perfectly valid reasons, not to register their interest. They may prefer, for example, the practical protection of secrecy rather than risk disclosure through registration. We think that it is best to allow anybody claiming kaitiaki status to object to the use of an item of mātauranga Māori or a taonga work, leaving the objector to substantiate that status when the objection is heard. Although there is a risk that unregistered kaitiaki may at that stage be found not to have the status to object because they cannot prove their standing, we stress that they are not disqualified from doing so. We see the role of the register as an additional safeguard, providing greater certainty both to kaitiaki and to those who wish to use taonga works or mātauranga Māori.

One option is a public notification process to allow for objections to kaitiaki registration. If there are objections, then the commission will have to resolve them. If there are none, then the kaitiaki can be registered as of right for any mātauranga Māori or taonga work. Registration should be free. An alternative approach would be to allow anyone claiming kaitiaki status to register in respect of any mātauranga Māori or taonga work, subject to compliance with simple requirements as to description and so on. That would leave any controversy over that status to be dealt with by the commission if an objection to the use of mātauranga Māori or a taonga work were ever lodged.

This would be a lower-cost option and may well be as effective as the approach of allowing objections to kaitiaki registration.

We have come to the view that a public register is a workable mechanism after much careful thought. We are aware that there are some taonga works that are to all intents and purposes secret. We would not wish to encourage the registration of such works and their kaitiaki. Secrecy is usually their best protection. The register, on the other hand, is really aimed at works that have – rightly or wrongly – become public and are treated by the current law as freely available. In these instances, formal registration is a practical way of affording them some protection.

(4) Commission personnel and budget

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

1.7.3 Key definitions and principles

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

In section 1.6.2 we identified the core characteristics of taonga works. They are sourced in mātauranga Māori; they relate to or invoke ancestors – that is, they have whakapapa; they contain or reflect traditional narrative

or stories; they have their own mauri; and each taonga work has a living kaitiaki. We would suggest, therefore, a working definition as follows:

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

We also identified the core characteristics of taonga-derived works in section 1.6.2. These are works that have a Māori ‘feel’ but carry other characteristics as well. Crucially, they do not invoke ancestors or traditional narratives in any direct way. As a result, they lack mauri and have no obvious kaitiaki. Accordingly, a working definition for them is as follows:

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

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

We have intentionally not set out a definition of mātauranga Māori. In truth, it is as difficult to define as Western knowledge. But a definition is unnecessary anyway. We do not recommend that all mātauranga Māori should be protected, but only those aspects of it so personally held by traditional Māori communities that a kaitiakitanga relationship arises in respect of it. Thus, it is the proximity of the mātauranga and the community that is the core defining factor, not the broad category of mātauranga Māori itself.

Returning then to taonga works, the effect of a determination that a work is a taonga work is to make involvement of kaitiaki compulsory in any future commercial

use of it. We have intentionally left open two possibilities in that involvement – the right to be consulted or the necessity for consent. It will be for the commission to decide which option is applicable in any given case. Just as we balanced competing interests in concluding that only mātauranga Māori and taonga works, but not taonga-derived works, should have the benefit of the future protection we recommend in respect of commercial use, the commission will need to strike a balance in choosing between consultation and consent. It will need to consider the nature of the proposed use: for example, consultation may well be sufficient for a relatively minor use such as a one-off public exhibition, whereas representing an important tribal taonga work on postcards or stamps would almost certainly require consent.

The effect on the user will also be relevant. Where the proposed use has significant commercial implications for a user, the commission may well want to encourage consultation as a first step, in the hope that dialogue produces compromise. The very purpose of such consultation is that it provides an opportunity for early identification of competing interests and potentially for early dispute resolution. The effectiveness of this approach has already been proven in consultation processes under the Resource Management Act. Some kaitiaki will be prepared to explore economic relationships; others will refuse. All will depend on the importance of the taonga and the tikanga Māori that is brought into play in kaitiaki decision-making. Just as it would be inappropriate to suggest to an owner of copyright how to use his or her property right, it is certainly not for us to suggest whether or not kaitiaki should be prepared to explore a commercial relationship.

The important principle is that the choice between consultation and consent is about balancing the impact on the kaitiaki against that on the user, and encouraging compromise where possible. This is the balance between the pursuit of property rights and enduring cultural obligations. As in all cases of competing interests, the law must provide for the balance to be struck as best it can.

1.8 CONCLUSION

We began this chapter with an explanation of why the Māori approach to rights and obligations in respect of their cultural heritage is different from that contained in the orthodox Western system of IP. We pointed to some examples we heard in evidence – the haka *Ka Mate*, the art of tā moko, the place name Te Taumatawhakatangihangakoauauotamateaurehaeaturipukakapikimaungahoronukupokaiwhenuakitanatahu, and the treasured song-poem collection *Ngā Mōteatea*. They demonstrated the dissonance between the kaitiakitanga of Māori communities and the Pākehā system of IP rights. Yet the cultural relationships between kaitiaki and taonga are clearly precious to Māori people and central to Māori identity. Only the most callous among us would hold that they should not be affirmed in law in some way.

We then explained exactly where the fit between kaitiakitanga and copyright, trade marks, and related rights is poor and why. We referred, for example, to the temporary nature of copyright, the nature of the uses it aims to prohibit, the nature of exceptions to exclusive rights, its normative grounding as an incentive to produce and commercially exploit new works, and its requirements of originality and fixation. And then, after reviewing the terms of the Treaty of Waitangi, we offered an analytical framework for determining how the interests of kaitiaki might be recognised in law, and how the relative strength of those interests might be balanced in the event of conflict with other interests. We recommended a general prohibition on offensive or derogatory public use of taonga works, taonga-derived works, and mātauranga Māori, and an objection-based, case-by-case system of inquiry for commercial uses of taonga works and mātauranga Māori.

We chose the objection-based, case-by-case model because while kaitiakitanga relationships are of the greatest importance to Māori, te ao Māori in the twenty-first century is no longer entirely distinct from settler society. Two hundred years of colonisation has created a large and growing overlap between them. This mixing zone has thrown up multiple interests in respect of both taonga works and mātauranga Māori. Any new system must

strive to protect and prioritise among them. The reality of culture and identity in modern New Zealand does not lend itself to sweeping utopian solutions imposed from above. A case-by-case approach will allow the players themselves – Māori, Pākehā, or corporate – to find answers relevant to their own situations, as long as the principles are clear and the process is transparent.

We also pointed out that New Zealand is not unique in having to confront the issue of protecting indigenous mātauranga and taonga works within a wider community and economy that does not share indigenous values. Beyond New Zealand, the debate is about how to design effective measures for the protection of traditional knowledge and traditional cultural expressions. The issue is live in international trade diplomacy because making genuine attempts to reconcile cultural interests with IP rights is increasingly seen as best business practice in the commercial sector. It removes both potential bitterness in indigenous communities and the possible question-mark in consumer perceptions over the ethics of non-indigenous corporates claiming private rights in traditional knowledge and traditional cultural expressions. And it can also remove commercial uncertainty for companies wanting to utilise traditional knowledge or traditional cultural expressions in their business. Member states within WIPO are currently working towards a treaty to protect them; the WTO is discussing how, if at all, such interests can be recognised in the TRIPS Agreement; and the United Nation's aspirational Declaration on the Rights of Indigenous Peoples makes direct reference to them. Binding minimum international standards will not come quickly. There is too much at stake. But they will come.

Doing nothing is not an option. In fact, we think New Zealand should take a leading role in developing a domestic framework for the protection of taonga works and mātauranga Māori. This would have both immediate and long-term benefits. Not only would New Zealand be setting its own standard, but it might also reap the potential economic benefits of exporting the local framework. This would take time, but it could well improve prospects for investment in New Zealand and also for Māori overseas.

We may well be one of the first Western countries to address these issues directly in domestic law, but then

New Zealand has often led the world in the area of indigenous rights. This is probably partly because of the crucial role Māori culture plays in New Zealand's national identity, and that in turn is a result of a unique history of conflict and cooperation, the relative size of the Māori population within the national population, and the fact that the country's particular geography makes physical integration inevitable. Whatever the reason, New Zealand is in a unique position to develop its own practical standards relevant to its own national context and to lead, perhaps assist, the world in doing so. That, surely, is better than having standards imposed on it, derived from circumstances very different from New Zealand's own.

Both the Crown and some interested parties who gave evidence before us argued that imposing further controls on the exercise of IP rights, such as requiring the consent of kaitiaki for certain uses of taonga works and mātauranga Māori, would have a detrimental effect on IP business in New Zealand. But is that necessarily so? Even without settled controls, this field is fraught with controversy both nationally and internationally. That is what is driving international change. It is no longer realistic to adopt a do-nothing approach, because that will simply lead to events overtaking us. In fact, ironically, removing the dissonance between kaitiakitanga and IP in New Zealand may well attract investment. The commercial value to IP-based companies of bringing order and certainty through a balanced statutory certification process should not be underestimated.

That brings us to the proposition that we have referred to several times already and which underpins the entire discussion of this subject in New Zealand: it is necessary to protect Māori culture and identity in this country because that is how we protect New Zealand culture and identity. The two are becoming increasingly difficult to separate. New Zealand's law should make room for the relationships between kaitiaki and their taonga works and mātauranga Māori to flourish as a matter of national interest. If those relationships are strong, then Māori culture and identity are strong; and if Māori culture and identity are strong, then New Zealand culture and identity are strong. The threats to identity are not internal but global. They are the genericising effects of a

lowest-common-denominator consumer culture and the ease with which IP-based ventures can pluck Māori culture for its uniqueness and saleability, and bend it to commercial ends. The haka can sell cars in Italy and tā moko provides an interesting twist to *haute couture* in Paris. It is time for New Zealand law to reflect, and so for the world to learn, that these things belong to New Zealand and that they have kaitiaki.

1.9 SUMMARY OF RECOMMENDATIONS

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

We define taonga and taonga-derived works as follows:

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

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

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

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

- (a) A general objection mechanism to prohibit the derogatory or offensive public use of taonga works, taonga-derived works, or mātauranga Māori.

Anybody should be entitled to object to the derogatory or offensive public use of taonga works, taonga-derived works, or mātauranga Māori.

- (b) A mechanism by which kaitiaki can prevent any commercial exploitation of taonga works or mātauranga Māori (but not taonga-derived works) unless and until there has been consultation and, where found appropriate, kaitiaki consent.

Only kaitiaki should be entitled to object to any non-derogatory or non-offensive commercial use of taonga works or mātauranga Māori.

2. An expert commission to have wider functions in relation to taonga works, taonga-derived works, and mātauranga Māori.

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

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

Adjudicative functions would include:

- (a) Hearing complaints from anyone alleging offensive or derogatory public use of taonga works, taonga-derived works, or mātauranga Māori, and deciding what steps must be taken to remedy the situation.
- (b) Hearing complaints from kaitiaki about the commercial use of taonga works and mātauranga Māori without their involvement. If the commission considers that

the thing in question is a taonga work or mātauranga Māori for which the kaitiaki has an obligation of kaitiakitanga, it will need to decide whether consultation between the kaitiaki and user is sufficient, or whether consent must precede any further use.

- (c) Determining whether, if the object in question is a work, it is a taonga work, a taonga-derived work, or neither.
- (d) Determining who is a kaitiaki (this is both an adjudicative and an administrative function). Our recommendations in respect of a kaitiaki register are referred to below.

In order to provide certainty, we recommend a process that allows for any person who wants to use a taonga work or mātauranga Māori to apply to the commission for a kind of declaratory ruling that the proposed use is permissible, or that it might be derogatory or offensive and the use of the work might give rise to an objection. This process should give guidance to those wishing to use taonga works or mātauranga Māori on whether kaitiaki rights might be infringed. The process should be quick, informal, and inexpensive. We also recommend that the commission produce advance guidelines in this area to give maximum assistance to kaitiaki and users.

The commission's decisions would be binding.

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

The commission's *administrative* function would primarily involve operating a register of kaitiaki in respect of particular taonga works. Registration

would be free, and iwi, hapū, whānau, or individuals could seek registration. We envisage a public notification process to allow for any objections, which the commission would have to resolve. If there are no objections, then the kaitiaki will be registered for the taonga work.

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

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

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

Text notes

- 1. Phil Moore and Bruce McFadgen, 'Kōhatu – Māori Use of Stone – Stone Tools', Te Ara – the Encyclopedia of New Zealand, <http://www.TeAra.govt.nz/en/kohatu-maori-use-of-stone/1> (accessed 10 October 2010); Janet Davidson, *The Prehistory of New Zealand* (Auckland: Longman Paul, 1987), pp 197–9; Garry Law,

- Archaeology of the Bay of Plenty* (Wellington: DOC Science and Technical Publishing, 2008), p 35
2. James Cowan, *The Maori: Yesterday and To-day* (Christchurch: Whitcombe and Tombs Limited, 1930), pp 150–151; Hoturoa Barclay-Kerr, ‘Waka – Canoes – Waka Tāua’, *Te Ara – the Encyclopedia of New Zealand*, <http://www.TeAra.govt.nz/en/waka-canoes/3> (accessed 10 October 2010); Robert Carrick, ed, *Historical Records of New Zealand South Prior to 1840* (Dunedin: Otago Daily Times, 1903), pp 86–88; Anne Salmond, *Between Worlds: Early Exchanges Between Maori and Europeans, 1773–1815* (Auckland: Viking, 1997), p 311
 3. J Patterson, ‘Maori Work Ethics and the Environment’, paper given at Whakahokia te Mauri conference, Massey University, 1 June 1990, pp 1–4 (doc K6 (David Williams, ‘Matauranga Maori and Taonga’, report commissioned by the Waitangi Tribunal through claimant counsel, 2001), pp 107–108). For further information on Erenora Puketapu-Hetet’s philosophy, see Erenora Puketapu-Hetet, *Maori Weaving* (Auckland: Longman Paul, 1989), p 5, and Darcy Nicholas and Keri Kaa, *Seven Maori Artists: Interviews by Darcy Nicholas and Keri Kaa* (Wellington: Government Printer, 1986), pp 38–42.
 4. Elsdon Best, *Maori Religion and Mythology* (Wellington: Te Papa Press, 2005), pt 2, pp 242, 324 (quoted in doc K6, p 17). In document K6, Williams has combined text from different pages of Best’s work.
 5. Best, *Maori Religion and Mythology*, pt 2, pp 255–256 (doc K6, pp 17–18)
 6. Document 113 (Rerekohu Robertson, brief of evidence on behalf of Ngāti Kahungunu, 2000), p 2; doc 118 (Piri Sciascia, brief of evidence on behalf of Ngāti Kahungunu, 2000), p 2
 7. Mr Sciascia also noted longer versions of the name had been used by his elders: Tetaumatawhakatangihangakoauauotamatea-arikinituripukakapikimaungapokaiwhenuaatanenuiarangikitanatau and Tetaumatawhakatangihangakoauauotamatea-urehaeaturipukakapikimaungahoronukupokaiwhenuapokaimoanakitanahtau, and another version of the common name: Tetaumatawhakatangihangakoauauotamateapokaiwhenuakitanahtau: doc 118, pp 2–3. We note that there are other translations in use. We note, too, that the phrase ‘the longest place name in the world’ is the subject of some debate. The official Romanised version of the full name for the Thai city of Bangkok is longer, but is not a single-word name like the Ngāti Kere name, and is seldom if ever used: Lonely Planet, ‘History – Te Chakri Dynasty and the Birth of Bangkok’, Lonely Planet, <http://www.lonelyplanet.com/thailand/bangkok/history> (accessed 27 October 2010).
 8. Document 112 (Ross Scott, brief of evidence on behalf of Ngāti Kahungunu, undated), pp 3–4; doc P10 (Ross Scott, updating brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006), p 3; doc 113, pp 3–4
 9. We use the shortened version of the name in this and in subsequent references for the sake of brevity.
 10. Document P10, pp 3–4; doc 112, p 2
 11. Mark Kopua, translated by Apirana Mahuika, under cross-examination by Crown counsel, 16th hearing, 30 August 2006 (transcript 4.1.16, pp 225–227)
 12. Document P26 (Mark Kopua, brief of evidence on behalf of Ngāti Porou, 15 August 2006), paras 17, 18. Note that the evidence was given in Māori and a translation provided. We have used the translation here.
 13. Hēni Collins, *Ka Mate Ka Ora: The Spirit of Te Rauparaha* (Wellington: Steele Roberts, 2010), pp 24–26. Collins also records variations to this account: one where Te Rauparaha was being pursued not by Ngāti Te Aho, but by some of his Waikato relations; and one where it was Te Wharerangi’s daughter, a puhi named Te Maari, who sat over a hastily dug pit that hid Te Rauparaha. See Te Ahukaramū Charles Royal, *Katu Au i Kōnei: A collection of songs from Ngāti Toarangatira and Ngāti Raukawa* (Wellington: Huia Publishers, 1994), p 83, and Te Maari Gardiner, *He Ohaaki nā ngā Mātua Tūpuna ko Okahukura – The Story of a Tuwharetoa Wharepuni* (Turangi: Otukou Marae Committee, 1993), p 25. Collins and many others have provided slightly different translations of *Ka Mate*; there are many subtle variations in translations of ancient song forms.
 14. *Ka Mate* was not originally composed to be done to actions; in fact the part that is called the haka is only a very small part of the much longer ngeri: Te Ariki Kawhe Wineera, under questioning by the presiding officer, 17th hearing, 8 September 2006 (transcript 4.1.17, pp 409–410). Some describe *Ka Mate* as a pōkeka rather than a ngeri. It is not our place to determine here which description is correct.
 15. Rachel Dawson, ‘New Zealand: The *Ka Mate* Haka – Generic IP Law v Indigenous Rights’, *Mondaq*, 29 March 2009
 16. Te Ahukaramū Charles Royal, ‘Mōteatea – Traditional Māori Song Poetry’, paper presented at Oceania Meets Asia: World Music Days 2009; International Symposium and Festival Dialogue in Music conference, Beijing, 3 November 2009, pp 1–2
 17. Apirana Ngata, *Nga Moteatea: He Marama Rere No Nga Waka Maha* (Hastings: ES Cliff and Co, 1928), pt 1, pp ii–iii; see also Ngata and Pei Te Hurinui Jones, *Ngā Mōteatea*, 4 vols (Auckland: Auckland University Press, for the Polynesian Society, 2004–2007), pt 1, p xvi.
 18. Apirana Ngata and Pei Te Hurinui Jones, *Nga Moteatea*, 3 vols (Wellington: AH and AW Reed, for the Polynesian Society, 1959–1970), pt 1, pp xiv–xv; see also Ngata and Pei Te Hurinui Jones, *Ngā Mōteatea*, 4 vols (Auckland: Auckland University Press, for the Polynesian Society, 2004–2007), pt 1, p xxii.

19. Many of these recordings were made under the auspices of the Māori Purposes Fund or by noted ethnomusicologist Mervyn McLean.
20. Peter Watson, *Ideas: A History of Thought and Invention, From Fire to Freud* (London: Weidenfeld and Nicholson, 2005), pp 383–386; Charles Lincoln Van Doren, *A History of Knowledge: Past, Present and Future* (New York: Ballantine Books, 1992), p 154
21. The Stationers' Company was given a royal charter in 1557.
22. For a detailed discussion of the history of the Stationers' Company, see Mark Rose, *Authors and Owners: the Invention of Copyright* (Cambridge, Massachusetts: Harvard University Press, 1995).
23. For a detailed discussion of the history and purpose of British IP law, see Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999).
24. A Sheffield knife mark was shown in the documentary *New Zealand Up for Grabs*: doc p68 (*New Zealand Up for Grabs*, directed by Toby Mills and Moana Maniapoto (A Tawera/Black Pearl Production, 2005)). This film is also known as *Guarding the Family Silver*; it was screened by TVNZ in October 2005 and again in February 2006.
25. There is no official definition of the term IP. Article 2 of the Convention Establishing the World Intellectual Property Organization, 14 July 1967, 21 UST 1749, 848 UNTS 3, gives the following list of subject matter protected by intellectual property rights:
 - literary, artistic and scientific works;
 - performances of performing artists, phonograms, and broadcasts;
 - inventions in all fields of human endeavour;
 - scientific discoveries;
 - industrial designs;
 - trade marks, service marks, and commercial names and designations;
 - protection against unfair competition; and
 - all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.
26. Universal Declaration of Human Rights, 10 December 1948, (3) GA res 217A (III), UN doc A/810 at 71 (1948), art 26(2)
27. Copyright Ordinance 1842 5 Vict 18
28. Hobson, as quoted in N A Foden, *New Zealand Legal History (1642 to 1842)* (Wellington: Sweet and Maxwell, 1965), p 182
29. New Zealand joined the Berne Convention in 1947. Currently, 164 states are party to the Convention. This Convention has been substantially revised over time, most recently in Paris in 1971. Though New Zealand never joined this revision, New Zealand laws reflect the revised standards and the Berne Convention is incorporated into the TRIPS Agreement, discussed below.
30. Berne Convention for the Protection of Literary and Artistic Works, Paris Act 1971 (amended 1979), art 3
31. Berne Convention for the Protection of Literary and Artistic Works, arts 1, 2(1)
32. Convention Establishing the World Intellectual Property Organization, 14 July 1967, art 3, 21 UST 1749, 848 UNTS 3, amended 28 September 1979
33. In 1984 New Zealand joined the Paris Convention for the Protection of Industrial Property. The latest revision, made in Stockholm in 1967, includes some requirements for the protection for trade marks and the core principle of national treatment. The Paris Convention works slightly differently from the Berne Convention because, unlike copyright, trade marks and other rights in the Convention are registered, and therefore not protected in a foreign country unless registered there. The Paris Convention also prohibits unauthorised use of state emblems such as flags, official hallmarks, and emblems of intergovernmental organisations such as the United Nations. For further discussion of this subject, see section 1.3.3.
34. Marrakesh Agreement Establishing the World Trade Organization, Uruguay Round Agreement, 33 ILM 1125 (1994), Marrakesh, 15 April 1994
35. The WTO replaced GATT as an international organisation, but the General Agreement still exists as the WTO's umbrella treaty for trade in goods.
36. Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1C, 1869 UNTS 299, 33 ILM 1197 (1994), art 68
37. Agreement on Trade-Related Aspects of Intellectual Property Rights, preamble
38. Agreement on Trade-Related Aspects of Intellectual Property Rights, art 9(1)
39. Agreement on Trade-Related Aspects of Intellectual Property Rights, art 4
40. World Trade Organization, 'Members and Observers,' World Trade Organization, <http://www.wto.org> (accessed 27 October 2010)
41. Agreement on Trade-Related Aspects of Intellectual Property Rights, art 1(1)
42. Mark Steel, under questioning by counsel for Ngāti Porou, 20th hearing, 21 December 2006 (transcript 4.1.20, p 297).

43. See, for example, Trans-Pacific Strategic Economic Partnership Agreement (opened for signature 18 July 2005, entered into force 28 May–8 November 2006), art 19.5.
44. Trans-Pacific Strategic Economic Partnership Agreement, art 10.3(c).
45. For a more detailed description of the WTO dispute settlement process see: WTO, 'Understanding the World Trade Organization: Settling Disputes', WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (accessed 16 June 2010).
46. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to Marrakesh Agreement Establishing the World Trade Organization, arts 21(3), 22.
47. United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples* (New York: United Nations, 2009), p 85.
48. United Nations Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*, p 74.
49. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, known as the WIPO-ICG.
50. World Intellectual Property Organization, 'Traditional Cultural Expressions (Folklore)', World Intellectual Property Organisation, <http://www.wipo.int/tk/en/folklore/> (accessed 15 October 2010). Crown evidence referred to the 'obvious relevance' of the principles for New Zealand and for Māori in particular: the Crown was 'supportive' of the work of the WIPO-ICG; the evidence noted Māori welcomed many of the principles. Crown evidence observed the principles are not always tailored to or appropriate for New Zealand conditions: doc R16, p 79.
51. World Intellectual Property Organization, 'WIPO General Assembly 2009 – Decision on Agenda Item 28', http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=129913 (accessed 15 October 2010).
52. Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, arts 1(a), 7, 8, 17. The text of this Convention can be accessed at: <http://www.portal.unesco.org>.
53. New Zealand endorsed the Declaration in April 2010: United Nations Department of Public Information, 'Press Conference on Ninth Session of Indigenous Forum' (press release, New York, 19 April 2010).
54. There are various other international conventions that address the matter from a human rights angle, for example the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.
55. World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, 'The Protection of Traditional Knowledge and Folklore: Summary of Issues Raised and Points Made', note by the Secretariat, IP/C/W/370/Rev.1, 9 March 2006; World Trade Organization, 'TRIPS: Reviews, Article 27.3(b) and Related Issues: Background and the Current Situation', World Trade Organization, <http://www.wto.org/> (accessed 15 October 2010).
56. United Nations Educational, Scientific and Cultural Organization and World Intellectual Property Organization, 'Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions' (Geneva: UNESCO and WIPO, 1985), available at <http://unesdoc.unesco.org/images/0006/000637/063799eb.pdf> (accessed 13 December 2010). The first attempt to codify international obligations of states with respect to indigenous and tribal populations was made by the International Labour Organization (ILO) in 1957: The Indigenous and Tribal Populations Convention (No 107). In addition, in 1989, the ILO adopted the Indigenous and Tribal Peoples Convention (ILO Convention 169).
57. Secretariat of the Pacific Community, Pacific Islands Forum Secretariat and UNESCO Pacific Regional Office, *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* (Secretariat of the Pacific Community, 2002) available at: <http://www.forumsec.org.fj/pages.cfm/newsroom/press-statements/2009/pacific-model-law-on-traditional-knowledge.html> (accessed 13 December 2010) See also doc R16(cc) ('Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law' (2002)), which the New Zealand government helped to develop.
58. Document M15 (Dr Hirini Mead, brief of evidence on behalf of Ngāti Porou, 17 May 2002), pp 17–23; doc P30(a) (Aroha Mead, brief of evidence in support of Ngāti Porou, 16 August 2006), pp 8–9; doc S6 (Counsel for Ngāti Porou, closing submissions, 23 April 2007), pp 64–65; First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, *The Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples* (Whakatane: First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, June 1993).
59. Paper 2.256 (Crown counsel, statement of response to statements of claim by Ngāti Kuri, Te Rarawa, Ngāti Wai, Ngāti Porou, Ngāti Kahungunu, and Ngāti Koata, 28 June 2002), p 25; doc R34 (Gerard van Bohemen, brief of evidence on behalf of the Ministry of Foreign Affairs and Trade, 8 January 2009), p 100; doc T1 (Crown counsel, closing submissions, 21 May 2007), pp 70–74.
60. 'Communication work means a transmission of sounds, visual images, or other information, or a combination of any of those,

- for reception by members of the public, and includes a broadcast or a cable programme': Copyright Act 1994, s 2.
61. Copyright Act 1994, s 14
 62. Ibid, ss 22, 23, 24, 25. Section 26 applies to Crown copyright.
 63. Note that moral rights cannot be transferred during the creator's lifetime but they can be waived and inherited: Copyright Act 1994, ss 118, 119.
 64. Copyright Act 1994, s 21(2)
 65. Ibid, s 14(2)
 66. *Henkel KGaA v Holdfast New Zealand Ltd* [2007] 1 NZLR 577 (SC)
 67. *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 (HL)
 68. For example, *University of Waikato v Benchmarking Services Ltd & Anor* (2004) 8 NZBLC 101,561, para 27 (CA)
 69. Sam Ricketson and Jane C Ginsberg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd ed, 2 vols (New York: Oxford University Press, 2006), vol 1, pp 404–406
 70. In other jurisdictions the threshold is even lower. For instance, Dutch copyright law protects non-original writings (*Geschriftenbescherming*), however banal or trivial they may be, provided they have been published or are intended for publication.
 71. Document s2 (Counsel for Ngāti Kahungunu, closing submissions, vol 2, 16 April 2007), p 9
 72. Ibid, pp 11–12
 73. Ibid, pp 11–12
 74. Copyright Act 1994, s 15
 75. Agreement on Trade-Related Aspects of Intellectual Property Rights, art 9.2
 76. Cited in *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673, 678 (CA)
 77. Document s2, p 9
 78. Copyright Act 1994, s 16
 79. Berne Convention for the Protection of Literary and Artistic Works 1886, art 6bis
 80. Copyright Act 1994, s 118
 81. Ibid, s 119
 82. Ibid, s 107
 83. Ibid, s 94
 84. Copyright Act 1994, s 96
 85. Ibid, s 97
 86. Ibid, s 98(1)(a)
 87. Ibid, s 98(1)(b)
 88. *Benchmark Building Supplies Ltd v Mitre 10 (NZ) Limited* [2004] 1 NZLR 26 (CA)
 89. *Snow v The Eaton Centre Ltd* (1982) 70 CPR (2d) 105
 90. Agreement on Trade-Related Aspects of Intellectual Property Rights, art 9(1)
 91. Berne Convention for the Protection of Literary and Artistic Works 1886, art 6bis
 92. Copyright Designs and Patents Act 1988, ch 1v (UK)
 93. Document s2, p 10
 94. Document s3 (Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, closing submissions, 5 September 2007), pp 185–186
 95. They are allowed to copy entire articles for archive purposes or for other libraries, and are rendered immune from action under the Act if the copying is done for a patron of the library; see generally sections 50–57 of the Copyright Act 1994.
 96. Copyright Act 1994, s 73
 97. The exception also applies to models for buildings and works of artistic craftsmanship as defined by copyright law. For an explanation of the term artistic craftsmanship, see *Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 216.
 98. In *Radford v Hallenstein Bros Ltd* it was held that section 73 permits 'commercial exploitation in the form of photography, drawings, postcards, and printing onto items of clothing' of artistic works that are permanently situated in a public place: *Radford v Hallenstein Bros Ltd* unreported, 22 February 2007, Keane J, High Court, Auckland, CIV-2006-404-4881.
 99. Section 5 of the Copyright Act 1994 defines the author as the person who creates the work.
 100. Copyright Act 1994, s 5(2), (3)
 101. Ibid, s 21(1), (2)
 102. Ibid, s 21(3)
 103. Ibid, s 21(3)
 104. Ibid, s 8
 105. Ibid, s 16
 106. Copyright Act 1994, s 16(1)(i) states that the owner of the copyright has the exclusive right to authorise another person to carry out any of the acts restricted in ss 16(1)(a)–(h).
 107. Document s2, pp 8–9

108. Copyright Act 1994, s 171
109. Ibid, s 178
110. Ibid, s 176
111. Ibid, s 193
112. Commonwealth of Australia, Copyright Act 1968, ss 195A, 195B; Copyright Act 1994, s 170(5)
113. Tanara Ngata, under questioning by counsel for Ngāti Koata, 21st hearing, 23 January 2007 (transcript 4.1.21, p 205)
114. Document s2, p 11
115. World Intellectual Property Organization Performances and Phonograms Treaty 1996, art 16
116. Designs Act 1953, s 2
117. Ibid, s 5(2)
118. Designs Act 1953, s 7. There is one Commissioner of Patents, Trade Marks and Designs and a separate Commissioner of Plant Variety Rights (PVRs). Patents and PVRs are discussed in the next chapter. For simplicity, we refer to the roles separately in their particular statutory contexts.
119. Designs Act 1953, s 11
120. Ibid, s 12(1)
121. Ibid, s 12(2)
122. Copyright Act 1994, s 75
123. Alongside the statutory code in relation to trade marks, the Trade Marks Act 2002, there is a common law doctrine called ‘passing off’ which covers similar subject matter. This doctrine protects a trader’s ‘get-up’, name, or goodwill, whether or not that trader has a registered trade mark. It too is a trade-related doctrine, although the protections available are more limited. It is unnecessary for our purposes to consider this in any more detail.
124. Intellectual Property Office of New Zealand, ‘About IPONZ’, Ministry of Economic Development, <http://www.iponz.govt.nz/cms> (accessed 18 October 2010)
125. Trade Marks Act 2002, s 5
126. There are a number of grounds for refusal of registration, see Trade Marks Act 2002, ss 17–30.
127. Trade Marks Act 2002, s 5
128. Ibid, ss 17–18
129. Document 112, p 3
130. Trade Marks Act 2002, s 5
131. See Intellectual Property Office of New Zealand, ‘Practice Guidelines: 04 Absolute Grounds – General’, s 4.2, <http://www.iponz.govt.nz/cms> (accessed 18 October 2010).
132. The current members of the Committee are: Ms Karen Te O Kahurangi Waaka (Chair of the Committee), Dr Deidre Brown, Associate Professor Pare Keiha, Mr Mauriora Kingi, and Ms Tui Te Hau.
133. Trade Marks Act 2002, s 178
134. Document s3, pp 125–126
135. In May 2010, agreement was reached between interim Transition Toi Iho Foundation trustees and representatives of Te Waka Toi that the Toi Iho trade marks and all associated IP rights would be transferred to the foundation as trustee for the new legal entity: Creative NZ, ‘Creative New Zealand Statement on Toi Iho’, Creative NZ, <http://www.creativenz.govt.nz/en/news/creative-new-zealand-statement-on-toi-iho> (accessed 12 April 2011); ‘CNZ Transfer of Toi Iho’, The Big Idea: Te Ara Nui, <http://www.the-bigidea.co.nz/news/industry-news/2010/may/70186-cnz-transfer-of-toi-iho> (accessed 12 April 2011).
136. The Geographical Indications (Wines and Spirits) Registration Act 2006 has been passed by Parliament but not yet brought into force by Order in Council. The only part of the Act in force is section 62, which repeals the Geographical Indications Act 1994.
137. See note 123 above.
138. *Wineworths Group Ltd v Comité Interprofessionnel du Vin de Champagne* [1992] 2 NZLR 327 (CA)
139. Other words and names which may not be used for an ‘inappropriate’ association or in connection with a business trade or occupation include ‘DSIR’, ‘Department of Scientific and Industrial Research’, ‘Ruakura’, ‘Wheat Research Institute’, ‘New Zealand Soil Bureau’, ‘New Zealand Oceanographic Institute’, ‘Soil Conservation Centre’, ‘Physics and Engineering Laboratory’, ‘Institute of Nuclear Sciences’, ‘Dominion Physical Laboratory’, ‘NECAL’, ‘NZGS’, ‘Animal Research Laboratory’, ‘Agricultural Research Centre’, ‘Management Consultancy Services’, ‘MAF’, ‘New Zealand Communicable Disease Centre’.
140. Flags, Emblems, and Names Protection Act 1981, s 17
141. Such use of the word ‘Anzac’ was prohibited under a notice drawn up on 29 August 1916 by Arthur William de Brito Saville, the Governor of New Zealand: Prohibiting the Use of the Word “Anzac”. The prohibition cited section 33 of the War Legislation Amendment Act, 1916. 29 August 1916, *New Zealand Gazette*, 1916, no 93, pp 2893–2894.
142. But see section 33 consequentially amending the Flags, Emblems, and Names Protection Act 1981.
143. Kevin Glover, ‘Domain Name Dispute Resolution’, *New Zealand Law Journal*, no 1 (2009), p 35
144. Domain Name Commission Limited, ‘Dispute Resolution Service Policy’, Domain Name Commission Limited, <http://www.dnc.org.nz/story/policy> (accessed 18 October 2010), s 4

145. Domain Name Commission, 'Dispute Resolution Service Policy', s 5
146. Flags, Emblems, and Names Protection Act 1981, part 2; Commercial Use of Royal Photographs Rules 1962
147. Copyright Act 1994, s105
148. Excepting trade marks, where perpetual protection is possible so long as renewal fees are paid.
149. Document 118, p 3
150. Document P22 (Piri Sciascia, updating brief of evidence on behalf of Ngāti Kahungunu, 15 August 2006), p 3
151. Mrs Robertson provided evidence of the complaint made by her local Māori Women's Welfare League branch in 1985 about a television advertisement. TVNZ withdrew the advertisement after the complaint and provided an apology: see doc 113, pp 3, 4, annex B. See also document 112, p 2.
152. Document 112, p 3
153. Trade mark 710608; doc P10, p 2
154. Trade mark 732842
155. Document 112, pp 3–4
156. Document P10, p 3
157. Document P39 (Te Ariki Wineera, brief of evidence on behalf of Ngāti Koata, 18 August 2006); Te Ariki Wineera, oral evidence on behalf of Ngāti Toa, in response to questions from the Tribunal, 17th hearing, 8 September 2006 (transcript 4.1.17, pp 397–412)
158. We note that the New Zealand Government at the time was reported to have asked the Italian advertising agency to withdraw the advertisement. However, this was not done. See: Stuff U Can Use, 'The All Black Haka Done by Fiat', Stuff U Can Use, http://stuffucanuse.com/italian_haka/fiat_haka.htm (accessed 19 October 2010).
159. Te Ariki Wineera, oral evidence on behalf of Ngāti Koata, in response to questions from the Tribunal, 17th hearing, 8 September 2006 (transcript 4.1.17, pp 410–411)
160. Ibid (transcript 4.1.17, p 411)
161. It will be recalled that *Ka Mate* is in fact the last verse of a much longer piece known as a *ngeri*. The trade mark application related only to that verse: doc P39, p 2.
162. At the time of writing, the Intellectual Property Office's online March 2011 register shows that the application is 'accepted/under proceeding' and an opposition has been lodged and the matter is proceeding to a hearing: see trade mark 814421.
163. Trade mark 827077 has been accepted by IPONZ, but at March 2011 has not yet been registered. A three-month period for opposition needs to pass before registration can take place.
164. Trade mark 814533
165. Trade marks 305166, 305167, and 305168.
166. New Zealand Press Association and Yvonne Tahana, 'Ka Mate Haka Rights Part of \$300m Treaty Deal', *New Zealand Herald*, 11 February 2009
167. Document B9 (Te Witi (Wiremu) McMath, brief of evidence on behalf of Ngāti Wai, 1998), p 17
168. Document P48 (Angeline Greensill, brief of evidence for Ngāti Koata, August 2006), p 8
169. Document G4 (Apirana Mahuika, brief of evidence on behalf of Ngāti Porou, 12 April 1999), p 50
170. Moana Maniapoto, oral evidence on behalf of Te Tai Tokerau and under questioning by Crown counsel, 18th hearing, 25 September 2006 (transcript 4.1.18, pp 30, 34–35, 46, 52); doc P68
171. Document P26, p 25. Mike Tyson is a former world heavyweight boxing champion from the US, Robbie Williams a well-known pop singer from the UK.
172. Document B10(a) (Te Warihi Hetaraka, brief of evidence on behalf of Ngāti Wai, undated), pp 22–23
173. Document S3, p 110; a similar point was made by Dr Darrell Posey: doc F1(b) (Darrell Posey, brief of evidence for the claimants, undated), p 4.
174. Document S2, pp 11–12
175. Moana Maniapoto, under questioning by Crown counsel, 18th hearing, 25 September 2006 (transcript 4.1.18, pp 37–38, 40–41)
176. Crown counsel, questioning claimant witness Moana Maniapoto, 18th hearing, 25 September 2006 (transcript 4.1.18, p 42)
177. Moana Maniapoto, under questioning by Crown counsel, 18th hearing, 25 September 2006 (transcript 4.1.18, p 42)
178. Document F1(b), p 5
179. Counsel noted that a Bill inserting a Treaty clause into the legislation that brought New Zealand law into TRIPS Agreement compliance was not passed. Wai 262 claimants, the Māori Congress and other Māori had opposed the legislation at Select Committee stage. The then Member of Parliament for Northern Māori, Tau Henare, sought to have a Treaty clause added to the GATT Bill by way of amendment, but the amendment was lost in Parliament by 42 votes to 40: paper 2.4 (Counsel for Ngāti Kuri, Te Rarawa and Ngāti Wai, submission on urgency for hearing, 14 August 1995), pp 3–6.
180. Document A17 (Malcolm McNeill, 'A Critique of GATT: TRIPS', 2 February 1997), p 7

181. Document s3, p 18; emphasis in original.
182. Document T1, p 50
183. Ibid, pp 53–60
184. Ibid, pp 49–61
185. Document R16 (Mark Steel, brief of evidence on behalf of the Ministry of Economic Development, 21 November 2006), pp 6, 7
186. Ibid, p 22
187. Ibid, p 90
188. Document T2 (Crown counsel, closing submissions, 21 May 2007), p 2
189. Document R16, p 90
190. Ibid, pp 90–93
191. Document R34, pp 21–25
192. Ibid, p 31
193. Ibid, pp 37–38
194. Ibid, pp 20–24; see also Mark Steel, under questioning by counsel for Ngāti Porou, 20th hearing, 21 December 2006 (transcript 4.1.20, p 297)
195. Document Q8 (Michael Smythe, brief of evidence on behalf of Creationz Consultants, 13 September 2006), p 4
196. Document Q8, p 3
197. Ibid, p 9
198. It is not our role to traverse that literature here.
199. Document I19 (Jacob Scott, brief of evidence on behalf of Ngāti Kahungunu, 2000), p 17
200. Ibid, pp 17–18
201. Document Q8, p 9
202. Document Q7 (Michael Smythe, brief of evidence on behalf of the Designers Institute of New Zealand Inc, 15 September 2006), p 17
203. Ibid, pp 8–9
204. Document Q7(a) (Designers Institute of New Zealand Inc, appendix to brief of evidence dated 15 September 2006, 15 September 2006), p 3
205. Document Q1 (Victoria Campbell, brief of evidence as an interested party, 4 September 2006), pp 3–4
206. Document Q7(a), p 3
207. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, p 236.
208. Document M15, pp 8–9
209. In the Tūranga Inquiry, the Crown conceded it had breached the Treaty in taking Te Hau ki Tūranga from Rongowhakaata: Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, pp 588–589.
210. He was not a member of the Tribunal at the time of the hearings.
211. ‘Te Māori’ refers to the *Te Māori* exhibition which toured the United States in 1984 and returned to New Zealand in 1986.
212. Document M15, app C, p 2
213. The presence of mauri in Rongomaraeroa raises the interesting question of who are its kaitiaki in accordance with tikanga Māori. We were advised by the then Kaihautū of Te Papa, Te Taru White, that over the past decade various iwi have been invited to sponsor special exhibits of taonga works relating to them. As each exhibiting iwi departs to be replaced by a new iwi sponsor, a ceremony is held that transfers the mauri of Rongomaraeroa from one to the other. As is the case with all marae, the iwi that holds the mauri has control of protocols at the Te Papa marae. It is clear therefore that in the special case of this national marae, the kaitiaki change, depending on which iwi has custody of its mauri: doc R32 (Arapata Hakiwai and Te Taru White, joint brief of evidence on behalf of Te Papa Tongarewa, 8 January 2007), p 12.
214. World Intellectual Property Organization, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, ‘The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles’, secretariat document, WIPO/GRTKF/IC/16/4, 22 January 2010
215. ‘The Committee will, during the next budgetary biennium (2010/2011), and without prejudice to the work pursued in other fora, continue its work and undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRS, TK and TCES’: World Intellectual Property Organization, General Assembly, ‘Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore’, thirty-eighth (nineteenth ordinary) session, 22 September – 1 October 2009, agenda item no 28, paras (a), (e).
216. ‘Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore: Policy Objectives and Core Principles’, annex to World Intellectual Property Organization, Intergovernmental Committee on Intellectual Property and Generic Resources, Traditional Knowledge and Folklore, ‘The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Revised Objectives and Principles’, secretariat document, WIPO/GRTKF/IC/16/4, 22 January 2010, p 3
217. Ibid, p 21

218. For a detailed description of this process see Augusto Willemsen Diaz, 'How Indigenous Peoples' Rights Reached the UN', *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, ed Claire Charters and Rodolfo Stavenhagen (Copenhagen: IWGIA, 2009), pp 16–31.
219. It also recognises the right of indigenous peoples to self-determination, the right to participate in decisions that affect them and requires states to consult and cooperate in good faith with the relevant indigenous peoples in order to obtain their prior informed consent before adopting any legislative or administrative measure that might affect them. Further, the Declaration recognises the spiritual relationship that indigenous peoples have with their lands, territories and natural resources and the ability to use and manage them in accordance with their own customs: United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/Res/61/295, arts 3, 8, 15, 19, 25, 26.
220. Document Q7, para 5.6
221. Ibid, para 4.1

Whakataukī notes

Page 28: John Locke, *Second Treatise of Government*, ed Crawford B Macpherson (Indianapolis: Hackett Publishing Company, 1980), p 66

Page 29: Herbert W Williams, *Dictionary of the Maori Language*, 7th ed (Wellington: GP Print, 1997), p 21

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

—Natalie Angier, 2008

THE GENETIC AND BIOLOGICAL RESOURCES
OF TAONGA SPECIES

2

He kōpura tīpokaia, he manawa tangata.

A seed tuber dug up, a human heart.



THE GENETIC AND BIOLOGICAL RESOURCES OF TAONGA SPECIES

2.1 INTRODUCTION

Biotechnology – the application of science and technology to living organisms in order to produce new products, services, or knowledge¹ – is big business. In 2009, annual revenue worldwide for established biotechnology centres was US\$79.1 billion.² It is especially important in a country like New Zealand, whose focus is growing agricultural products for export, but it is a global phenomenon.

New Zealand's flora and fauna developed in splendid isolation over many millions of years. As a result, New Zealand hosts an estimated 80,000 indigenous species, of which only about 30,000 have been classified. Significantly, most of these indigenous species are endemic, which means they occur naturally nowhere else on Earth.³ Biotechnology companies are keenly interested in the utility (commercial and otherwise) of the genetic and biological resources of these species. They can provide the raw materials for new pharmaceuticals, cosmetics, new industrial processes, new genetic traits for existing organisms, and so on. Research programmes are undertaken at universities, Crown research institutes, and private companies to tap into this potential.

In the 1,000 years since Māori arrived, they too have developed a keen interest in New Zealand's indigenous flora and fauna. This is reflected in extensive traditions about, and close cultural relationships with, these species. Māori say that their relationships with 'taonga species' should be recognised in our intellectual property (IP) law, and should take priority over commercial interests. Māori also say that commercial interests should not be allowed to exploit taonga species without their approval. For its part, the Crown recognises that Māori have special cultural associations with taonga species, but says that these associations do not give Māori ownership of the genetic or biological material of these species and do not justify a veto over commercial exploitation. The impressive array of interested parties who gave evidence in this claim tended to support the Crown's position. The problem is that when the species in question is a taonga species, the interests of science, commerce, and kaitiaki will intersect and sometimes conflict. In a broad sense, this chapter is about how these interests should be managed when they come together, and how conflicts should be resolved when they occur.

The foregoing describes the 'conflict' in simple binary terms, but in truth the debate is far more complex and nuanced than this. It is necessary therefore to spend some time establishing basic principles and articulating underlying assumptions before moving on to address the debate itself. We have chosen to structure the chapter around the following major headings:

◀ Tuatara. The Tribunal heard evidence that tuatara are revered as a taonga by Ngāti Koata, Ngāti Wai, and Ngāti Porou.

- *Te ao Māori and taonga species* (section 2.2), in which (as in chapter 1), we explore aspects of mātauranga Māori and tikanga Māori insofar as they pertain to the relationship between kaitiaki and taonga species. To ground the discussion we also introduce a small number of species about which claimants gave evidence. These demonstrate in practical ways some aspects of mātauranga Māori as well as traditional and modern uses. They also reflect the interplay between traditional Māori values and modern research and commerce as it occurs in today's world.
- *Te ao Pākehā, research science, and intellectual property* (section 2.3), in which we trace briefly the evolution of Western science, before discussing how the relationship between research science and the marketplace has given rise to the approach of te ao Pākehā to the exploitation of the genetic and biological resources of taonga species.
- *Bioprospecting, genetic modification, and intellectual property* (sections 2.4 to 2.7), where we turn to the three areas of law and policy that emerged in hearings as the focus of the claimants' concerns. We background the three areas separately because each of them is subject to quite different – indeed unconnected – legal and policy regimes.
- *The rights of kaitiaki in taonga species and mātauranga Māori* (section 2.8), in which we bring bioprospecting, genetic modification, and IP together. This section is arranged around four basic questions:
 - Does existing law and policy protect the interests of kaitiaki in mātauranga Māori and the genetic and biological resources of taonga species?
 - Are the principles of the Treaty relevant to the Māori interest in taonga species?
 - Are the principles of the Treaty relevant to the protection of mātauranga Māori?
 - How should the kaitiaki interest be weighed against the interests of others?

After briefly considering some wider issues also relevant to the claim, we conclude in broad terms that existing law does not sufficiently protect the interests of kaitiaki, and that it should do so to a greater degree.

- *Reforms* (section 2.9), in which we recommend a set of reforms that will strengthen the protections for kaitiakitanga in accordance with the principles of the Treaty of Waitangi, without unduly interfering in the interests of science, commerce, or the wider community.

It will be seen from this outline that we have used two phrases begging definition. They are 'genetic and biological resources' and 'taonga species'.

In the preliminary phase of our hearings we offered tentative definitions for both terms, but we now think those have outgrown their usefulness.⁴ For a definition of genetic and biological resources we look to article 2 of the international Convention on Biological Diversity (CBD) as providing a more substantive benchmark. It defines biological resources as including 'genetic resources, organisms or parts thereof, populations or any other biotic component of ecosystems with actual or potential use or value for humanity'.

Genetic resources are a subset of biological resources and are defined as 'genetic material of actual or potential value', while genetic material is defined as 'any material of plant, animal, microbial or other origin containing functional units of heredity'.

The smallest functional unit of heredity is a gene. Genes are segments within the DNA that control the production of proteins and influence the development of a specific characteristic of a living organism.⁵ When we refer to genetic resources, we mean the genetic information encoded in the DNA sequence which is located in a cell's nucleus. When we refer to the biological resources of taonga species, we mean the physical material that makes up the micro-organism, plant, or animal in accordance with the CBD definition.

Taonga species are far less easily defined. In the pre-hearing phase we defined them as species that have 'particular cultural or spiritual significance' to the claimants. A list of taonga species was prepared, but this did no more than record all of the species for which claims of special relationship were made.⁶ We accepted for the purposes of our inquiry that taonga species are what claimant communities say they are. But that does not mean such claims are unaccountable or unreviewable. Whether a species is a taonga species can be tested. Taonga species

have mātauranga Māori in relation to them. They have whakapapa able to be recited by tohunga (expert practitioners). Certain iwi or hapū will say that they are kaitiaki in respect of the species. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status, and what obligations this creates for them. In essence, a taonga species will have kōrero tuku iho, or inherited learnings, the existence and credibility of which can be tested. When we use the term ‘taonga species’, we too are drawing on these multiple meanings. For present purposes greater precision is probably unnecessary.

One of the understandings that emerged in the course of our deliberations on this chapter was that bioprospecting, genetic modification, and IP are really different parts of a single process that usually begins with scientific research and ends (for the fortunate few) with successful commercial exploitation of a new patent-protected product. This means that, at all points on the continuum, the issues are generally the same, and often so are the answers. However, for the sake of clarity we have found it necessary to explore them separately (in sections 2.5, 2.6, and 2.7), framing our analysis and conclusions on each as we proceed. We have gathered interested parties’ evidence together in the context of IP rights, rather than in the preceding sections on bioprospecting and genetic modification, because this, in the end, is the area in which these parties’ concerns coalesce. We then give our overall analysis and recommendations for reform in sections 2.8 and 2.9.

Another important contextual point is that this debate, like that in relation to taonga works, is international. The very same discussion that took place in our hearings is also taking place in the negotiating rooms of the World Intellectual Property Organization (WIPO, a specialised agency of the United Nations) and the World Trade Organization (TRIPS Council). Accordingly, although our focus is the Treaty of Waitangi, we also look to the work of international forums for additional guidance.

It is often said that the issues thrown up by taonga species, related mātauranga Māori, and kaitiaki relationships with them, are issues of culture and identity. That is of course true. Māori culture is partly a reflection of taonga species, because it developed its distinctive character as a response to them. The symbiosis is such that protecting

taonga species and mātauranga Māori aids the survival of Māori culture itself. That is why, as we will say, these things are important enough to justify protection in law. But it is not just Māori culture and identity that is at issue here. The unique relationship between kaitiaki and taonga species speaks to our national identity, just as it does with taonga works. Many New Zealanders regard indigenous flora and fauna as much more than a resource to be exploited. They see them as vital components and symbols of nationhood, as having intrinsic value that has little or nothing to do with the species’ economic potential. We will also explore these themes in more detail below.

2.2 TE AO MĀORI AND TAONGA SPECIES

2.2.1 The responsibilities of kaitiaki of taonga species

In chapter 1, we talked about how the new arrivals from Hawaiki embedded themselves into the environment of Aotearoa, changed it, and were in turn changed by it. Kinship – whanaungatanga – remained the core principle of this evolving culture: it continued to define the relationships between the people, the land, and its flora and fauna. But the great trees and plants took new names, speaking to whakapapa relationships with humans that were differently constructed from those that existed in Hawaiki. Tōtara and kauri had no equivalent in Hawaiki, and new names had to be created, as they did for birds like kiwi and tūi. These are but a few examples reflecting a gradual but fundamental shift in the cultural matrix of these people; we will allude to several more in section 2.2.2. As we also said, at some point in this multi-generational process of change the distinctive language that we now call te reo Māori was born. But its roots are in the invention of new names for places, flora, and fauna.⁷

Even the gods changed subtly, with Papa-tū-ā-nuku – the female Earth – taking a much stronger role. A similar shift in consciousness saw her son Tāne-mahuta – the male personification of the primordial forest ecosystem – assume the senior position amongst his siblings in most tribes. These changes reflected the migration from small islands to the new, larger ones, where land and forest had a much stronger presence.

In this sense Māori culture as we know it today is a creation of its environment. It retains many aspects of its



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

Hawaikian roots, but the elements that make it distinctive in the world can be traced to the relationships kaitiaki built up with the land, water, flora, and fauna of this place. In this way, the mauri, or inner well-being of land and water spaces, and the whakapapa of flora and fauna do not just serve to articulate the human relationships with these things; they are the building blocks of an entire world view and of Māori identity itself. They play a similar role to the core definers of Western culture such as the arts, democracy, the rule of law, and so forth. But while the more human-centred Western culture tends to define itself by reference to its own thought and labour, Māori culture relies on pre-existing, pre-human definers – mountains, rivers, plants, animals, and so on. Māori culture seeks to reflect rather than dominate its surroundings. That is why the relationship between humans and taonga species is a definer of Māori culture itself. It is a preoccupation of the body of distinctive Māori knowledge that today we call mātauranga Māori.

All begins in te ao Māori with the idea of whanaungatanga or kinship – the preference to see everything as related rather than individuated. As we said in section 1.2, whanaungatanga apportions rights and obligations among the living; affirms active connections with the dead; and explains people's relationships with the myriad elements of creation, whether seen as animate or inanimate to the Western eye. It is not just an idealised metaphor in te ao Māori. It is carefully remembered and handed on in

whakapapa. It is the conceptual basis for all of the rights and obligations that arise among those within its web, whether human or not. It explains why, as in any family, obligation is more important than right. These ideas are encapsulated in the concept of kaitiakitanga.

We also introduced kaitiakitanga in chapter 1, but its importance in respect of the Māori interest in taonga species is such that it bears exploring further. In the preceding chapter we discussed kaitiakitanga and mana as reciprocal ideas: if mana is authority or right, then kaitiakitanga is its purpose and its limit. We said that its root word is tiaki, meaning to nurture or care for, and that in the human realm those who have mana must exercise it in accordance with the values of kaitiakitanga. This means kaitiaki must act unselfishly, and with right mind and heart, using correct procedure. It emphasises individual and community responsibility to nurture taonga species and the environment in which they live. It is similar to Western concepts of trusteeship or stewardship, though these lack the spiritual dimension present in kaitiakitanga. Kaitiakitanga is a community-based concept. It is not just the obligation of an individual but of an entire tribal community. It lasts for as long as the community itself.

That is not to say that the Māori world view requires humans to treat the environment as pristine and untouchable. Nor does it suggest that good kaitiakitanga has invariably been practised by Māori leaders and

communities throughout history. On the contrary, Māori – like all human communities – survived by exploiting the resources around them, and in doing so they occasionally caused significant damage (we discuss this at length in chapter 3). That was certainly the case when the Hawaiians began to grapple both with megafauna in great abundance and a heavily forested environment that was a barrier to familiar modes of cultivation. The Hawaiians certainly did not live up to their own values in the early days of colonisation, but with time and experience they seem to have created a system of knowledge and technology that produced a kind of equilibrium between themselves and the environment that was more consistent with those values. Kaitiakitanga is the word, the ideal, that expresses that equilibrium. It is a way of thinking and acting that seeks to express and enhance whanaungatanga with the elements of the environment.

Taonga species are important to kaitiaki in different ways. To explain those ways, or at least some of them, it is necessary to understand the relationship. We begin by affirming the obvious point that the connections between kaitiaki and taonga species are holistic and complex. We accept that by deconstructing the relationship here we impoverish something that has taken 30 or 40 generations to build. And to make matters worse, we have only a few paragraphs in which to convey volumes of mātauranga. We proceed cautiously nonetheless, because if our Western-dominated system is to accommodate deeply felt Māori concerns, those concerns need to be understood, even if only at a basic level.

The evidence we heard suggests that while there is often a considerable body of esoteric knowledge about taonga species, the relationship is primarily a practical one. Tohunga who gave evidence could speak at length on the medicinal and other uses of plants. Iwi members spoke to us in detail of their own personal experiences and perceptions of the importance of various plants and animals. Some could speak on higher matters of whakapapa connection and why, according to mātauranga Māori, plants or animals have the characteristics they do.⁸ But that was not often a focus. Most spoke in more tangible terms, perhaps reflecting the fact that mātauranga Māori has a sound basis in long-term observation. All practitioners,

without exception, emphasised two things: their reverence for these taonga and the necessity of expressing that reverence through karakia (prayers or incantations) whenever they came in contact with them.

Some taonga species are emblematic of community or cultural identity. Tuatara perform that function for Ngāti Koata.⁹ Tohorā (whales) have a similar role for a number of East Coast tribes and, as we heard in evidence, for Ngāti Wai in the north. Other iwi have similar relationships with particular species of marine fauna, native birds, and so forth. Emblematic species often have mystical or spiritual functions. They act as spiritual guardians (kaitiaki in a different sense of that word) of the iwi or hapū in question. They are said to appear at important events or times for the community, and they will communicate with tribal matakite, or seers, to warn of dangers ahead. (Taonga species in the context of conservation issues are discussed in chapter 4.)

Other taonga species – particularly indigenous flora – have defined roles in spiritual events or rituals. Kawakawa, for example, is used extensively in rituals associated with death and grieving as an adornment, both for the body of the deceased and for mourners. But it is also widely used as a preventive medicine. Koromiko is often used by tohunga as a technique for enhancing the tapu of a ritual or karakia. The flowering of the puawānanga serves as a harbinger of good fortune in the seasonal growing cycle.

Many species of indigenous flora have important rongoā or medicinal qualities. They depend for their efficacy on the quality of their own mauri, as well as that of the gatherer. Robert McGowan, an expert on rongoā Māori, advised us:

Traditional healers attest to the spiritual force, the *mauri*, within all manner of objects, plants included, and the ability of particular people to communicate with them. This is particularly apposite to *rongoa Maori*. The *mauri* within a plant can reach out to the *mauri* of the healer, and share the gift of healing that it carries.¹⁰

We were given a great deal of evidence about the role taonga species play in the arts of weaving, building, carving, and so forth. Reverend Paul Weka and Connie

Pewhairangi spoke to us at length about the importance of harakeke and kiekie to weavers.¹¹ Reverend Weka told us he was the last person in Ngāti Porou with the full mātauranga regarding kiekie harvest, which is conducted with an eye to future weaving and plant health.¹² Such evidence suggested that the relationship between the weaver and the plant is more than a simple connection between an artisan and his or her materials. Along with other weavers, these witnesses constantly reiterated the importance of the spiritual well-being of the plants with which they worked. They used karakia and special gathering and disposal rituals to reflect their reverence for, and reliance on, these plants. So it was also with the carvers and canoe builders. The mauri – the physical and spiritual wellness – of their taonga species was the paramount concern of these practitioners. Their fear for the plants over which they have a responsibility of kaitiakitanga is real and personal.

These kinds of specialised relationships – those associated with community identity, ritual, spiritual and physical well-being, and traditional crafts – give rise to high levels of expectation among kaitiaki that their relationships will be respected. But more general relationships must also be taken into account. All indigenous flora and fauna will be seen as components of the functioning system of creation. Each of them has its own mauri; whakapapa; associated kōrero or stories relating to its genesis, antecedents, and descendants; and lore in relation to characteristics, conservation, harvest, and use. This will be the case whether or not the species has one or more specialist functions. In other words, they are all a part of the life matrix that developed in this unique environment and, as such, they are all reflected in some important way in mātauranga Māori. The protection of these more generalised relationships will also need to be considered and weighed against other interests.

We will expand on the examples mentioned here in more detail below. For now it is sufficient to summarise the points made by saying that the relationship between Māori and taonga species is one founded in kinship; that this gives rise to the obligations of kaitiakitanga that are both personal and collective; and that those obligations are multi-layered in ways that reflect the depth and complexity of that relationship.

2.2.2 Some taonga species in detail

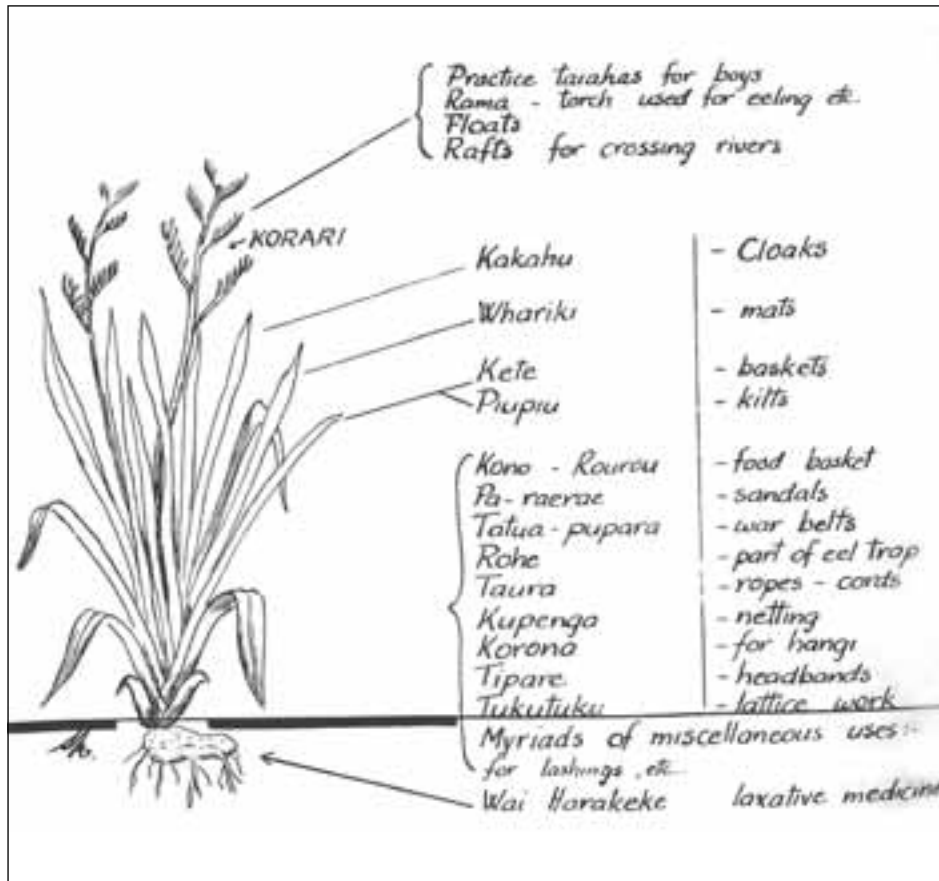
Having set out the basic characteristics of the relationship between kaitiaki and taonga species in te ao Māori, we turn now to discuss in greater detail some of the examples provided to us in evidence. In some cases they were the focus of particular iwi in a particular place, but in most they were important to all. We stress, however, that these are no more than examples that illustrate points we wish to make. Likewise, the claimants warned us that even the larger body of evidence they gave about taonga species was no more than a selection of the mātauranga Māori held by kaitiaki.

Claimants were very concerned about past publication of mātauranga Māori without the consent of kaitiaki, and for that reason gave some of the evidence in confidence. We have no wish to compound the grievance, but it is necessary to say something of the special relationships with these exemplar species and the mātauranga Māori supporting them. Without it, our analysis of the problem would be meaningless and our suggestions for reform would lack cogency. We trust that what we do say does not breach these confidences.

The taonga species we will address in more detail are: harakeke, koromiko, pōhutukawa, kōwhai ngutukākā, puawānanga, poroporo, kawakawa, mānuka, kūmara, and tuatara.

(1) Harakeke

It is hard to think of a plant more important to mātauranga Māori – indeed to traditional Māori life – than harakeke, or New Zealand flax (*Phormium tenax* and *P cookianum*). According to William Colenso, when the first Pākehā settlers advised Māori that there was no harakeke in England, Māori were astonished. ‘How is it possible to live there without it?’ they asked.¹³ Harakeke provides shelter, garments, fine fibre for weaving (muka), and powerful medicines for a multitude of ailments. We heard much evidence of these things from tohunga rongoā (expert practitioners of traditional medicine) and academics. But we were told that there is more to harakeke than its practical utility. It is also the perfect metaphor for the growth and life of the whānau. The young centre of the harakeke bush – the rito – symbolises the vulnerable new generation. These shoots are protected, first by



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

the folds of the mother leaf and then, beyond that, by the father. Arranged outside this nuclear grouping are the leaves of the older generations, which weavers told us are freely offered up by the harakeke for harvest, and provide the greatest benefits to humans. In return, harvesters are taught to return unused portions of the harakeke leaf to the base of the plant from which it came.

The arrangement of this plant is said to teach us that an abundant future proceeds only from the well-being of the new generation. As the oft-quoted whakataukī reminds us:

*Hutia te rito o te harakeke kei hea te komako e ko e?
Mau e ui mai he aha te mea nui o te ao
Maku e ki atu, he tangata, he tangata, he tangata.*

If you pluck out the young shoot of the flax bush where will the bell bird land to offer its song?

If you are to ask me what is the most important thing in the world

It is the people, the people, the people.

In this whakataukī the future of the people is likened to the vulnerability of the rito.

The importance of harakeke to Māori life, past and present, is reflected in the quality of its lineage. Harakeke is a child of Haumia-tiketike, one of the senior children of Rangi and Papa. Harakeke is a sibling of the many low-growing species of fern, herb, and hebe. They cling to and grow over their grandmother. They are said to be her most intimate garments.

Flax was highly sought after as the raw material for rope-making by early European colonists, and was one of the first commodities Māori bartered for European goods. For some 80 years up to the First World War, flax exports to Europe became a significant source of wealth for the country. Interestingly, in 1861, New Zealand's first ever patent was granted to A G Purchas and J Ninnis under the 1860 Patent Act for an 'Invention for the preparation of the Fibre of the *Phormium tenax* (flax) and other Plants for Manufacturing Purposes'.¹⁴

Today, in addition to its traditional uses, the medicinal properties of harakeke are recognised by New Zealand cosmetic companies. One of the best known of these companies harnesses the gel from the base of the leaf for its antiseptic, healing, and soothing qualities for use in a range of skincare products.¹⁵ It acknowledges the whakapapa of harakeke as a 'descendant of Rangi – sky father' in its promotional material.¹⁶ Harakeke has also been extensively investigated for its potential as a high-quality clothing fabric that can be woven commercially.¹⁷

Flax is also popular as a garden plant, and there are numerous cultivated varieties. Todd Layt of New South Wales, Australia, holds two patents under United States law in respect of harakeke varieties.¹⁸

Both relate to distinctive varieties of *Phormium tenax*, which are characterised by different growth habits (medium and dwarf growth).¹⁹

In New Zealand, a patent has been granted to Christall Rata for a processing method to create a net-like pattern over at least a portion of the harakeke leaf.²⁰ The patent specification acknowledges that 'the Maori people have used flax leaves and fibres from these leaves for years'. Another patent is held by Australia's Commonwealth Scientific and Industrial Research Organisation, and a Canadian co-owner, and relates to the 'expression of non-native genes in flax seeds'.²¹

Claimants are concerned about the long-term implications for their traditional relationship with harakeke – including access to plants and the transmission of mātauranga Māori associated with weaving – when private rights are granted over the species. They are also concerned about their lack of input into commercial developments of harakeke. Counsel for Ngāti Porou argued that

the Plant Variety Rights Act 1987 in particular, and the IP system in general, provide only 'limited recognition to the protection of the wider values that apply to matauranga'.²² Those wider values include a respect for the plant and the knowledge associated with it.

(2) Koromiko

Koromiko (*Hebe salicifolia*, *H stricta*, and allied species) is another of Papa-tū-ā-nuku's garment plants, descended from Haumia-tiketike. It is a large, bushy shrub with upright branches, white to pale lilac flowers, and distinctive spear-shaped leaves. As Hema Nui a Tawhaki Witana advised us: 'Its flower is full of nectar and the bees relish it when it is in season'.²³ Koromiko is a real tohunga plant in the sense that it was, and remains, the plant favoured by traditional healers for healing rituals. Some of the evidence we heard about koromiko was given on a confidential basis, and it is not for us to repeat its substance. It is sufficient to point out that koromiko was often chosen by tohunga to accompany karakia in order to prevent or cure illnesses.

In addition, we were advised extensively of the particular healing properties of the plant. Without repeating the detail, it was clear to us that every part of the plant in each stage of its development addresses a particular ailment. Indeed, different parts of the plant in different parts of its life cycle are capable of addressing opposing symptoms – for example, diarrhoea and constipation.

Independent confirmation of the power of the plant can also be found in RC Cooper and RC Cambie's seminal reference work, *New Zealand's Economic Native Plants*. The authors explain:

One of the most important of the 'bush cures' is the use of *Hebe* species, particularly koromiko ... which is a well-known and authenticated remedy for dysentery. Koromiko is the only native plant to have received recognition in British medicine, being listed as a remedy for diarrhoea in the 1895 *Extra Pharmacopoeia*, London.²⁴

It is notable, too, that in the late nineteenth century koromiko leaves were used in public hospitals for the treatment of severe diarrhoea:

An epidemic of this 30 years ago filled the Christchurch Hospital and the doctors could not cope with it until the Maori remedy was used. The Maoris got 12 soft leaves – over that was too strong, and chewed the koromiko raw.²⁵

It appears that its effectiveness as a remedy was so accepted by New Zealand authorities that ‘during World War II, quantities of the dried plant were sent to the North African front, where it was used effectively by Māori troops’:

The value of the plant has been traced to its anti-peristaltic action. The active principle was originally suggested to be the tannins which are present in the plant, but more recent work by Martin-Smith has indicated that it is a phenolic glycoside.²⁶

It is perhaps unsurprising that a plant so hardy, attractive, and with such powerful therapeutic properties should be sought after by commercial interests. Some herbal remedy companies market koromiko-based products,²⁷ but koromiko’s real impact is, in fact, as an ornamental plant. Former Department of Scientific and Industrial Research (DSIR) botanist Dr Ron Close gave us evidence as an interested party.²⁸ He advised:

The hebe genus has about 40 or 50 natural species, but there has been a rapid proliferation in the number of hebe cultivars. A recent book by Laurie Metcalf names and describes nearly 800 hebe cultivars.²⁹

He described the commercial spread of the plant this way:

Hebe is a major crop plant in Denmark, and in Holland, and in the UK. They have taken that plant and bulked it up and then they are selling it all round Europe in particular. So it is a world-known plant, and I believe it is also cultivated quite substantially in Columbia, and the Columbians then send it to USA.³⁰

Twenty-one years ago, in Denmark alone, annual sales of koromiko cultivars topped 1.5 million pots valued at \$NZ15 million (at 1990 values).³¹ Another reference puts

Danish production for the same period at 2.5 million hebe plants annually.³²

In New Zealand, Duncan & Davies Contracting Limited, for example, holds a special form of right called a plant variety right (PVR) over variegated forms of koromiko (for a description and discussion of PVRs, see sections 2.7.2 and 2.9.3(5)).³³

The claimants are dismayed by such developments. They have neither taken part in nor received any benefit from them – even though, they say, koromiko is a plant with which they have an intimate relationship and over which they bear the obligation of kaitiakitanga.

(3) *Pōhutukawa*

The pōhutukawa (*Metrosideros excelsa*) is one of New Zealand’s most widely recognised trees. Though it grows naturally only as far south as Gisborne in the east and northern Taranaki in the west, and is widely regarded as an exclusively coastal species, it has been planted in parts of the South Island, and flourishes in numerous inland environments. It grows best, however, close to the coast, where its massive, twisting branches and even its exposed roots may be seen overhanging cliffs and beaches, seemingly in defiance of gravity. Its feathery, brilliant red flowers which appear from November to January are reputed to herald a long hot summer – for this reason, as much as its beauty, many think of pōhutukawa as New Zealand’s own ‘Christmas tree’ – but even when not in flower the tree is a treasured feature of the landscape. A yellow-flowered form of *M excelsa* was found on Mōtiti Island in the Bay of Plenty in the early 1940s and has since become popular as a garden tree, as is a second species of pōhutukawa, the smaller *M kermadecensis*, originally from the Kermadec Islands.³⁴

Probably New Zealand’s largest pōhutukawa, Te Waho o Rerekohu, grows at Te Araroa, near the East Cape. It is more than 19.8 metres high, has a spread of nearly 38.5 metres, and is at least 350 years old. Even older is the little pōhutukawa, Te Rēinga, that for at least 800 years has clung to the cliff face at Te Rerenga Wairua (Cape Rēinga). This tree has a central place in Māori tradition. It is said to guard the entrance to the sacred cave through which spirits pass on their way to the next world.³⁵



Pōhutukawa showing leaves,
flowers, buds, and capsules,
painted by Sydney Parkinson.

Māori sayings about pōhutukawa stretch back to the first peopling of these islands. The inner bark has a range of medicinal properties. Low-growing cultivars of pōhutukawa and its close relative the rātā are popular garden plants both in New Zealand and overseas.

Unsurprisingly, given its longevity, stature, and spread, the pōhutukawa is the subject of numerous stories. Perhaps the best-known of these tells of the young warrior, Tawhaki, and his attempt to find help in heaven to avenge his father's death. The pōhutukawa's flowers are said to represent Tawhaki's blood, shed after he fell to Earth.³⁶ A pōhutukawa at Kawhia Harbour called

Karewa is said to be the tree to which the *Tainui* waka was tied after completing its voyage across the Pacific from Hawaiki. Also at Kawhia is the large tree known as Tangi te Korowhiti, named after a boy who was put to death after he stole food destined for the builders of the *Tainui* canoe. On the nearby Aotea Harbour is yet another famous tree said to have protected a spring where a lonely pāpera or

grey duck lamented a lost love and turned to stone. The colour red, so characteristic of pōhutukawa and relatively unusual in the forests of Aotearoa, carries special chiefly status. There are numerous stories and pepeha (sayings) which tell of the relationship between the blooms of the pōhutukawa and the plume of red feathers worn as a headdress by the Hawaikian voyagers.³⁷

Pōhutukawa also had a number of traditional uses. Its attractive, deep-red wood is exceptionally strong (*Metrosideros* means 'iron hearted'), and was used for weapons, canoes, paddles, and eel clubs.³⁸ It has a long history as a medicinal plant as well. The flower nectar was used to alleviate sore throats, and an infusion of the inner bark was taken to treat dysentery and diarrhoea. The inner bark contains tannin which was also used to stem bleeding. To this end, either the bark itself or a poultice of boiled and powdered bark would be held in place against a wound.³⁹

Today, pale cream-coloured pōhutukawa honey is produced commercially – its flavour is typically described as resembling butterscotch – but the main commercial use of the plant is as a garden specimen. Here, low-growing varieties are most favoured. The yellow-bloomed *M. excelsa* is, as we have said, one of these, but several cultivars of pōhutukawa and its close relative the rātā have also been developed to meet demand for flowering natives as ornamental shrubs. As a result, Duncan & Davies Contracting Limited, for example, holds pvr's over specially bred varieties of *Metrosideros excelsa* (pōhutukawa) and *M. robusta* (rātā).⁴⁰

There was concern among some claimants that the breeding of new strains of a taonga species like pōhutukawa for the international and local ornamental plant market, and the granting of pvr's over them, has occurred without consultation with Māori. In their view, such developments pose a risk to the longstanding relationship between kaitiaki and taonga species.

(4) *Kōwhai ngutukākā*

Kōwhai ngutukākā, or kaka beak (*Clianthus puniceus*), was one of the indigenous species collected by Joseph Banks and Daniel Solander at Anaura Bay when Cook's *Endeavour* visited the East Coast in 1769. Long prized for its distinctive blooms, it is perhaps best known these days

as a garden plant, but it is one of New Zealand's rarest species in the wild, confined now to some groves near the Kaipara Harbour, and to isolated areas of the East Coast and Urewera National Park. A member of the pea family, it is a usually low-growing, rather spindly tree that has clusters of dramatic beak-shaped flowers ranging from bright crimson to pink in colour.⁴¹

Tate Pewhairangi, who gave evidence on behalf of Ngāti Porou, claimed the species as a taonga for his iwi. Kōwhai ngutukākā is, for example, a pattern used in the whare whakairo (carved house) at Te Pakirikiri Marae, Tokomaru Bay,⁴² and in the highly prized meeting house Ruatēpupuke, now based in the Field Museum in Chicago. He also described to us in some detail the

Kōwhai ngutukākā (kaka beak), painted by Sydney Parkinson. Parkinson accompanied James Cook and Joseph Banks on the *Endeavour*.



2.2.2(5)

history of kōwhai ngutukākā in his rohe. There are, he told us, no kōwhai ngutukākā plants left on the area of Ngāti Porou land known as the Hikuwai. In the early 1980s, however, Mr Pewhairangi allowed a Department of Lands and Survey employee to collect seed pods from the few remaining kōwhai ngutukākā in the area for a department breeding programme. He told us he was excited by the prospect of the plant being restored for future generations and was happy for the programme to proceed, but he requested that the bred plants be returned to the Hikuwai and that they would not be sold commercially.⁴³

Neither of these conditions, he told us, was respected. Kōwhai ngutukākā have been planted on the roadside outside the rohe, and not returned to the Hikuwai, and plants are available for purchase in garden centres and other retail outlets. Mr Pewhairangi told us that Ngāti Porou are dismayed the plant has been grown and sold for profit without any value being returned to the iwi. He also told us of his fear that kōwhai ngutukākā will lose its value as a taonga species if it is sold commercially, particularly because it is not widely grown in the Ngāti Porou rohe and, particularly, on the Hikuwai.⁴⁴

Ngāti Porou's special relationship with the plant is not with all kōwhai ngutukākā, but with the plants in their shared territory. If an iwi right somehow interferes with or undermines that relationship, and deprives Māori from benefiting from it, the claimants argue that the species is inadequately protected as a taonga under article 2 of the Treaty.

(5) *Puawānanga*

The star-shaped white flowers of the puawānanga, or New Zealand clematis (*Clematis paniculata*), are the largest and perhaps the most beautiful of any in the New Zealand bush. In Māori tradition, puawānanga was:

the child of two stars of the heavens: Rehua, the father, whose appearance was the sign of summer coming, and Puanga, the mother, a star whose twinkling foretold the kind of season in prospect. She was the food bringer: if her rays twinkled towards the north, a plentiful year was in prospect; if towards the south, a lean year for products of the forest, field and sea would follow.⁴⁵



Puawānanga by Clelia L Burton. The focus of commercial interest in puawānanga, or New Zealand clematis, has been on its value as an ornamental plant. Efforts are ongoing to develop shrub-like, rather than climbing, forms suitable for home gardens.

In tradition, when people saw puawānanga flowers in the tops of the trees, they took it as signal to engage in productive activity.⁴⁶ Hema Nui a Tawhaki Witana told us:

The flowers are not used widely. No Maori will pick them and bring them into the house. They are sacred in a sense and are meant to stay upon the plant to give their blessing to all who saw them. They bring the blessings of the stars with them when they bloom. It is quality of life that is both spectacular yet gentle. They herald good fortune and offer hope.⁴⁷

We were also told of the plant's medicinal properties.

In the 1980s, scientists at Opunake in Taranaki tried to incorporate perfumes from kōwhai, puawānanga, and rewarewa petals.⁴⁸ However, like the koromiko and kōwhai ngutukākā, commercial interest in puawānanga has mainly focused on its value as an ornamental plant. Indeed, specimens were exported to Britain as early as 1840, and the variety 'Lobata' has been a collector's item ever since.⁴⁹

In 1986 a collaborative project was set up between New Zealand's DSIR (Botany Division) and the National Institute of Agriculture Research in France. Genetic studies of puawānanga were aimed at introducing the shrub-form genes into the standard climbing form of the plant to produce a more 'showy' or commercially attractive cultivar. As far as we are aware, the project is ongoing but there has been no Māori involvement in it.⁵⁰

(6) *Poroporo*

Poroporo (*Solanum aviculare* and *S. laciniatum*) is a member of the nightshade family. It is a fast-growing shrub, up to two metres tall, with long dark-green leaves and attractive purple flowers. Its small fruit ripen to an orange or scarlet colour. It has a delicious acidic taste when ripe, but is poisonous when green. This orange-fruited plant differs from another indigenous member of the nightshade family, the small-flowered nightshade *S. nodiflorum*, and from the larger-flowered *S. nigrum*, both of which have small black berries and are sometimes also known as poroporo. We heard evidence from Ngāti Koata about these plants as a food source.⁵¹ However, our discussion below concerns the orange-fruited variety.

According to Māori tradition, poroporo was a name known in Hawaiki. We know this because of a particularly infamous incident involving Tama-te-kapua – soon to become captain of the Te Arawa migration canoe. He coveted the fruit of a tall poroporo tree owned by the ariki and tohunga Uenuku. There is some debate about whether poroporo in Hawaiki was a form of breadfruit (*Artocarpus altilis*, a member of the fig family) or a berry-bearing plant. The weight of opinion appears to favour the breadfruit version, but whatever the true position, the important point is that the fruit of this particular species was highly valued. Indeed, the tree in question was

so important to Uenuku that it had a name – Te Rākau Whakamarumaru o Te Whare o Uenuku (The Tree that Protects the House of Uenuku) – and its fruit was so prized that Tamatekapua was prepared to risk the wrath of his ariki to get at it. The young chief and his brother Whakaturia built themselves stilts to get at the sweeter top fruit but were caught red-handed. Most people today say it was because of Uenuku's fury at this incursion that Tamatekapua built Te Arawa and emigrated.⁵²

Once in Aotearoa, Māori gave the same name to several local species of solanum. The continuing value of

Poroporo by Clelia L Burton. This hardy native plant, favoured by Māori and early Pākehā settlers for its edible berries, was widely propagated in Eastern European countries for the steroid industry in the 1960s and 1970s. Attempts to replicate that enterprise in New Zealand failed.



the orange-fruited varieties, in particular, is reflected in the fact that it was not just gathered in the forest but was deliberately cultivated next to whare or in groves. Indeed, the existence of poroporo groves was used in evidence to the nineteenth-century Native Land Court to establish customary title. First and foremost, poroporo was prized for the taste of its fruit. It was often described as kai tamariki – children’s food – much in the way lollies are thought of today. According to Murdoch Riley, ‘English settlers stewed the berries and made them into pies and jam, calling them “Māori gooseberries” and “bullabull”, the latter a transliteration of the original name.’⁵³ It was not just humans who craved the fruit. Kererū, tūi, and kōkōmako also gorged on the ripe berries. This made poroporo bushes a favourite site for birding traps.

Poroporo was also used in decoration. The juice of the fruit was made into a pigment for tā moko, and the wood sap was used to prepare timber destined for waka or doorways in order to fix and enhance the final red coating of kōkōwai (red ochre).⁵⁴

Poroporo plants were first collected and taken to Europe by Joseph Banks and Daniel Solander who were aboard the *Endeavour* on Cook’s first voyage to New Zealand. But it was a New Zealand chemist, Professor LH Briggs, who isolated the plant’s active steroidal ingredient, solasodine, in 1942. Commercial production began in Hungary in the 1960s – coincidentally, using descendants of the original Banks and Solander plants, although these were later supplemented by further imports from New Zealand. Since then, solasodine has been produced commercially in the former Soviet Union, Romania, and China, using poroporo cropped on a very large scale. Indeed, poroporo became so important in the former Soviet Union that in 1972 it appeared on the 10-kopek postage stamp as part of a series devoted to medicinal plants.⁵⁵ Growth trials have also been undertaken in pilot production facilities established in Pakistan, Egypt, Israel, Japan, England, and Indonesia.

In the 1970s, a factory was established in Waitara, in Taranaki, in a venture jointly owned by Fletcher Holdings and a Dutch pharmaceutical company to extract solasodine for use in the contraceptive pill. The venture was unsuccessful because of crop failure due to poor weather, variable solasodine content, and cheaper overseas

products.⁵⁶ But the efficacy of the steroidal properties of poroporo – and its leaves in particular – is attested to in the plant’s more traditional uses. Māori boiled the leaves in water to make an effective shampoo solution, said also to eradicate dandruff and darken grey hairs. The same active ingredient also makes various decoctions of the leaves effective in treating rheumatic problems, as well as skin ailments such as eczema, especially when mixed with other herbs. A poultice made from the pounded leaves was used for the treatment of ulcers and sores.⁵⁷

Just as New Zealand has lost revenue from the vast number of hebe cultivars worldwide, so too have the failed efforts to commercialise poroporo had a price. As economic botanists Cooper and Cambie observe:

The failure of this venture [to extract solasodine] does not augur well for similar New Zealand industries based on natural products. Despite the obvious advantages of an indigenous plant source and a history of local chemical endeavour in the field, it might appear in hindsight that New Zealand was far too slow to capitalise on what might have been a very lucrative industry.⁵⁸

Certainly the therapeutic and narcotic properties of some solanum species have been the subject of research in Europe since the eighteenth century, and independently of the specific mātauranga Māori relating to poroporo, but there is no doubt that the Māori relationship with and understanding of poroporo runs deep. Yet Philip Rasmussen, who gave evidence for Ngāti Kahungunu, argued Māori have had no involvement in either the export or development of this plant. He insisted that:

we have to pursue product development, using New Zealand native plants, and that we should do so in the most ethical manner possible, and that has to involve Maori at an early stage, not just as a raw material supplier not just someone getting royalties because some researcher has found a magic chemical in a species of New Zealand native plant. It has to be the products themselves, right through from day one to the end I believe, Maori need to benefit economically, first and foremost. This is a global world we live in. We can’t hold back development, it is going to happen whether we like it or not.⁵⁹

(7) Kawakawa

The kawakawa, or pepper tree (*Macropiper excelsum*), grows prolifically in native bush. Up to six metres in height, it has characteristic heart-shaped leaves (usually pitted with holes made by insects) and jointed stems reminiscent of bamboo. Kupe's people recognised it immediately. It has a strong family likeness to its tropical cousin kava or 'ava (*Piper methysticum*), and so they called it kawakawa. Kawakawa is probably second only to harakeke in terms of its broad utility. An infusion of its leaves is widely used as a daily tonic. It is said to be good for the blood, and has mild purgative properties. We were told that the leaves, bark, or fruit have a dozen or so other medicinal applications, the details of which were provided extensively in evidence.⁶⁰

Just as importantly, kawakawa has a vital ceremonial function. It was traditionally used as a perfume and preservative for bodies lying in state, and continues to be used as a potent symbol of mourning. In most tribes today women will adorn their heads with kawakawa to signify grief, and coffins will have kawakawa leaves placed in or near them. Among some tribes, all senior male and female mourners will wear kawakawa wreaths, and those involved in tangihanga pōwhiri will carry kawakawa leaves in their hands. Hence the final stanza of the famous Taranaki ngeri:

*He aha te tohu o te ringaringa? He kawakawa!
Tukua ki raro ki a hope rā, he koroki o
Ko te whakatau a te mate! Hu e ha!*

*What is the symbol that our hands must bear? It is kawakawa!
Let them fall to our sides to demonstrate our grief
Death bids us welcome! Hu e ha!*

For these reasons, Māori treat kawakawa with special reverence.

The commercial world is also discovering the benefits of kawakawa. A process for the brewing of a beer or ale in which fresh kawakawa leaves are added to the brew before the end of the boiling stage in order to give it a distinctive flavour has been patented in New Zealand.⁶¹

Tohunga rongoā, in particular, expressed concern at the number of kawakawa-based remedies available in



Kawakawa. This plant is highly regarded by Māori both for its medicinal properties and for its important role in rituals associated with death and grieving. Unlike many other native species, it is still widespread in the bush, partly because its leaves are unpalatable to possums.

New Zealand and abroad without acknowledgement of the Māori values that surround the plant – indeed, without Māori participation at all. Mr Rasmussen said Māori should be key players in the commercial development of traditional remedies or rongoā. He said they were not, and he feared that unless Māori were given room to step up, ‘an enormous global market’ in natural health products would be captured by overseas interests.⁶² The potential of commercialisation presents a sharp challenge to the kaitiaki relationship. Some Māori are opposed to any commercialisation of rongoā. Others are comfortable with it, provided development is ethical and consistent with the values of kaitiakitanga (see our discussion in section

73.8). All look to ensure that the appropriate kaitiaki has a central role in any system of IP or trade regulation.⁶³

(8) *Mānuka*

Mānuka, or tea tree (*Leptospermum scoparium*), is one of New Zealand's most common native trees. It grows throughout the country and tolerates most conditions – it is very hardy and adaptable, and thrives under fire. Mānuka typically produces single white flowers, though sometimes double-flowered or red-flowered forms appear, and its little leaves are highly aromatic when crushed.

Most New Zealanders know how good hard red mānuka wood is for tool handles, posts, and firewood. But as Riley confirms, Māori have long used mānuka wood for canoe decking, poles, and weapons.⁶⁴ The return to popularity of traditional martial arts and of waka has seen mānuka find increased favour as a timber of choice in recent times. It was also used in the past for fish hooks, eel pots, cray pots, and fish traps, though this has mostly given way to modern manufactured materials. Both Te Kapunga Dewes and the Reverend Paul Weka of Ngāti Porou spoke to us of the techniques used to build mānuka and supplejack cray-pots to catch the legendary Tairāwhiti kōura.⁶⁵

Ada Haig, a senior Ngāti Porou kuia, explained to us how mānuka is used in the construction of tukutuku panels to decorate meeting houses. She said that all of the Ngāti Porou carved houses were decorated using mānuka.⁶⁶ As Hirini Clarke told us:

[Mānuka is a] very sturdy wood indeed and our koroua, they knew which was the best, they looked at the grain, they knew how to dry it, they did all these sorts of things because it's such a wonderful resource for Māori. Not only in terms of its medicine, not only in terms of its uses for implements and various types of equipment, but it also gave us warmth.⁶⁷

The most extensive evidence about mānuka, however, related to its medicinal uses. Mr Clarke again told us:

The mānuka was used in different ways. The leaves for example were used for oral infections, infections of the gums, toothache. It was sometimes used with other types of native



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

plants, put into a liquid form and taken internally for upset tummies. It was also used, the bark, was pulped and mixed in with other rongoa and applied to open wounds . . . It was mixed with certain other native plants and made into medicines to cure hākihaki [sores] and other skin infections.⁶⁸

As chairman of directors of Tairāwhiti Pharmaceuticals Limited (Taipharms), a wholly Māori-owned East Cape-based company that produces mānuka extracts for use in medicinal and cosmetic products under the brand name 'Natural Solutions', Mr Clarke knows a great deal about mānuka's therapeutic properties. Ngāti Porou was particularly hard hit by the big economic downturn of the late

1980s. Armed with their knowledge of rongoā, Mr Clarke and other Māori landowners in the East Cape decided to look for employment opportunities in mānuka-based products. With a small government grant, they sought the assistance of the Cawthron Institute to explain in scientific terms why mānuka had such healing power and to help determine whether it had commercial potential. They were advised that it contained a unique antibacterial component. They discovered that the concentration of this antibacterial component was higher in East Coast mānuka than almost anywhere else in the country – indeed, anywhere else in the world. Now Tairawhiti Pharmaceuticals is one of a number of mānuka product-based companies producing two main product lines – mānuka honey and mānuka oil.

Mānuka oil is extracted from the foliage of the plant. It is now retailed all over the world as a natural health product. It has antibacterial, antifungal, and antihistamine properties, and is used to treat conditions such as acne, athlete's foot, ringworm, and skin rashes. It is also used as a fragrance in cosmetics, and in soaps and shampoos for scalp or skin irritations. On a more medical note, Mr Clarke told us:

The oil was very active against the golden staph or a strain which is called staphylococcus aureas . . . a lot of us would remember the H bug that was in epidemic form a few years ago . . . The mānuka is the only known natural cure against the H bug or the golden staph as it is commonly called in medical circles.⁶⁹

In fact, mānuka is known to kill a broad range of micro-organisms, including bacteria that are resistant to antibiotics. Several hospitals worldwide are successfully using mānuka honey for post-surgical treatment.⁷⁰

Honey has long been used as a wound ointment, but mānuka honey has special characteristics that seem to derive from the addition of mānuka elements to the ordinary healing properties of honey.⁷¹ Once again, honey from East Cape appears to have the greatest concentration of this characteristic because of the chemical make-up of the nectar.⁷² In Mr Clarke's own words: 'The manuka honey here in Ngati Porou has certain unique features

that mean its products can command premium prices.'⁷³ It is now used worldwide as a health food, a general tonic, in wound-care products such as bandages, in cosmetic skin-care products, for acne treatments, and so on.

Mānuka products are marketed according to the antibacterial strength of the honey as measured by the UMF, or Unique Mānuka Factor. Today 28 companies are licensed to use the UMF trade mark,⁷⁴ and the industry is said to be worth \$100 million in annual turnover.⁷⁵ Despite the recent global economic downturn, the company 'New Zealand Honey' was ranked number one on Deloitte's 'Fast 50 List', with an astonishing growth of 995 per cent between 2007 and 2009.⁷⁶

This new industry has become a major export earner. Tairawhiti Pharmaceuticals has been there from the beginning, and other Māori interests are now players,⁷⁷ but Mr Clarke lamented the lack of protections for the Māori relationship with this important plant. After all, it was concern over the use of Māori knowledge about the healing properties of plants such as mānuka that started this inquiry in the first place. In his words:

A major risk is that the manuka from Matakaoa/Ngati Porou could be grown by anyone. No one 'owns' the species, the genus, or the genetic make up of our Manuka and Kanuka. [Kanuka, *Kunzeaericoides*, is a close relative of manuka; it too has a variety of traditional medicinal uses.] I do understand that unless a cultivar with distinctive traits is bred, no plant variety right can be granted. A scientist Taipharms has worked with has told us he saw manuka growing in a laboratory in a nursery in France some time ago, and when the French scientist with him was questioned as to how the manuka came to be in Grasse, the French Scientist apparently just shrugged and said 'we have our sources'. But really, all you need to do in this isolated part of the Country, where few cars travel along the roads, and the farmers are busy, is to stop the car, and take some seed pods from the trees. It is that easy. As well, I am aware that in Tikitiki, a Ngati Porou landowner was unaware that a beekeeper had taken some specimen trees from his land. This particular landowner had proven high levels of umf shown to have been present on honey collected from hives on his property.⁷⁸

Due to its scientifically proven antibacterial effect, mānuka is highly sought after and subject to intense scientific research.⁷⁹ In January 2008, researchers from the Institute of Food Chemistry at the Technical University of Dresden claimed to have identified the main active compound responsible for the antibacterial activity in mānuka honey as ‘methylglyoxal’.⁸⁰

The article which reported the scientific results stressed that ‘honey derived from the Manuka tree (*Leptospermum scoparium*) in New Zealand, has a very high level of “nonperoxide” antibacterial activity. The pronounced antibacterial activity of Manuka honey is an important commercial property.’ Its authors also confirmed that ‘the use of honey as a traditional remedy for bacterial infections is known since ancient times’. However, they did not acknowledge Māori as the source of knowledge relating to the properties of mānuka.⁸¹

In an interview, the lead researcher further explained that:

The story started about in the early 90s when they discovered that manuka honey has some kind of special pronounced antibacterial activity which is due to so-called non-peroxide compounds . . . A lot of groups tried to find out about the chemistry behind it. We were lucky; about three years ago we discovered a compound named methylglyoxal . . . We could see that this compound is exclusively responsible for this pronounced antibacterial activity.⁸²

The researchers suspect that the highly potent antibacterial properties of the honey are largely attributable to the environment in which mānuka grow in New Zealand. They are therefore studying the particular environmental conditions (soil, sunlight, and so on) that give rise to high-potency mānuka. ‘We have a lot of plant samples obtained from New Zealand from our colleagues there.’⁸³

In New Zealand, patents have been granted for a number of mānuka-related products and processes. These include the use of mānuka in a process for brewing ale; mānuka extract useful in the treatment and prevention of oral diseases and pathogens; UMF-fortified honey; mānuka hair-removal formulation; and mānuka honey as part of an antibacterial compound.⁸⁴



A branch of white mānuka in flower and seed, drawn by Georgina Burne Hetley. Mānuka wood was widely used by Māori for weaponry, building, and firewood. Today, mānuka oil and mānuka honey are the basis of a multi-million-dollar industry in which Māori are increasingly important players.

Our searches also revealed at least two existing United States patents in relation to mānuka. The first is held by Coast Biologicals Limited (Auckland, NZ) and relates to an ‘antimicrobial composition comprising *Leptospermum scoparium* and *Melaleuca alternifolia* oils’. The prior art described in the patent explains the importance of

mānuka and its applications.⁸⁵ It also confirms the existence of mātauranga Māori about the therapeutic properties of mānuka. It provides:

In recent years increased effort has been devoted to investigating and isolating commercially useful extracts from native plants and animals internationally. In some respects this has been motivated by continuing resistance developed by infective organisms and diseases to conventional therapies but also by a desire to extract full benefit from the world's resources. In some cases the biological organism can be chemically active in its raw state, but more usually isolation or other treatment is necessary to release the therapeutic and/or prophylactic effects. In New Zealand, essential oils have been extracted from New Zealand manuka tree (*leptospermum scoparium*) on a commercial basis for some years although the industry continues to grow. Manuka oil has been used to date in various applications including aromatherapy, cosmetics, and as a toothpaste ingredient. According to one source manuka is the most abundant and widely distributed flowering native tree in New Zealand. It was historically used in New Zealand by Maori and later European settlers for purposes including the treatment of respiratory ailments, burns, dandruff, dysentery, fever, and indigestion, as well as being drunk as a type of tea. The biologically active ingredient is the oil accumulated in oil glands in the leaves. Whilst research indicates that there may be different chemotypes of manuka in New Zealand, the present invention relates to all New Zealand chemotypes, although particular reference is made to manuka derived from the East Cape region of New Zealand.⁸⁶

The second patent is held by Alfred Stirnadel from Germany, and relates to 'medication containing extract substances from plants or plant parts of the species *Leptospermum scoparium*'.⁸⁷

As far as we are aware, Māori have not been involved in the acquisition of any of these patents.

(9) Kūmara

A great many varieties of sweet potato (*Ipomoea batatas*, a member of the convolvulus family) occur worldwide,⁸⁸ and the history of their distribution and trade is the

subject of considerable archaeological and ethnobotanical research. It is, however, generally agreed that the plant has its origins in South America, possibly in Peru, from where it eventually found its way across the globe, forming an important part of the diet of peoples from Eastern Europe to Polynesia.⁸⁹ That is certainly true of New Zealand's sweet potato, the kūmara, the most important of the food crops (that included also taro, yams, and gourds) carried by Māori from Hawaiki.⁹⁰

Different iwi and hapū have their own versions of the mythological origins of kūmara, and of its journey to Aotearoa. We were told about many of these in evidence. What is common to them all is a reverence for kūmara as a taonga species – a mainstay of traditional Māori agriculture, and a plant that has an important role in Māori cosmology and whakapapa. It carries with it a wealth of tradition, ritual, and story.⁹¹

Te Rarawa say Kupe brought kūmara tubers to Aotearoa and planted them at Hokianga.⁹² Other tribes have their own stories of how and where the kūmara arrived in Aotearoa. Indeed, it is indicative of the kūmara's centrality in Māori life that nearly every tribe claims their ancestors brought the kūmara first.⁹³

Some say that a woman called Whakaotirangi was the first to introduce kūmara to these shores. While her fellow passengers eventually ate the seed kūmara they took with them on the voyage, she kept hers tied in a corner of her kete for safekeeping. In Tainui tradition, Whakaotirangi came to Aotearoa as the principal wife of the captain Hoturoa. During the journey Hoturoa's second wife, Marama, had an illicit affair with a slave. As a result, the seeds she carried with her failed when they were planted in the new land – among them her seed kūmara, which grew as a bindweed. By contrast, the seeds brought by Whakaotirangi flourished in Aotearoa.⁹⁴

Another version of the story of how kūmara came to Aotearoa has been recounted by the Ngāti Porou carver, Pine Taiapa. In Hawaiki, he said, Ruakapunga, the high priest of the cult of the kūmara, sent one of his people, Tairangahue, to Aotearoa to assess its suitability as a site for kūmara cultivation. After Tairangahue saw the flowering kōwhai and abundant birdlife in the area of Gisborne, he returned to Hawaiki to tell Ruakapunga how good the



Mokena Pahoe of Waipiro Bay in front of kumara pits. Māori became expert at adapting Polynesian horticultural methods to Aotearoa's colder climate.

land there was for cultivation. When he travelled back to Aotearoa once again, he did so on giant birds the high priest had provided for him. But he overlooked the need to recite vital incantations of thanksgiving and to ensure the safe return of the birds once he reached his destination. Tairangahue eventually uttered the appropriate karakia, but it was too late, and the birds arrived home in very poor condition. 'To avenge the maltreatment of his birds, Ruakapunga sent three pests to affect the growth of the kumara, the anuhe, a grub, and mokowhiti and the mokoroa.'⁹⁵ All these pests led to failure of the kumara crop, and are a reminder, Taiapa said, 'of Ruakapunga's vengeance on man' for his thoughtlessness.⁹⁶

The mythical origins of the kumara are also recounted

in the famous oriori or chant, 'Po! Po!' from the Gisborne area, said to have been composed by Enoke Te Pakaru of Te Aitanga-a-Mahaki. It was recorded by Apirana Ngata and Pei Te Hurinui Jones in *Ngā Moteatea* (which we refer to in section 1.2.2), and contains detailed references to the provenance of the kumara, and rituals associated with its cultivation and use.⁹⁷

No one knows precisely how many varieties of kumara made the journey to Aotearoa – there may have been as many as 20 or more, each with specific characteristics of colour, size, flavour, and hardness, and each of them suited to particular environments.⁹⁸ Only three of these ancient varieties now survive – Hutihuti, Rekamaroa, and Taputini, the three varieties identified in the 1950s by Dr

Douglas Yen of the DSIR, who built up a remarkable collection of some 700 kūmara lines from New Zealand, the Pacific Islands, and around the Pacific Rim for the purposes of identification.⁹⁹ All three are distinct from (and much smaller than) the kūmara cultivars grown in New Zealand today.¹⁰⁰

Hema Nui a Tawhaki Witana, of Te Rarawa, explained to us some of the traditional practices associated with the cultivation of kūmara in Aotearoa. Garden sites were carefully chosen, and rituals and karakia accompanied each aspect of their preparation and maintenance. She said, for example, that in ancient times people would leave a line of kūmara in the ground as a koha or gift to the winds and to other elements and creatures that were part of the immediate environment.¹⁰¹ By giving this gift to the kūmara's family, the food could be enjoyed in abundance into the future.

Likewise, special implements were used and processes developed for each subsequent stage of harvest and storage. The kūmara were usually stored in lined and covered pits that kept the tubers dry and at an even temperature, and out of reach of rats. 'Much depended on the survival of [the] people in making sure that the kumara was intact for the next growing season,' Mrs Witana explained.¹⁰² Indeed, it can be argued that the way in which Māori succeeded in turning kūmara, a relatively fragile tropical perennial, into a high-yield annual crop was fundamental to their survival and prosperity in the cooler climate of their new land. In particular, the development of sophisticated, temperature-controlled storage techniques for seed stock allowed kūmara cultivation to spread in such a way that cultivation was possible from Northland to Banks Peninsula (for more discussion of this, see chapters 3 and 6). The remains of centuries-old kūmara gardens and, especially, storage pits may still be found in various parts of the country, and have been the subject of ongoing study.

Like many other taonga species, the ancient varieties of kūmara have long been valued for more than one function. The starchy tubers were, of course, high in energy and suitable for cooking in a variety of ways – in hāngī, by boiling or roasting, or by grating the flesh to make a dish called roroi.¹⁰³ Traditionally, smoked or sundried kūmara, known as kao, were taken as a 'convenience food' by

warriors and travellers.¹⁰⁴ And cooked kūmara was said to have special power to protect people travelling by night – it was often carried to ward off evil spirits.¹⁰⁵

Kūmara also had a range of medicinal uses. It seems that a variety of skin ailments, from minor irritations to rashes, burns, and even open wounds, were treated using various kūmara preparations, be it from the leaves, the juice, or the tubers themselves. An infusion of the leaves was drunk as a purgative, and a hot, soup-like mixture made of kao and water is reported to have been used as an antidote to karaka berry poisoning.¹⁰⁶

Over time, and even as new varieties of kūmara supplanted the older ones (and the potato, too, found increasing favour as a food crop), Māori continued to rely on kūmara as a staple of agriculture. They were quick to embrace the larger varieties introduced, perhaps in two or three phases, by European settlers from the early 1800s onwards, and to adapt their own traditional agricultural practices to the requirements of these new plants.¹⁰⁷ Perhaps the most significant of these introductions was the variety thought to have been brought to New Zealand in the 1850s by those aboard a whaling ship called the *Rainbow* who traded it in return for assistance with repairs.¹⁰⁸ Māori called this variety Waina (on account either of its vine-like form or its wine-red skin colour), favouring it especially for its relative ease of cultivation and high yield.¹⁰⁹

Today, New Zealand's \$14 million kūmara industry, producing some 20,000 tonnes annually, relies on three main cultivars – Owairaka Red, Toka Gold, and Beauregard – none of which are derived from the ancient lines of pre-European origin.¹¹⁰ Production is now largely centred around the Ruawai Flats area of Kaipara, though commercial operations once spread from Northland to Auckland, and from the Bay of Plenty to Gisborne.¹¹¹

Māori have long participated in, and benefited from, the farming of new kūmara varieties such as these, just as they did with the pre-European varieties. Indeed, some claimants say that the long tradition of Māori expertise in the cultivation of kūmara has been crucial to the development of the kūmara industry as we know it today.¹¹² But the fate of the ancient varieties has given rise to particular concern. The claimants were disappointed that many of the older varieties – those most potent for

rongoā – have been compromised. This has occurred not only through hybridisation but also as a consequence of the export of much of Dr Yen's kūmara seed collection to Japan in 1969.¹¹³ We were told that in the late 1980s Mrs Witana and other members of the Pou Hao Rangi Trust travelled to Japan to retrieve a number of cultivars from the collection – including the pre-European varieties Taputini, Rekamaroa, and Hutihuti.¹¹⁴ The Trust planned to establish an ethnobotanical garden in Māngere called Te Wao Nui a Tane, and between 1993 and 1995 received money from the Foundation for Research Science and Technology for the purpose. The project seems to have lapsed for lack of ongoing funding – an outcome regretted by the Trust and others keen to maintain these ancient lines in New Zealand.¹¹⁵ The claimants expressed their desire for funding to re-establish the garden, and to be 'acknowledged as interim-kaitiaki or trustees on behalf of all Maori, of the surviving varieties of kumara returned from Japan in 1988'.¹¹⁶

The claimants assert their right as kaitiaki to protect the genetic integrity of these precious varieties. That kūmara are not endemic to New Zealand but were brought to Aotearoa from Polynesia and, before that, to Polynesia from South America, made no difference to their status as taonga. In fact, because they arrived as canoe plants their status was enhanced.

(10) *Tuatara*

Tuatara (*Sphenodon punctatus*) are often called living fossils. According to *Te Ara*, New Zealand's online encyclopaedia, they are 'the only living representatives of an ancient lineage – the order Sphenodontia, over 250 million years old . . . just two species of tuatara survive, and only in New Zealand'. The name tuatara simply means spiny back, but various remarkable anatomical features distinguish them from other reptiles, among them 'a defining pattern of openings in the skull and a unique type of haemoglobin in the blood, and males have no external reproductive organ'.¹¹⁷

Māori approach the tuatara's great age, as well as its unique physiology (including, significantly, the 'defining pattern of openings in the skull'), from a different perspective. Mrs Witana told us that tuatara are descended from Punga, a son of Tangaroa, the sea god, although she

acknowledged that some say tuatara came from another of Tangaroa's sons, Peketua.¹¹⁸ Such antiquity, combined with the fact that individuals are so long-lived, means that mātauranga Māori accords them a special position. It is said by all of the tribes that the tuatara is a seer, able to see into the spiritual realm through a 'third eye' granted to it by Tangaroa. For this reason, tuatara are often given a role as spiritual kaitiaki of special places such as urupā (burial sites), and places where great misfortune has occurred, such as battlegrounds.

Takapourewa, or Stephens Island, a small island in Cook Strait, is home to about 50 per cent of the world's population of these rare and ancient creatures.¹¹⁹ The island was formerly owned by Ngāti Koata, but in 1891 it was taken by the Crown for a lighthouse,¹²⁰ and is now administered by the Department of Conservation (DOC). Ngāti Koata are acknowledged by all to be the kaitiaki of the tuatara of Takapourewa – indeed, of all tuatara within their rohe.¹²¹ This kaitiaki obligation is a matter of pride and identity for members of the iwi.

Alfred Elkington, born on nearby Rangitoto ki te Tonga, or D'Urville Island, in 1929, described how the deep cultural and spiritual relationship between his iwi and tuatara extended to a reverence for each and every one of the species:

We had a lot of respect for the tuatara – my grandmother used to say it was a very special animal to us. We are the kaitiaki. It is a taonga of Ngāti Koata. I always had a sense that it was Ngāti Koata's responsibility to look after the tuatara. Uncle Rangi and Uncle Son considered that we were its kaitiaki. For example, a friend of the family once took a tuatara from the [nearby] Trios in a sugar sack – the uncles told him to put it back on the island.¹²²

In a similar vein, Terewai Grace (née Elkington) recalled a childhood encounter with tuatara while muttonbirding in the Trios islands:

My brother John found a tuatara egg and put it in his pocket. We got on the boat and started off and we saw a tuatara swimming behind us. My father said, 'has somebody taken something belonging to the tuatara?' My brother John showed him the egg, so we had to turn around and go back.

We were watching the tuatara following us, and my father went ashore. He took the egg and put it down, and waited until the tuatara came back, picked up its egg and scuffled away. My father was extremely angry with my brother.¹²³

And Puhanga Tupaea reminded us just how normal the friendship with tuatara was for Ngāti Koata children:

At Port Hardy there was a tuatara that used to lie on the rocks – when the children would be swimming in the sea, the tuatara would drag their clothes up and prevent them from getting wet. It was very intelligent. We all knew about that tuatara.¹²⁴

Ngāti Koata have a ‘joint management’ agreement with DOC in respect of the island and its tuatara.

An extensive programme of scientific research has been undertaken under this agreement, as have visits to the island by Ngāti Koata and others. The agreement started with good intentions, but all has not been plain sailing. There have been deep and ongoing disagreements over access to the island for scientific and tourism activity, and it is fair to say that DOC and Ngāti Koata are at odds over whose preferences should prevail.¹²⁵ We will deal with the issues peculiar to DOC in chapter 4. In this chapter, we focus on Ngāti Koata’s concerns about the potential effects of scientific research on tuatara and on the tribe’s kaitiaki role.

While Ngāti Koata acknowledged the need for, even welcomed, scientific research into tuatara on Takapourewa, they feared that without proper controls from a Māori perspective research could go too far and come to disrespect these special animals. They gave us a number of practical examples of the problems as they saw them. A particular concern was the risk that the DNA of the tuatara – remnant as it is of the dinosaurs – might be isolated and used inappropriately. Ngāti Koata felt that as kaitiaki they had a special responsibility to prevent such occurrences. This problem was reflected in a disagreement between the iwi and a Massey University researcher who applied to the Environmental Risk Management Authority (ERMA) to take blood samples from Takapourewa tuatara for gene mapping.¹²⁶ Jim Elkington expressed the displeasure of the tribe at both

ERMA’s decision to accept the application, and the failure to consult Ngāti Koata before it was made. In fact, he argued that Ngāti Koata should not merely be consulted but should have a right to share in the decision-making to ensure that genetic experimentation does not involve mistreatment of this taonga species or any part of its genome.

Ngāti Koata was also concerned that proper practices be adopted when tuatara travel. When a proposal was floated to ‘lend’ tuatara to Chester Zoo in the UK, Benjamin Hippolite, who was both a Ngāti Koata kaumatua and a DOC employee at the time, gave evidence about conditions set by the iwi. He said:

When we get requests for tuatara to go to overseas zoos, we have a number of requirements and protocols for taonga leaving the country. These are that:

- (a) an area be set aside for tuatara;
- (b) the tuatara is accompanied by one of our kaumatua, and we/they are given a welcome in accordance with our protocol;
- (c) they are only on *loan* to the zoo; and
- (d) the zoo must send reports to Ngāti Koata from time to time as to the welfare of the tuatara.

We may never call the tuatara back, but are able to do so if, for example, the population on Takapourewa was wiped out.¹²⁷

Chester Zoo writes to Ngāti Koata from time to time with reports on the tuatara in its care. ‘That is an example,’ adds Mr Hippolite, ‘of us exercising our kaitiakitanga now.’¹²⁸

Another relevant research project has involved the genetic modification of *E coli* bacteria with DNA taken from tuatara.¹²⁹ The research, undertaken by scientists at Victoria University of Wellington, was aimed at identifying the genes involved in the immune system, sex determination, and olfactory receptors of the tuatara. Ngāti Koata and Te Āti Awa were consulted and involved in the project, and the university maintained a good working relationship with the kaitiaki, whom ERMA stipulated should be kept informed on a regular basis.¹³⁰

It is clear that the claimants’ intimate and longstanding spiritual relationship with the species, combined with the tuatara’s rarity, and a high level of scientific interest in its unique physiology, creates an exceptional situation. The

claimants would say that this special combination of circumstances entitles them to an exceptional level of control over each and every one of the tuatara within their rohe.

2.2.3 A different perspective

The examples we have discussed above all contain elements of mātauranga Māori to guide kaitiaki and practitioners in how they should relate to, use, or care for the taonga species in question. The mātauranga Māori reflects the cultural and practical importance of each taonga species. In addition, the examples show that taonga species are used in modern Western ways, whether in research, science, or commerce, by people who are not kaitiaki and who are unfamiliar with mātauranga Māori and the requirements of kaitiakitanga. Some intentionally involve Māori to some extent. But in no case has Māori involvement been compelled by law. Most use occurs without reference to kaitiaki or mātauranga Māori practitioners.

Having described the perspectives that kaitiaki and practitioners of mātauranga Māori bring to taonga species, it is necessary now to explore the perspectives of the researchers, scientists, and entrepreneurs who are also deeply interested in these species. Their relationships with taonga species operate within te ao Pākehā and in accordance with its prescriptions. It is appropriate therefore to spend some time tracing the way in which science, the marketplace, and IP law have come together to configure these very different kinds of relationships.

As we said in the introduction to the chapter, this strictly binary approach is a simplification. We are aware that in reality te ao Māori, governed by traditional Māori values, and te ao Pākehā, governed by Western values, are not mutually exclusive. Rather, after more than 200 years of close interaction, there is a large and growing area of overlap between them. An increasing number of scientists, researchers, and entrepreneurs are Māori, at least some of whom adhere to Māori values as much as they can in their private and professional lives. Some, of course, choose not to. Conversely, an increasing number of Pākehā and other New Zealanders who are not Māori have been drawn into te ao Māori to live in accordance with Māori values. Their perspectives are having an increasingly powerful effect on national life. Nevertheless,

the starting point in our search for a way forward with respect to taonga species must be to build a clear understanding of the two value systems. It is only when the two ends of the spectrum are understood that we can begin to explore how they might interact.

2.3 TE AO PĀKEHĀ, RESEARCH SCIENCE, AND INTELLECTUAL PROPERTY

2.3.1 Science, technology, and the development of patent and trade mark law

In chapter 1 we briefly surveyed the development of the Western concept of intellectual property from the beginning of the industrial revolution. In this chapter, our initial focus is research science, followed by the development of industrial IP, particularly patents and plant variety rights. We do not intend to provide a lengthy treatise on either topic, but attempt a brief description of some salient points in their development as necessary background to the wider issues raised in this chapter.

We consider, first, the values and methods underpinning research science, and how those methods might intersect with the values that prevail in te ao Māori. ‘Science’ – from the Latin *scientia* – originally meant knowledge in any form, and at least until the nineteenth century was taken to mean any particular branch of knowledge or study. The change to its modern meaning was well under way when in 1834 the English mathematician and philosopher William Whewell coined the term ‘scientist’ to describe a new form of knowledge practitioner.¹³¹ This new practitioner was a rationalist and an empiricist who applied reason to the phenomena of the physical universe – and only the physical universe – in order to understand its elements, systems, and relationships. The scientific method was the instrument of this new practitioner. It required hypothesis, experimentation, and observation, the purpose of which was to deduce truth by methodically excluding untruth. Over time, science slowly shed its old generalised meaning, and came to encompass in a single idea three distinct but related elements: the scientific method, its product (scientific knowledge), and the culture of relentless and methodical search that drove it.

Scientific knowledge had then to be ordered in a



Flax plant *Phormium cookianum* Le Jolis from the Banks and Solander collection of 1769. Some 30 years later, numerous plants from Cook's first voyage were still being propagated in the Royal Botanic Garden at Kew.

structured way, both to preserve the knowledge and signify relationships between its internal elements. Chemistry required its periodic table; geology and palaeontology needed their aeons, ages, eras, and periods. Early attempts to structure and organise life forms can be traced back to ancient Greece, where the philosopher and naturalist Aristotle classified herbs, shrubs, and trees as early as 300 BC.¹³² But as the horizons of European exploration of the world expanded over the centuries, the

discovery of unimagined numbers of new plants and animals required new methods of describing and classifying them. The most enduring of these was formulated by the Swedish botanist Carl Linnaeus (1707–78), who in 1735 described in his *Systema Naturae* a method for classifying and naming all known and still-to-be-discovered living organisms according to their shared physical characteristics. If Māori deployed whakapapa to give order to nature in the new world of Aotearoa, then the Linnaean system of biological taxonomy performed the same function for Europeans in the modern world of science.¹³³

One of Carl Linnaeus's students was Daniel Solander. He accompanied Cook on his voyage to Aotearoa in 1769 as an assistant to the naturalist Joseph Banks. Together Banks and Solander collected thousands of specimens of native plants and animals during their first circumnavigation of these islands, and on their return to Britain spent many months classifying them in accordance with the Linnaean system. In this way, New Zealand's animals and plants – among them mānuka and poroporo – entered the body of scientific knowledge and became eligible for subjection to the scientific method, beginning a chain of events that has led, albeit indirectly, to this claim.¹³⁴

It can be seen that the scientific world view differs from, and to some extent is at odds with, te ao Māori in several respects. First, it is concerned largely with the advancement of knowledge, which science prizes above other values. Biotechnology, for example, seeks to identify uses for living organisms, but does not determine whether those uses serve values such as kaitiakitanga or, for that matter, questions of national identity or national interest.

Secondly, science's empiricism means that it relies on evidence that can be directly observed or sensed. It has no place for non-physical worlds, and little or no place for received knowledge that cannot be directly tested. To give one example, there is nothing in the scientific method that requires a DNA researcher to consider the mauri or whakapapa of a tuatara.

Thirdly, the scientific method is in general reductive, which means that it seeks to understand each object or phenomenon in the physical universe by breaking it down into its component parts and identifying underlying properties or laws. Its taxonomies categorise plants, animals, and other phenomena based on underlying

characteristics, rather than focusing principally on their relationships to other creatures within their particular environmental context. This reductive approach means that the efficacy of mānuka, for example, is not considered holistically as a reflection of its mauri; rather, scientists have isolated its active compound, and are working to identify the genetic and environmental factors that determine the concentration of those compounds within the plant.

We now turn to consider how patent law evolved against a backdrop of scientific and technological innovation and industrialisation. Again, this process reflects a world view that contrasts with, and is in many respects at odds with, te ao Māori.

During the eighteenth century, at the same time as Europe's colonial expansion, the first industrial revolution was making its presence felt in Britain. Iron foundries and textile factories were built, and at the end of the eighteenth century steam engines were invented. These developments radically changed Britain, then Western Europe, and, later still, North America, ultimately ushering in the beginning of machine-based production that would transform the world. While there is still debate about whether slavery and colonialism were two of the root causes of the industrial revolution, there can be no argument that scientific and technological innovation on the one hand, and economic innovation on the other, were absolutely crucial. Science and technology provided the machines and physical processes. Capital funded their construction and extracted unprecedented value from them by providing mass-produced goods to consumers via the key economic innovation of the time, the free market. As the pioneering political economist Adam Smith (1723–90) observed, the infinite demands of the market ensure perpetual innovation.

In Britain, this technological innovation played a central role in the great transformation from feudalism to modern capitalism. Skills and production were the source of improvement, and it was this transition that supported the emerging idea that people have rights in their creative endeavours (see also section 1.3).

The first British patent statute, known as the Statute of Monopolies, had been passed in 1623 and became law in Britain in 1624.¹³⁵ It was designed to stop the Crown

misusing letters patent to bestow privileges on patentees who had not invented their products.¹³⁶ The Statute required for the first time that patents could be granted only to the 'true and first inventor' for 'any manner of new manufacture'.¹³⁷ The Statute of Monopolies still forms the basis of the definition of invention in New Zealand's patent law, and those same words are found in New Zealand's Patents Act 1953.¹³⁸

In his *Lectures on Jurisprudence* (1766), Smith described patents as a 'rare example of a harmless exclusive privilege' that supported innovation. About a decade later, he justified patents as 'the easiest and most natural way in which the state can recompense for hazarding a dangerous and expensive experiment, of which the publick is afterwards to reap the benefit'.¹³⁹

Smith was talking about what he considered were good patents, not the misuse of the royal prerogative. The relationship between the royal prerogative and patent law remained entangled, however, and legal historians argue that modern patent law did not emerge clearly until the mid-nineteenth century.¹⁴⁰ Even then, there was considerable hostility towards patents, partly because they were viewed as contrary to laissez-faire ideals,¹⁴¹ but mainly because the process for granting them was deficient. Patent applications were not examined for inventiveness and novelty in the way they are today (see section 2.7.1), and as a result patents were unreliable. By the end of the nineteenth century, the British Patent Office had been significantly reformed in response to these problems, and patents as a result came to be regarded as being good for commerce.¹⁴²

2.3.2 Patent rights today

The patent system, as it has evolved, aims to balance private and public interests in the development of science and technology. The private interest is served by granting the patent holder an exclusive right to exploit an invention for a limited period of time. In most cases, those wishing to use the underlying knowledge in the patent will require a licence from the patent owner. In this way, patents are seen as rewarding innovation, and as providing incentives for the commercialisation of that innovation.¹⁴³

The public interest side of the equation is served in two ways. First, when a patent is registered the knowledge in

the patent is disclosed in a written explanation known as a patent specification and claims. That knowledge, in theory at least, becomes available to other innovators who may wish to develop or modify it without breaching the patent holder's rights. Then, when the patent expires, that knowledge becomes available for others to use in any way at all. This is the point where knowledge enters the public domain, which we first referred to in chapter 1. There we described the public domain as the vast body of knowledge and information that is freely available for the public to use as they see fit. Research science would not exist without access to and use of the public domain, for each advance in scientific knowledge builds on prior advances, and each new innovation steps up from earlier ones that reside in the public domain.

Over time, an effective patent system has come to be seen as an important part of a functioning modern economy. The granting of exclusive rights rewards innovation (though there are many examples of innovation unprotected by IP).¹⁴⁴ Exclusive rights are also said to provide incentives for investment in, and commercialisation of, innovation.¹⁴⁵

New Zealand's patent law is based on international standards and grants the patent owner a monopoly over the invention to which it relates for a period of 20 years.¹⁴⁶ That monopoly entitles the patentee to prevent others from exploiting the invention in New Zealand without permission. In return, the owner must put a written explanation of the invention (the patent specification) onto a publicly available patent register, and must also outline the invention's uses.¹⁴⁷ The extent of the patent grant is defined in what are known as 'the claims'.¹⁴⁸ In this way, as we explained above, investors receive their due, while the detail of the innovation is available to others who might want to carry the idea forward or modify it without breaching the original patent,¹⁴⁹ and that detail eventually becomes fully available in the public domain when the patent expires. That, at least, is the theory of the patent disclosure requirement. In practice, some patent applicants try to describe their inventions as opaquely as possible in order to limit their usefulness to other innovators. Indeed, there is debate about whether patent specifications and claims adequately perform their intended role.¹⁵⁰ That said, patent specifications make information

about patented inventions available to the public. Without patents, that information might be kept confidential as a kind of trade secret.

By the end of the twentieth century, private rights in knowledge and information had extended to cover the creation of new varieties of plants and animals, the isolated genetic or biological elements of existing species, and the extractive or analytical processes that produced them. Most rights have taken the form of patents. Examples include patents over entire gene sequences, and the extraction and synthesis of active therapeutic ingredients in plants. A new form of right called the plant variety right (PVR) was introduced in 1987 to provide protections for those engaged in the production of new plant variants through selective breeding. In New Zealand, we see PVRs mostly in the large ornamental plant industry, but they are also deployed to protect commercial interests in food and forestry plants.

2.3.3 The challenge ahead

These developments have created a point of potential tension between those who wish to utilise private property rights in the genetic and biological resources of plants and animals to create wealth, and kaitiaki who often have very different priorities. We explained above how research science is founded on an empirical world view that is blind to many aspects of te ao Māori. Patents, and the commercial system they serve, are likewise at odds with te ao Māori in fundamental ways. The idea that knowledge about the specific properties of a taonga (such as kawakawa or mānuka) can be parcelled up and assigned to different owners is, in itself, alien to the relationship-based world of mauri and whanaungatanga. As with research science, the patent system is founded on a set of values that are not those of kaitiaki. Its central concerns are the advancement of knowledge and the protection of commercial interest in that knowledge, rather than mauri or environmental values. This is a theme we will return to later.

There is also tension between Māori and Pākehā approaches to access to knowledge. Pākehā culture places great value on unrestricted access to knowledge and ideas. This has long been seen as a precondition to progress. Of course, access to knowledge and ideas even in the public domain is constrained in Western societies

by laws relating not only to IP but also to public safety, defamation, moral standards, and privacy, to name a few. But the principle that access should be as unconstrained as possible is fundamental to Western thinking. By contrast, Māori culture does not place such great value on free access. Concepts of tapu, mauri, and whakapapa tend to suggest that access must be earned. The first priority of kaitiaki is to protect rather than publish information. That is not to say that mātauranga Māori is always secret. Far from it. But kaitiaki are often very uncomfortable when they have lost oversight of readily available mātauranga Māori (see, for example, section 6.4).

These tensions go to the heart of the ways in which we generate knowledge and wealth in New Zealand. The central question is whether our current system can accommodate a new set of rights to be held by kaitiaki communities and individuals who do not share the values upon which the system was built. That, indeed, is the question we attempt to answer in this chapter.

We have said that the issues the claimants brought before us were focused on specific but related areas:

- ▶ unauthorised use of mātauranga Māori in research based on bioprospecting, and the resulting unauthorised scientific or commercial use of genetic and biological resources of taonga species;
- ▶ offensive interference with the whakapapa of taonga species when they are subjected to genetic modification; and
- ▶ use of the IP regime to exploit rights in the genetic and biological resources of taonga species in ways that exclude kaitiaki and undermine the relationship between kaitiaki and taonga species.

We have also said that it has become clear to us that these three areas of law and policy – bioprospecting, genetic modification, and IP – are different parts of a single process that begins with scientific research and ends (sometimes, at least) with the successful commercial exploitation of a new patent-protected product. In the next section, we provide an overview of the research process as it relates to each of these component areas. We follow this up with more detailed discussion of their particular legal and policy regimes in subsequent sections. In each case, the immediate context is different, yet, significantly, each gives rise to similar issues and questions that

are central to the claimants' concerns. We address these in turn in sections 2.5, 2.6, and 2.7.

2.4 BIOPROSPECTING, GENETIC MODIFICATION, AND INTELLECTUAL PROPERTY: AN OVERVIEW

2.4.1 Biotechnology research

The New Zealand Government spends in excess of \$NZ700 million a year in direct research science funding (see chapter 6).¹⁵¹ That excludes funding for staffing and infrastructure of science faculties in tertiary education. Private expenditure is somewhat higher, at \$NZ913 million in 2008.¹⁵²

These figures represent a tiny proportion of world activity in this area. The OECD as a whole spent over \$US935 billion on research, science, and technology in 2008.¹⁵³ Expenditure in China and India adds a further significant component. By any measure, research science is a huge global industry and a sizeable proportion of the world's economy.

Some of that money is spent on research into plants and animals, whether it is simply to better understand them or to harness some hoped-for benefit. Biotechnology – the manipulation of genes, proteins, and other components of life to produce new knowledge and sometimes new products or services – is a major area of this research science, with applications in pharmaceutical, agricultural, horticultural, and industrial processes, among others.¹⁵⁴ Globally, there are more than 4,000 biotechnology companies, and the industry was valued at \$US89.7 billion in 2008.¹⁵⁵

Arguably, all biotechnology is undertaken to advance human well-being or purposes. This means that human subjects can be directly involved in the process in several ways. Human DNA sequences and genes are the subject of research and, as discussed below (section 2.7.1(7)), may be patented. Humans are also involved in field trials of pharmaceuticals that may be the product of a biotechnological process.

New Zealand is a tiny player in the world market, but biotechnology is a small but important part of our economy and generated income of \$351 million in 2009.¹⁵⁶ Between 2005 and 2009 the number of biotechnology companies operating in New Zealand increased from 87

to 267.¹⁵⁷ Government investment in the sector was almost \$250 million in 2007.¹⁵⁸ Private investment has remained small, at \$67 million in 2007.¹⁵⁹ Weak private-sector investment is seen by the Government as a significant issue in any reform of biotechnology-related policy.¹⁶⁰

It is clear, nonetheless, that biotechnology is a major growth sector both in New Zealand and globally, and that the momentum gathered so far is going to increase. Scientists estimate that almost half of new cancer drugs developed between 1941 and 2006 were either natural products or directly derived from them.¹⁶¹ It is not known exactly how many species of flora and fauna exist (estimates vary between 10 and 100 million), but globally about 1.75 million species have been discovered, described, and named.¹⁶² Most are still to be assessed for potential biotechnology uses. It is estimated, for example, that less than one per cent of the world's 250,000 tropical plants have been screened for their potential pharmaceutical properties.¹⁶³ These facts, and the evidence we heard – from iwi, scientists, academics, Crown and private research institutes, and officials – only confirms that research into indigenous plants and animals is highly significant and growing.

2.4.2 The research process

The research pathway can begin in many different ways and span many years. A common beginning is the search for a beneficial characteristic that is inherent in the genetic make-up of a living organism by means of the process known as bioprospecting. In New Zealand, some Crown research institutes (CRIs), universities, and private biotechnology companies undertake research of this kind.¹⁶⁴ Foreign universities and biotechnology companies are substantially involved as well, though usually in collaboration with local agencies.

Bioprospecting is the search, extraction, and examination of biological material or its molecular, biochemical, or genetic content (whether *in situ* or *ex situ*)¹⁶⁵ for the purpose of determining its potential to yield a commercial product. Examples of such products include pharmaceuticals, cosmetics, pesticides, and other agricultural products, and new varieties of organisms. What distinguishes bioprospecting from other biotechnology research is the notion of prospecting – searching biological material

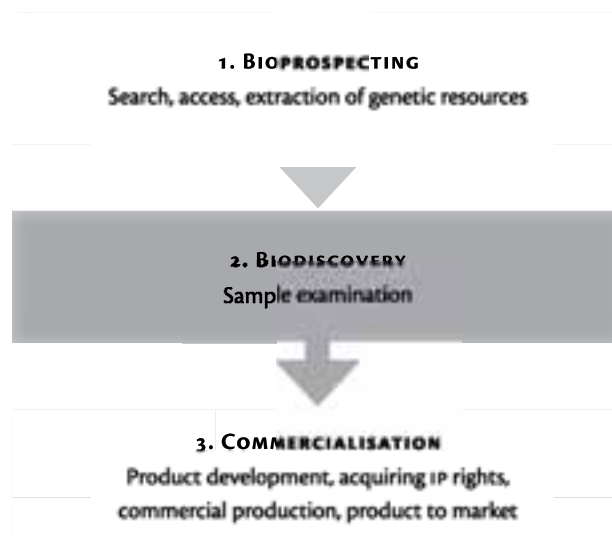


Figure 2.1: Stages of bioprospecting

for hitherto undiscovered substances and applications. Indeed, researchers often begin with the end use in mind, and prospect biological material accordingly.

New Zealand's relative isolation has contributed to the development of a rich variety of life forms, many of which are found nowhere else in the world. This, and the fact that New Zealand's 405 million hectare exclusive economic zone (EEZ) is one of the largest in the world,¹⁶⁶ makes the country attractive to bioprospectors in a variety of specialised fields. As one example, hydrothermal vents within the EEZ offer unique opportunities to study micro-organisms that have developed in extreme environments. Research into organisms of this kind may lead to the discovery of bioactives with commercial potential. Bioprospecting also contributes to New Zealand's economic development in other ways, for instance through the education and training of new researchers with valuable skills.

Bioprospecting research can, however, be extremely expensive. Collecting samples and screening for bioactive substances requires a high level of expertise and investment. Downstream activities, such as the development, testing, and obtaining approval of pharmaceutical drugs, may require many millions of dollars. For all the potential

value of bioprospecting, that value cannot be guaranteed, and can be hard won. A great deal of money can be spent searching for and developing a substance that never becomes a commercial product.

The biggest challenge for bioprospectors is knowing where to look and what to look for. Sometimes the information will be available in scientific journals, but often the best source will be 'old' communities with longstanding experience of the characteristics of the plants and animals within their environments.¹⁶⁷ These communities will carry information that science has yet to discover. That is why traditional knowledge, or mātauranga Māori, can be valuable in bioprospecting. It often contains detailed and long-tested information about biological characteristics that can remove the randomness and cost of unaided bioprospecting. Indeed, one study has found that bioprospectors increased the likelihood of finding useful chemical compounds from 1:10,000 to 1:2 if traditional knowledge was used to focus the prospect.¹⁶⁸

The next challenge for the bioprospector is securing access to the biological resource. This will raise legal questions about who owns the resource once it is harvested and who controls the right to exploit its genetic material.

There is currently no specific legal framework around bioprospecting in New Zealand. In 2007, the Government released a proposed policy framework for consultation, which we will discuss in more detail in section 2.5.4.

Sometimes a discovery will lead to the development of a product based on the extraction of active compounds from the organism itself. Mānuka-based products are examples of this. Sometimes, however, researchers or biotechnology companies will try to isolate an organism's active compound and replicate it artificially by creating a synthetic product with similar characteristics. This is known as synthetic biology, which extends to the replication of entire organisms.¹⁶⁹ In May 2010, for example, scientists from the J Craig Venter Institute in the United States published the results of their successful experiment to assemble from scratch the entire genome of a bacterium, *Mycoplasma mycoides*.¹⁷⁰ Using synthetic biology in preference to naturally grown material can help biotechnology companies to reduce long-term production costs and more effectively control product quality. It is also

possible to manipulate the existing genes of an organism in order to emphasise latent genetic characteristics.

In other cases, the biotechnology company may want to extract a genetic characteristic from the target organism to introduce that characteristic into another organism that it already produces or has rights over. Alternatively, the objective may be to introduce external genetic characteristics into another organism which expresses unique, novel traits. For example, New Zealand scientists (at Crop and Food Research) inserted an insect-resistant gene that is naturally produced by *Bacillus thuringiensis* (*Bt*)¹⁷¹ into brassicas to keep them free from caterpillar damage without the use of synthetic pesticides.¹⁷² The same genes were transferred into potato (*Solanum tuberosum* L) to enhance their resistance to larvae of the potato tuber moth.¹⁷³

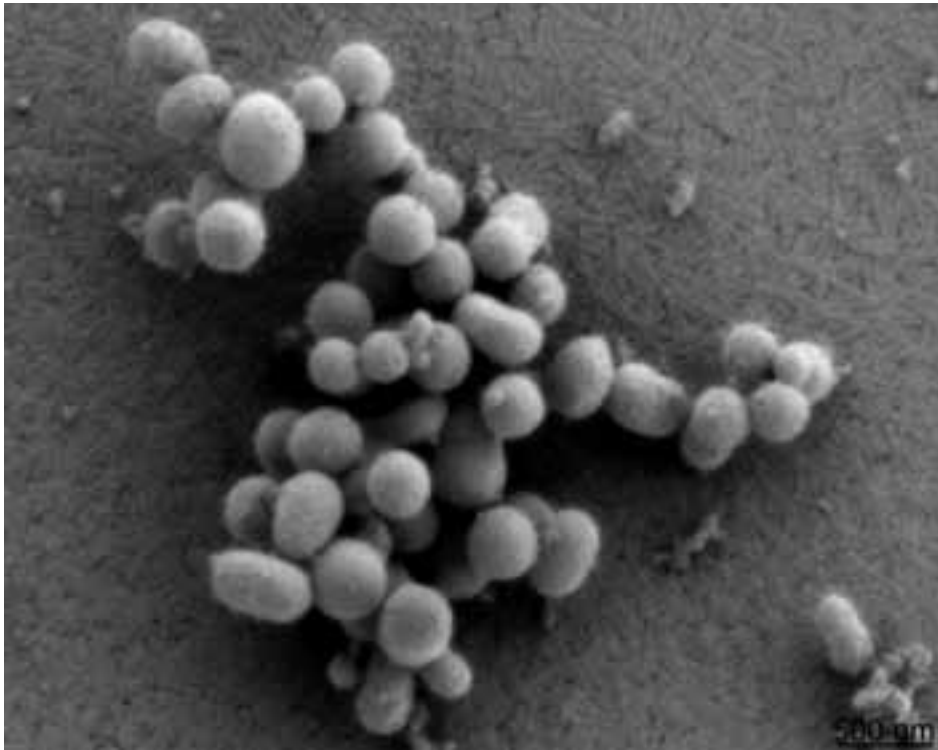
This process is known as *genetic modification*. Genetic modification was comprehensively defined by the Royal Commission on Genetic Modification in 2001:

- ▶ the deletion, change or moving of genes within an organism, or
- ▶ the transfer of genes from one organism to another, or
- ▶ the modification of existing genes or the construction of new genes and their incorporation into any organism.¹⁷⁴

The result of this procedure is a genetically modified organism (GMO).¹⁷⁵ While the potential benefits of gene technology are immense (for example, higher yields, resistance to pests and diseases, adaptation to particular environments, and increased convenience in harvesting and storage), there are equally significant risks (including, for example, antibiotic resistance and allergic reactions in people and animals, reduction of biological diversity, and cross-pollination of GMOs and naturally occurring organisms).

Specific controls on the creation and custody of GMOs are contained in the Hazardous Substances and New Organisms Act 1996 (HSNO Act) and administered by ERMA.¹⁷⁶

Whatever the result of the extraction, synthesis, or modification process, the biotechnology company will want to protect its interest in the commercial value of the product or process. That is, it will want to prevent others



Scanning electron micrograph of *Mycoplasma mycoides* JCv1-syn1. Research into flora and fauna is often conducted in the laboratory at the molecular level. *M mycoides* causes lung disease in cattle. This image is of a self-replicating synthesised version of the organism, developed by the J Craig Venter Institute.

from using or copying either the product or the process. In this way, companies can greatly increase the likelihood of recouping the cost of research and development. The company will usually apply for a patent – often in many countries simultaneously – in order to secure that protection. *Intellectual property rights*, particularly patents, are both the culmination of the research process and the starting point for commercial development. Patents are assets that can be used to obtain finance to develop research into saleable commodities. They also give the developer an exclusive right over others who may be engaged in a similar line of research.

In New Zealand, biotechnology patent approvals increased from 190 in the two years to 2005, to 305 in the two years to 2009.¹⁷⁷ Globally, New Zealand contributed to 0.3 per cent of all biotechnology patent applications filed under the Patent Cooperation Treaty (see section 2.7.1(6)) in 2006.¹⁷⁸

In addition to biotechnology, traditional plant breeding and hybridisation is another large area of scientific and commercial activity, and one in which IP rights are also relevant. Most people think in this context of the specialised species and hybrids sold in garden centres – a sizeable industry in itself. We referred to several examples of this in section 2.2.2: cultivars of hebe, puawānanga, and kōwhai ngutukākā, among others, have all found markets worldwide. But the field is much larger than this. It also includes breeding for forestry and food plants, for example.

The foregoing confirmed for us that bioprospecting, genetic modification, and IP are not isolated subjects. They are points along a single path from discovery to exploitation of commercially valuable material – which, in our context, means the genetic and biological resources of taonga species, and mātauranga Māori. We therefore turn now to consider each category in greater detail

before bringing them back together in a single analysis (section 2.8). We begin with bioprospecting and focus primarily on the Crown's proposed bioprospecting policy in the context of New Zealand's international obligations. We then move to genetic modification and consider the HSNO Act and the work of ERMA. Finally, we turn to issues related to patents and PVRs. We will identify as early as possible relevant issues and the conflicts that arise between world views. But, as we have said, we will delay our analysis of the issues until we have completed that survey.

2.5 BIOPROSPECTING AND TAONGA SPECIES

In this section we begin by summarising the concerns expressed by the claimants in the field of bioprospecting, and the Crown's responses to them. The claimants focused on the need to protect the kaitiaki relationship with taonga species, and the Crown focused on ensuring the protection of proper incentives for innovation and economic development. We conclude with the observation that this tension is in fact an international phenomenon. That leads neatly into the next section, which discusses the international debate.

2.5.1 Claimant concerns and the Crown response

The claimants were concerned that bioprospecting would conflict with the interests of kaitiaki if and when it involves the utilisation of taonga species in the ways we have described. The arguments were pitched at four levels.

First, some claimants focused on their ownership of mātauranga Māori in respect of taonga species, rather than the species themselves. They said this knowledge should not be used by others to exploit the genetic or biological resources of taonga species unless kaitiaki first give their consent.¹⁷⁹

The focus of the second level of concern raised by some claimants was the kaitiaki relationship with taonga species. The claimants sought protection for that relationship. They said that longstanding values underpinning kaitiaki relationships with taonga species might preclude bioprospecting when the proposed use of the species was inconsistent with tikanga Māori. In such cases, the

claimants argued for a right of veto to ensure that where a kaitiaki–taonga species relationship was established, nothing would be done to damage it.¹⁸⁰ On this level, kaitiaki did not claim ownership rights in the species themselves, but rather the right to protect the integrity of their relationship with them.

Thirdly, some claimants said the kaitiaki relationship with taonga species is so all-encompassing and special that they claimed ownership over the genetic resources contained in the taonga species. Here the claimants distinguished between the genetic code that produces the species and the physical plant or animal. They claimed that no matter who has the right in the animal or plant, access to the genetic resource requires kaitiaki consent. They said they own the genetic code but accepted that the plant or animal could be owned by another.¹⁸¹ In this sense, the claimed code ownership is akin to a patent right in a plant – except that a patent would expire, whereas the claimed ownership of the genetic code is based on a relationship that is not finite. They argued that no exploitation of genetic material should be allowed without kaitiaki consent.

Occasionally, with very rare and precious species, such as the tuatara on Takapourewa, the claim was cast differently again. Here the kaitiaki relationship involves not just the genetic level but also each living example of the species, at least within the traditional territory of the kaitiaki. This was the stance taken by Ngāti Koata in respect of tuatara.

We heard examples of all four in evidence and have summarised some of them at the beginning of this chapter.

Claimants said that the publications of nineteenth-century naturalists and twentieth-century ethnographers, anthropologists, and ethnobotanists led to the mātauranga Māori of kaitiaki becoming available to bioprospectors.¹⁸² They contended that bioprospectors have used this information in successfully exploiting indigenous species for commercial purposes. They raised two distinct issues here. The first was that their mātauranga Māori has been stolen or made available for anyone to use in a manner their tupuna would never have contemplated, and should not be used without appropriate acknowledgement and

consent, even if that knowledge exists in published form in the public domain.¹⁸³ Murray Hemopo of Ngāti Hikairo hapū put it this way:

Our pakekes [elders], our kuia have given that information to Pakehas, in good faith. And that's how it's got out into this commercial world and it's sad but it's there, but . . . it should still be our property right . . . I'm saying it's ours, because it is our tikanga, our mohiotanga [knowledge].¹⁸⁴

The second issue was that exploitation of the genetic and biological resources of taonga species may be inconsistent with kaitiaki values and should not be allowed, whatever the source of the relevant biochemical information.¹⁸⁵ These claimants argued that current commercial uses of taonga species breach the Treaty of Waitangi. Work by scientists to synthesise methylglyoxal, the active therapeutic ingredient in mānuka honey, is an example of such work. In light of the commercial potential of mānuka honey, researchers overseas are attempting to replicate the effect of methylglyoxal in synthetic products. They also intend to enhance the production of high-potency mānuka. Working from mānuka tree samples sent from New Zealand, researchers are investigating the special conditions under which high-potency mānuka has been developed.¹⁸⁶

At the beginning of this chapter we referred to Hirini Clarke of Ngāti Porou, chairman of a Māori-owned mānuka products-based company. He lamented the inability of Māori to control commercial exploitation of the unique characteristics of mānuka. His argument followed the same logic as that of other claimants: the therapeutic qualities of mānuka were well known in mātauranga Māori long before the current explosion in mānuka-based products.¹⁸⁷ His concern was that the legal framework around the industry gave no recognition to those who contributed the original knowledge and still hold a special relationship with the particular taonga species.

An additional issue might arise when the market for the synthetic product undermines the market for the natural product. This problem has emerged overseas.¹⁸⁸

As can be seen, there was a range of views among claimants about the appropriateness of commercialising

either mātauranga Māori or the genetic and biological resources of taonga species. Some, such as Mr Clarke, were obviously not opposed to commercial exploitation. Those claimant witnesses argued that where this could occur consistently with kaitiaki values, Māori were still not receiving any share of the benefits.¹⁸⁹

For its part, the Crown rejected any general claim to Māori ownership of or rights in any genetic resources in New Zealand. The Crown's position was that the owner of the land on which indigenous flora grows also owns the genetic resources of that flora and has the sole right to exploit it. The Crown submitted that wildlife, as defined by the Wildlife Act 1953, is owned by the Crown wherever it is situated, and the Crown has the sole right to exploit the genetic resources of those fauna. Its general contention was that this allocation of legal rights is consistent with the Treaty of Waitangi. Also rejected was any suggestion that Māori held more limited rights in species such as a right to control use of the species or its genetic resources, decision-making powers, or veto rights. The Crown also rejected any Māori right to be consulted about the use of taonga species for which they felt 'a cultural association.'¹⁹⁰

One of the reasons offered for such a firm rejection was that genetic resources were not known of at the time the Treaty was signed in 1840.¹⁹¹

On a different note, the Crown acknowledged that New Zealand has 'no recognised guidelines or regulations on the use of traditional knowledge by bioprospectors.'¹⁹² Mark Steel, deputy secretary at the Industry and Regional Development Branch of the Ministry of Economic Development (MED), accepted that this situation is undesirable for both Māori and bioprospectors.¹⁹³ He also confirmed that MED was looking for guidance from the Tribunal on the issue.¹⁹⁴

That said, the Crown made it clear that its preference was for a system that encouraged exploitation of New Zealand's biodiversity, with the maximum sustainable access to biological resources and minimum compliance and transaction costs possible.¹⁹⁵ The Crown was opposed to any system that requires the prior consent of kaitiaki for the exploitation of biological resources in taonga species, unless kaitiaki are the landowners.¹⁹⁶ Similarly, the Crown was opposed to any system requiring

bioprospectors to agree terms with kaitiaki on questions such as access and benefit sharing before being allowed to exploit the resource.¹⁹⁷ Such systems, the Crown argued, would unreasonably hamper innovation and economic development in the growing biotechnology field. They would deter potential investors in research and development in New Zealand, and lead to bioprospecting and biotechnology companies moving offshore to undertake their work in countries with more attractive regulatory environments (and, in some cases, where New Zealand species are being cultivated anyway).

We heard some evidence from other interested parties, including biotechnology companies and research institutes. Some of them were involved in bioprospecting projects. For two reasons, however, we have decided to deal with all interested party evidence in the IP section below (section 2.7.4). First, the evidence is not easily subdivided into those parts that deal only with bioprospecting, and separate treatment would have created a certain unhelpful artificiality. Secondly, a number of the points that were made in respect of bioprospecting by other interested parties apply also to GMOs and IP. Dealing with interested party evidence in one place avoids unnecessary repetition.

2.5.2 Bioprospecting, the Convention on Biological Diversity, and the interests of indigenous peoples

The issues raised by the claimants are not unique to New Zealand. Governments and indigenous peoples all over the world are trying to resolve them. In this section, we consider New Zealand's international obligations in respect of bioprospecting, and how those obligations might influence domestic policies in respect of taonga species. For, as will be seen, it appears increasingly likely that New Zealand will be obliged to provide for both the preservation of traditional knowledge about indigenous flora and fauna, and Māori involvement in decision-making about, and equitable sharing of benefits from, the use of those species.

For the most part, the debate arises in the context of international multilateral deliberations over protection of the world's biodiversity. This is essentially a discussion between the technology-rich but biodiversity-poor countries (such as the United States and European nations) on the one hand, and the technology-poor

but biodiversity-rich countries (of, for example, South America and Africa) on the other (see maps right). There are two focuses of this discussion: one is around the conservation of biodiversity and sharing its costs, and the other relates to the rules for exploiting that diversity, including rules about sharing benefits. The interests of indigenous peoples in biological and genetic resources are swept up in this global discussion.¹⁹⁸

We will, therefore, consider international developments in this field at some length before returning to a discussion of current and prospective bioprospecting law and policy in New Zealand because, simply put, the international context has such a powerful impact on it.

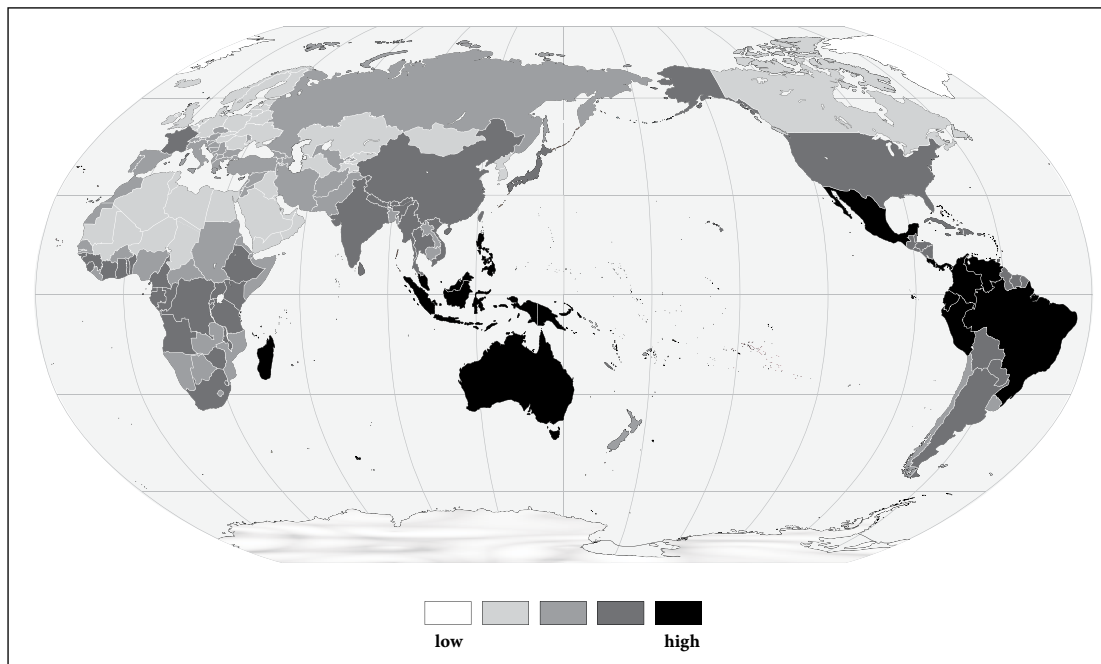
The centre of gravity in the international bioprospecting debate is the Convention on Biological Diversity (CBD), adopted during the United Nations Earth Summit in Rio de Janeiro in 1992. The CBD was as a global response to the rapid loss of the Earth's biodiversity. It is a framework convention setting out the parameters for the conservation of biodiversity on an international level.¹⁹⁹ (We also discuss this in section 4.5.4.)

New Zealand is one of 193 countries party to the CBD,²⁰⁰ one of the most widely supported conventions in United Nations history. Only a handful of countries are not party to it – notably, the United States. The refusal of the US to sign up to the CBD is significant because it is a major player in biotechnology and related industries worldwide. All signatory parties must accept the Convention in its entirety. Conditional acceptances are not allowed.²⁰¹ The three primary objectives of the CBD are:

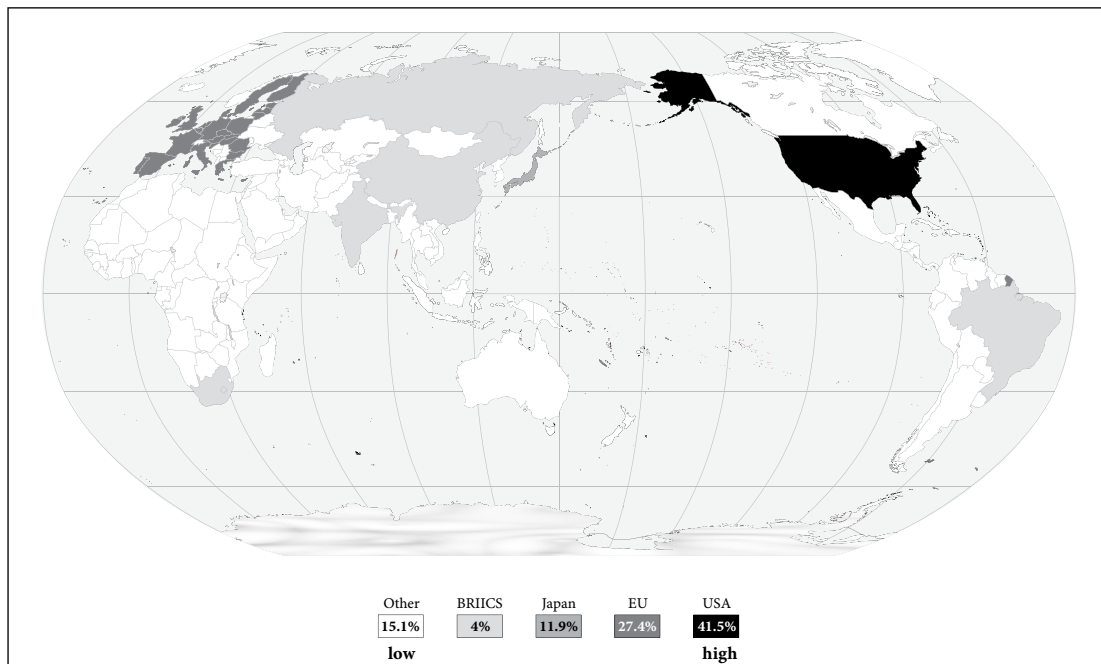
- conservation of biological diversity;
- sustainable use of its components; and
- the fair and equitable sharing of the benefits derived from the use of genetic resources.²⁰²

The last two objectives relate directly to the rapidly growing bioprospecting industry.

The CBD binds all signatory states and 'must be performed in good faith'.²⁰³ As such, it imposes international legal obligations on them. But it is not self-executing – that is, its provisions do not automatically become part of the domestic law of member states until formally incorporated into domestic law through the enactment of CBD-compliant legislation.²⁰⁴ As will be seen, the CBD speaks at a level of high principle. There is a great deal of ambiguity



Map 2.1: Global distribution of biodiversity, 2001



Map 2.2: Global distribution of international biotechnology patent applications under the Patent Cooperation Treaty 2006

around interpretation, and considerable discretion as to how those high principles are implemented in domestic legislation.

(1) Access and benefit sharing

Article 15 of the CBD introduces the concept of access and benefit sharing (ABS) as a primary lever in rebalancing the asymmetry we have already mentioned between industrialised but biodiversity-poor countries and biodiversity-rich developing countries (the so-called North-South divide). ABS is used as a shorthand for the principle that there should be 'fair and equitable sharing of benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources'.²⁰⁵ The main benefit of this regime to those seeking to access biodiversity is that it provides a long-term system for sustaining the biotechnology industry. The primary purpose of the benefit-sharing side of the equation is to reward and compensate provider states for the effort and cost of conserving their own biological diversity. A secondary purpose is to alleviate poverty by promoting economic development in those countries.²⁰⁶

In article 15, signatory states agree that the biodiversity contained within their respective borders is no longer common heritage freely accessible to bioprospectors. Instead each state is entitled to introduce laws governing access to its own biodiversity. That includes all biodiversity within its borders, whether publicly or privately owned, and whether accessed *in situ* or *ex situ*. The *quid pro quo* for international acceptance of a state's right to control access to all biodiversity (within its borders) is the companion obligation also contained in article 15 – that is, states must 'create conditions to facilitate access to genetic resources' (emphasis added). Where provider states are given broad discretion is in how the benefits of access are to be shared. Article 15 allows provider states to require three things of international bioprospectors. The first is that the prior informed consent (PIC) of the 'Contracting Party providing such resources' may be required for any such access. The second is that states may require access to be on 'mutually agreed terms'. The third is that they may require bioprospectors to provide some form of value for that access. Value may be either monetary or non-monetary.

Thus article 15 demonstrates that there is now, for the first time, broad international acceptance that states can create rights in the biological and genetic resources of their indigenous species wherever those species may be found within national borders.

Within the article 15 debate, many developing countries wanted to include mechanisms to ensure that indigenous people also shared in these benefits where bioprospecting relied in some way on indigenous traditional knowledge, innovations, or practices. This issue was greatly contested in the CBD negotiations, but in the end the developing and developed world agreed on the terms of article 8(j) – a provision dealing with *in situ* conservation. It provides that each contracting party shall:

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.²⁰⁷

The purpose of this clause was to underline the vital role of traditional knowledge, innovation, and practices in biodiversity conservation and, within that role, to encourage regimes to provide benefits from bioprospecting to the owners of that knowledge.

While the intention of article 8(j) is clear, the price of the developed world's agreement was that it became surrounded by highly conditional wording. Thus the requirement to provide for indigenous peoples applies only 'as far as possible and as appropriate' and 'subject to . . . national legislation'.²⁰⁸ The scope of the provision is also limited to traditional knowledge relevant to the conservation and sustainable use of biological diversity. Nonetheless, even in this conditional form, the article draws a direct connection between traditional knowledge holders and state ABS regimes. It contains specific reference to both PIC and benefit sharing – issues dealt with in article 15(5) and article 15(7).

The National Māori Congress, then representing 45 iwi, participated in the final drafting session of the CBD and

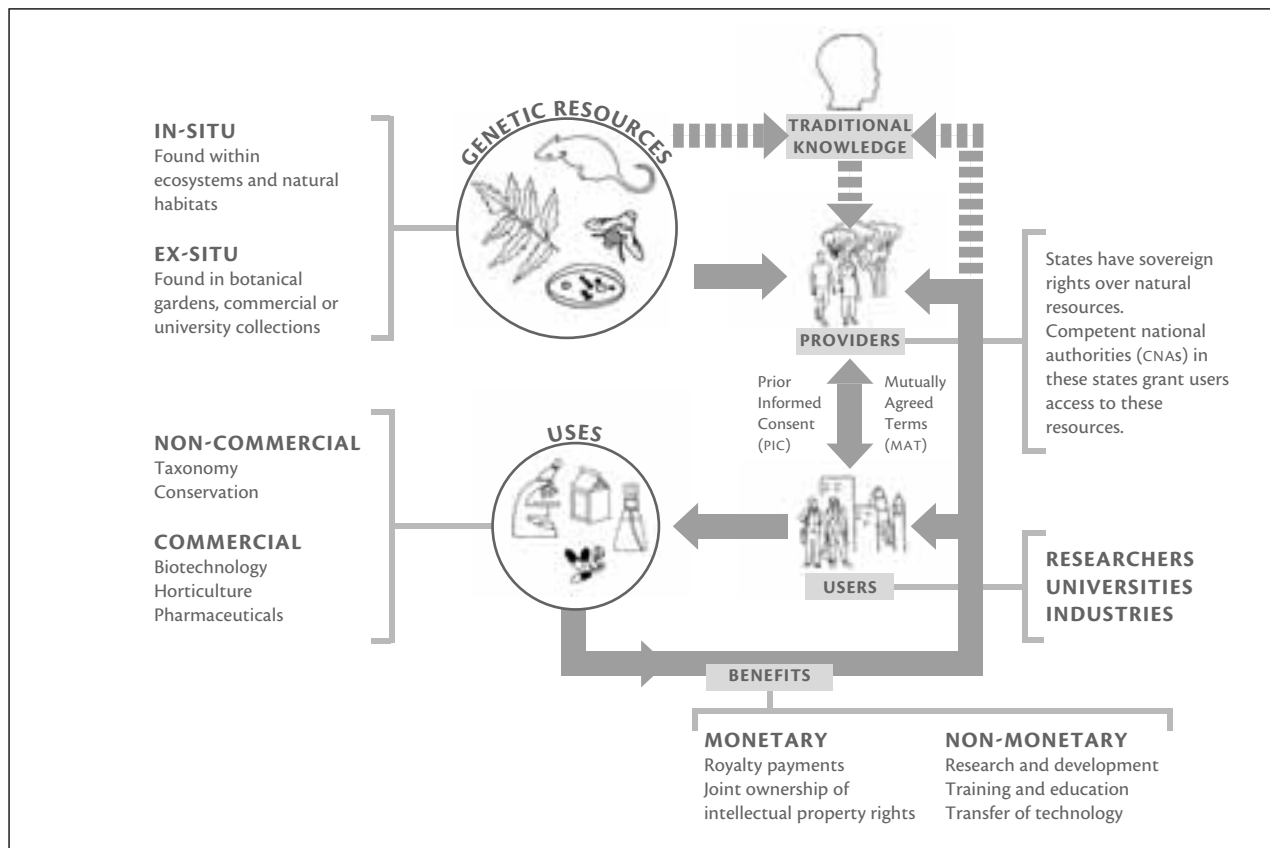


Figure 2.2: Access and benefit sharing: key themes

was supportive of the Crown's ratification of it. According to Aroha Mead, who spoke to us about this issue, the Māori Congress acknowledged the 'constructive spirit and intention of the articles relating to indigenous peoples and traditional knowledge'.²⁰⁹

State parties continue to meet and plan implementation of the ABS principles. The governing body of the CBD signatories is known as the Conference of the Parties, which convenes biennially.²¹⁰ Its primary purpose is to keep under regular review the implementation of the CBD and to make decisions necessary to promote its effective implementation.²¹¹

In 2002, in an initial attempt to further clarify the scope of ABS and PIC, the sixth conference of the parties produced the Bonn guidelines. These are non-binding,

voluntary guidelines intended to assist the parties in developing national ABS measures. They were adopted unanimously.²¹² The guidelines contemplate that, under articles 15 and 8(j), the holders of traditional knowledge should receive benefits where that knowledge is used for commercial or other research purposes.²¹³ They also suggest that research (commercial or otherwise) should not be undertaken without the PIC of traditional knowledge holders.²¹⁴ In New Zealand, the guidelines would require that kaitiaki be entitled to benefit where mātauranga Māori is used in bioprospecting, and that their PIC is needed.

As we have said, the Bonn Guidelines are just that. They do not bind the contracting parties to the CBD. But they do assist in understanding what the words of articles 15

and 8(j) were intended to mean. In light of the approach taken in the guidelines as drafted by the contracting parties themselves, there can be no question that the ABS regime foreshadowed in article 15 was intended to include benefits for indigenous communities. This approach has also been confirmed by various CBD decisions.²¹⁵

After intense negotiations, a breakthrough was achieved when, in October 2010, 'The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity' was adopted at the Nagoya Biodiversity Summit.²¹⁶ The protocol is the instrument for implementing the ABS provisions of the CBD. It will enter into force 90 days after 50 countries have signed up to it.²¹⁷

Despite the strong opposition of developed countries, including New Zealand, to the imposition of a mandatory regime, the protocol will, unlike the Bonn Guidelines, be legally binding upon the parties.²¹⁸ The protocol makes it clear that the ABS and PIC mechanisms established under article 15 of the CBD also apply to traditional knowledge associated with genetic resources.²¹⁹

In relation to genetic resources the protocol provides that:

- ▶ Benefits arising from the utilisation of genetic resources as well as subsequent applications and commercialisation shall be shared in a fair and equitable way with the Party providing such resources that is the country of origin of such resources (article 5(1));
- ▶ Access to genetic resource shall be subject to the PIC of the Party providing such resources that is the country of origin of such resources (article 6(1));
- ▶ Indigenous peoples are entitled to share benefits from uses of genetic resources and there must be PIC for access to those genetic resources where indigenous people have relevant rights over genetic resources under national laws (articles 5(2) and 6(2)). In other words, unless domestic law gives rights to indigenous peoples over the actual genetic resources, indigenous people will not have any direct benefit sharing or PIC rights in relation to the genetic resources.

However the situation is different where traditional knowledge associated with genetic resource is involved. The protocol provides that:

- ▶ Each Party shall take legislative, administrative or policy measures in order that the benefits arising from the utilisation of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge (article 5(5));
- ▶ Parties shall take measures to ensure that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed on the basis of the PIC or the approval and involvement of those indigenous and local communities (article 7).

The Nagoya Protocol addresses traditional knowledge associated with genetic resources with provisions on access, benefit sharing, and compliance. It also addresses genetic resources where indigenous and local communities have the established right to grant access to them. Contracting parties must take measures to ensure the PIC of these communities, and fair and equitable benefit sharing.

(2) *The relationship between the CBD and international IP treaties*

While article 8(j) introduces the concept of ABS for traditional knowledge holders – kaitiaki in the New Zealand context – and places a limited obligation on states to facilitate ABS for kaitiaki, the CBD must be read as a whole. Quite apart from the caveats in article 8(j) itself, two other articles limit its impact on orthodox IP rights. Article 16 obliges wealthier countries to facilitate the transfer of their technologies to poorer countries to enable the latter to exploit their biodiversity sustainably. But any such assistance will be subject to respect for the IP rights that provider countries or corporations may own in the relevant technology or biotechnology.²²⁰ In the same vein, article 16(5) of the CBD provides that:

The Contracting Parties, recognising that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this

regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.

On the face of it, therefore, any ABS regime will be subject to vested private property rights. This is obviously an important limitation.

In addition, article 22(1) limits the CBD's effect on any existing international obligations. It provides:

The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological biodiversity.

Since 1931, New Zealand has been party to the international IP agreement known as the Paris Convention for the Protection of Industrial Property (1883).²²¹ This agreement requires that its members provide certain protections for patents. In 1994, the substantive obligations under the Paris Convention were incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights.²²² The TRIPS Agreement expands considerably on the Paris Convention protection of patents, requiring that members of the World Trade Organization (WTO) make patents available for inventions in all fields of technology.²²³ Every one of the WTO's state members now has to comply with the TRIPS Agreement standards (see also section 1.3.3). Implementation of the TRIPS Agreement obligations is supported through the WTO dispute settlement process.²²⁴ By contrast, the CBD has no comparable enforcement mechanism. Thus, a further limitation on the force of article 8(j) is the international consensus that the minimum IP standards set out in the TRIPS Agreement will take priority over any ABS rights of kaitiaki, unless those minimum standards can be shown to cause serious damage or threat to biological diversity.²²⁵

Hence, the underlying problem is that patents and PVRs are being granted irrespective of whether the initial research complied with the CBD's ABS requirement. The TRIPS Agreement does not expressly require patent applicants to disclose in their applications whether traditional

knowledge or genetic resources have contributed in any way to the invention.

Thus, although the ideas of ABS and PIC are laid down in the CBD, they have little practical effect because they are at present unenforceable. Internationally, there is a lot of debate in the TRIPS Council and at WIPO about how to reconcile the potential disparity between the CBD and the TRIPS Agreement. One of the few specific tools that has been proposed for promoting the implementation of PIC and ABS is to require disclosure-of-origin in patent applications. The proponents of disclosure requirements claim that unless there is a legal obligation to disclose the use of any traditional knowledge or the source of any genetic resources in the invention, the ABS rights in the CBD will continue to have little practical impact. In effect, disclosure is likely to be the trigger for ABS negotiations.

(3) *The disclosure debate*

That is the current position, but the relationship between the TRIPS Agreement and the CBD is part of the broader intense debate in the general round of WTO negotiations, known as the Doha Round.²²⁶

Several proposals have been offered to reconcile the competing interests of the CBD and the TRIPS Agreement. A number of developing countries proposed to amend the Agreement so that patent applicants will be required to disclose the country of origin of genetic resources and traditional knowledge used in any inventions. These developing countries argue that if traditional knowledge or the genetic material of what we would call taonga species has contributed in any way to the invention, then the PIC of the traditional owners should be required, along with proof of fair and equitable benefit sharing. Many developed countries are opposed to this kind of disclosure requirement and suggest various alternative solutions outside the TRIPS Agreement.²²⁷

The US denies that there is a conflict between the CBD and the TRIPS Agreement. It proposes that national contract law should resolve any issues. Another proposal, this time by Switzerland, was for disclosure to be a requirement of the Patent Cooperation Treaty rather than the TRIPS Agreement. A proposal by the EU was different again. The EU originally supported a multi-lateral

disclosure regime operating outside the patent system, so that non-disclosure would not affect the validity of a patent. Developing countries opposed this proposal. They believe patentability should be directly affected.²²⁸ More recently, the EU has shifted its position and joined with some developing countries, including Brazil and India, and proposed draft 'modalities' for 'TRIPS/CBD disclosure'. These state that:

- ▶ Members agree to amend the TRIPS Agreement to include a mandatory requirement for the disclosure of the country providing/source of genetic resources, and/or associated traditional knowledge for which a definition will be agreed, in patent applications. Patent applications will not be processed without completion of the disclosure requirement.
- ▶ Members agree to define the nature and extent of a reference to prior informed consent and access and benefit sharing.
- ▶ Text based negotiations shall be undertaken, in Special Sessions of the TRIPS Council, and as an integral part of the Single Undertaking, to implement the above. Additional elements contained in members' proposals, such as PIC and ABS as an integral part of the disclosure requirement and post grant sanctions, may also be raised and shall be considered in these negotiations.²²⁹

Besides the TRIPS Council, the Intergovernmental Committee (IGC) of the World Intellectual Property Organization (WIPO) is also actively engaged in the disclosure debate (see also section 1.3.4).²³⁰ The debate could lead to an amendment to the TRIPS Agreement (although at present that looks unlikely) that provides for a disclosure requirement. Some countries have decided not to wait. They have implemented disclosure requirements of one kind or another into their national legislation.²³¹

(4) Summary

In summary, then, the CBD introduces two important concepts to the debate here in New Zealand about the rights of kaitiaki. They are the idea that states are entitled to control the use of genetic resources of species within their borders (article 15), and that any regime providing for such control should include ABS for kaitiaki (8(j)). Though these concepts represent a significant advance

on the status quo, it is important not to overestimate the CBD's impact. As a general proposition, IP rights take priority over ABS obligations, but that position is highly contested and it is impossible to predict exactly how the issue will finally be resolved. That does not mean articles 15 and 8(j) are empty words. The message is that they must be read realistically. In the end, article 15 requires New Zealand to establish an ABS regime for bioprospecting, and article 8(j) requires that, in doing so, consideration be given to the interests of kaitiaki.

For present purposes it is sufficient to reiterate that the issue of kaitiaki rights in respect of taonga species and mātauranga Māori is far from unique to New Zealand. These matters have been the subject of intense debate in international forums, including the WTO and WIPO, for the last 20 years. Indeed, the pace of international activity has increased significantly in recent years, and the discussion has shifted from a lengthy period of stating the problem to tentative suggestions for solutions. Moreover, the adoption of the Nagoya Protocol marks a turning point in the international debate around ABS and PIC. The international community considers these mechanisms as crucial to prevent the misappropriation of genetic resources and traditional knowledge, and to provide for the sustainable use of biodiversity. These developments are therefore of central importance to the Treaty of Waitangi obligations that we confront in this claim, where we use the words taonga species and mātauranga Māori rather than genetic resources and traditional knowledge. The well-advanced international stance on PIC, and ABS in particular, and the ongoing debate on disclosure of origin provide valuable input to discussion and policy developments in New Zealand. In this light, the Crown's stance on the issue may be seen to be already out of date.

We return to the international context in sections 2.7.3 and 2.9.3. In the next section we will discuss current New Zealand law in respect of bioprospecting, as well as the Government's proposals for reform. When we discuss reform proposals, we will consider whether they take account of both New Zealand's CBD and Treaty of Waitangi obligations.

2.5.3 Current bioprospecting law and policy in New Zealand

In a sense there is no current bioprospecting law or policy in New Zealand. That is because New Zealand's legal and policy framework does not recognise bioprospecting as a separate subject for regulation, whether those resources are *in situ* or *ex situ*. The effect is that control of bioprospecting falls to be dealt with within the pre-existing default settings of the general law.

Thus, where researchers prospect on private land, either the common law, or generally applicable statutes relating to ownership of biospecimens on that land, control the rights of the parties. In most cases, this will mean the landowner controls all rights in respect of the target specimen, and that person's consent will be all the bioprospector needs. The only exception to this general rule is where special legislation has been enacted to effectively confer ownership on the Crown, so that it can either completely prohibit the taking of particular species or require Crown consent prior to harvest. For example, the Wildlife Act 1953 provides as a general rule that any animal living in a wild state is owned by the Crown even when it is located on private land.²³² The same applies to wild animals that are harmful introduced species under the Wild Animal Control Act 1977.²³³

The position on Crown-owned or Crown-controlled land is less straightforward. Various Acts require anyone wishing to access or collect biological resources on that land to apply for permission to do so. The requirements will vary according to the purpose, location, and the nature of those resources. For example, for a concession to take plants from a conservation area, section 30(1) of the Conservation Act 1987 applies; for a permit to undertake research for scientific or education purposes, sections 49 and 50 of the Reserves Act 1977 apply; to disturb indigenous flora and fauna in a national park, consent under section 5 of the National Parks Act 1980 applies; a permit to take or kill wildlife is required under section 53 of the Wildlife Act 1953; and a permit to take a marine mammal alive or dead is required under section 4 of the Marine Mammals Protection Act 1978.

A number of Crown agencies are responsible for the administration of access to Crown-owned or Crown-controlled biological material. However, processes for

gaining access to biological resources vary greatly, and there is no coordination between departments as to how to deal with bioprospecting. For example, the Ministry of Fisheries may grant special permits to bioprospectors who wish to access fisheries resources,²³⁴ while Land Information New Zealand has no specific system for processing bioprospecting applications over New Zealand's land and seabed that it administers.

(1) *Bioprospecting on the conservation estate*

DOC is the only agency administering Crown land that provides specific guidance on how bioprospecting should be conducted on the conservation estate, including in national parks. The conservation estate comprises some eight million hectares of land, or one-third of New Zealand (see chapter 4 for a full discussion of taonga and the conservation estate).

Section 4 of the Conservation Act 1987 requires DOC to interpret and apply the Conservation Act and any associated legislation in a way that gives effect to the principles of the Treaty of Waitangi.²³⁵ Section 4 provides one of the strongest legislative requirements anywhere for the Crown to give effect to its Treaty obligations.

The Conservation General Policy (CGP) guides and directs decisions under the Conservation Act 1987, the Wildlife Act 1953, the Marine Reserves Act 1971, the Reserves Act 1977, the Wild Animal Control Act 1977, and the Marine Mammals Protection Act 1978. The CGP derives its statutory legitimacy from section 17B of the Conservation Act.

A separate General Policy for National Parks is adopted under the National Parks Act 1980.²³⁶ The purpose of the General Policy for National Parks is to provide consistent national direction for the administration of national parks through conservation management strategies and national park management plans.

Together, the CGP and the General Policy for National Parks control all of DOC's day-to-day activities, including research and the collection of plant and animals (see section 4.4). In the following we focus our analysis on the CGP, but the findings apply equally to bioprospecting in national parks. Given the status of the CGP and the strength of the Treaty clause in the Act, the specific provisions of the CGP have considerable weight. They

provide detailed guidance on the issuing of concessions for research on public conservation lands and waters.

Section 12 of the CGP, and section 11 of the General Policy for National Parks in virtually identical wording, deal with research and information needs. Section 12 differentiates between access to public conservation lands for research and monitoring purposes, and access for the purpose of collecting material, whether for commercial or non-commercial use.²³⁷ It contains a specific requirement to recognise the Māori interest:

Matauranga Maori and tangata whenua interests in research and monitoring on public conservation lands and waters, species and resources should be recognised and may be supported by cooperative arrangements.²³⁸

Section 12(d), which deals with the collection of material, provides that applications will be considered on a case-by-case basis according to the following criteria:

- i. collection is consistent with legislation, conservation management strategies and plans and the Department's Treaty responsibilities;
- ii. collection is essential for either management, research, interpretation or educational purposes;
- iii. the amounts to be collected are small in relation to the abundance of the material;
- iv. whether collection could occur outside or elsewhere within public conservation lands and waters where the potential adverse effects could be significantly less; and
- v. there are minimal adverse effects from collection.

The CGP puts significant restraints on the way in which information gained from bioprospecting on the conservation estate may be used. It states:

- 12 (e) Any property rights, including intellectual property rights, should be safeguarded for the benefit of the Crown, on behalf of the people of New Zealand.
- 12 (g) Results of research and monitoring on public conservation lands and waters should be made publicly available unless withheld for good reason under the Official Information Act 1982.

It is obvious to us that section 12 of the CGP recognises that there is significant Māori interest in bioprospecting within the conservation estate. It provides ways in which kaitiaki can become involved and their perspectives taken into account. We were not told about how these provisions are administered or, indeed, whether there is demand by bioprospectors for access to the conservation estate. All that can be said at this stage is that the words of section 4 of the Act and section 12 of the CGP, as well as section 11 of the General Policy for National Parks, are wide enough to accommodate significant Māori involvement in bioprospecting decisions if DOC invites it. They may well be wide enough even to cover PIC and ABS. We do not know whether in practice the department takes a PIC- and ABS-consistent approach. (See also section 4.7 for a general discussion of iwi involvement in decisions about commercial activity on the conservation estate.)

We are mindful that when tohunga in the areas of weaving, carving, or rongoā want to access taonga species within the conservation estate, they can apply to pātaka komiti – panels made up of representatives from local iwi who consider the application and manage cultural harvest within a particular conservancy or geographic area. They make recommendations to the regional conservator, who makes the formal decision. This process seems to work, although, as we say in chapter 4, iwi are interested in making decisions in their own right rather than being mere recommenders. Nonetheless, this system, or a variant on it, seems to provide useful guidance in the context of bioprospecting. We return to it later.

The Minister of Conservation also has some control over bioprospecting activities in the marine environment. Within the territorial sea²³⁹ – that is, the area that extends out to 12 nautical miles (22 kilometres) from the baseline, which is usually the mean low-water mark along the coast – prospecting in the coastal marine area²⁴⁰ is subject to the Resource Management Act 1991.²⁴¹ The Minister of Conservation is responsible for setting coastal policy statements and regional coastal plans which control use and development of the coastal environment and coastal marine area.²⁴²

Within that territorial sea, DOC is also responsible for managing marine reserves. The CGP, which explicitly

allows for bioprospecting applications, applies to the Marine Reserves Act 1971.

Beyond the territorial sea, the Crown's areas of legislative competence become more limited.²⁴³ Within New Zealand's EEZ, DOC can issue permits under the Marine Mammals Protection Act 1978 and the Wildlife Act 1953.²⁴⁴ Bioprospecting activities falling within the scope of these Acts are also subject to the CGP.

(2) *Bioprospecting in the marine environment*

Outside the conservation estate, access to resources within the EEZ can be granted under the Fisheries Act 1996, the Crown Minerals Act 1991, and the Continental Shelf Act 1964. For instance, special permits to conduct investigative research can be issued by the Ministry of Fisheries under section 97(1)(a)(ii) of the Fisheries Act 1996. A special permit can be issued only in respect of fish, aquatic life, and seaweed, but not for micro-organisms or fungi since they are not covered by the Act.²⁴⁵ However, the last mentioned are of particular interest for bioprospectors. In addition, foreign researchers need the consent of the Ministry of Foreign Affairs and Trade (MFAT) to undertake marine scientific research in the EEZ and on the continental shelf.²⁴⁶ MFAT's consent is also required for the taking of sponges and sedentary species from the floor of New Zealand's continental shelf.²⁴⁷ Living organisms that are not attached to the continental shelf are not covered.

The Crown's approach to bioprospecting is largely uncoordinated, as the various government departments handle applications differently. In addition, research into species that are not governed by either the Fisheries Act 1996 or the Continental Shelf Act 1964 is entirely unregulated. For example, New Zealand is authorised to regulate the conduct of scientific research within its EEZ under section 27 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, but has not done so.

As a consequence, beyond the conservation estate and DOC-controlled marine areas, the Crown has no system in place for the consideration of Māori interests, and no department other than DOC has a mechanism for addressing the Māori interest in bioprospecting.

(3) *Access to ex situ genetic resources*

In situ biological resources are not the only focus for bioprospectors. There are a number of private and publicly owned *ex situ* collections of specimens that have been, and will continue to be, of interest to researchers. They include Landcare Research's Allan Herbarium at Lincoln, botanical gardens, zoos, museums, and gene banks. There are no specific statutory controls on these collections, and it is for the owner of the collection to impose conditions on and allow access for research.

(4) *Summary*

It is clear from the above that the rules around bioprospecting are complex and uncoordinated, and lack an overarching framework. It appears that only DOC has a policy capable of applying to bioprospecting within the conservation estate. The effect of this is that most of New Zealand's terrestrial and aquatic flora and fauna are not subject to any comprehensive bioprospecting regime. Access to and scientific research into some species is entirely unregulated.

2.5.4 The proposed bioprospecting policy

Nobody, not even the Crown, thinks the status quo is an acceptable response to the challenges of the modern biotechnology industry. For the claimants, it fails to protect taonga species and mātauranga Māori beyond the conservation estate, and it does not deliver ABS. For the prospectors, it lacks simplicity and transparency. For the Crown, it lacks cohesion and balance. In light of this consensus, MED began work on a series of discussion documents on how a future comprehensive bioprospecting policy framework might look. In November 2002, MED circulated the document *Bioprospecting in New Zealand: discussing the options*, and sought and received public feedback.²⁴⁸ In July 2007, the Ministry released *Bioprospecting: Harnessing Benefits for New Zealand*, and followed this up with extensive stakeholder consultation, including with Māori.²⁴⁹

Despite widespread optimism about the likely benefits of reform, it must be said that MED's 2007 proposed policy framework is a disappointment. The aims of the drafters were clearly more modest than the expectations

2.5.4

Plants growing in their natural habitat are said to be *in situ*. The conservation and propagation of native flora such as harakeke, here seen growing on a typical coastal site, is increasingly popular. Angeline Greensill told us the Māori system of kaitiakitanga 'focuses on whānau and hapū ensuring that the mauri of all things within our respective rohe, beneficial to human existence, is maintained'.



Plants grown outside their natural habitat for the purposes of research and development are said to be *ex situ*. These young plants are at the Makaurau Marae Nursery, Māngere. When the Wai 262 claim was lodged, native plants made up only 10 per cent of plants sold within New Zealand. In 2006 they made up 45 per cent of local sales and 30 per cent of those sold internationally. Some marae are capitalising on this demand.

of the stakeholders. Much that is important is excluded from the review, and in reality it is little more than the Crown seeking to render more coherent its own internal consenting system where the prospecting is carried out on or in Crown-owned resources. Crucially, prospecting on private land is out of scope. Issues relating to mātauranga Māori are expressly excluded, since it is perceived as ‘an issue much broader than bioprospecting.’²⁵⁰ Three options are presented ‘to stimulate thought on this important matter, though each belongs to broader on-going discussion.’²⁵¹ They are: to establish a voluntary register of traditional knowledge; ensure the existence of legally registered and fully mandated governance entities; and establish a code of ‘best practice’ for the use of traditional knowledge by bioprospectors. There is little in the draft to address claimant concerns in respect of mātauranga Māori.²⁵² In particular, there is no reference to the protection of taonga species or to kaitiaki relationships with them, and certainly no suggestion of ABS or PIC in accordance with the CBD obligations contained in article 15. In addition, only commercial bioprospecting is in scope. This means that early-stage research that is not explicitly commercial is not covered, even though most commercial exploitation begins in this way.²⁵³ *Ex situ* collections are also excluded, even where such collections are Crown owned. Finally, bioprospecting is very carefully defined so as to exclude all downstream product development from the initial prospect.²⁵⁴ This means the Crown gives up any right to control what may be done with the genetic resources of the specimen after it is harvested, except where specific conditions are imposed at the harvest stage. These limitations do little to deliver the cohesion needed.

In 2008, four bioprospecting working groups were convened by MED, Te Puni Kōkiri, the Ministry of Research, Science and Technology, and MFAT. They marked the beginning of phase two of the Government’s engagement on the proposed policy.²⁵⁵ A number of meetings have been held, but to date no changes have been made to the proposals.²⁵⁶

2.5.5 Conclusion

It appears that despite the steady crystallisation of the international debate and the clear signals of domestic stakeholders in the ongoing reform process, all of the concerns raised by claimants before us remain at large and not dealt with. It may be that the Crown is awaiting this report before finalising its proposals. If that is true, it can at least be said that from our perspective the issues are clear. There also appears to be a wide gap between the respective positions of the claimants and the Crown, as they were described to us in hearings well before the current policy proposals. That gap is worth exploring.

It will be recalled that the claimants argued their case at four levels (see section 2.5.1). They said:

- ▶ Bioprospectors should not use mātauranga Māori about taonga species without the consent of kaitiaki.
- ▶ Bioprospectors should not use taonga species if such use is inconsistent with tikanga Māori and therefore damages the kaitiaki relationships with those species. Kaitiaki claim a right of veto over use in order to protect that relationship.
- ▶ The kaitiaki relationship with taonga species is so all-encompassing that it amounts to ownership of the genetic resources of that species. The result, claimants said, is that no exploitation of those resources should be allowed without kaitiaki consent.
- ▶ In exceptional cases, the kaitiaki relationship is so special that it extends to both the genetic and biological resources of the taonga species. They therefore claim ownership of each living example of that species within the traditional territory of the kaitiaki.

Whether kaitiaki should have any of these graduated rights depends on the relationship between kaitiaki and either the relevant traditional knowledge or the relevant taonga species. It is this same relationship we must focus on, whether we are talking of bioprospecting, genetic modification, or IP rights in genetic material. Thus, while (as the international debate shows) bioprospecting is a significant subject in itself, the issues it raises about the rights or interests of kaitiaki are identical to those in the other two areas. As previously indicated, we think it best to set out those issues, then to offer our answers in one place. We will do so in a consolidated analysis section

later in the chapter (section 2.8). It is sufficient at this early stage, therefore, to reiterate some of our conclusions in respect of the state of New Zealand law and policy on bioprospecting in the knowledge that we will return to the underlying questions at the end of the chapter.

In this part we concluded that current bioprospecting law lacks cohesion. We certainly agree with the Crown that rationalisation is required. It is in the interests of all stakeholders to resolve uncertainties in the current regime, and to establish a robust and transparent policy around Māori involvement in bioprospecting. However, we considered that the reform proposal released in 2007 falls short of achieving this. Most importantly, the reform proposal fails to address the claimants' concerns, since mātauranga Māori is expressly excluded from the reform. It also fails to protect the kaitiaki relationship with taonga species.

There is a significant protection mechanism for Māori interests affected by bioprospecting on the conservation estate where section 4 of the Conservation Act applies, but we were not given any information about how that mechanism is applied in practice. As we have said, in the area of cultural harvest there are already special pātaka komiti in place which are made up of local iwi representatives who consider applications for cultural harvest. Pātaka komiti make recommendations to the regional conservator, who then makes the formal decision. This process seems to operate well, and the same or a similar approach could be deployed in the context of bioprospecting as well as cultural harvest.

We have no way of knowing how the Crown's proposed new bioprospecting policy might affect DOC's work in this area, and whether the priority given to the Treaty and Māori interests under section 4 of the Act, section 12 of the CGP, and section 11 of the General Policy for National Parks respectively will survive any review.

It is particularly disappointing that these very limited proposals have been developed despite the energetic international debate around the relationship between the CBD requirements of ABS and PIC, and the TRIPS patent system. That debate is steadily evolving toward the international development of a requirement that patentees at least disclose any traditional knowledge and the source of any genetic resources that contributed in any way to the

invention. The New Zealand proposals fail to acknowledge, let alone engage with, this debate. In an interesting circularity, Crown documents suggest that this has been because of an absence of any overarching domestic policy.²⁵⁷

That is how matters stand. As we have said, we will outline at the end of the chapter how we think the New Zealand system should work in the future, if it is to be Treaty compliant.

We turn now to look at genetic modification.

2.6 GENETIC MODIFICATION AND TAONGA SPECIES

New Zealand's relative remoteness from other land masses over millions of years has given rise to a unique biodiversity. Our flora and fauna is therefore highly susceptible to impacts from introduced species, pests, and other unwanted organisms. As a result, New Zealand has one of the world's strictest legal frameworks around biosecurity. This section relates to one aspect of biosecurity – the development, importation, and use of genetically modified organisms.

GMOs are organisms whose genetic material has been altered by means of recombinant DNA technology (genetic engineering). Unlike traditional breeding techniques, this involves deleting, changing, or moving genes within a living organism so that the new organism exhibits certain desired characteristics. It includes the transfer of genes from one organism to another, including across species boundaries (transgenic organisms). The statutory definition of a genetically modified organism is:

Any organism in which any of the genes or other genetic material—

- (a) have been modified by *in vitro* techniques; or
- (b) are inherited or otherwise derived, through any number of replications, from any genes or other genetic material which has been modified by *in vitro* techniques.²⁵⁸

GM technology has great potential benefits as well as equally significant risks to the well-being of the environment and the health and safety of people. The state of scientific knowledge is such that some of these risks are

uncertain and unpredictable. Unlike bioprospecting, the field of genetic modification is therefore heavily regulated. It is controlled under the Hazardous Substances and New Organisms Act 1996,²⁵⁹ which prescribes a case-by-case approach for managing these risks and benefits. The statutory gate is that any person intending to import, develop, field-test, or release a GMO requires approval under the Act.²⁶⁰

The subject is so complex that the HSNO Act (which we discuss in more detail below) is accompanied by a range of subordinate regulations, orders, and protocols variously defining in detail the organisms caught by its terms, stipulating procedures under it, and mandating the application of certain scientific methodologies.

The Act is administered by the Environmental Risk Management Authority (the Authority), a panel of six to eight people who are appointed by the Minister for the Environment to make decisions under it. We have noted above, and acknowledge again here, that from 1 July 2011 the Environmental Protection Authority will undertake all of the functions currently performed by ERMA under the HSNO Act. It will also be responsible for proposals of national significance under the Resource Management Act 1991, and administer the Emissions Trading Scheme under the Climate Change Response Act 2002. However, our analysis of the organisation and proposals for reform apply equally to the new regime.

Decisions to approve or withhold approval to develop,²⁶¹ import, or use GMOs are quasi-judicial in nature. The Authority is supported by a secretariat described as 'the Agency'.²⁶² The Act also creates a specialist Māori committee called Ngā Kaihautū Tikanga Taiao (Ngā Kaihautū).²⁶³ Its function is to provide advice and assistance to the Authority when requested. Together, the Authority, the Agency, and Ngā Kaihautū comprise ERMA New Zealand (ERMA).

The claimants raised specific concerns about the HSNO regime. Although the regime provides some safeguards for Māori interests, the claimants argued that these do not go far enough. They said that the structures and mechanisms for recognising Māori interests and concerns lack the power to be effective. They also argued that Māori perspectives are given a low priority in ERMA's decision-making processes, and in particular that risks to the

relationships between kaitiaki and taonga species are not considered in most ERMA decisions.

We will consider these claims in section 2.6.5, but first we will set out in more detail the legislation, structures, and processes for decision-making about GMOs, and for Māori input into those decisions.

2.6.1 The Hazardous Substances and New Organisms Act 1996

(1) *The Act's purpose, principles, and considerations*

Part 2 of the Act lays down a hierarchy of relevant factors – some philosophical, some practical – which the Authority must apply in reaching its findings. These are modelled generally on the approach in the Resource Management Act 1991, no doubt because there is some overlap in issues and approaches between the two Acts (for further discussion of the RMA, see chapter 3). At the top of the HSNO hierarchy is the Act's purpose. It provides:

The purpose of this Act is to protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms.²⁶⁴

All decisions under the Act must be made in pursuit of this purpose.

Below and subject to this are the principles of the Act. They require those exercising functions under the Act to recognise and provide for:

- (a) The safeguarding of the life-supporting capacity of air, water, soil, and ecosystems:
- (b) The maintenance and enhancement of the capacity of people and communities to provide for their own economic, social, and cultural wellbeing and for the reasonably foreseeable needs of future generations.²⁶⁵

Below these principles is a matrix of mandatory 'take into account' considerations. Section 6 provides the following list:

- (a) The sustainability of all native and valued introduced flora and fauna:
- (b) The intrinsic value of ecosystems:

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

Section 7 adds a requirement to take account of the 'precautionary approach' in making decisions under the Act. Section 8 requires that 'All persons exercising powers and functions under this Act shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)'.

As in the Resource Management Act, this complex of purpose, principles, and considerations is intended to be read in descending order of importance and weight. No specific direction is given as to the relative internal weighting of the 'take into account' considerations in sections 6, 7, and 8.

(2) *HSNO Regulations and Methodology Order*

As we have said, the Authority's job is to assess the risks of hazardous substances and new organisms to the environment and the community. This is a difficult task, requiring command of the relevant science as well as the ability to compare the assessment of that discipline with cultural, social, and economic considerations that are not scientific. The drafters of the legislation recognised that challenge by requiring the Authority, by order-in-council, to promulgate a universal assessment methodology document.²⁶⁶ The purpose of 'the methodology' is to set out in consistent detail how these multi-disciplinary risk assessments will be done in accordance with the purpose, principles, and considerations of the Act as outlined above.²⁶⁷ The operative Methodology Order was promulgated in 1998 and runs to 11 pages. A revised methodology was sent to the Minister for the Environment in February 2009 but has not yet been promulgated.²⁶⁸

The importance of the methodology cannot be overstated. It is the engine of the entire process. Section 9(5) protects the methodology by proscribing challenges to its adequacy. An interesting question arises as to the relationship between that shield and the requirements of part 2. We will come back to this later.

2.6.2 ERMA's institutional structure

As noted above, ERMA comprises three formal elements – the Authority, the Agency, and Ngā Kaihautū Tikanga Taiao. In 2004, the Authority added a three-member Ethics Advisory Panel to its internal structure. As the name suggests, this panel advises on any ethical issues that may arise in the Authority's decision-making. The panel operates on an informal basis and without statutory mandate.

(1) *The Authority*

Some of the Authority's key functions are:

- ▶ making decisions on applications to import, develop, field-test, or release a GMO under part 5 of the Act;
- ▶ monitoring and coordinating compliance with the Act;
- ▶ promoting public awareness of the risks associated with hazardous substances and new organisms;
- ▶ advising the Minister for the Environment; and
- ▶ inquiring into accidents or emergencies.²⁶⁹

Under part 5 of the Act, the Authority makes decisions on the importation, development, and manufacture of hazardous substances and new organisms. It may grant or decline approvals, place conditions upon approvals, and monitor these conditions.

In making appointments to the Authority, the Minister is required to ensure there is a 'balanced mix of knowledge and experience in matters likely to come before the Authority'.²⁷⁰ This explicitly includes knowledge and experience in 'matters relating to the Treaty of Waitangi and tikanga Māori'.²⁷¹

The Authority has the powers of a commission of inquiry.²⁷² Its decisions are quasi-judicial and it must act independently. Its decisions are appealable, for the most part, to the High Court, but only on a point of law.²⁷³ The Minister for the Environment can under certain circumstances 'call in' an application.²⁷⁴ Those circumstances include where an application will have 'significant cultural, economic, environmental, ethical, health, international, or spiritual effects'.²⁷⁵ But the Minister cannot give directions to the Authority when it is seized of an application.²⁷⁶ The Authority is a Crown entity but is independent of the Crown. The authority operates on a budget of \$10.6 million²⁷⁷ and employs approximately 90 staff.

(2) The Agency

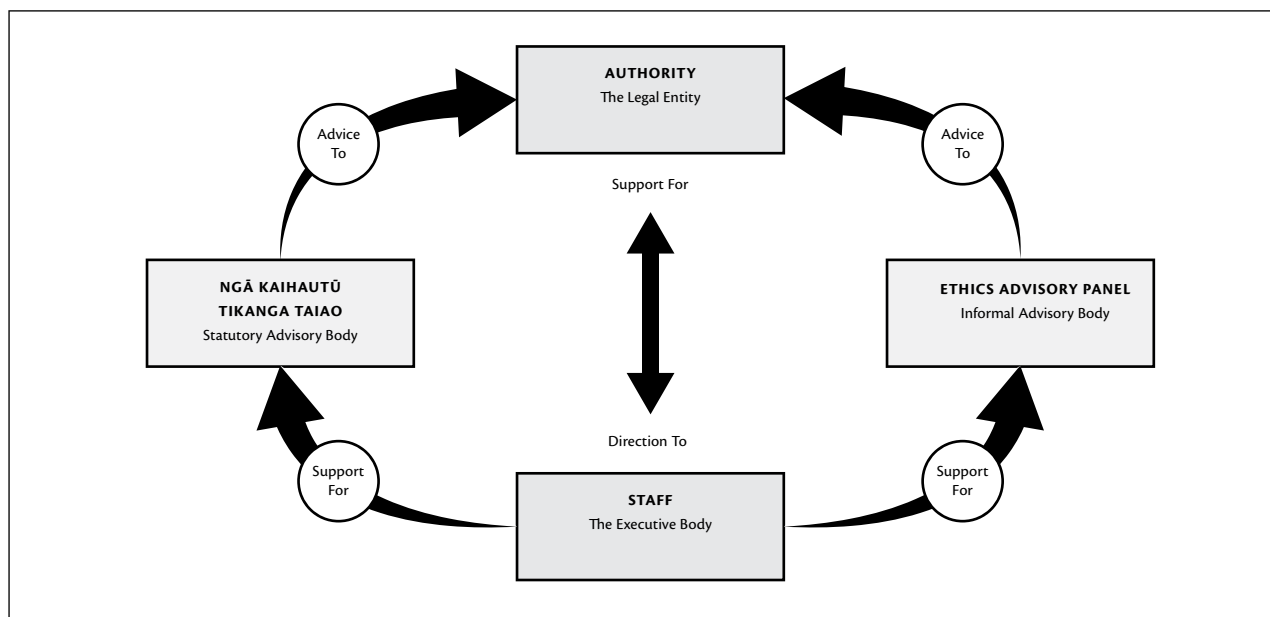
The Agency was established to provide administrative support to the Authority under the leadership of the chief executive. The Agency comprises five working groups: new organisms; hazardous substances; strategy and analysis; corporate services; and Māori. The Māori group is called Kaupapa Kura Taiao.²⁷⁸

(3) Ngā Kaihautū Tikanga Taiao

Ngā Kaihautū Tikanga Taiao was formally established in 2003 under section 24A of the HSNO Act following the recommendation of the Royal Commission on Genetic Modification in 2001, although we were advised that it had existed as an informal committee of the Authority prior to this.²⁷⁹ Its purpose is to provide advice and assistance on policy, process, and applications 'as sought by the Authority'.²⁸⁰ Section 24B specifically requires that this be 'given from the Maori perspective'. It also directs that any advice and assistance must 'come within the terms of reference set by the Authority for Ngā Kaihautu Tikanga Taiao'.²⁸¹ The operative terms of reference identify the functions and responsibilities of Ngā Kaihautū as follows:

- To provide the Authority with advice on organisational planning, policy development and procedure so that it takes account of Māori perspectives including Tikanga Māori, the Tiriti o Waitangi/Treaty of Waitangi, economic, scientific and other Māori aspirations;
- To recommend and assist with strategies that will enhance the knowledge, understanding and participation of Māori in relation to the role of the HSNO Act and functions of the Authority;
- To advise on the membership of committees with delegated authority to make decisions, as provided for under clause 43 of the First Schedule of the HSNO Act;
- Review and recommend appropriate processes and protocols for ensuring the satisfactory incorporation of Māori perspectives to decision-making by the Authority and its delegated decision-makers under Part v of the HSNO Act;
- To advise on and monitor the activities of ERMA New Zealand, including Part V decision-making, to ensure the timely, appropriate and effective incorporation of Māori perspectives; and
- To provide advice on other functions of the Authority,

Figure 2.3: ERMA's institutional structure



including implementation of the transitional provisions, monitoring the effectiveness of the Act and of enforcement, public awareness initiatives and the general management and operations of ERMA New Zealand.²⁸²

The Authority appoints Ngā Kaihautū's chairperson and members, and sets remuneration.²⁸³ The evidence does not suggest that Ngā Kaihautū meets on a regular basis, but the terms of reference requires that there be joint meetings of the Authority and Ngā Kaihautū three to four times a year. The Authority's chief executive told us that Ngā Kaihautū members are free to attend all meetings of the Authority on a non-voting basis. We did not hear evidence directly from Ngā Kaihautū, but were advised by the chief executive that Ngā Kaihautū initiates and reviews ERMA policies and procedures – especially those raising questions of tikanga Māori.²⁸⁴ We were also advised that Ngā Kaihautū evaluates at least one significant part 5 application and decision (that is, an application relating to the importation, development, and manufacture of hazardous substances and new organisms) a year to ensure that Māori perspectives and issues have been incorporated in the decision-making process to an appropriate level.²⁸⁵ Funding for Ngā Kaihautū is the subject of an executive support agreement between Ngā Kaihautū and the chief executive, though we were not given any information on the level of funding provided under such agreements.

Although these arrangements point to Ngā Kaihautū's having degree of independence from the Authority, it is clear that it does not have any decision-making power of its own. Its role is purely advisory. The relationship between Ngā Kaihautū and Kaupapa Kura Taiao was not clear to us on the evidence. It appears that the latter operates fully within the Authority and does not work to Ngā Kaihautū. It is possible that the practical impact of the unit on decision-making within the Authority is greater than that of the more ephemeral Ngā Kaihautū committee, but we have no way of assessing this.

2.6.3 ERMA's approach to its GMO caseload

GMO applications to ERMA under part 5 of the HSNO Act are generally divided into low-risk and non-low-risk genetic modification. The categories are treated differently

in terms of time, cost, procedure, and the body which is making the decision. Each is comprehensively defined in the HSNO (Low-Risk Genetic Modification) Regulations 2003.

We take some time to describe these categories and processes below because, as will be seen in section 2.6.5, they are particularly relevant to the claimants' concerns.

(1) Low-risk genetic modification

Applications to develop in containment or import into containment GMOs that are considered to be low risk under the HSNO Low-Risk Genetic Modification Regulations 2003 may be rapidly assessed by Institutional Biological Safety Committees (IBSCs).²⁸⁶ Low-risk genetic modification relates to new organisms that are said to present minimal risks to people and the environment.²⁸⁷ These are typically genetic modifications which involve a specific host; are performed within laboratory containment; and are non-pathogenic, non-virulent, and non-infectious.²⁸⁸ In addition, the regulations require that the new organism should not have a *greater* ability to escape from or to survive outside of containment than the non-modified organism.²⁸⁹

Many of the risks associated with GMOs in laboratory containment²⁹⁰ are considered by ERMA to be negligible because the modified host organism is clearly identifiable and classifiable, and the nature of the genetic modification is well characterised and documented.²⁹¹ For example, long experience in the genetic modification of mice within laboratory containment has produced a full array of technological and procedural safeguards.²⁹²

A comprehensive risk assessment is usually considered unnecessary, and the decision-making process can be fast-tracked under the rapid assessment provisions of the Act, which do not demand a public notification process.²⁹³ Typically, low-risk proposals to import or develop a GMO in secure containment are eligible for the rapid assessment process.²⁹⁴ Some are dealt with on a project-specific basis (section 42A) to streamline the approval process and improve flexibility for this type of GM research.²⁹⁵ Decisions under the rapid assessment provision are usually made within 10 days of application,²⁹⁶ and the costs involved are consequently low.

The Authority may delegate the power to conduct a

rapid assessment to develop in containment or import into containment to either the chief executive of ERMA New Zealand or, more usually, to an IBSC located within a university or CRI.²⁹⁷ The option of delegating outside the Authority is available because research institutions have great experience in dealing with the sorts of issues that arise with hazardous substances and new organisms. There are currently 19 IBSCs operating throughout the country. In deciding whether low-risk experiments in contained laboratories should proceed, they too must apply the provisions of the HSNO Act, the Methodology Order, and the 2003 regulations. They are also bound by any relevant protocols issued by the Authority (see table opposite).²⁹⁸

An IBSC has a minimum of five members with the necessary knowledge and expertise to assess and evaluate the applications. Membership is made up of:

- ▶ a chairperson;
- ▶ a Biological Safety Officer who is not the chairperson;
- ▶ at least one layperson not associated with the institution who is able to consider wider community interests;
- ▶ a microbiologist;
- ▶ a molecular biologist or a geneticist or both;
- ▶ an ecologist with expertise relevant to the type of organism to be developed; and
- ▶ at least one Māori representative, unless an exemption is granted.²⁹⁹

ERMA's policy is that on each committee there should be at least one Māori representative appointed on 'the nomination of the iwi or hapū with mana whenua in the location of the IBSC'.³⁰⁰ Applications that raise Māori cultural objections during the consultation process have to be referred to the Authority if the objections cannot be addressed by imposing controls or by declining the application.

(2) Non-low-risk genetic modification

The schedule to the 2003 regulations specifies developments that are considered non-low-risk genetic modifications. For example, micro-organisms involving or resulting in pathogens that usually cause serious or life-threatening diseases in humans, animals, or plants are deemed not to be low-risk genetic modifications.³⁰¹ So too

Table 2.1: New organism decisions made by International Biological Safety Committees under delegated authority for 2009/10, as at 30 June 2010

IBSC application type	Decisions made
Lincoln University	
GMO development in containment	
– rapid assessment	1
GMO import into containment	
– rapid assessment	0
Minor or technical amendments	8
Subtotal	9
Massey University	
GMO development in containment	
– rapid assessment	7
GMO import into containment	
– rapid assessment	1
Minor or technical amendments	6
Subtotal	14
University of Auckland	
GMO development in containment	
– rapid assessment	6
GMO import into containment	
– rapid assessment	4
Minor or technical amendments	2
Subtotal	12
University of Otago	
GMO development in containment	
– rapid assessment	7
GMO import into containment	
– rapid assessment	3
Minor or technical amendments	0
Subtotal	10
Total	45



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

are proposals that involve expression of vertebrate toxin genes (clause 1(d)), pathogenic determinants (clause 1(f)), pathogenic micro-organisms whose modification results in antibiotic resistance (clause 1(k)), or modifications which increase the virulence or infectivity of a virus – to mention just a few.

Applications relating to non-low-risk genetic modification have to be decided by the Authority and cannot be delegated. Applications to import a GMO for release, or to release a GMO from containment, including field-testing, will be subject to public notification and a full public submission process.³⁰² The Authority has discretion to publicly notify proposals to develop a GMO in containment.³⁰³ An application will be publicly notified if the Authority considers it to be of significant public interest.

Once the application has been publicly notified, it is open to a public submission (section 54). Anybody may make a submission within 30 working days of the application being publicly notified. The applicant, the Authority, or any submitter can require that the matter proceed to a formal hearing.³⁰⁴ As a result, the costs of applications that are non-low-risk can run to many thousands of dollars,

and the process can be extremely time-consuming. By contrast, low-risk application costs are negligible and the process is quick. There are many more low-risk applications than there are non-low-risk ones.³⁰⁵

(3) *Consultation with Māori*

Applicants are obliged to consult with the Māori community prior to lodging a low-risk application with the relevant IBSC unless the duty has been waived.³⁰⁶ Such consultation is mandatory for:

- (a) Work that involves DNA from native flora and fauna.
- (b) The import and/or development of human DNA or human cell lines of Māori origin.
- (c) Work that involves human embryonic stem cells regardless of their source.³⁰⁷

Consultation is also mandatory when DNA from traditional varieties of taonga *tuku iho* or DNA that is from other valued species are involved, where the following additional criteria are met:



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

- (a) the species that are deemed to be taonga tuku iho or valued have been agreed between the applicant institution and the relevant Māori community, through a proper process of consultation;
- (b) this agreement is documented to the satisfaction of the parties and the documentation is provided to the decision-maker.³⁰⁸

Applicants should consult with the local hapū or iwi of the place where the proposed research occurs. When the research involves DNA from organisms found naturally in New Zealand, applicants must also consult with mana whenua in the locations from which the DNA is sourced.³⁰⁹

An application that does not comply with these requirements will either be declined or returned to the applicant with an instruction to resubmit once the requirements are met. The policy puts emphasis on the fact that 'consultation is a two way (at least) process' that requires 'every reasonable endeavour' to consult be undertaken.³¹⁰ Reasonable endeavours include 'multiple, not single, attempts to establish a dialogue', and they:

require attempts at face to face meetings, not just written correspondence. However, it is accepted that on occasion reasonable endeavours will not succeed and, under those circumstances, the obligation shall be considered to have been discharged . . . the circumstances of such attempts must be documented so they are available for audit.³¹¹

The obligation to consult with the Māori community can be waived 'if there is agreement and understanding, between the institution and the relevant local Māori community, on what type of work is not of concern.'³¹² Furthermore:

[The] need to consult may also be waived if the IBSC has a member, or has in other ways formally involved Māori individuals who are mandated to speak on behalf of the relevant local Māori community. Wider consultation with the Māori community will only be necessary if advised by the mandated individual.³¹³

2.6.4 Māori provisions and processes

The relevance of Māori perspectives in ERMA's decision-making process is reflected both in the fact that the HSNO Act specifically requires consideration of that perspective and in the formal establishment of Ngā Kaihautū. The latter amounts to a structural response to the statutory requirement. The system has also produced a track record of vigorous engagement by Ngā Kaihautū (and we presume the Kaupapa Kura Taiao unit) with the part 5 decision-making processes of the Authority. ERMA's consultation policies and support materials in respect of Māori concerns have included:

- ▶ compulsory applicant consultation with local iwi in IBSC applications involving indigenous flora and fauna;
- ▶ compulsory Māori membership of IBSCs;
- ▶ consultation with Māori on HSNO applications that involve human cell lines or human DNA;
- ▶ national consultation with Māori under the HSNO Act;
- ▶ the protocol for 'Incorporating Māori Perspectives in Part v Decision Making';
- ▶ the production of a 'Guide for Applicants in Working with Māori'; and
- ▶ establishment of and terms of reference for a Māori National Network made up of IBSC Māori members and iwi resource managers from throughout New Zealand.³¹⁴

This combination has produced consultation initiatives around the operation of the Act as well as IBSCs. It has also led to the production of a number of formal advice documents, including one to assist applicants to engage with tangata whenua. In 2007, ERMA launched its Kia Pūmau te Manaaki strategy.³¹⁵ This is now the centrepiece of ERMA's Māori policies and procedures. The strategy aims to:

- ▶ improve ERMA's infrastructural capability to understand Māori cultural perspectives;
- ▶ develop a robust and durable working relationship with Māori; and
- ▶ facilitate effective engagement of iwi and Māori generally in HSNO decision-making.³¹⁶

Appended to the strategy is an implementation plan

which is developed on an annual basis. The plan for 2009/10 lists 12 programme initiatives specific to the three themes. Practical initiatives to enhance ERMA's capability to address Māori cultural perspectives in the decision-making process include:

- ▶ one annual training session for the Authority;
- ▶ a two-day workshop for ERMA staff in respect of te reo and tikanga Māori, and a one-day workshop on the Treaty of Waitangi;
- ▶ a review of the three Māori consultation policies; and
- ▶ improvement of the risk assessment framework to ensure the effective incorporation of Māori perspectives.

The strategy also aims to encourage meaningful and durable relationships with the Māori community through effective communication with the Māori National Network³¹⁷ and maintenance and development of positive iwi-based relationships. Initiatives for effective engagement with the Māori community under the strategy include an annual two-day wānanga or hui; training and support for applicants about how to engage with Māori; and funding for Māori to aid their participation in HSNO decisions.³¹⁸

Initiatives such as these make it clear that the system through which decisions are made about the development, importation, and release of GMOS accepts that Māori bring a valid perspective to that process.

2.6.5 Claimant concerns and the Crown response

Despite these procedural and substantive safeguards around Māori interests, the claimants criticised key aspects of ERMA's statutory mandate, internal structures, and decision-making processes on the basis that, in every case, they combined to subordinate Māori values to the preferences of science. They said that the safeguards were essentially window-dressing.

The claimants argued that the flaw in the HSNO Act can be found in the way Māori perspectives are given low priority in part 2.³¹⁹ They pointed to the fact that section 6(d) protecting the Māori relationship with the physical and cultural environment is only a 'take into account' consideration.³²⁰ The same is true of the principles of the Treaty

in section 8. These two Māori factors share the same status as six other competing factors, and all eight are subordinated to the purpose and principles of the Act.³²¹ In addition, kaitiakitanga – the core Māori value in any discussion of genetics – is not mentioned at all in part 2.³²² The effect is that Māori considerations are not important enough to carry the day, since they ‘are regarded as having an intangible basis and therefore end up being set aside in favour of that which can be measured’.³²³

Next the claimants argued that Ngā Kaihautū lacks sufficient teeth to make any difference.³²⁴ An advisory body can be ignored, they said, and in reality that is what is happening. Ngā Kaihautū has produced policies and protocols, but in no instance have concerns expressed by Māori been enough to prevent an application being approved unless accompanied by some other form of concern capable of empirical measurement.³²⁵ In a similar vein, claimants acknowledged the requirement for Māori membership of IBSCs, but argued that these members do not necessarily represent mana whenua and can be routinely outvoted.³²⁶ According to ERMA policy, any Māori opposition to an application – whether from an IBSC member or tangata whenua – results in the decision being taken from the IBSC anyway and forwarded to the Authority.³²⁷

As to concerns about the decision-making process, the claimants raised two issues. The first related to the way in which low-risk applications are dealt with. The second related to what we have described above (see section 2.6.3) as the engine of ERMA’s processes – the methodology.

The vast majority of applications are low risk, and decisions about how they are dealt with affect most of ERMA’s work. The claimants complained that the decision about what is low risk is based entirely on scientific criteria. The problem is amplified because almost all IBSC members are scientists and it is rare to find ethicists or social scientists on the committees. This system allows applications to be put through the low-risk fast track even when they represent high risks to the relationship between kaitiaki and the taonga species in question. Bevan Tipene-Matua, for example, complained that in the first few years of ERMA’s operation, ‘approvals were given by IBSCs to carry out low-risk GM experiments on various indigenous species, including the kōkako, saddleback, seven species

of shellfish, and the tuatara’.³²⁸ The claimants argued that applications should be treated as non-low-risk on cultural grounds alone where the facts justify this.

A related problem is the local nature of the committees. IBSCs generally hear applications relating to GMO research carried out in their respective districts.³²⁹ This is the approach even where, from a Māori perspective, the effect on a taonga species has national implications. For example, a number of iwi took the view that transgenic GMO research can amount to corruption of the whakapapa of taonga species.³³⁰ Thus, logically, corruption in one place is corruption everywhere. Because of its implications for tikanga Māori, they said such research should never be treated as low risk.

As we have said, the methodology is specifically provided for in section 9 of the HSNO Act. Its purpose is to set out how ERMA will carry out its risk assessments in accordance with the purpose, principles, and considerations of part 2 of the Act. It is intended to provide the operational detail to ensure that part 2 is implemented. The claimants said the methodology is so science biased it effectively negates the Māori provisions in part 2 while purporting to take them into account.³³¹ They pointed in particular to clauses 25 and 26.³³² Clause 25 requires the Authority to commence any assessment by reference to the scientific evidence and to deal with other matters only if the evidence raises them. Clause 26 allows the Authority to approve an application where the GMO poses negligible risks to the environment, and human health and safety, if the potential benefits of the GMO outweigh the costs.³³³ The Authority appears to interpret this as physical risk only. Generally, the claimants said the entire thrust of the methodology is to privilege scientific evidence over cultural factors.

In a neat summary of the position, Angeline Greensill (Tainui hapū and Ngāti Porou) said:

The Government and its agents such as ERMA who administer the HSNO Act have ignored Māori tikanga and despite strong Māori opposition nationally have approved applications for trans-species experiments (GM98009) the cloning of kaimoana – kuku, pipi, tuatua (GM099/HRA0020) and DNA modification of other species.

ERMA has repeatedly ignored advice given by its own Māori advisory group on matters regarding breaches of tikanga. To date no applications have been refused despite the fact that several deal with the genetic engineering of native flora and fauna.

Māori require a decisive role, particularly in cases potentially involving so called 'horizontal gene transfer', by which the integrity of indigenous species is potentially endangered.³³⁴

The evidence of the chief executive of the Authority was that ERMA is very sensitive to Māori concerns. Ngā Kaihautū, he said, is 'a key part of our day to day work' and has 'a huge effect in driving policy'. Its views are 'listened to very carefully'.³³⁵ It was argued that ERMA's policies in the Māori area are often driven by Ngā Kaihautū, and this is reflected in, for example, the operative policy for 'Incorporating Māori Perspectives in Part v Decision Making', the Kia Pūmau te Manaaki strategy, and the current 'Guide for Applicants' in working with Māori. The chief executive rejected any suggestion that science trumps tikanga Māori in ERMA's decision-making. He argued that ERMA's commitment to Māori perspectives begins with the relevant provisions in the HSNO legislation, and is reflected in the existence of Ngā Kaihautū, the Kaupapa Kura Taiao unit, and compulsory Māori participation in IBSCs. He said there are policies, protocols, guidelines, and ethics documents produced under the auspices of the Authority that directly address Māori concerns. These demonstrate how completely the Māori perspective is integrated into the daily work of ERMA.³³⁶

Underlying the debate about what ERMA does is the more profound philosophical anxiety over genetic modification itself. A number of the claimants expressed abhorrence at the whole idea of transferring genetic material from one species to another. They said this corrupted the whakapapa of those species and destroyed their mauri. Their concerns were not restricted to indigenous species but applied to every species, including humans, because each lineage contributes an element to the matrix of creation, and therefore the corruption of one element compromises the whole. This might be described as the hard-line conservative view.

Some claimant witnesses took a more flexible view and conceded that where GM provided medical benefits, such as relieving distress from diseases like Alzheimer's disease or diabetes, it should be encouraged. As an expert witness on behalf of the claimants, Professor Mason Durie argued that 'the human condition is pretty precious and we shouldn't close our eyes to possibilities of alleviating illness.' However, he was opposed to GM that involves the crossing of species boundaries. Within these limitations, he said, 'the prolongation of life whether it be the plants or animals or people is always worth investigation'.³³⁷

Mr Tipene-Matua told us about his involvement with the Rakaipaaka Health and Ancestry Study. He described this as a 'large-scale, long-term epidemiological project, which aims to identify the serious diseases that affect the community, understand the heritability of these diseases through the use of whakakapa, and identify the genetic and environmental factors that influence these diseases'.³³⁸ If the research is successful, it is hoped there will be substantive health gains for Māori. Mr Tipene-Matua advised us that the 3,000 participants in the study would be informed and consenting – indeed, he regarded this consent as 'ground-breaking' in procedural terms, because it would provide extensive protection for the participants. He was concerned, however, that other studies directly involving Māori might not have such ethical protocols.

Other claimant witnesses, such as Gerrard Albert, who gave evidence for Ngāti Koata but who was until 2000 a member and chair of Ngā Kaihautū, accepted that GM is as much a philosophical conundrum for Māori as it is for any other culture. He argued that Māori people needed to:

sit down and come to terms with what the science was, and once they understood what the science was and were fine with that they could find within their own cultural context, within their own intellectual context, an answer.³³⁹

He, along with others, accepted that in some circumstances the benefits to humanity of genetic modification research made for a compelling case. Their complaint was that Māori are given insufficient time in HSNO Act applications to find the cultural, intellectual, or moral balance

demanding by a culture centred on whakapapa and a belief that all things have mauri, and that ERMA lacks the will or authority to create that space.³⁴⁰

We note that this was not the first time such issues had been raised. Many of these concerns were discussed in the first appeal to be made against an ERMA decision involving genetic modification. In 1999, AgResearch lodged an application to field-test cattle whose genetic make-up had been altered by the insertion of gene sequences from a human myelin basic protein gene.³⁴¹ It was hoped this work would assist research into multiple sclerosis. AgResearch consulted the local hapū, Ngāti Wairere, on whose ancestral lands the research institute is located. Ngāti Wairere opposed the project because they regarded the crossing of species boundaries as contrary to their tikanga, and an interference with the whakapapa and mauri of both species involved.³⁴² Ngāti Wairere subsequently lodged an appeal to the High Court. We refer to the result of this appeal in sections 2.8.1 and 2.8.4.³⁴³

We also heard some evidence from other interested parties that were involved with GMO research. As we have explained, we will deal with all interested party evidence relating to bioprospecting, GMOs, and IP together in section 7.4.

2.6.6 Conclusion

We acknowledge that ERMA has made a genuine effort to engage with Māori and address many of their concerns about genetic modification in general, and the way in which Māori perspectives are incorporated into its policies and procedures in particular. It has put specific structures and processes in place to give Māori a voice – the recent Kia Pūmau te Manaaki strategy attempts to improve ERMA's relationships with Māori, and Ngā Kaihautū, especially, provides a robust platform for Māori views to be considered. The Crown emphasised its commitment to taking Māori concerns seriously, and we have no doubt that this is the case.

The much greater concern for us is whether, when it comes to crucial decision-making processes, the balance between the interests of Māori and the interests of science is struck appropriately, and in such a way as to ensure that the latter do not take unmerited precedence.

Is ERMA science biased? Do the relevant considerations under the HSNO Act de-prioritise Māori concerns? Does the methodology reflect this approach? Are the interests of kaitiaki recognised, understood, and given appropriate weight in the part 5 application process? Is Ngā Kaihautū too reactive? We attempt to answer these questions in our analysis in section 2.8. For present purposes, it is sufficient to affirm that these appear to be genuine issues for careful consideration and we will return to each of them below.

2.7 INTELLECTUAL PROPERTY AND TAONGA SPECIES

As we have explained, bioprospecting, genetic modification, and IP are all relevant to the kaitiaki relationship with taonga species. In this section we focus on IP. We begin by setting out some of the basics of patent and plant variety right law before moving on to discuss the concerns raised by the claimants, the Crown, and other interested parties in this area. We acknowledge that in doing so we are condensing complex concepts and centuries of law and debate, and that the law in this area is far more nuanced and contested than we suggest here. Our intention is simply to summarise and contextualise, and so to provide a rudimentary framework for the wider issues brought before us. We are also mindful that at the time of writing there is a Patents Bill before Parliament that may change some aspects of the law discussed here.³⁴⁴ It is inappropriate to discuss the details of that Bill,³⁴⁵ but we are in position to refer to the general policy, particularly as articulated in the draft Bill which was put before us in the Crown's evidence.³⁴⁶

2.7.1 Patents

As we have said in section 2.3.2, patents³⁴⁷ reflect an underlying social contract in which the law confers on the owner of the patent (the patentee) an exclusive right to exploit an invention for a period of 20 years. During this time, other people wishing to use, make, sell, or import this invention must have the patentee's permission to do so.³⁴⁸ In exchange for this bundle of exclusive rights, the patentee has to disclose in a patent specification the invention and the best method of carrying out the

invention. The specification has associated claims about what the invention does which define the scope of the invention. The public availability of the information in a patent specification and patent claims is widely regarded as a potential spur to further innovation.

Upon application, the Commissioner of Patents grants a patent after an examination process conducted by the Intellectual Property Office of New Zealand (IPONZ).³⁴⁹ This examination process is limited in scope. IPONZ does not examine patents for all aspects of patentability, such as obviousness, which we discuss further below.³⁵⁰ Rather, it determines whether an invention is a manner of new manufacture. One of the reasons for this limited scope of assessment is that the examination process is very expensive and requires a large team of patent examiners. The patent applicant is therefore given the benefit of the doubt that what they have applied for is an invention, and hence patentable, unless it clearly is not.³⁵¹ What this means is that many patents registered in New Zealand may not withstand close scrutiny. Under the New Zealand system, one can only be sure that an invention satisfies the requirements of patentability after it has been tested in either an opposition or revocation hearing at IPONZ, or in court. In theory, New Zealand's light standard of examination means the cost of enforcement is passed on to competitors who must dispute the patent in court. This is considered fair because competitors are the primary beneficiaries of enforcement. Others have expressed concern about the efficacy of the 'benefit of the doubt' approach because it allows too many questionable patents to be registered and casts too great a financial burden on competitors wishing to protect their own interests. Current law reform proposals suggest strengthening the examination of patents prior to registration to achieve better patents.

To qualify for a patent, an invention must:

- be an invention;
- be new (that is, novel);
- not be obvious but rather involve an inventive step; and
- be useful.

Under the current Act, IPONZ does not examine patents for either obviousness or usefulness, but these are grounds on which a third party may object to a patent prior to its being granted³⁵² or apply to revoke a patent

after grant.³⁵³ Under the draft Patents Bill, novelty and usefulness are expressly stated as criteria for patentability.

(1) *Invention*

A patent is granted for a patentable invention. An invention can be a product or process within the scope of a 'manner of new manufacture'.³⁵⁴ As the phrase 'manner of new manufacture' comes from the Statute of Monopolies of 1623, it has a rich history of interpretation both within Britain and throughout Britain's former colonies.

Broadly, patent law distinguishes between innovation and mere discovery – although where the line lies between these two concepts is hotly contested. An innovation is patentable, whereas a discovery is not. For instance, a patent cannot be granted over naturally occurring things such as an animal, plant, or micro-organism, unless it has been modified in some way.³⁵⁵ Hirini Clarke encountered this distinction when he sought patents to reflect Ngāti Porou's relationship with and interest in mānuka. He told us that his patent applications had been turned down because mānuka occurs naturally and, therefore, does not meet the requirements for a patent.³⁵⁶ In the same vein, laws of nature (such as the law of gravity) and mere information (such as a mathematical formula) cannot be patented. No specific scientific or technological subject matter is expressly excluded from patentability under the current Patents Act, but over time interpretations of the term invention and the Statute of Monopolies, which is part of the definition of invention in the Patents Act 1953, have meant that methods of medical treatment are excluded from patentability.³⁵⁷ It is beyond the scope of this summary to explain the details of that exclusion, but it is important to note that it is directed at surgical, therapeutic, and diagnostic methods. Pharmaceuticals are still patentable.

An invention does not have to be complicated to be patentable. Patentable inventions range from relatively simple innovations, such as the Post-it note or a pen, to complex scientific processes, such as the process of making plastic that is capable of conducting electricity.

(2) *The invention must be new*

An invention is considered to be new if it contains a characteristic which is not known in the existing body of

knowledge within New Zealand. If the invention is disclosed – that is, used, displayed, or otherwise made available in New Zealand – before a patent application is made, it is no longer new. Such disclosure can be either oral or through some form of print or other publication.³⁵⁸ This limitation to knowledge within New Zealand is known as a local novelty rule. It is no longer common international practice, and IPONZ acknowledges its ineffectiveness in the internet age. The draft Patents Bill proposes changing this to a worldwide novelty rule, meaning that an invention will not be new if it is known of anywhere in the world.

Products or processes already known to mātauranga Māori cannot meet the newness requirement because, by definition, a section of the wider community already knows about them. For example, the process for using the special properties of poroporo to darken grey hair (see section 2.2.2) is not eligible for a patent. It might, however, be possible to obtain patent protection for both the process of isolating the active substance and the isolated substance, provided it too is new in the sense that it has never been isolated from that plant before. Thus, despite pre-existing mātauranga Māori in respect of, for example, the antibacterial effect of mānuka, the inventive process and the resulting isolated substance could meet the newness requirement if no one had isolated the special active compound in mānuka before. Though mātauranga Māori might have been the trigger to research how to separate out the active compound in mānuka, its existence will not have destroyed the novelty of this isolation process.

(3) *The invention must not be obvious; rather it must involve an inventive step*

The invention must not be obvious for a person skilled in the relevant art – that is, an expert in the field. Applied to our mānuka example, a court or IPONZ, assessing obviousness, will ask the following question: is the described process for isolating the active compound in mānuka obvious to an expert in the field as it relates to mānuka? The idea to isolate the active compound might be obvious even to a layperson, but that is not the question. The obviousness test is focused on the more complex question of how this is done and whether that was obvious.³⁵⁹

(4) *The invention must be useful*

The last requirement is that the invention is useful. That is, it does what the patentee intends it to do. Historically, this requirement was interpreted to mean the invention must result in a vendible product. This is no longer the test. Rather the invention must be capable of some kind of industrial application. In the context of our mānuka example, the process of isolating the active compound is an industrial application.

The above approaches to novelty and inventive step do not adapt well to patents over isolated gene sequences. The United States Patent and Trademark Office has therefore adapted the standard that for a gene sequence to be patentable the use of the gene sequence must be disclosed.³⁶⁰ This approach has been adopted by IPONZ.

(5) *The morality exclusion*

Under section 17 of the Patents Act 1953, the Commissioner of Patents may refuse a patent application on the basis that it would be contrary to morality to use the invention.³⁶¹ Section 17 is the only basis on which a patent application which otherwise complies with the patentability criteria may be turned down. The use of section 17 is at the commissioner's discretion. In 2008, IPONZ reviewed its practice with regard to raising objections under section 17(1) of the Act, and issued the following guidelines:

Following this review IPONZ will continue to raise objections under s17(1) where it appears that the use of the invention would be contrary to morality for New Zealand society as a whole or for a significant section of the community, including Maori. In doing so, IPONZ considers that it may for any given application under consideration take the following into account: the concerns of interest groups, evidence including appropriate public polls and research, corresponding foreign legislation, case law and guidelines.

Additionally, IPONZ also considers that it is appropriate to consider the content of the proposed Patents Bill and corresponding documentation produced by various Government officials in review of the Patents Bill. IPONZ may also consider consultation with non-Government parties appropriate so as to arrive at a suitably informed decision in any given case.

As a general guide, claims to the following subject matter are likely to attract an objection under s17(1): human beings,

Mānuka flower, Te Pahi, Northland, 1992. Mānuka, or tea tree, is widespread in the New Zealand bush. Its therapeutic qualities have long been valued by Māori. Hirini Clarke told us that he had sought patents to reflect Ngāti Porou's relationship with and interest in mānuka. His applications were rejected because mānuka occurs naturally and so does not meet the requirements of patentability.



processes which give rise to human beings and biological processes for their production; methods of cloning human beings; totipotent human stem cells; human embryos and processes requiring their use; placental and umbilical cord tissues and processes requiring the use of placental and umbilical cord tissues; transformed host cells within a human and other cells and tissues within a human.³⁶²

In May 2009, an amendment was made to this practice note because it had apparently 'caused some confusion with respect to the nature of what would and would not be objectionable under section 17(1) of the Patents Act 1953'. IPONZ has revised the practice note as follows:

IPONZ will continue to raise objections under s17(1) where it appears that the use of the invention would be contrary to morality for New Zealand society as a whole or for a significant section of the community. In doing so, IPONZ considers that it may for any given application under consideration take the following into account: the concerns of interest groups, evidence including appropriate public polls

and research, corresponding foreign legislation, case law and guidelines.

As a general guide, claims to the following subject matter are likely to attract an objection under s17(1): human beings, processes which give rise to human beings and biological processes for their production; methods of cloning human beings; human embryos and processes requiring their use; transformed host cells within a human and other cells and tissues within a human.³⁶³

These notes are long, but we think the text important. In particular we point out that the express reference to Māori in the first practice note has been omitted from the second. This will not have been accidental. We take up the *ordre public* and morality exclusions again in section 2.7.3.

(6) Legal effect and enforcement

A patent can become a valuable business asset. It can be used to raise and secure capital to develop an invention, and can be even more valuable if it relates to a product or process that is in demand. Like any property, it can be

bought, sold, transferred, or licensed. A person caught exploiting the invention without permission during the term of the patent can be sued by the owner or exclusive licensee for patent infringement. The owner may be entitled to an injunction to prevent the infringement, damages, or the profits obtained by the infringer. Infringement proceedings are a powerful tool to assist patentees in protecting the commercial value of their invention.

A patent granted under the Patents Act 1953 has effect only in New Zealand, Tokelau, Niue, and the Cook Islands. Patents that have been granted in any other countries or regions are unenforceable in New Zealand. If a person wants to patent the same inventions in a number of different countries, then the Patent Cooperation Treaty provides a way in which those applications can be made simultaneously (or consecutively within a defined time-frame, most often 12 months).³⁶⁴ This treaty assists with international registration. It does not create an international patent. Each country independently examines and decides whether to register a patent, and the resulting patents, if they are granted, exist independently of each other.

(7) *The patenting of life forms*

It is now possible to patent life forms, or at least parts of life forms. New patent applications with broad claims to newly isolated or purified genes, proteins, or other biological materials have given rise to a great deal of debate about where discovery stops and invention begins.

(a) ANIMALS, PLANTS, AND MICRO-ORGANISMS

Genetically modified animals or plants, and the processes for the genetic modification, are patentable. For example, there is a patent for the production of a 'transgenic non-human animal' which is capable of producing a particular immunoglobulin.³⁶⁵ Numerous patents relating to genetically modified plants have been granted in New Zealand. An example is a patent for a 'method for producing temperature-tolerant plants'. The specification 'describes a process for constructing temperature-tolerant plants which comprises transforming a plant by a recombinant vector containing a gene encoding choline oxidase'.³⁶⁶

Naturally occurring and genetically modified

micro-organisms (which include bacteria) are also patentable in New Zealand.

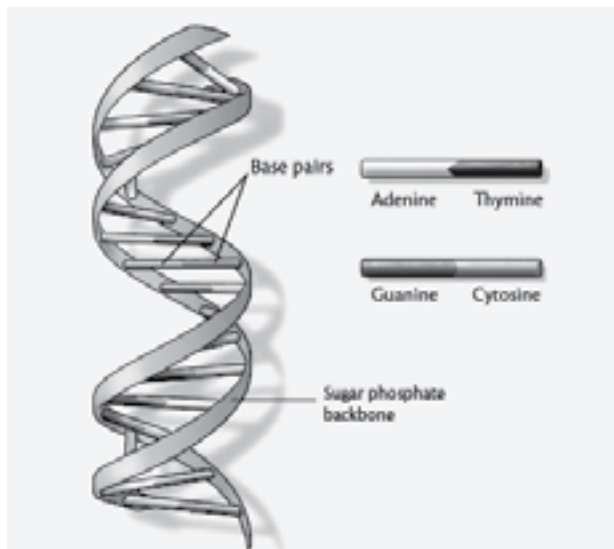
(b) GENETIC MATERIAL

Modern biotechnology makes it possible to isolate or purify biological material that is identical or largely identical to such material as it exists in nature. Such biological materials are merely extracted from their environment. They are arguably discovered, not invented. However, patents are now being granted not just for the technology used in the isolation and purification process (which is clearly an invention), but also for the isolated gene sequence itself. The most controversial patents for naturally occurring gene sequences have been granted in relation to two breast cancer genes (BRCA1/BRCA2 patents, which are enforced in Australia and the United States).

The supporters of patentability consider that the cost and sophistication of the isolation process is so great that the result should be treated as an invention and granted a patent, even though the genetic material existed before isolation. They say that unless patents can be granted for this work, the research will stop. Those who oppose such rights say that isolating aspects of life forms is not invention, but is merely discovery. They say that such patents artificially increase the cost of research undertaken on a particular gene (for example, breast cancer research). They say that keeping such work in the public domain by refusing to grant private rights will not stop the work. They argue that, on the contrary, privatising this research slows progress by putting whole areas of inquiry off limits, and increases the cost of access to the benefits of the research.

(c) HUMANS

The Patents Act 1953 does not explicitly exclude humans or human-related material from patentability. However, IPONZ refuses to grant patents for genetically modified humans, human body parts, or human genes while within their natural host. IPONZ relies for this position on the morality provision in section 17 of the Act. As we have said, IPONZ advises that human beings, processes which give rise to human beings and biological processes for their production, methods of cloning human beings,



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

human embryos and processes requiring their use, transformed host cells within a human, and other cells and tissues within a human are not patentable.³⁶⁷

By contrast, gene sequences that have been isolated from the human body are patentable in New Zealand. For instance, a patent has been granted for an isolated gene sequence that is present in breast and bladder carcinoma.³⁶⁸ In New Zealand, the law favours patentability of isolated aspects of life forms. But the debate continues worldwide and it is clear that New Zealand law will be affected by any resolution of it. In particular, at the time of writing an Australian Senate Inquiry into the patentability of genes has been published.³⁶⁹

2.7.2 Plant Variety Rights

The TRIPS Agreement allows countries to exclude plant varieties from domestic patent laws, but countries must then protect them under a separate *sui generis* (stand-alone) legal regime.³⁷⁰ New Zealand opted for this separate path when it enacted the Plant Variety Rights Act 1987.³⁷¹

PVRs provide protection for those engaged in the production of new plant variants through selective breeding. They are quite different from patents. A PVR gives the owner an exclusive right to produce and sell propagating material of that new plant variety. Nonetheless, PVRs are property like all other IP and may be transferred or licensed in the same way as patents. PVRs are also limited in time. They last for 20 years in the case of non-woody plants, or 23 years in the case of woody plants.

PVRs control only commercial propagation of the variety and its products. They do not prevent non-commercial propagation. Nor do they prevent non-commercial harvest of the variety's products. The Nursery and Garden Industry Association told us that a PVR variety could also be used by someone other than the owner to develop a new variety without infringing the original PVR. The new variety could in turn qualify for its own PVR.

In New Zealand PVRs 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, homogeneous, and stable'.³⁷² In addition, it must have an acceptable proposed name according to international guidelines.³⁷³

A variety is not new if a part of it has already been offered for sale in New Zealand within a year of the date of the PVR application. Nor, in the case of woody plants, will it be new if it has been sold overseas within six years of the application date. The period for non-woody plants is four years.³⁷⁴

Plants that are not new varieties but have existed in the New Zealand environment for some time will not meet the newness requirement for a PVR. The kōwhai ngutukākā (see section 2.2.2) is an example of this. Tate Pewhairangi, of the Te Whānau a Rautaupare hapū of Ngāti Porou, told us that kōwhai ngutukākā is available for sale in plant nurseries for home gardens. He attached a label from such a plant to his evidence. The label called the plant 'Kaka King'. The name Kaka King is a registered trade mark belonging to Esme and Mark Dean of Tauranga,³⁷⁵ but because the plant has not been hybridised it does not meet the PVR criteria. Mr Pewhairangi did question where the sellers of the plants obtained the propagating material from, but this is not an issue that is considered in the process of granting a PVR.



Kōwhai ngutukākā (Kaka beak). The kaka beak is an example of a rare plant propagated and widely sold in commercial nurseries, while its existence in the wild is precarious.

A plant is distinct if it is different from all commonly known varieties in at least one way, such as shape, colour, and disease resistance.³⁷⁶

Uniformity and stability are related. They are designed to ensure that the plant is a genuine variety and remains true to its characteristics after propagation.

An example of an actual PVR was provided by Jim Rumbal, who gave evidence on behalf of Duncan & Davies Contracting Limited, a plant-growing business. He told us that a variant of the crimson-flowering akakura

(a member of the *Metrosideros* species, which includes pōhutukawa and rātā), ‘with attractive yellow variegated distinctive foliage and bushy habitat’, was granted a PVR because of ‘the considerable time and effort expended in studying growth characteristics, breeding, cultivating and maintaining’ it. The claimants argued that this amounted to privatising a pōhutukawa variant, but Mr Rumbal said that to claim that ‘the Carousel a cultivar of *metrosideros* carminea or Akakura is a pōhutukawa is not correct.’³⁷⁷

A draft Bill to amend PVR law was released for consultation in 2005. It proposed that the Commissioner of Plant Variety Rights be precluded from approving a name for a plant variety if he or she considers the name likely to offend a significant section of the community, including Māori. The same draft Bill also suggested certain changes to the definition of ‘owner’ so that plant varieties must be specifically bred to qualify for a PVR. ‘Discovered’ varieties would no longer qualify. In effect, if someone ‘discovers’ a plant that is already known to Māori, it could not qualify for a PVR under the proposed Bill.

2.7.3 Patents in international treaties

We have already said that New Zealand’s IP law has to provide the *minimum* IP standards set out in the TRIPS Agreement. It is important to note that the TRIPS Agreement allows WTO member states to enact ‘more extensive protection’ in their domestic law than prescribed by the TRIPS Agreement, as long as such protection does not run counter to its provisions.³⁷⁸ Therefore the TRIPS Agreement has been described as a floor, not a ceiling – and we have discussed the implications of this at some length in the previous chapter on taonga works (see section 1.3.3).

These minimum standards require New Zealand’s patent law to provide protection for inventions in all fields of technology, whether product or process, which are new, non-obvious, and useful.³⁷⁹ Such protection must be granted for at least 20 years.³⁸⁰ New Zealand’s Patents Act complies with all these requirements.

The TRIPS Agreement allows enough flexibility for each member state to fine-tune its patent law according to its particular economic, cultural, and social interests. Article 8 sets out certain principles, including:

Members may, in formulating or amending their laws and regulations, adopt measures necessary . . . to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided such measures are consistent with the provisions of this Agreement.

In recognition of this broad principle, the Agreement provides that members may exclude certain matters from patentability. These include:

- ▶ diagnostic, therapeutic, and surgical methods for the treatment of humans and animals;
- ▶ plants and animals, with some important exceptions;
- ▶ inventions where prevention of their commercial exploitation is necessary to protect *ordre public* or morality.³⁸¹

Therefore, New Zealand cannot exclude biotechnological inventions from its patent law. Article 27(2), however, provides some discretion to refuse a patent when it is considered necessary to protect higher public interests.³⁸²

If members of the TRIPS Agreement do not provide patents for plants or plant varieties, members must provide a *sui generis* system for the protection of plants.³⁸³ In New Zealand, the Plant Variety Rights Act 1987 (described above) provides such *sui generis* protection, based on the standards in the International Union for the Protection of New Varieties of Plants, known as UPOV.³⁸⁴

(1) *Ordre public and morality*

The *ordre public* and morality exceptions in the TRIPS Agreement are crucial to the claimants' arguments in respect of taonga species. This is because, outside these two exceptions, the Agreement allows New Zealand very little flexibility within the patent system to provide for the interests kaitiaki claim in those species.

Because of the importance of this issue, we set out the whole of the *ordre public* and morality section of the TRIPS Agreement:

Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that

such exclusion is not made merely because the exploitation is prohibited by their law.³⁸⁵

The phrase *ordre public* is French. It is not the same as public order – at least not in the narrow sense of maintaining public safety. In fact, during the TRIPS Agreement drafting process the phrase 'public order' was specifically replaced with *ordre public* because of the difference in meaning.³⁸⁶

Expert commentator on the TRIPS Agreement Daniel Gervais describes *ordre public* this way:

While public order may be defined as the maintenance of public safety, *ordre public* concerns the fundamentals from which one cannot derogate without endangering the institution of a given society . . . : It expresses concerns about matters threatening the social structures which tie a society together, ie, matters that threaten the structure of civil society as such.³⁸⁷

He defines morality as 'the degree of conformity to moral principles (especially good). The concept of morality is relative to the values prevailing in a society. Such values are not the same in different cultures and countries, and change over time.'³⁸⁸

These two concepts allow member countries to adopt laws, policies, and measures in the area of patents that might otherwise be inconsistent with their TRIPS undertakings. They cannot do this on a mere whim, but under article 27(2) they may exclude or modify patentability in order to protect beliefs or values that are fundamental within the host society, or to maintain institutions seen as important to national culture or identity.

These exclusions are wide enough to accommodate any kaitiaki interest that may be found to exist in taonga species and mātauranga Māori, as long as that interest is seen to reflect deeply held beliefs and values within New Zealand society. Similarly, the Crown is, by these exclusions, able to fully address its obligations under the Treaty of Waitangi provided it is accepted that the Treaty is an institution that is very important to New Zealand's national culture or identity.³⁸⁹

In New Zealand, section 17 of the Patents Act 1953 refers only to morality,³⁹⁰ and this has been the basis on

which human and human-related material has been excluded from patentability. As we have said, originally IPONZ explicitly accepted that Māori views of what might be contrary to morality were relevant to the operation of that section. But in May 2009, that explicit recognition was removed from the relevant internal practice note (see section 2.7.1). The matter is obviously the subject of internal discussion, and we will be referring later to the way in which IPONZ has explained its procedures in international forums. It is sufficient at this point to reiterate that the way in which the *ordre public* and morality exceptions have been used internationally suggests there is at least a good argument that they are wide enough to include within their purview the interests of kaitiaki in taonga species. If that is the case, both IPONZ and the Crown would have far more room to incorporate protective measures within patent legislation and IPONZ procedures.

(2) *The Crown's approach to international developments*

As we said at the outset, there is a new Patents Bill before the House. This Bill is the first comprehensive reconsideration of New Zealand's patent law since the enactment of the Patents Act 1953. At the time of our hearings, the Bill had been publicly circulated in draft form. This was known as the draft Bill. The Crown adduced evidence about both the draft Bill and its relevant underlying policies.³⁹¹

The Crown told us that the Bill is the vehicle by which it proposed to introduce a new Māori patents advisory committee. In particular, Mark Steel, deputy secretary, Industry and Regional Development Branch of the Ministry of Economic Development, said:

The proposed Patents Bill provides for the creation of an advisory committee to advise the commissioner on whether an invention seeking patent protection is derived from Maori traditional knowledge or from indigenous plants or animals, and whether the commercial exploitation of the invention is likely to be contrary to Maori values.³⁹²

We understand that the Bill includes explicit *ordre public* and morality exceptions as allowed by the TRIPS Agreement, and that the work of the proposed Māori advisory committee would be in part to assist the

THE CASE OF THE ONCO MOUSE

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

The best-known example of the use of an *ordre public* exception in European law concerns the 'onco mouse'. This mouse's onco gene is genetically altered through a patented process so that the mouse has a 50 per cent chance of developing cancer. While the methods of genetically altering the mouse are patented in the US, EU, Canada, and other places, patenting of the actual mouse and offspring there has been the subject of considerable international disagreement. This debate was most intense in Europe and Canada.

After much litigation in the various levels of the European Patent Office, the mouse itself was eventually patented. The decision involved balancing competing interests, including the suffering of the mice, the potential benefits of the invention, environmental risks, and so-called public unease. The patent office concluded that the mouse itself was registrable primarily because of the significant benefits to humans in cancer research. This can be contrasted to Upjohn Company's application to patent a hairless mouse used in research for the treatment of baldness. That application was rejected after the same factors were weighed. In sum, unlike onco mouse, the benefits to humans of a hairless mouse did not outweigh the suffering of the mice. Clearly the approach taken by the EPO in which competing principles and ethical considerations are weighed to reach a final conclusion suggests that *ordre public* and morality are to be interpreted broadly.

2.7.4

commissioner to determine whether those exceptions to patentability should be invoked in any particular case.

There is, of course, much more to the Bill, but these proposed changes are clearly part of New Zealand's policy response to the international debate. While it is inappropriate for us to discuss the detailed provisions of the Bill, we will return to the proposed underlying policies when we discuss the reforms necessary to bring patent law into line with the Treaty of Waitangi in section 2.9.

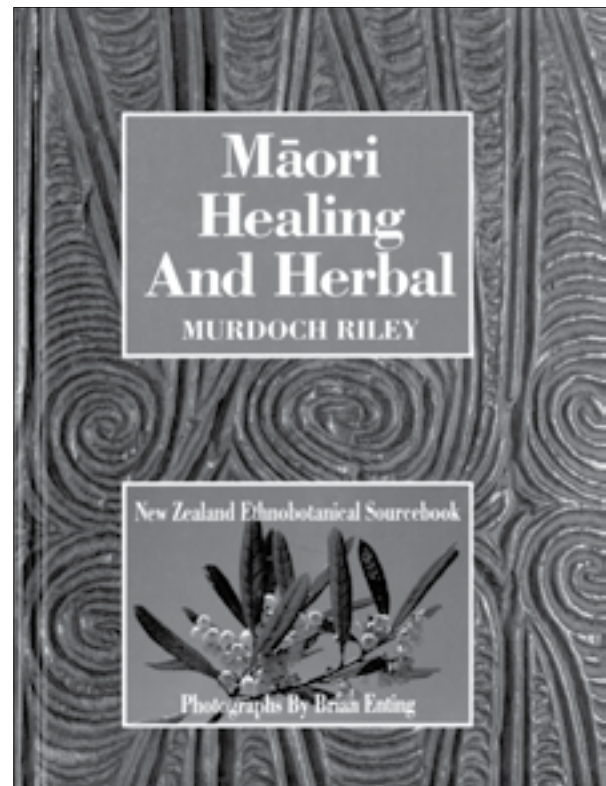
2.7.4 Claimant, Crown, and interested parties' arguments

(1) *The claimants' concerns*

As with bioprospecting and genetic modification, the claimants were opposed to an IP system that allows researchers to use mātauranga Māori without consent. They were equally opposed to recognition of any form of exclusive legal rights in the genetic and biological resources of taonga species in anyone other than kaitiaki. They offered the same four levels of argument as were made in respect of bioprospecting and GM.³⁹³

First, if researchers use mātauranga Māori in their work, any resulting IP should be subject to prior Māori rights. We are aware, for example, of the work of Forest Herbs Research Limited which makes a variety of herbal products including 'Kolorex', used for the treatment of fungal infections. This product is derived from an extract of horopito (*Pseudowintera colorata*). Peter Butler, the company's managing director, confirmed that Forest Herbs Research relied for its work in this case on an article from the *Journal of Medicinal Plant Research* entitled 'Antibiotic Substances from New Zealand Plants'. He denied any reliance on mātauranga Māori, but the article, having first referred to the strong antibiotic activity of horopito, continues:

According to Philipson only 5–10% of the world's plant resources have been evaluated for pharmacological activity and very few of New Zealand's unique indigenous flora have been investigated. In these laboratories we are following leads from Maori folklore and are currently investigating NZ plants for antibiotic activity with particular reference to antifungal agents.³⁹⁴



Murdoch Riley's book *Māori Healing and Herbal* contains a wealth of mātauranga Māori on many taonga species.

Hema Nui a Tawhaki Witana of Te Rarawa referred in her evidence to Murdoch Riley's widely available book, *Māori Healing and Herbal: New Zealand's Ethnobotanical Source Book*, a reference work we too have found invaluable in our inquiry.³⁹⁵ It contains a wealth of mātauranga Māori in respect of many taonga species. Although the work is protected by copyright, that does not prevent others from using the information contained in it to decide what plants might be worthy of future research or commercialisation. Some claimants argued that even where the mātauranga Māori is derived from published sources, it should not be used without appropriate acknowledgement and consent.³⁹⁶ They said the law does not recognise that they have any rights in their mātauranga, whether published or unpublished.

Secondly, some claimants argued that the IP system should not allow the owner of a patent or PVR to exploit any part of the genetic and biological resources of taonga species if such exploitation is inconsistent with the long-standing values underpinning kaitiaki relationships with those species. These claimants said that to allow this would damage or destroy the relationship. Counsel for Ngāti Kahungunu put the argument this way:

The real issue . . . is not whether Maori/Ngati Kahungunu interests can be protected by patents because they patently cannot. Rather, the issue is the use of patents by third parties to isolate rights to particular aspects of indigenous and/or taonga species without providing for the Maori/Ngati Kahungunu interest. If in such circumstances patents were granted it could result in changes being made to the species of indigenous flora and fauna, or part of the species being commercialised in an inappropriate way. As a result there is a risk that if patents are granted over biological and genetic resources it will adversely affect or interfere with the kaitiaki responsibility of Maori including Ngati Kahungunu with their biological and genetic resources.³⁹⁷

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

We referred earlier to the evidence of Hirini Clarke of Tairāwhiti Pharmaceuticals, makers of a range of mānuka-based products (see section 2.2.2). Regretting the lack of Ngāti Porou rights in Tairāwhiti mānuka, he was in effect arguing for the recognition of Ngāti Porou's status as the 'traditional owner' of mānuka's genetic resources in the iwi's rohe.³⁹⁸ He considered it unjust that outsiders could simply walk away with an aspect of Ngāti Porou heritage and exploit it without any accountability back to the iwi. He said only Ngāti Porou should be entitled to control and exploit the genetic resources of their mānuka. In fact, mānuka-based products are, as we said, the subject of several registered patents in New Zealand. They relate, for instance, to products for hair removal, antibacterial compounds, and fortified UMF honey, among others.

The fourth level of claimant concern was focused on exceptional cases, where the kaitiaki relationship transcends the genetic or molecular level and applies to each living example of a species within the kaitiaki's traditional territory. As we have said, the relationship between Ngāti Koata and the tuatara is an example of a claim pitched at this level.

Benjamin Hippolite and Terewai Grace encapsulated this relationship in their evidence. Mr Hippolite said:

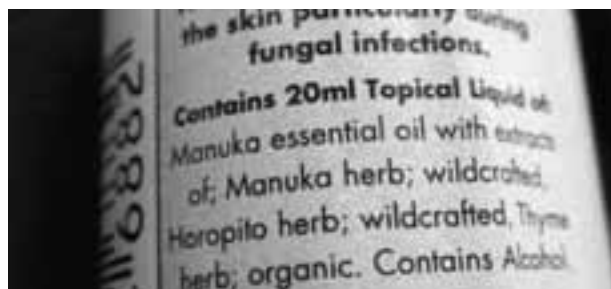
[The tuatara's] spiritual significance was that because of its age it gathered knowledge. Our people looked to old people for wisdom, counsel and recommendations. The tuatara symbolises that. The third eye cannot see the material world, but sees the spiritual.³⁹⁹

And Mrs Grace told us:

The tuatara, like mutton-birds, are of the utmost importance to our iwi because they are part of our history. The tuatara is the oldest living animal – it is almost like our tupuna. Because we have that relationship with it, Ngati Koata is the proper kaitiaki for the tuatara. It has to be Ngati Koata.⁴⁰⁰

In summary, the claimants' arguments spanned a spectrum from an exclusive focus on the relevant underlying mātauranga Māori to the desire for complete control not just of the genetic resources of taonga species but of every living specimen. The common element in these

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





Tuatara. Witnesses such as Terewai Grace and Alfred Elkington of Ngāti Koata told us of their profound relationship with the tuatara of Takapourewa. They said that Ngāti Koata were the ‘proper kaitiaki’ of the species within their rohe.

arguments is the relationship between kaitiaki and either the mātauranga or the taonga species.

The question this element poses is whether the claimed relationship is ever strong enough to limit or even override the rights of those who own patents or PVRs in taonga species, or whether patents or PVRs should be granted in the future. Even more relevant is the question of whether a way can be found both to protect the claimed relationship and grant these rights.

(2) *The Crown's concerns*

As we have said in section 2.5.1, the Crown rejected a general claim to Māori ownership of or rights in any genetic resources in New Zealand, including a general claim to IP rights. The Crown's particular concern was that any general ownership or rights of this kind would have a negative effect on the research and innovation process.

Many Crown witnesses feared that protecting any Māori interest in taonga species risked undermining investment in New Zealand scientific and technological

research by making investment itself too risky. Dr Helen Anderson, chief executive of the Ministry of Research, Science and Technology (MORST), and Mr Steel from MED focused particularly on the multiplicity of stakeholders in the field of genetic and biological resources. They argued that those stakeholder interests must be adequately protected in any modern system of IP rights. Their position was that it is important to increase research capacity in order to contribute to New Zealand's economic growth, and recognising Māori rights in taonga species threatened to cut across that objective.⁴⁰¹

The Crown also argued that once mātauranga Māori is in the public domain it is difficult to control its use. Counsel pointed out that Māori have put in the public domain much mātauranga Māori, particularly that relating to rongoā uses of genetic and biological resources. It is apparent, for example, that Murdoch Riley had extensive Māori assistance in compiling his *Māori Healing and Herbal*, which is used by Māori and non-Māori alike as a basic reference guide to the medicinal applications of taonga species.⁴⁰² The Crown submitted that there is neither a practical way, nor any need, to protect mātauranga Māori once it is published in this way.

Mr Steel accepted that the TRIPS Agreement has not 'foreclosed the Crown's ability to provide mechanisms to protect Maori traditional knowledge from misappropriation and misuse within the IP regime'.⁴⁰³ He acknowledged the importance of mātauranga Māori for New Zealand's economy as a whole, and noted that it is 'used to a significant extent by a range of Maori and some non-Maori businesses' in areas such as 'media, entertainment, tourism, food products and health'. He said that changes to the IP system are only part of the solution and 'unlikely to have a significant bearing on further Maori economic development utilising traditional knowledge'.⁴⁰⁴

Mr Steel also gave evidence about MED's Traditional Knowledge Work Programme, which was launched to consider the relationship between IP rights and traditional knowledge systems, as well as the economic potential of mātauranga Māori.⁴⁰⁵ According to a study commissioned by MED which assessed the economic significance of mātauranga Māori, the revenue generated by the six case-study businesses was in excess of \$15 million. The study found that mātauranga Māori was used in many

different ways and across all stages of product life, from production to marketing. At whatever stage mātauranga Māori was used, it had 'economic potential, especially for Māori'.⁴⁰⁶ The department responded that the study 'reinforced MED's focus on traditional knowledge as an economic development initiative'.⁴⁰⁷

(3) Interested parties' concerns

A distinctive feature of this claim was the extensive involvement of interested parties who were neither claimants nor the Crown. These were parties whose work or particular focus was affected by the claim in respect of the genetic resources of taonga species. They included institutions involved in research and development such as universities (represented by the vice-chancellors committee), CRIS, and private biotechnology companies, as well as individual scientists. Owners of PVRS, such as Duncan & Davies Contracting Limited and Black Bridge Nurseries, also made submissions. In addition, we heard evidence from representatives of relevant industries such as the Nursery and Garden Industry Association of New Zealand (NGIA), Horticulture New Zealand, the New Zealand Association of Science Educators, and the New Zealand Institute of Patent Attorneys Inc. The Federation of Māori Authorities (FOMA), broadly representing Māori land, natural resource, and commercial interests, also made a submission.

Other submitters included: Dr Ron Close, a retired DSIR botanist, concerned about the exclusive nature of rights sought in the claim, and NZ Flax Hybridisers Ltd, which has worked for more than 30 years on extending and consolidating flax biodiversity, and seeks to provide flax varieties for weavers on a not-for-profit basis. The organisation opposed restrictions on the exchange of material and commercial activity. Genesis Research and Development, a private biotechnology company, told us that the claim, if upheld, could limit the company's research, investment, and innovation potential.

As we have explained, we have gathered interested parties' evidence together in the context of IP rights, rather than in the earlier bioprospecting and genetic modification sections of this chapter, because this, in the end, is the area in which these parties' concerns coalesce. We acknowledge that some of the evidence outlined below

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relates as well to these other subject areas, but we think a clearer picture of the issues emerges by describing them in one place.

In 1997, David Penny, professor of theoretical biology at Massey University, provided an important and wide-ranging submission that cut to the heart of the issues around claims to genetic material. He reminded us of the need to have regard to European traditional knowledge, and that many of the ideas about nature and research are comparatively new in Western culture. He recalled, for example, the popular seventeenth-century notion of transformations within a species, whereby animals might transform into plants, or transformations occur between 'living' and 'non-living forms'. He was concerned about the scope of the claim and limited definitions of what 'full control' of a species might mean in practice, but he was also interested in the idea of 'species' and its development as a concept, given, for example, that 'kōwhai plants of *Sophoramicophylla* grow in New Zealand, several South Pacific islands, Chile, and on a South Atlantic island. He noted two *Hebe* species grow in South America too:

To claim a 'species' is to claim all these plants, even though they are growing in different countries. Conversely, South American indigenous groups from Chile could claim plants of these same species that are growing in New Zealand . . . For migratory animals the difficulties increase.

The very concept itself of species is still unresolved in biology.⁴⁰⁸

Professor Penny raised the topic of potential pharmaceuticals. He told us that the proportion of pharmaceutical company research spending on bioprospecting research is far lower than the (then) new initiatives in 'rational drug design' (where 3D crystallography and other methods probe drug functionality at the molecular level). Indeed, Professor Penny queried whether there is in fact any 'pot of gold' in bioprospecting in New Zealand.⁴⁰⁹ He said 'this . . . does not in any way alter the principles of ownership of indigenous knowledge and/or to rights to indigenous resources. But there should not be any build up of unreasonable expectations, nor building up fears that people are being deprived of some large bonanza.'⁴¹⁰

(4) *Plant nursery and FOMA submissions*

The Wai 262 claim's focus on native plants was of immediate interest to commercial plant nurseries. Numerous nurseries wrote to offer their views during the first hearings in 1997.⁴¹¹

Nurseries were concerned about the prospect of Māori being granted exclusive rights over native plants, in part because such a grant might impede what has become an important commercial industry. The NGIA noted:

The total annual retail turnover for green plants in New Zealand is approximately \$250m. The total annual value of exports of plants from New Zealand is about \$15m.

In 1990, the starting date for this claim, sales of New Zealand native plants made up only 10% of total sales of plants in New Zealand. The demand for native plants has grown steadily since then and now represents 45% of the value of the domestic market and 30% of the value of the export market for plants.⁴¹²

NGIA and Black Bridge Nurseries, for example, were opposed to recognising that Māori hold any perpetual, exclusive rights to flora and fauna. They contended that granting Māori proprietary rights over flora and fauna on the basis of cultural association would negate the time, money, and effort nurseries had spent in researching, developing, and promoting native plants.⁴¹³ They feared that the recognition of Māori rights would automatically prevent them from plying their trade.

While concerns about business operation were a factor in many plant nursery submissions, later evidence also referred to the fact many Māori and non-Māori have a growing appreciation for native plants. Duncan & Davies told us:

Duncan & Davies who hold PVR rights for *Metrosideros carminea* 'Carousel', can claim many instances over almost a century, where studying and cultivating rare hybrids and mutant forms of our NZ flora have successfully saved them from extinction for all New Zealanders of future generations to enjoy. The study, breeding and cultivation of these ornamental cultivars have also provided employment opportunities for many New Zealanders both Maori and Pakeha who



Pukanui (*Meryta sinclairii*). This rare subtropical tree from New Zealand's northern offshore Islands was salvaged by nursery and botanical experts, and is now commonly cultivated in gardens.

nurture these cultivars for the benefit of our modern New Zealand society.⁴¹⁴

Duncan & Davies listed a number of plants saved from extinction through propagation, such as the popular large-leaved pukanui, the climber *Tecomanthe*, and a tree brought by Māori from Polynesia, *Cordyline* Tī Tawhiti.⁴¹⁵

Oratia Native Plant Nursery shared another striking example of the efforts of specialist nurseries. The tree *Pennantia baylisiana* is endemic to Three Kings Island. A lone tree was found on the island in 1945 and it has been listed in the *Guinness Book of Records* as the rarest plant in the world.⁴¹⁶ Oratia and Duncan & Davies were involved in the propagation of the tree in the 1980s and Oratia Nursery has since sold many of the trees, with all proceeds going towards plant conservation. There is still only one *Pennantia baylisiana* tree in the wild.⁴¹⁷

Oratia contended that genetic resources and flora and fauna should be freely available to all for the benefit of

New Zealand biodiversity.⁴¹⁸ Duncan & Davies concluded that:

The relatively few artificially bred and commercially propagated cultivars that are protected by plant variety rights legislation in no way impinges on the rights of Maori but rather adds to the rich diversity of the New Zealand flora available to all New Zealanders to grow and enjoy.⁴¹⁹

Enjoyment was a crucial factor for many submitters, for as botanist Dr Close said, 'it is clear that both Iwi Maori and non-Maori have a real "love of the bush". The old "slash and burn" philosophy has now, fortunately, been replaced by restoration and enhancement programmes.'⁴²⁰

A thoughtful submission by NGIA relied on articles 15 and 8(j) of the CBD (see discussion in section 2.5.2) in urging that a distinction should be drawn between the bare genetic resources and any traditional knowledge in respect of those resources. NGIA accepted that it might be

appropriate to recognise rights in the traditional knowledge, but argued there could be no justification for recognising any direct rights in the resources themselves. While Māori may have created the knowledge, they did not create the species.⁴²¹ The Association's position was that control of genetic resources should be vested in the State.

Forest Herbs Limited took a similar line with respect to the products of indigenous plants. It will be recalled that the company markets a range of horopito-based products. Managing director Peter Butler contended that horopito is a 65-million-year-old plant whose genetic characteristics are a public good.⁴²² He argued that Māori cultural association with horopito is no basis for Māori taking control or ownership of it.⁴²³

By contrast, FOMA argued that any legal framework should provide perpetual protection for mātauranga Māori, and that commercial exploitation of flora and fauna from Crown estates should be subject to benefit sharing in favour of Māori.⁴²⁴

(5) Crown research institutes' submissions

As we have said, we heard from almost all the CRIS, both individually and as a collective group, the latter in the form of a submission from the Association of CRIS (ACRI, now known as Science New Zealand). The CRIS are the biggest players in the New Zealand research and development sector. In 2008/09 the total revenue of the eight CRIS was \$675 million and they accounted for a quarter of New Zealand's total research expenditure.⁴²⁵ Contestable government grants represent less than half of their total revenue, the rest being derived from private investors and income from commercial activity.⁴²⁶ Each CRI is an independent company with its own board, but they are all subject to the Crown Research Institute Act 1992. The Act declares that the statutory purpose of each CRI is to undertake research and, among other things, to do so for the benefit of New Zealand and to exhibit a sense of social responsibility.⁴²⁷ The source of income does not alter that statutory commitment. The relationship between the Crown owner and the CRI is articulated through a statement of corporate intent agreed with shareholding ministers.⁴²⁸ Together the CRIS employ more than 4,400 staff.⁴²⁹

All CRIS have business and research relationships with Māori, and in some cases these are very extensive indeed. The importance of those relationships is reflected in the fact that all CRIS employ at least one Māori portfolio manager. Some go even further. For example, Dr Alvin Cooper, acting chief executive officer and director of strategic development at the National Institute of Water and Atmospheric Science (NIWA), advised us that NIWA employs a general manager of Māori development, and has two other Māori development managers overseeing NIWA's dedicated Māori Development Unit, Te Kūwaha (comprising 15 technical staff). These managers, we were told, 'work exclusively on identifying and developing research and development projects with Māori groups, liaising with Māori, ensuring correct protocols are observed and providing in-house training and advice'.⁴³⁰ Frankly, we were surprised by the extent of business CRIS were undertaking that involved Māori subject matter or Māori clients. This bodes well for the future.

Unlike the Crown and private-sector submitters, the CRIS were not uniformly opposed to recognition of new legal rights for Māori in genetic and biological resources. Certainly they submitted that the Tribunal should be mindful of the potential impacts of any changes on the research and development environment in New Zealand. And they were particularly concerned to ensure that changes would not unduly increase the uncertainty or time involved in doing business in the research and development sector. After all, one of the statutory responsibilities each of them carries is to maintain profitability.⁴³¹ But they also acknowledged the potential upside in bringing Māori interests into the research and development mainstream. They saw this as a natural extension of the growth of their existing Māori portfolios.⁴³²

Dr Alex Malahoff, chief executive of Geological and Nuclear Sciences (GNS), explained to us that his company is actively bioprospecting for extremophiles – that is, for the micro-organisms that inhabit extreme environments such as geothermal fumaroles. Such work has involved GNS in arrangements with Māori landowners similar to ABS agreements.⁴³³ Indeed, he said that potential international investors saw such arrangements as positive evidence of ethical research and development.⁴³⁴



NIWA's Te Kūwaha research group in 2009. Crown research institutes are working on building their capacity to work with iwi.

His experience meant he was positive about the prospect of working with an IP system that recognises collectively held Māori rights in genetic and biological resources unconnected to land ownership.

Dr Cooper advised us that NIWA works with Māori communities in the areas of climate change, environmental impacts, and marine biodiversity. He emphasised the need to establish working relationships at the earliest possible stage, and to use projects as opportunities to build capacities within communities. He stressed that these relationships were good for NIWA as well as for these

communities. He gave the example of NIWA's work in tītī (muttonbird) research with Ngāi Tahu interests. NIWA witnesses told us of various iwi relationships in aquaculture, and in nutritional, cosmetic, and medicinal product research. Both Dr Severne, general manager Māori development at NIWA, and Dr Cooper indicated to us that relationships with Māori communities and clients are an important part of NIWA's work.⁴³⁵

Crop and Food Research (CFR, now Plant and Food Research Limited) is active in both bioprospecting and genetic modification. In 2003 CFR adopted a framework

2.7.4(5)

Te Kopia Scenic Reserve, Bay of Plenty, containing the largest remaining geothermal fumarole on mainland New Zealand. Unique environments such as this are of potential interest to bioprospectors.



for partnerships with Māori called Te Putahi o Ngā Wai (the confluence of streams). In it, CFR aims to bring together its knowledge of science with traditional knowledge and values in the Māori community. Two leading concepts in the framework are ‘prior informed agreement’ and ‘integrity’. We were advised that prior informed agreement is sought from an iwi or Māori representative body in areas of research and development where Māori have a particular interest or concern. The concept of integrity involves understanding and accepting the responsibilities, obligations, values, strengths, and weaknesses of each party.⁴³⁶

CFR’s consultation framework is particularly strong. It provides:

- a) There will be full disclosure of intent (in writing), including a research and development (‘R&D’) proposal and benefits that Māori will accrue;
- b) All business/research scenarios will be explored with the aim of delivering maximum benefit to Māori;

- c) There will be sufficient time given to consider the proposal;
- d) There will be sufficient time for Māori to gain an independent assessment of the project/proposal.⁴³⁷

The company made it clear that its approach applies ‘irrespective of changes in operating frameworks or legal requirements’. CFR has undertaken research into traditional foods and food preparations, cosmetics, and Māori horticulture within this framework.⁴³⁸

The Treaty settlement process and the steady expansion of existing tribal landholdings have led to a spectacular increase in Māori participation in the exotic forestry industry. This has no doubt been the driver for Forest Research Limited’s (Scion’s) efforts in engaging with iwi and Māori landowners. One of the innovations Scion has introduced is a stand-alone Māori advisory committee, not unlike ERMA’s Ngā Kaihautū. The committee is called Te Aroturuki. Its main objectives are to enhance relationships between scientists and Māori, develop better

research outcomes, and ensure that areas of concern to Māori around plant gene technologies are recognised, discussed, and addressed.⁴³⁹

We were advised that this is an important way of ensuring that Scion's strategic direction is aligned with Māori aspirations. But Scion's work is not restricted to exotic forestry. It also has a research programme into 70 indigenous plant species. Chief executive Tom Richardson said:

Utilisation of indigenous species as an economic resource and a subject matter of research is, at present, relatively minor compared to that of exotic species. However, Scion scientists see a significant future potential for a greater proportion of research and scientific discovery in the native species area and view it as very important to Maori and to New Zealand. Scion is becoming increasingly focused on the opportunities in the biomaterials space and hence the significant interest in the uniqueness that indigenous flora and fauna may bring to that opportunity. The current level of investment in this opportunity is not representative of its likely future importance.⁴⁴⁰

He did, however, express some concern over any possible changes to the current regime that might make it harder to undertake research or to obtain rights in the result. His evidence reflected an ambivalence common to most CRIS as they struggled to reconcile increasing Māori-related revenue with concerns about the effect of additional Māori rights on their core business. Like many CRIS, Scion was looking to the Tribunal for guidance in resolving that tension in a way that produces greatest benefit for all.

The mission of Landcare Research/Manaaki Whenua is to support sustainable management of New Zealand's land resources.⁴⁴¹ As part of its brief to protect endangered species and maintain biodiversity, Landcare holds seven of New Zealand's 25 nationally significant databases and *ex situ* biological collections. We were advised that the company makes samples from its National New Zealand Flax Collection available to Māori communities throughout the country. After a long and successful partnership arrangement with the National Māori Weavers' Association – Te Roopu Raranga Whatu o Aotearoa – the Association is now the lead contractor in the ongoing

research collaboration with Landcare.⁴⁴² Landcare staff proposing research must ensure Māori concerns are covered through consultation. If Māori interests do exist, researchers 'must involve Māori entities in the development of the programme'.⁴⁴³

Dr Warren Parker, chief executive of Landcare Research, gave lead evidence on the company's behalf. During the course of questions, counsel for the Te Tai Tokerau claimants put to him the International Society of Ethnobiology's code of ethics as adopted by its general assembly in 2006. The code is a far-reaching document containing both principles and practical guidelines for ethical behaviour by professionals engaged at the interface between biology and culture. It acknowledges that indigenous peoples have prior rights and responsibilities, including traditional guardianship; it accepts the need for their prior informed consent when traditional resources are exploited, mutual benefit and equitable sharing, and so forth.⁴⁴⁴ Dr Parker cautioned – and we accept – that he was not particularly familiar with the code. But he made it clear that much of Landcare's work with Māori communities and businesses already aligns well with these values.⁴⁴⁵

Having said that, Landcare's preference was for 'soft law' reforms that will not stifle the steady evolution of existing organic relationships with Māori. Landcare was opposed to one-size-fits-all responses such as a single national Māori commission, because there is no single Māori position in this difficult area.⁴⁴⁶ Some Māori are pro-exploitation and some are not. In addition, Landcare argued that guidelines would help the research and development sector more than would an imposed legislative regime.

It is fair to say that the need for guidelines to assist those involved in education and research and development was a common theme. In the education area, there were questions about how mātauranga Māori should be included in the science curriculum, particularly at primary and secondary school levels.⁴⁴⁷ The Association of Science Educators stressed the importance of maintaining a robust science curriculum that includes information about flora and fauna and provides the basis for scientific training.⁴⁴⁸ In the research and development sector the question of whom to consult with, and how, was a particular issue. We accept that these are important matters

to be taken up in any suggestions for reform, and we will address them below.

(6) New Zealand Institute of Patent Attorneys' submission

To wrap up this discussion of the views of interested parties, it is appropriate to refer to a careful and considered submission from the New Zealand Institute of Patent Attorneys (NZIPA).⁴⁴⁹ This is the national professional organisation representing New Zealand's patent attorneys – that is, persons qualified by examination to be registered as such under the Patents Act 1953. Among the many points the institute makes are two of real significance. The first is the argument that any reforms to meet the concerns of claimants should not undermine the existing IP law framework. NZIPA argued that *sui generis* or special stand-alone legislation should be used. Amending the IP law framework to accommodate perpetual kaitiaki relationships with material that, by its nature, is not invented would, NZIPA said, undermine some of the basic foundations of that system. The second is that protections within a *sui generis* system should not extend beyond interests in traditional knowledge. Specifically, there should be no recognition of rights in what we would call taonga species themselves. This is the same position that was advocated by NGIA.

2.7.5 Conclusion

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

For their part, both the Crown and the numerous interested parties who gave evidence before us emphasised that any recognition of Māori rights should not have a

chilling effect on research and consequently on IP rights. It is clear to us that the CRIs, in particular, have good working relationships with Māori, and demonstrated best practices for including Māori as advisers in the research process. However, this on its own does not meet the claimants' concerns.

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

But the heart of the problem is this. The primary purpose of the patent system is to enable commercial exploitation; it was never intended to accommodate mātauranga Māori or indeed to respond to the interests of kaitiaki. For instance, within the examination process, patents and PVRs are granted to the party who first expresses knowledge in Western scientific terms. IP examiners are often trained in Western science but not in tikanga Māori. If they consult scientific databases to research the relevant existing prior art, they are unlikely to find any reference to mātauranga Māori because it is barely documented in such databases. Further, the legal framework is inadequate in many ways for protecting the kaitiaki interest. For example, after the expiry of a patent, the patented invention becomes available for others to use – a concept that may run counter to the responsibilities of kaitiakitanga. In sum, it is clear to us that many aspects of the IP system as it affects the genetic and biological resources of taonga species fail to meet the needs of the claimants, because it was never designed to do so.

2.8 THE RIGHTS OF KAITIAKI IN TAONGA SPECIES AND MĀTAURANGA MĀORI

In this chapter we have emphasised that bioprospecting, genetic modification, and IP are not isolated subjects. Each occupies a place along the road from discovery to exploitation of commercially valuable biological material. The overall context is research, and the various questions we ask in relation to particular research milestones, such as the bioprospect, the point of gene isolation, or the final outcome, are all the same: should Māori interests or

values affect the way in which research into the genetic and biological resources of taonga species is undertaken and its outcomes exploited?

In sections 2.5 to 2.7 we considered each category in detail. We began with bioprospecting, focusing mainly on DOC's existing bioprospecting system under its Conservation General Policy as that policy is affected by section 4 of the Conservation Act. We also discussed the Crown's proposed bioprospecting policy. We then considered genetic modification, particularly the HSNO Act 1996 and the work of ERMA. Finally, we set out issues in relation to patents and PVRs. It is now time to bring the material back together again and to confront the core question in this entire debate: is there a case for greater protection of kaitiaki interests than the status quo, or do the current regimes strike an appropriate balance in their particular contexts?

We will structure our discussion of the issues around four key questions, followed by a brief discussion (in section 2.8.5) of some broader issues also relevant to the claim. The four key questions are:

- *Does existing law and policy protect the interests of kaitiaki in mātauranga Māori and in the genetic and biological resources of taonga species?* Here we consider whether the law as it relates to bioprospecting, GMOs, and IP rights attaches any particular importance to the mātauranga Māori of kaitiaki or any relationships they might have with taonga species. We conclude that some provision is made, particularly in respect of GMOs, but in no area does the law protect kaitiaki interests to the extent sought by claimants.
- *Are the principles of the Treaty relevant to the Māori interest in taonga species?* Here we consider whether the principles of the Treaty of Waitangi go so far as to recognise Māori rights in taonga species. We conclude that the Treaty does not provide for Māori ownership of taonga species or their genetic and biological material. Rather, it is the kaitiaki relationship with the taonga species that is entitled to a reasonable degree of protection.
- *Are the principles of the Treaty relevant to the protection of mātauranga Māori?* In this section we

consider once again whether the principles of the Treaty of Waitangi are relevant to the protection of mātauranga Māori. We conclude that the Treaty does not provide for Māori ownership of mātauranga Māori at least where the knowledge is already publicly known, but that kaitiaki have a right to acknowledgement and to have a reasonable degree of control over the use of mātauranga Māori. Where mātauranga Māori is used commercially, the kaitiaki interest must be given better recognition in line with the principles we outline in the analysis below.

- *How should the interests of kaitiaki and others 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 others? We conclude that these questions can only be answered within the framework we propose on a case-by-case basis.

2.8.1 Does existing law and policy protect kaitiaki interests?

(1) Bioprospecting

In section 2.5.1, the claimants said that the values underpinning kaitiaki relationships with taonga species would preclude exploitation of genetic and biological resources inconsistent with those values, whether or not mātauranga Māori is used by the bioprospector. To protect the kaitiaki relationship, claimants argued for an effective say over the way in which taonga species are to be used by bioprospectors. In addition, where mātauranga Māori is to be used for research purposes they said it must be subject to kaitiaki consent.

We concluded that current rules around bioprospecting lack cohesion. We acknowledged that the Crown is currently proposing reforms in bioprospecting, but that Māori concerns are specifically excluded from consideration. This means that the proposed bioprospecting policy offers none of the protections sought by claimants.

We do accept that where bioprospecting is undertaken

in the conservation estate, section 4 of the Conservation Act, section 12 of the CGP, and section 11 of the General Policy for National Parks combine to provide an avenue for significant Māori involvement. In theory, these provisions may be wide enough to allow for access and benefit sharing with kaitiaki on the basis of their prior informed consent. However, we were not told how these provisions operate in practice. We were not informed whether the department actively invites engagement with kaitiaki or whether it takes a PIC- or ABS-consistent approach.

DOC uses Māori committees (pātaka komiti) to manage iwi access to plants and animals for cultural harvest purposes. The pātaka komiti are made of representatives of local iwi who consider applications regarding cultural harvest. They make recommendations to the regional conservator, who subsequently makes the formal decision. In theory, at least, this already operational model – the pātaka komiti system – could be tapped into (see section 4.6.3). This system does not seem to have been used in the context of bioprospecting. There is no reason why it should not also apply to applications by non-Māori to access genetic and biological material within the conservation estate for scientific or commercial purposes.

We also referred to extensive and dynamic international debate in this area, and some of the guidelines and solutions being offered at that level to assist domestic lawmakers. We were surprised to see that the Crown, in its effort to set up a transparent and robust policy, did not make use of international developments in this area, including developments in international law.

We conclude therefore that law and policy in respect of bioprospecting does not yet make adequate provision for the kaitiaki interest in mātauranga Māori or the genetic and biological resources of taonga species.

(2) Genetic modification

The position in respect of GM and the work of ERMA is less straightforward. The HSNO Act does contain provisions designed to ensure that Māori perspectives are taken into account when decisions are made about GMOS. ERMA's structures include Ngā Kaihautū Tikanga Taiao – an independent Māori advisory committee – and a Māori unit within the agency called Kaupapa Kura Taiao.⁴⁵⁰ These innovations have produced documents such as the

operative policy for 'Incorporating Māori Perspectives in Part V Decision Making'. Moreover, as a matter of policy ERMA requires that IBSCs – local committees with authority to decide low-risk applications – must have at least one Māori member.

The claimants argued, however, that key aspects of ERMA's statutory mandate, internal structures, and decision-making processes effectively combined to subordinate Māori values to the preferences of science. For example, although it is based on the structure of the Resource Management Act, the HSNO Act excludes from consideration the core concept of kaitiakitanga. In addition, Māori interests compete with six other factors to be 'taken into account', and all such factors are subordinated to the purpose and principles of the Act. These dominant considerations are primarily science related and do not include Māori concerns. The claimants said this was reflected most powerfully in ERMA's methodology. The claimants said the methodology is so science biased it effectively negates the Māori provisions in part 2 while purporting to take them into account.⁴⁵¹ Clause 25 of the methodology requires the Authority to commence any assessment by reference to the scientific evidence and to deal with other matters only if the evidence raises them. Clause 26 allows the Authority to approve an application where the GMO poses negligible risks to the environment and to human health and safety if the potential benefits of the GMO outweigh the costs.

Looking at ERMA's internal structures, the claimants pointed out that Ngā Kaihautū is an adviser, not a decider, and then only at the request of the Authority. Its views will always be ignored unless they are corroborated by science, and its perspectives will always be overridden unless they align with the science culture of the organisation.

With respect to low-risk GM, the claimants accept that there is now compulsory Māori membership of IBSCs, but they continue to have concerns. First, they say that Māori members are not required to be local mana whenua. Secondly, those members can be outvoted. Thirdly, the low-risk classification is based entirely on scientific criteria and takes no account of any Māori criteria. The claimants argued that this approach results in applications with a high 'Māori' risk being treated as low risk and fast-tracked to easy approvals.

We acknowledge that the HSNO regime is a considerable advance on the protections offered in the area of bioprospecting. The innovations introduced into ERMA's mandate, structures, and processes to protect Māori interests represent a genuine attempt to deal with difficult issues. Having said that, we agree with the claimants that these innovations do not deliver everything they want. Indeed, they were not designed to do so. But that does not mean they deliberately marginalise Māori concerns. The system was constructed to introduce Māori perspectives into a sophisticated multi-disciplinary balancing process, and the evidence before us suggests it has succeeded in doing that. But developing a new organism is an intensely scientific process, and that means science dominates the distribution of weightings when the balance is struck. This is reflected in the Act and in ERMA's structures, and particularly in its methodology. The practical and perhaps unintended effect of this is that while Māori perspectives are ever present, they will not prevail unless backed up in some way by science. Māori concerns that are not supported by science-based risk analyses have never been treated as decisive in applications of which we are aware at any time in ERMA's history.

Yet in the High Court in *Bleakley v Environmental Risk Management Authority* Justice Goddard noted that the words 'culture and traditions' were included in the HSNO Act both to underscore the special nature of the relationship of Māori (as opposed to any other group) to the matters listed in the provision, and to 'ensure that the relationship of Maori with taonga was not read down, dissipated or minimised by those charged with exercising functions, powers and duties under the Act'.⁴⁵²

If the Māori interest is accorded appropriate weight in the law and culture of this organisation there will be circumstances where that interest should prevail, with or without science. The fact that this has never happened suggests to us that there is a flaw in the HSNO statutory framework, the science bias of the methodology, or the culture and structure of ERMA itself. All the more so when we were advised that ERMA had granted applications providing for the genetic modification of taonga species as low-risk applications rather than non-low-risk applications. We would conclude, therefore, that the law and policy in respect of GMOS does not protect the

interests of kaitiaki in mātauranga Māori or in the genetic and biological resources of taonga species.

(3) *The patent and PVR systems*

The claimants were opposed to an IP system that allows researchers to use mātauranga Māori without consent. They were equally opposed to recognising, in anyone other than kaitiaki, any form of exclusive legal rights in respect of the genetic and biological resources of taonga species.

All parties, including the Crown, accepted that there are two ways in which patent and PVR law and policy fail to meet claimant expectations. First, the law does not recognise that kaitiaki can have any positive rights in their mātauranga or in the genetic and biological resources of taonga species. Their ancestors may have created the mātauranga Māori, but that does not mean it meets the novelty requirement of modern patent law, and their relationships with both mātauranga and taonga species demand perpetual rather than time-limited protection. Secondly, even though kaitiaki are the descendants of those who created the mātauranga, and have cultural relationships with taonga species, they cannot prevent others from acquiring IP rights in aspects of the genetic and biological resources of those species. In addition, a great deal of the mātauranga Māori that underpins the kaitiaki relationship is now freely available in the public domain. Others are at liberty to use it in their search for exploitable species and associated private rights.

The essence of the case for the claimants was that their cultural interests are real and entitled to proper recognition in the law. They sought recognition both as a positive vehicle for Māori development and as a shield against exploitation that runs contrary to Māori values. The Crown rejoinder was that the IP system was never designed to protect kaitiaki interests, and is ill suited to the task. In fact, the Crown and some interested parties argued that to grant such protection would effectively undermine the system and hinder both innovation and investment.

Though the Crown argued against any fundamental rewrite of patent and PVR law, it did accept that there are genuine issues to be addressed over the protection of both mātauranga Māori and cultural relationships

with taonga species. It accepted that some protection is justified. The question for the Crown was how much the system should incorporate these considerations into IP decision-making. In evidence, the Crown told us that it proposed to introduce a new Māori advisory committee within the patent system. As discussed, the Crown told us that the function of such a committee would be to advise the Commissioner of Patents whether an ‘invention’ is derived from Māori traditional knowledge or from indigenous plants or animals, and if it is likely to be contrary to Māori values. We also understand that the commissioner could seek the advice of the advisory committee when deciding whether an invention is patentable, including whether it is novel.⁴⁵³

As discussed above, in the area of PVRs a draft Bill was released for consultation in 2005. It proposed reforms to prevent the use of names for PVRs that would be offensive to Māori, and changes to the definition of owner that mean plant varieties must be specifically bred to qualify for a PVR.

At the time of writing neither the draft Patents Bill nor the draft PVR amendments have been enacted.

We will address these proposed reforms further below. As matters stand, the existing law in relation to patents and PVRs does not protect the interests of kaitiaki in mātauranga Māori and the genetic and biological resources of taonga species.

(4) Conclusion

In conclusion, in none of the areas we have considered – bioprospecting, genetic modification, and patents and plant variety rights – do current laws, policies, and practices adequately protect kaitiaki interests in the genetic and biological resources of taonga species. The claimant concerns, as we have said, are consistent across all three areas, and in essence are about the protection of kaitiaki relationships with those species.

The specific failings in the Crown regime vary. In the case of bioprospecting, current policies lack coherence, and proposed policies provide none of the protections sought by kaitiaki. In the case of GM, there are well-established structures and practices, and these provide some recognition for kaitiaki interests, but not nearly enough to protect the kaitiaki interests at issue in this claim. In

the case of IP, there is a well-established legal framework, but it makes little or no provision for recognising kaitiaki interests.

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.

In the next two sections, we will examine the Treaty interests in taonga species and in mātauranga Māori, before considering how those interests should be weighed alongside others.

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

We said in section 1.6.1 that it is inappropriate to speak of exclusive possession of taonga works and mātauranga Māori, as guaranteed in article 2 of the Treaty’s English text. As we also noted, kaitiakitanga and ownership are ways in which two different cultures decide rights and obligations in respect of the resources they value. Kaitiakitanga focuses on obligations and relationships, while property ownership is focused on the rights of the human owners. When the two cultures met, kaitiaki sometimes became legal owners. But the relationships and obligations of kaitiaki persist, whether they or others own the resource, or even where no one owns it.

As we see it, it is even less appropriate to apply the concept of exclusive ownership to the genetic and biological resources of taonga species. While Māori can say they created taonga works and mātauranga Māori, they did not create taonga species. In fact, at a cultural level at least, the relationship is the reverse – the taonga species

created Māori culture. A general case for exclusive proprietary rights in the genetic and biological resources of taonga species cannot be justified by reason only of cultural association. While we have not inquired into the historical facts, we do not think that cultural association alone is sufficient to translate into proprietary rights in the Pākehā legal paradigm. We have, however, noted that there will be some species, such as the tuatara, for which the cultural relationship is so transcendent that rights and obligations in respect of every living example of the taonga species can be justified. This relationship will often be accompanied by deep concern over the survival or well-being of the species. But even then it is quite inappropriate to think in terms of exclusive ownership. The rights and obligations contemplated in those instances must be seen as very much an exceptional response to exceptional circumstances.

As with taonga works, the answer is not to be found in the exclusive ownership of the Treaty's English text, but in the tino rangatiratanga, or authority and control, of the Māori text. This same principle applies to the kaitiaki relationship with taonga species. It is beyond doubt that taonga species are treasured things – taonga within the meaning of article 2 of the Treaty's Māori text. All of the indicators of taonga status are present: they are allocated important places in the whakapapa of creation; they have kōrero or stories reflecting their creation, use, role, and mana; there are tikanga or laws governing the human-species relationship, and so forth. We consider rights of authority or control more appropriate to the concept of kaitiakitanga.

We noted earlier (section 2.5.1) that the Crown, in its submissions, rejected any Māori right to control over genetic and biological resources in taonga species, and that one of its reasons was that genetic resources were not known in 1840. This argument has, of course, been made before the Tribunal in other contexts. Consistently, however, the Tribunal has found that the Treaty was, as the Motunui-Waitara Tribunal put it, 'not intended merely to fossilise a status quo, but to provide a direction for future growth and development'.⁴⁵⁴ In the case of fisheries, the Muriwhenua Fishing Tribunal explained that any argument seeking to limit Māori to 1840 technology led to the rejoinder that non-Māori should be similarly constrained.

Just as Māori no longer fish in canoes, non-Māori no longer use wooden sailing boats; both have a right to adopt new technology and to learn from each other.⁴⁵⁵

A more comparable example to genetic resources might be the electromagnetic spectrum and radio frequencies, which the Tribunal also found by majority in its interim and final *Radio Spectrum* reports in 1999 to be subject to the right of development. That panel defined the principle of development as meaning that 'Maori expected and were entitled to develop their properties and themselves and to have a fair and equitable share in Crown-created property rights, including those made available by scientific and technical developments'.⁴⁵⁶

In the case of the genetic and biological resources of taonga species, it can equally be said that the Crown has no authority over these things either, since it hardly knew of them when the Treaty was signed, and that the right of development is applicable in this context too.

Furthermore, as we explained above, the kaitiaki interest in taonga species is not one of property ownership; rather, kaitiaki are interested in the ongoing health of their relationships with those taonga. There can be no doubt that these relationships predated the Treaty. As we have said, it is from these relationships that Māori culture evolved. For both of these reasons, we reject this Crown argument.

Instead, in respect of bioprospecting, GM, and IP rights, we find that the principle of tino rangatiratanga justifies some level of kaitiaki control over the use of genetic and biological resources of taonga species. Such control must be sufficient for kaitiaki to protect their relationship with those species to a reasonable degree.

To determine the appropriate degree of protection it is vital to understand the kaitiaki relationship and the ways in which bioprospecting, GM, and IP rights might affect it. In none of these fields, however, is there room for sweeping generalisations and simplistic black-and-white solutions. Kaitiaki relationships with their taonga species vary according to the priorities and perspectives of kaitiaki, the nature of the taonga species, and the history of the relationship. For these reasons, the degree of protection will also vary.

We have said that the core principle of Māori culture is whanaungatanga, or kinship, and that this provides the

conceptual basis for the allocation of rights and obligations among people and between people and their environment. Kaitiakitanga – the position of nurturer – is the ethic that reflects this. It emphasises unselfish obligation to kin. We have also said that the relationship between kaitiaki and taonga species is often multi-layered. Species might be emblematic of community identity, used for their spiritual or medicinal power, or for technology such as building, carving, weaving, and so forth. Whatever the use or uses, they are explained and controlled through whakapapa and story. Put simply, kaitiaki are related by descent to taonga species, and the story of the descent line carries with it the rules of the relationship.

We have characterised the relationship between kaitiaki and taonga species in the kinship terms of te ao Māori earlier in this chapter, and there is no need to repeat that here. What we want to emphasise now is that the relationship is multi-faceted. As we said in section 2.2, different taonga species have different roles in different contexts (whether of time, place, or community), and in almost all cases more than one role. They will also be perceived differently by different iwi and hapū. For example, some communities emphasise the emblematic importance of the tohorā or whale; others do not. The importance of the relationship varies considerably from community to community.

This plurality has important implications for the way we must think about protecting kaitiaki relationships with taonga species. It means that the needs of the relationship can only be defined case by case. Each species will be different and, even within each species, contexts and kaitiaki may well drive different priorities. For example, many communities treat particular taonga species as their own kaitiaki, or spiritual guardians. But a species that is kaitiaki to one community will not be kaitiaki to all. In addition, different proposed uses may have different effects. For instance, kaitiaki may say it is unacceptable to create a GMO based on a taonga species, but regard the commercial-scale production of rongoā plants as beneficial for the survival of both the species and the rongoā knowledge. Whatever the intended use, the level of protection must be sufficient to keep the relationship safe and healthy.

Generally, the greater the effects of the proposed research upon the kaitiaki relationship, the greater the

right of involvement. Indeed, where the proposed use is so invasive that it threatens to undermine the relationship altogether, the PIC of kaitiaki will always be necessary. An example of this might be the creation of a transgenic GMO version of a taonga species – a process likely to involve interference in the whakapapa of that species. It must be accepted that damage to kaitiaki relationships is a possible outcome of such work and that this creates a legitimate Māori interest in it. Other uses such as breeding and naming cultivars of taonga species could affect the kaitiaki relationship in less dramatic ways. As a matter of principle, however, these too should involve kaitiaki in decision-making.

The important point is that the trigger for a substantive Māori role in decision-making on these issues is the need to protect the ancient relationship between kaitiaki and taonga species in circumstances where what is proposed will affect it. In keeping with the Māori preference for holism, it is the relationship as a whole that is entitled to protection, not any property right in genetic and biological resources such as, for example, the potential of its isolated genes. It is the fact that Māori identity is embedded in the species that creates a just claim, not any Western scientific dissection or conception of property. Accordingly, a reasonable degree of Māori control over the use of the genetic and biological resources of taonga species is justified under the principles of the Treaty.

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

What then of expectations for the protection of mātauranga Māori itself? In a sense this is easier to conceptualise. Mātauranga Māori in respect of taonga species is so obviously created by Māori communities themselves that it is not difficult to accept that the relevant community ought to hold some rights in it, even if those rights fall short of the exclusivity for which the claimants argued.

Though mātauranga is a creation of Māori, the concept of exclusive ownership as guaranteed in article 2 of the Treaty's English text does not fit here either. Much mātauranga Māori about taonga species is already published and publicly available. It is impossible to claw back all uses of this material on the theory of an exclusive right. In reality, these forms of mātauranga are out there contributing

to humanity's collective understanding, and they cannot be put back into some kind of sacred box. For example, the secondary school science curriculum already features important components on indigenous flora and fauna.⁴⁵⁷ This should be encouraged, not prevented. As with taonga species, we do not accept that mātauranga Māori should be exclusively owned, as it would be wrong to exclude others from experiencing the richness of te ao Māori.

Having said that it is unrealistic to attempt to claw back exclusive and undisturbed possession of this knowledge, there remains a just claim against those who would seek to exploit that knowledge for commercial gain without proper acknowledgement of the prior rights of kaitiaki. After all, the relevant mātauranga Māori will always be a creation of the relevant kaitiaki community, and it would be most unfair to deprive that community of a say in its commercial exploitation.

Thus, what can be amply justified are three rights. First, the right of kaitiaki to acknowledgement. Secondly, their right to have a reasonable degree of control over the use of mātauranga Māori. Thirdly, any commercial use of mātauranga Māori in respect of taonga species must give proper recognition to the interests of kaitiaki. Just what is 'proper recognition' must depend on the circumstances. Kaitiaki relationships with their mātauranga will all be different, just as they often are with taonga species. There will be cases where a consent requirement is appropriate. In others, disclosure or consultation will be sufficient. The answer will depend on the balancing process in which the importance of the relationship will be weighed against the interests of researchers or the holders of IP rights on a case-by-case basis.

2.8.4 How should the interests of kaitiaki and others be weighed?

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 IP 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.

So what are the other interests to be considered? The first and most obvious category is the interests of those who have property rights and those who wish to apply for them. They include holders of patents in relation to taonga species and those with PVRs in respect of variants of those species. The owners of these rights expect to be able to fully exploit their commercial value.

Property rights are seen as very powerful indeed in the Western value system, and they will often be given high priority if drawn into competition with other interests. However, they are never absolute. For example, most forms of property will be subject to some extent to wider interests. Private land can be taken for community purposes, and landowners are always limited in what they can do on their land by the needs of the community and the environment. In the IP area, trade marks can be revoked if they are offensive to any section of the community, including Māori, and it will be recalled that under the Patents Act 1953 the commissioner can refuse to grant a patent if the invention is in some way contrary to morality.

Of course if the system is redesigned so that kaitiaki interests must be considered in the patent application before private rights are granted, then issues such as these will not arise in the future. Even so, patent applicants and their supporting investors want to see a system in which decision-making processes are transparent, certain, and carried out in a timely manner.

Property rights are important, but there are also valid non-property interests to be considered. They are less easily pinned down than private property rights, but the benefits to society are real. The research and development sector has changed our lives and communities, often without the need for private IP rights to attract investment. As we have said earlier, a great deal of science and technology exists in the public domain untagged by IP rights, and is the source of much modern innovation. This ‘public good’ research and development draws considerable government and private funding. It is obviously important that work of this kind is not discouraged.

These sentiments were expressed consistently in evidence by Crown witnesses, the CRIS, and the universities. Dr Anderson, the chief executive of MORST, put the issues squarely on the table. She said that if research and development were subjected to additional consultation requirements, mandatory consents, and research constraints as a result of this claim, it could reduce research into indigenous flora and fauna, slow the process down, increase its costs, and produce a net reduction in the benefits that research and development delivers to New Zealand. Under the heading ‘What outcomes do we desire?’ she said:

In all instances where the WAI 262 claim could impact on knowledge creation and research activities in New Zealand, the interests of researchers and scientists would be served by arrangements that avoid imposing complex knowledge ownership arrangements that restrict or delay outcomes from research, particularly where they may need to be iwi-by-iwi negotiations about the use of flora and fauna in research activities, or where iwi with similar resources could influence research intended to be in collaboration with another iwi. In addition these arrangements should:

- ▶ ... encourage activities, including research, that increase our understanding and ability to protect indigenous flora and fauna; and
- ▶ ... ensure that researchers and RS&T organisations have certainty of access to indigenous flora and fauna for research purposes and certainty as to their rights when using knowledge created from these resources.⁴⁵⁸

As Dr Anderson hints, quite apart from the practical utility of research and development, knowledge is a distinct value in itself, and the advancement of knowledge about taonga species is self-evidently a valid interest to be weighed in the balance here.

Aside from these human interests in and perspectives on taonga species, there is at least one further valid interest: that of the species themselves. There will be many circumstances in which kaitiaki would say their primary interest is the well-being of the species, but there may be situations where there is conflict. Research and development aimed at preserving or increasing a threatened population of taonga species may create challenges for kaitiaki in some circumstances – for example, where the research and development involves the prospect of genetic modification to preserve the species. The example is hypothetical, but it serves to remind us that the species themselves have important and independent interests to be considered in all cases.

From our discussion in sections 2.8.1, 2.8.2, and 2.8.3, it is obvious there are powerful interests at work here. But some fundamental principles emerge naturally about how we might reconcile those interests. 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 IP 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. This in turn means that any new system capable of taking appropriate account of kaitiaki relationships with taonga species must hinge upon a mechanism for balancing that interest against the others we have discussed. This mechanism must be able to hone in on the win-win point between apparently conflicting interests, if it exists. If that point cannot be found, the mechanism must have the mandate to choose which of the interests is to have priority, and to do so in a principled, transparent, and timely way.

We do not think this task can be performed generically. Even where there are common elements, each case will

have its own considerations, and each balancing process will be unique to itself.

Any other approach will give one or other interest automatic priority and negate the particular concerns or considerations that others might wish to bring even before they have been heard. As we have said, no single set of interests should have priority as of right. A genuine case-by-case analysis is the only sound approach to reconciling the needs of the kaitiaki relationship with those of other stakeholders. This is in line with Justice Goddard's view in *Bleakley v ERMA* that 'no blueprint for spiritual values can be developed for slavish application in every case'.⁴⁵⁹

2.8.5 What other interests are relevant to the protection of the kaitiaki relationship?

Even without the Treaty, we think there is great power in ensuring 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.

There is also a unifying dimension here. These special relationships are not just for the benefit of Māori. They relate to this country's unique flora and fauna within equally unique land and seascapes. They must now be seen to deserve protection as an element of national identity. For many New Zealanders, indigenous flora and fauna are not merely a resource to be exploited. Indigenous plants and wildlife are symbols of nationhood, and possess intrinsic value that requires protection.

Internationally, it has long been acknowledged that the protection of indigenous interests provides for 'social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values'.⁴⁶⁰ The WIPO principles are but one strand of the international debate that has been ongoing for more than two decades around issues that are at the heart of this claim. We have discussed some aspects of this debate in sections 1.3.3 and 1.6.3. Of

particular relevance here is article 31(1) of the Declaration on the Rights of Indigenous Peoples which acknowledges that 'indigenous peoples have the right to maintain, control, protect and develop their . . . sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora'. It also states that 'they have the right to maintain, control, protect and develop their intellectual property' over such things. International proposals such as these are clearly more advanced than any developments in New Zealand.⁴⁶¹

The recent adoption of the Nagoya Protocol, and its effort to effectively implement the ABS and PIC provisions of the CBD for access to genetic resources and associated traditional knowledge, indicates how relevant and alive the issue is in the global discourse.

The ability of kaitiaki to protect their relationships with taonga species also serves the interest of all New Zealanders in fostering the preservation of New Zealand's biodiversity. Protecting the kaitiaki interest and conserving indigenous flora and fauna are two sides of the same coin. A report of the United Nations Environment Programme (UNEP) acknowledged that there is 'a direct relationship between cultural diversity, linguistic diversity and biological diversity and that the quickening pace of loss of traditional knowledge was having correspondingly devastating impact on all biological diversity'.⁴⁶²

We discuss the kaitiaki role in environmental management in more detail in chapters 3 and 4. For the present it is enough to stress that protecting the kaitiaki relationship with taonga species and mātauranga Māori has important implications for protecting the environment itself, and vice versa.

Such interdependence only reinforces our conclusion that where there is a risk that bioprospecting, GM, or IP rights will affect kaitiaki relationships with taonga species or mātauranga Māori, those relationships are entitled to a reasonable degree of protection. This right, however, is not absolute – it can be overridden in appropriate circumstances. Once a kaitiaki relationship has been identified and acknowledged, the decision about how much protection it should receive will require a proper balancing of kaitiaki and competing interests.

2.9 REFORMS

If the previous section outlines the appropriate design principles for the system to be made Treaty compliant, at what point in the process from research and development to commercial exploitation should the balancing be undertaken, who should do it, and how?

In fact, there are already systems in place whose purpose it is to balance competing interests at the crucial points along that process. DOC's CGP is one point, ERMA's GMO approvals are another, patent and PVR registrations are the third. They do not cover the whole field or every research and development circumstance, but they are influential enough across a sufficiently wide range of possibilities that, with redesign, they can deliver balanced protection for kaitiaki without wholesale reform of existing systems.

2.9.1 Bioprospecting

In sections 2.5.3 and 2.5.4 we discussed the shortcomings of the current and proposed bioprospecting regime. It is now time to turn to our recommendations for reform.

We recommend that DOC take the lead in designing a comprehensive bioprospecting regime that accords with the department's Treaty obligation, and does so in consultation with Māori. We say this because the department has experience in complying with the requirements of section 4 of the Conservation Act. DOC is therefore well equipped to develop a framework that provides appropriate protection for kaitiaki relationships with taonga species and mātauranga Māori within the conservation estate.

This approach would have a significant benchmarking effect outside the estate. There are three reasons for this. First, the conservation estate is enormous – covering, as we have said, one-third of the country. Secondly, it includes most of our most important areas of indigenous terrestrial and marine biodiversity, and is thus a potential target for bioprospectors. Thirdly, these protections will operate alongside the changes we will recommend below to patent and PVR decisions. In this way the entire research process from discovery to exploitation is covered, giving all parties the opportunity to engage in discussion at an early stage. Certainty is paramount for investors and scientists alike. They need to know at an

early stage how, and when, to engage with kaitiaki so that all parties are satisfied with the way the proposed research will be conducted. Fairness and predictability are crucial for all stakeholders to avoid misunderstandings further down the track. Together these changes are likely to have a cumulative effect on all bioprospecting, wherever it occurs.

Having said this, we are aware that reform of all bioprospecting, including within the conservation estate, is being considered by the Ministry of Economic Development. We commented earlier on our concerns in respect of the draft policy. While we understand the rationale for a single bioprospecting policy applicable to all Crown land, the conservation estate is unarguably a special case. There is a legal obligation that it be administered in a Treaty-consistent manner. The Māori interest has most weight there. As we have said, DOC is most familiar with its own Treaty obligations, and it should therefore take the lead role.

In addition, DOC already has in place an operational system that could be used to provide for genuine Māori involvement in respect of bioprospecting applications. The decision-making processes of the pātaka komiti are most appropriate for safeguarding the Māori interest in bioprospecting activities. These committees would be able to accommodate the fact that there is no general answer to the question of how to protect the kaitiaki relationship with taonga species and mātauranga Māori. This, as we said, is a question of careful case-by-case analysis. The advantage lies in the ability of kaitiaki to express and control the level of protection which is necessary in a particular case to keep the relationships safe and healthy.

Therefore, we recommend the role of the pātaka komiti be expanded and used for bioprospecting applications for scientific or commercial purposes within the conservation estate. The komiti's role would change from advisory to one of joint decision-making with the regional conservator. We also recommend that the pātaka komiti – like Ngā Kaihautū within ERMA – actively engage in the development of guidelines and protocols to streamline the application and engagement process.

We have described in section 2.5.2 the significant international context in respect of benefit sharing obligations when genetic resources or traditional knowledge

are being accessed (article 15 of the CBD). Although this is potentially a strong mechanism for the protection of kaitiaki interests, we do not support the notion that ABS on the basis of PIC is required whenever an application is made to bioprospect. Such an approach would assume that every bioprospecting proposal would involve either traditional knowledge or interference in the kaitiaki relationship with taonga species. That will not always be the case. A blanket approach would give unjustified priority to the kaitiaki interest and negate other valid interests. A genuine case-by-case analysis is the only sound way to reconcile the needs of the relationship with those of other stakeholders. The pātaka komiti is the place where this balancing should be done.

It is unnecessary – indeed unwise – for us to offer any more precise prescription. It is sufficient to note that section 4 of the Conservation Act requires the department’s bioprospecting regime to be constructed as far as possible in a manner consistent with the principles of the Treaty of Waitangi. The principles of the Treaty require the basic design features we have already described in section 2.8. Practical implementation may be assisted by reference to the recommendations we make about building successful partnerships in chapter 6. Beyond that it will be for the department, in consultation with Māori, to design compliant policies and decision processes.

2.9.2 Genetic modification

In respect of GMOS, we said that ERMA’s legislation and systems have successfully introduced Māori perspectives into a sophisticated multi-disciplinary balancing process. But we also said that the status of Ngā Kaihautū and the understandable privileging of science methodologies have meant Māori views will not prevail in this process unless corroborated in some way by science. In short, science always has the trump card.

This is most obvious in the Methodology Order which effectively negates the Māori provisions in part 2 while purporting to take them into account. Clause 25 requires the Authority to commence the assessment of an application with reference to the scientific evidence and to deal with other matters only if the evidence raises them. Additionally, clause 26 allows the Authority to approve an application where the proposed GMO poses negligible

risks to the environment and to human health and safety if the potential benefits of the GMO outweigh the costs. This means that in cases where the cultural risk is high (that is, interference with whakapapa) but scientifically, the risks posed to the environment or human health are negligible, the research can proceed. Clearly, the assessment process is, in this instance, dominated by scientific evidence and disregards cultural factors entirely.

We recommend four changes. First, the methodology should be brought in line with the HSNO Act. That is, no automatic privilege should be given to physical risks as it is currently the case under clauses 25 and 26.

Secondly, section 5 of the HSNO Act should have an additional paragraph (c) requiring all persons exercising functions, powers, and duties under the Act to achieve its purpose by recognising and providing for the relationship between kaitiaki Māori and their taonga species. Thirdly, while it is appropriate that Ngā Kaihautū should remain an advisory committee, that group should be empowered to appoint at least two members to the Authority itself. Fourthly, Ngā Kaihautū should give advice when it considers that an application is relevant to Māori interests, and not only when the Authority requests Ngā Kaihautū’s advice.

The change to section 5 is recommended as a simple and straightforward way of recalibrating the value of the Māori interest in ERMA’s balancing process. That interest would still be subject to the overall purpose of the Act, but it would be clear that the cultural well-being of communities as explicitly protected in paragraph (b) includes the special position of kaitiaki. With this change we can be more confident that the Māori perspective will be given priority, even without scientific corroboration, when circumstances warrant it.

The third change is designed to ensure that there are independently appointed Māori voices at the table where priorities are finally decided in accordance with the statutory weightings. It will be important to require that these people have genuine insight into tikanga Māori and the obligations of kaitiaki so that the Māori community will feel comfortable with their ability to speak for that perspective. It is to be hoped that an enhanced Māori presence will have a material effect not just on individual part 5 decisions, but also on the overall way in which the

Authority goes about its work. For example, the claimants expressed concerns about the way in which low-risk applications are called out and assessed. These are within ERMA's internal control, and we would expect that one of the effects of re-weighting the Māori interest and putting Māori voices at the Authority's table would be a properly considered response to them. We think it best to encourage those inside the system to develop the appropriate reforms. Our role is to suggest the proper statutory environment for that to occur.

The fourth change ensures that Māori concerns and interests that are relevant to a particular application are detected at a very early stage. The focus of the Authority is clearly on scientific matters, and its members might not immediately detect that an application has the potential to affect kaitiaki relationships. The Authority cannot be expected to take the kaitiaki interest into account if it does not know that interest exists. It is the role of Ngā Kaihautū to draw that interest to the Authority's attention. Therefore, Ngā Kaihautū should take an active role in providing advice to the Authority to ensure the Māori interest is not unwittingly overlooked in the decision-making process. That means Ngā Kaihautū should not only act at the request of the Authority, but should also proactively advise the Authority of the Māori interest whenever it occurs.

2.9.3 IP rights

The current law does not protect the kaitiaki interest in taonga species and mātauranga Māori. As we have said, it was not designed to do so. Changes are needed so that the Patents Act and the Plant Variety Rights Act explicitly recognise the kaitiaki interest. Indeed, the Crown has recognised that the Māori interest in taonga species and mātauranga Māori needs to be taken into account in this legislation. However, current Crown policy does not go far enough. In this section we recommend the reforms we consider necessary.

(1) Patents Advisory Committee

As we have said, it is not appropriate for us to discuss the detailed provisions of the draft Patents Bill currently before Parliament, but it is appropriate for us to discuss current Crown policies in this area in general terms,

and the draft Bill before it entered Parliament, not least because they were discussed extensively by Crown witnesses in our hearings.⁴⁶³

Crown policy, discussed above, is to create a Māori committee to advise the Commissioner of Patents about whether inventions are derived from mātauranga Māori or use taonga species in some way, and whether the proposed use of either is consistent with Māori values. The Committee's advice can be directed to the criteria for granting a patent, such as whether the invention is a straight copy of an existing traditional use and therefore lacks the essential ingredient of novelty. It seems that the committee can also advise on whether the invention is contrary to Māori values – perhaps, for example, because of the way a taonga species is used or because it relies on mātauranga Māori without proper acknowledgement. On these grounds, it would be open to the committee to advise that the invention is not patentable because it is contrary to morality or *ordre public*. These concepts of higher principle are found in the minimum-standard-setting TRIPS Agreement described in section 2.7.3 above.

There is considerable merit in the committee mechanism. It certainly represents an improvement on the Patents Act in the sense that it would at least make Māori values relevant to the issue of patentability. In that sense, its role and structure would be similar to those of the pātaka komiti in respect of bioprospecting and Ngā Kaihautū in respect of GM. As with pātaka komiti and Ngā Kaihautū, a carefully constructed Māori advisory committee for patents could be the lynchpin for identifying and protecting Māori interests.

There are, however, some problems to be addressed before the committee mechanism can be said to comply with the design principles we outlined in section 2.8.

The first problem is that the committee as proposed is only reactive. It would consider a matter only on request from the commissioner. A second and related problem is that the committee is likely to be very much a part-time body without the support of an executive unit. This means it will not have investigative capacity of its own. The third problem is that patent examiners who act in the name of the commissioner, and who seek and then consider the advice given, are most often trained in law or science. They are unlikely to be ethicists or experts in

Māori culture and values. We cannot be sure they have the skill to spot a relevant problem in a patent application. They might also find it difficult to understand cultural advice, and even more difficult to balance that against scientific or legal argument.

Even if those problems are addressed, there are other potential problems in the detail. For example, the committee will be effective only if there is a clear relationship between the subject matter of its mandate and the morality and *ordre public* exceptions. The committee will also need procedural innovations to assist its work. These will include opportunities for kaitiaki to give notice of their interest, and requirements for applicants to disclose the use of mātauranga Māori or taonga species in their patent application. We address all these issues below.

We recommend the committee have a mandate in two broad areas of patent law. First, it should advise the commissioner on the requirements of patentability: invention, novelty, that it constitutes an inventive step, and utility. Unless the committee has this mandate, the commissioner could unwittingly grant a patent to an invention derived from mātauranga Māori where that derivation means, for example, that the invention is not novel. As discussed in section 2.7.1, the derivation from mātauranga Māori will often not affect patentability. This is because the invention, even if derived from mātauranga Māori, may have added something new.

Secondly, the committee must be able to advise the commissioner on the existence of kaitiaki interests, even if the patentability criteria are satisfied. That is because, in accordance with the TRIPS Agreement, the commissioner can still decline a patent if it is contrary to *ordre public* or morality.⁴⁶⁴

As with the pātaka komiti and Ngā Kaihautū, we are comfortable with the idea that the Māori committee should have an advisory rather than directive role. But it should not function only at the behest of the commissioner. It should be able to advise the commissioner as it sees fit on tikanga Māori and patents. It should be able to prepare guidelines and protocols to help applicants who are using mātauranga Māori or taonga species decide when and how to engage with kaitiaki. The committee should also have a mandate to investigate any application or patent filed or granted in New Zealand, and to advise

the commissioner accordingly.⁴⁶⁵ When the commissioner comes to consider an application that raises Māori issues, he or she should be required to take formal advice from the committee.

The final point is that a mechanism is needed to augment the commissioner's expertise when dealing with applications raising Māori issues. The technique we recommended in respect of ERMA was to add two representatives from Ngā Kaihautū to the Authority whenever a decision on an issue of tikanga Māori must be made. That would ensure, we said, that a Māori voice is at the table when competing interests come to be balanced. The answer in respect of IPONZ is that in such cases the commissioner should sit jointly with the chairperson of the committee, or his or her delegate.

(2) *Ordre public and morality*

The commissioner can, as we have said, refuse to register a patent if it is contrary to morality under the Patents Act (section 17). We understand that in 2004, IPONZ formally advised WIPO that the commissioner is entitled to refuse a patent application under this provision:

Where an invention is either derived from or uses TK, or relates to an indigenous flora or fauna, or products extracted therefrom applicants, are asked to provide an indication or evidence of prior informed consent being given by a relevant Maori group.⁴⁶⁶

IPONZ further advised, 'This requirement is not specifically included in the Patents Act, but is required as a matter of internal office procedure.'⁴⁶⁷

Thus, as currently constructed, section 17 is a gateway for Māori issues; just as section 4 of the Conservation Act and section 6(d) of the HSNO Act are in their respective fields. But without express reference to Māori issues, it is a weak protection. This can be seen by the way in which IPONZ addressed the relevance of Māori interests under the section after 2004. IPONZ's 2008 guidelines were consistent with its advice to WIPO. The guidelines indicated that IPONZ would continue to raise objections 'where it appears that the use of the invention would be contrary to morality for New Zealand society as a whole or for a significant section of the community, including Maori.' But

in 2009 the words ‘including Maori’ were deleted from the guidelines.

This suggests to us there are two problems with the section 17 gateway. The first is that the lack of express provision for Māori interests subjects those interests to the shifting attitudes of successive officials. That is clearly inappropriate. The second problem is that morality (described in section 2.7.3) itself may well be too narrow to encompass the protection of a people’s fundamental values or world view. To some extent the Māori relationship with mātauranga Māori and taonga species may be less a question of what is morally appropriate, and more about the demands of high social policy in a country like New Zealand where issues between Māori and Pākehā are customarily negotiated by reference to the principles contained in our founding document. Seen from this perspective, the place of Māori interests in New Zealand’s system of patent law is quintessentially an issue of *ordre public*. That is, it is a matter that goes to the fundamentals of society, the derogation from which risks endangering its essential identity, character, and institutions.

We therefore recommend that the commissioner have the power to exclude patents that are contrary to *ordre public* as well as morality. An *ordre public* clause would enable a rejection on the basis that the invention to which the patent relates unduly interferes with the kaitiaki relationship with a taonga species. *Ordre public* is also relevant to the consequences of failing to disclose use of mātauranga Māori in the patenting process. We discuss this below.

It will be necessary to give to the Commissioner of Patents an explicit power to refuse to register an otherwise complying patent application where the patent specification discloses an invention whose use would be inconsistent with the protection of kaitiaki relationships with taonga species. When making an *ordre public* or morality decision of this kind, the commissioner should be required to balance the interests of kaitiaki with those of other valid interest holders. The applicant’s interests are obviously in the balance, but the interests of the wider economy and community, and the species itself, may also be relevant.

The Māori interest should not be subjected to statutory subordination. Rather, it should be articulated in the

Act in a manner which ensures that kaitiaki relationships with taonga species are protected in accordance with their proven depth unless it can be demonstrated, in the particular case, that other interests deserve priority. The law should not shy from a requirement to address these difficult questions in a principled and transparent way. The Patents Act will need to be changed to provide for this balancing process.

(3) Notice of the kaitiaki interest

Before a matter reaches the IPONZ decision-making process, there are mechanisms which can be used to ensure that applicants and kaitiaki have early notice of each other, and to enable kaitiaki to participate in an application for registration if they have concerns. The goal is that notice of competing interests should be given as soon as possible so that concerns may be resolved early.

We recommend two mechanisms to allow early and effective engagement between the parties. The first is the voluntary registration of the kaitiaki interest. The second is the obligation upon patent applicants to disclose whether any mātauranga Māori or taonga species have contributed to the inventive activity. We discuss the disclosure requirement below, but turn now to the notice of kaitiaki interest.

As we have said, we see considerable value in kaitiaki being able to register their interest in taonga species and mātauranga Māori. First, it provides a clear statement of the Māori interest. It also gives kaitiaki the opportunity to demonstrate the depth of their commitment to safeguarding their relationship with particular mātauranga Māori or taonga species. This proactive approach means kaitiaki can register their interest only when they think it is essential to do so. Secondly, a register gives patent applicants fair warning of the kaitiaki interest and of the need to engage with them, and in this way provides applicants with the level of certainty required to protect their economic interests. Certainty and transparency are fundamental to successful engagement between the parties.

Kaitiaki may be iwi, hapū, whānau, or individuals. They should be able to register which species sourced from which areas are taonga to them. For example, Ngāti Koata could register their interest in the tuatara of Takapourewa. Or the Pou Hao Rangi Trust, for example, could register

their interest in ancient varieties of kūmara. We have said in section 2.2.2 that the Trust wishes to be 'acknowledged as interim kaitiaki or trustees on behalf of all Maori, of surviving varieties of kumara returned from Japan in 1988', and to this end also urged that a national ethnobotanical garden be re-established in Auckland to foster the collection and preservation of unique New Zealand flora.⁴⁶⁸ Plans for such a garden were announced in 1990, and finance approved, but the project seems to have foundered from the mid-1990s. We would like to see it revived, and new funding provided, to assist the goal of preserving the genetic diversity of taonga species like kūmara in a garden that is, as the Minister for Science envisaged in 1990, 'like a national park and a living museum rolled into one'.⁴⁶⁹ This could be done as a partnership between the Trust or an equivalent and the Ministry of Science and Innovation, or some other organisation; the critical point is that we would expect those claiming a kaitiaki relationship with relevant taonga species to register their interest in those species if they so wish. Kaitiaki could thus have a role in decision-making around the design, development, and maintenance of the garden.

Kaitiaki should also be able to record in summary form aspects of mātauranga Māori that they apprehend might be used by patent applicants. We accept this approach has risks. On the one hand, the registers will have to be public and available for perusal, otherwise they will not work as notice to potential applicants. On the other hand, much mātauranga Māori in respect of taonga species is already well and truly in the public domain. This mechanism will best address the needs of kaitiaki whose mātauranga is already locatable and accessible in the public domain. In the end, the registration decision is best left to kaitiaki themselves to make. If they do not want material or relationships to be published, they are fully entitled to keep them secret.

There should also be a right to object, whether or not an interest in the taonga species or mātauranga Māori has been registered. This will ensure that those who prefer not to publish their mātauranga or relationships are not disenfranchised by their decision.

Once kaitiaki have registered their interest in the mātauranga Māori in respect of a taonga species, it can be easily accessed by the patent examiner as prior art. As we

have said, prior art negates the novelty of the invention, meaning that a patent will not be granted.

(4) Disclosure

The final safeguard should be a requirement on patent applicants to disclose whether they have used any mātauranga Māori or any taonga species in the inventive activity that has led to the patent application.

(a) DISCLOSURE AND KAITIAKI INVOLVEMENT

We have said that there is much international debate as to how to prevent the misappropriation of genetic resources and traditional knowledge in accordance with article 15 of the CBD (see section 2.5.2). One way of achieving this is the development of an international regime on ABS. Another measure, considered within the WTO Doha Round, is the introduction of an additional disclosure requirement into the TRIPS Agreement.

The obvious question is whether a disclosure requirement could be deployed in a New Zealand context to give effect to the design principles we described in section 2.8. There we said that Māori do not have property in their culture (that is, mātauranga Māori and taonga species) and that the kaitiaki interest should not automatically be awarded priority. However, it is the kaitiaki relationship that needs to be protected from damage to a reasonable degree. There is, of course, no general formula that specifies how much protection is needed to keep the relationship safe and healthy in a given situation. That can happen only after a careful case-by-case analysis requiring a thorough understanding of the kaitiaki relationship in question, the effects of IP ownership upon it, and the identification of the interests of the wider community.

Based on these criteria, it is clear that a genuine analysis and balancing of relevant interests has to take place at an early stage – that is, before a patent is granted. Once the patent is granted, it is too late. Damage to the kaitiaki relationship may already have occurred. Moreover, relying on a vigilant objector to become active and raise objections after the patent has been granted may put an unfair burden on the objector. It is also an expensive undertaking. Indeed, the cost of objection might deter kaitiaki. We also think that early notification is justified on the simple grounds of fairness. To initiate early engagement,

every patent applicant should therefore disclose whether mātauranga Māori or the genetic and biological resources of taonga species have contributed to the inventive activity that led to the patent application. In this way, kaitiaki and the Māori advisory committee will be alerted to the issue at the outset.

There are other reasons for recommending a disclosure requirement as a vehicle for kaitiaki involvement in New Zealand's patent regime. Disclosure allows kaitiaki to monitor and, to a certain extent, control the use of mātauranga Māori and taonga species in the research process. In appropriate cases, this might even trigger ABS arrangements between the parties. This has implications for New Zealand's obligations under the CBD in that it builds a bridge between the requirements of the CBD and those of patent law.

It can also be argued that a disclosure requirement enhances the credibility and transparency of the entire patent system. As we have said, patent examiners are often trained in Western science but not in tikanga Māori, and so may not recognise the existence of the Māori interest in a particular patent application. Moreover, when searching scientific databases for the relevant existing prior art, they are unlikely to find any reference to mātauranga Māori, because it is little documented in such databases. A requirement for patent applicants to disclose any relevant traditional knowledge or genetic resources that contributed to the inventive activity will assist patent examiners in making better decisions about patentability criteria such as inventorship and novelty.

As we have said, disclosure is not an entirely new concept. The disclosure of certain facts is already a key requirement for the granting of a patent. For instance, patent law requires patent applicants to disclose the invention in such a way that it can be made or carried out by a person skilled in the relevant field of science or technology.⁴⁷⁰ Indeed, the underlying social contract of a patent is that the property right is granted in exchange for disclosure of the invention.⁴⁷¹ Many countries have implemented various other forms of disclosure requirements into their domestic patent law.⁴⁷² China, for instance, adopted a disclosure requirement in its domestic patent system.⁴⁷³ In Europe disclosure-of-origin requirements were introduced into several national laws in the wake

of the EU Biotechnology Directive.⁴⁷⁴ Under this directive, the scope, form, and legal effect of those disclosure requirements is also voluntary; consequently, the requirements vary between EU countries. In effect, disclosure of origin of genetic resources is not mandatory for all patent applications. 'In none of the countries was the adoption of DRS highly controversial.'⁴⁷⁵ The additional disclosure requirement we recommend – disclosure of any use of mātauranga Māori or genetic and biological resources of taonga species that has contributed in any way to the inventive activity that has led to the patent application – seems to us to fit well within existing patent law.

We turn now to the more challenging question of what an effective disclosure requirement might look like in practice.

(b) THE NATURE OF THE DISCLOSURE REQUIREMENT

The scope of an effective disclosure requirement must be wide enough to initiate engagement between all stakeholders at an early stage. Hence, an applicant for a patent relating to biological materials or mātauranga Māori should be required to disclose:

- ▶ the source and country of origin of any genetic or biological resource that contributed in any material way to the invention; and
- ▶ mātauranga Māori that was used in the course of research, including traditional knowledge that is not integral to the invention but that prompted the inventor to take the course of research that led to the relevant patent application.

The disclosure requirement must be mandatory.

The significant international momentum around the implementation of disclosure requirements can be used to assist in designing a requirement that is appropriate in the New Zealand context. As to the conceptual difficulty of defining mātauranga Māori or traditional knowledge, we refer to article 3 of the WIPO principles which provides that:

the term 'traditional knowledge' refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying

traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and *knowledge associated with genetic resources*. [Emphasis added.]⁴⁷⁶

This definition works well in our context.

(C) CONSEQUENCES OF FAILURE TO COMPLY WITH A DISCLOSURE REQUIREMENT

Patent law distinguishes between formal and substantive disclosure requirements. Patent systems have formal requirements that must be met within certain timeframes. These are usually determined by regulations, and may be extended in certain circumstances – usually at the discretion of the commissioner and based on reasonable grounds. Formal disclosure requirements do not refer to the actual nature of the invention. They include, for example, a requirement to provide addresses of applicants and copies of foreign patent applications.

By contrast, substantive disclosure requirements are concerned with the technological nature of the invention and whether the patentability criteria are met. Failure to meet substantive requirements (for example, novelty, non-obviousness, industrial application) may lead to sanctions such as rejection, invalidation, or revocation of a patent.

Hence, the difference between formal and substantive requirements is determined by the consequences of non-compliance. While failure to meet substantial requirements may have implications for the validity of the patent (if granted), failure to meet formal requirements may not result in such sanctions.

On one hand, we do not think that a purely formal disclosure requirement is a viable option, since it lacks the necessary incentive for patent applicants to disclose the use of mātauranga Māori and taonga species. On the other hand, we consider the strict consequences of a substantive disclosure requirement (refusal or revocation of a patent) to be too draconian. At this stage we can only reiterate that the kaitiaki relationship is entitled to a reasonable degree of protection. Just what is reasonable is a question to be answered on a case-by-case basis.

The underlying purpose is to create a system that provides sufficient incentives for researchers to disclose use of taonga species and mātauranga Māori without creating a chilling effect on genuine innovation. Thus, we prefer an approach that makes disclosure mandatory, but the consequences of failure a matter of discretion for the commissioner (sitting with the chair of the Māori committee). This means that in some cases there will be no sanction at all, because the effects on the relationship are limited or the parties have found ways to mitigate possible detrimental effects. In other cases, a patent will be revoked or refused – but only when the merits of the case justify it.

We consider this approach desirable, because it is likely to have a proportionate impact on research and patenting behaviour. Harsher consequences that affect the validity of a patent, no matter what the actual effect on the kaitiaki relationship, would have a detrimental impact on the biotechnology sector and other research and development activities. Smaller companies would be especially affected by overly strict sanctions. We do not think this can be justified.

Naturally, this approach comes with an element of uncertainty. There is, however, nothing new in it, since granted patents are exposed to the ongoing possibility of objection or revocation anyway. It is also consistent with the highly discretionary approach we favour in other parts of this and the previous chapter.

Evidence of PIC and ABS should not be a prerequisite for the granting of a patent. We said in section 2.7.3 that, in appropriate cases, early engagement will produce PIC from kaitiaki, as well as ABS arrangements. However, there is no justification for mandatory ABS arrangements in each and every case. We are confident that PIC and ABS will evolve naturally where the interests of researchers and kaitiaki make such requirements necessary for the parties to move forward.

Finally, we recommend that IPONZ records of applications for such disclosure be easily accessible to the public. In this way, applications can be monitored and the process of searching for applications in which disclosure has been made streamlined. Third parties will be able to search for relevant applications. As we have said, one of the objectives of the disclosure requirement is to enhance the transparency of the patent system.

(d) DISCLOSURE IN SUMMARY

We have said throughout this chapter that bioprospecting, GM, and IP are not isolated subjects but points along a single path from discovery to exploitation of commercially valuable biological material. IP rights, particularly patents, are both the culmination of the research process and the starting point for commercial development. They are assets used to obtain finance to develop research into saleable commodities, and to give the developer priority over others who may be engaged in a similar line of research. The granting of a patent is also the point at which the financial investment for research and development can begin to be recouped and pecuniary rewards reaped. Hence, it is a point that has considerable relevance for and impact on the commercialisation of research.

If the kaitiaki interest is not protected in the entire research continuum from bioprospecting to the commercialisation phase, there is a real and demonstrable risk that commercial interests will always override the kaitiaki interest. We are not suggesting the proposed disclosure requirement is the whole answer to the issue, but it provides an effective mechanism to ensure that kaitiaki interests are at the table when patent decisions are made.

(5) PVRs

Existing PVR law does not provide protection for the kaitiaki interests. We described above (see section 2.7.2) the proposals contained in the 2005 draft PVR Bill.⁴⁷⁷ It included two changes of relevance to this claim. The first was to give the commissioner more control over plant variety names, and the second was that discovered varieties could no longer qualify for a PVR. We think these changes are wise, and we support their enactment. We would add that PVR legislation should also include a power to refuse a PVR on the ground that it would affect kaitiaki relationships with taonga species. The Commissioner of Plant Variety Rights would be required to understand the nature of that relationship and the likely effects upon it, and then to balance the interests of kaitiaki against those of the applicant and the wider public. The commissioner should be supported by the same Māori advisory committee that we recommend becomes part of the patent regime.

We have so far not dealt with an issue that was of great

concern to claimants and plant nurseries. This related to whether there are any Māori interests in unmodified taonga plant species propagated for sale and export by private business interests such as nurseries. We referred earlier in the chapter to evidence of the proliferation of hebes, puawānanga, and kōwhai ngutukākā in Europe and North America, and to the size of New Zealand's own domestic ornamental plant industry. Although they are not strictly speaking PVR issues, we think it appropriate to deal with these matters here.

First, we have made it clear that we do not think kaitiaki have a proprietary interest in any taonga species. Rather, the interest to be protected is the cultural relationship between kaitiaki and the taonga species. The question is therefore whether propagation, sale, and export of taonga species by non-kaitiaki is inconsistent with that relationship. We do not see any inconsistency here. On the contrary, an industry that encourages the revegetation of this country in taonga species is thoroughly consistent with kaitiaki relationships. The more taonga species growing in New Zealand, the better. Nor do we think that export is necessarily a bad thing. In any event, as was made clear to us by claimant witnesses, it is now too late to turn back that clock. We cannot see any basis for the argument that Māori consent is necessary for either sale or export of unmodified taonga species. Sale and export is really about specimens, not species. It does not affect the underlying nature of the species, or kaitiaki relationships with them, and it is that which must be properly protected.

The introduction of an advisory committee, as suggested above, appears to create the possibility that a taonga species could be refused a PVR in New Zealand but granted one overseas. However, this is happening already. For example, the 'Carousel' PVR (referred to in section 2.7.4(4)) was developed in France and then imported into New Zealand. While that is a problem that should be acknowledged, we do not think it will necessarily last. As with patents, there is developing international momentum to introduce protection for indigenous interests and at some point discussions will crystallise into an enforceable international legal framework. Because New Zealand thrives on trade, this country could well play a vital role in developing such frameworks both regionally

and globally. In any event, with so much international uncertainty around this issue, New Zealand could well obtain a competitive and comparative advantage by seizing the initiative and creating certainty.

2.9.4 Finding a kaitiaki

The foregoing is fine in theory, but how are we to identify who is a kaitiaki and who is not? Interested parties and Crown officials continually pointed to this as a practical issue that needs to be resolved with certainty. In chapter 1 on taonga works we suggested a registration system for kaitiaki claiming an interest in taonga works. Kaitiaki identification is more difficult in the case of taonga species, because they were not created by kaitiaki communities but pre-existed them, and most taonga species can be found in different parts of the country. Many communities will have their own self-generated mātauranga about taonga species, reflecting their own particular relationships with them. It follows that there will be cases with multiple kaitiaki, each of them having a justifiable interest.

The problem is far from insurmountable, however. It is one that has been regularly dealt with in environmental regulation and Treaty settlements in the last 30 years. 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.

The provenance of the genetic and biological material will give one hapū or iwi priority over the others. If the biological material is mānuka from the East Cape, then the interests of Ngāti Porou or Te Whānau-a-Apanui will take priority, depending on which valley the mānuka is harvested from. Other iwi may well have broader interests, but the iwi from whose territory the material is taken ought to be treated as the relevant kaitiaki in the first instance.

A system of kaitiaki registration similar to that suggested for taonga works (see section 1.7.2(3)) is not a complete answer, but it will unquestionably help. We have in mind a register that allows kaitiaki communities to record their status in respect of particular taonga species within

or sourced from their rohe. There may well be multiple registrations, and we do not apprehend that a decision would be required as to which of the kaitiaki registrants should have priority unless a patent or PVR application makes that necessary. Rather, the register would be designed to help those in research and development working with *in situ* and *ex situ* examples of taonga species to know who claims an interest and who should be consulted.

If a decision is required, the role of the Māori advisory committee will be important. We would expect the committee to develop ethical guidelines in relation to consultation and negotiation, and we would expect the commissioner and the chair of the Māori committee (or the chair's nominee) to look to the committee for formal advice on the question.

Registration of local kaitiaki will not address national issues – for example, where it is proposed to modify the genetic profile of a taonga species in a way that raises issues for all members of that species, wherever they are situated within New Zealand. Local kaitiaki will always have an important role in respect of genetic and biological material harvested from their rohe, but they are unlikely to bring a national perspective, and in many cases that perspective will be the relevant one. Such issues may be taken up in the future by a national body representing the interests of kaitiaki throughout the country. But a national body representing kaitiaki cannot be created from the outside. It will be for Māori themselves to develop such a body as they see fit. Perhaps this report will provide an impetus for discussions to this end.

2.9.5 Ethics and guidelines

We have said on a number of occasions that this chapter is, in essence, about research. We have recommended law changes to give better protection to kaitiaki relationships with taonga species in the research process, but it is important not to lose sight of the fact that changes to the law are not a complete answer. Most of the controls on the way modern research and development is done are found not in the law but in guidelines and codes of conduct.⁴⁷⁸ Likewise, many of the practical ways in which kaitiaki relationships with taonga species are to be protected in research and development work ought to be

contained in ethical guidelines and codes of conduct prepared in collaboration with kaitiaki representatives. These could range in subject matter from identifying when an issue in relation to tikanga Māori arises, to locating and engaging with kaitiaki. We would expect universities, private research institutions, CRIS, DOC, ERMA, and IPONZ all to be interested in, and contributing to, the preparation of such guidelines and codes. Indeed, we see the development of guidelines as important in all three areas along the research continuum. As part of their proactive role, each of the advisory committees (that is, the pātaka komiti, Ngā Kaihautū, and the Māori advisory committee to the Commissioner of Patents) should assist in the preparation of adequate guidelines in their respective fields. In terms of shared decision-making by the Treaty partners for the protection of kaitiaki relationships, the working principles we outline in section 6.8, in respect of protecting mātauranga Māori may also prove useful. We hope these documents will come to reflect the principles we have set out in this chapter.

Similarly, in the education sector it is important to ensure that mātauranga Māori relating to New Zealand's flora and fauna is used and taught in the science curriculum in such a way as to foster respect for Māori knowledge. That will require that mātauranga Māori is properly acknowledged and respectfully presented – but as we have said in chapter 1 and in section 2.9.3(3), it is for kaitiaki themselves to register their interest in closely held iwi and hapū mātauranga as a precursor to direct involvement in decision-making about its use. Mātauranga Māori that is not held by specific kaitiaki should be freely available to all who are willing to use it consistently. The guidelines we recommend are developed for use by those in research and development will be relevant to those in the education sector more broadly.

2.10 CONCLUSION

In essence, this chapter is about how the interests of kaitiaki and those involved in research, science, and commerce can be managed when their interests coincide, and how disagreements should be resolved when

conflicts occur. We have reflected on the extensive traditions about and close cultural relationships Māori have with taonga species, all of which are underpinned by the body of knowledge known as mātauranga Māori. And we have stressed that Māori culture as we know it today is a creation of its environment – mountains, rivers, flora and fauna, and the like. That is why, over many centuries, the human relationship with taonga species has assumed such cultural and spiritual significance. Indeed, it can be argued that it is one of the key definers of Māori identity. We have also described how the concept of kaitiakitanga governs a community's obligations and responsibilities to safeguard the relationship between humans and taonga species in perpetuity.

We have also briefly explained how the more individualistic Western culture developed quite different perspectives on human interaction with the natural environment. This is reflected in the development of a complex legal and regulatory regime that confers exclusive rights in knowledge and information in relation to that environment and governs access to it. One of the main drivers of this system is the need to encourage commercial exploitation of those resources.

Over the last century, this notion of exclusive rights in property, knowledge and information has extended to cover the creation of new varieties of plants and animals, the genetic or biological elements of existing species, and the extractive or analytical processes that produced them. Such developments have given rise to potential conflict between those who commercially exploit private property rights in the genetic and biological resources of taonga species, and kaitiaki who may have very different priorities.

During the course of this inquiry, however, it has become clear to us that conflict is not inherent in the relationship between Māori values and the Western approach to the exploitation of taonga species and mātauranga Māori. We have seen, for example, how numerous government agencies have implemented their own internal strategies for acknowledging and accommodating different perspectives within their day-to-day research and development activities. These developments are positive,

but they exist in isolation. The larger, central question is whether Māori interests and values should affect the way in which research into the genetic and biological resources of taonga species is carried out and its outcomes exploited.

We have looked to the Treaty of Waitangi for guidance. We have concluded that the issue is best resolved by reference to the concept of *tino rangatiratanga* as expressed in the Treaty's Māori text, rather than to the concept of exclusive ownership as expressed in article 2 of the Treaty's English text.

Accordingly, we conclude that kaitiaki do not have rights in the genetic and biological resources of taonga species that are akin to the Western conception of ownership. Only in the most rare and exceptional cases, like the tuatara, would we say kaitiaki are justified in claiming an interest in each living specimen of a taonga species. Instead, we conclude that where there is a risk that bioprospecting, GM, or IP rights will affect kaitiaki relationships with taonga species, those relationships are entitled to a reasonable degree of protection. Just what is reasonable is a matter for case-by-case analysis. It requires a full understanding of the level of protection required to keep the relationship safe and healthy, as well as a careful balancing of all competing interests.

We also conclude that kaitiaki have valid rights in respect of the *mātauranga* Māori associated with their taonga species, even though such rights do not amount to exclusive ownership of that knowledge, at least where the knowledge is already publicly known. We conclude that activities involving the commercial exploitation of *mātauranga* Māori must give proper recognition to the interests of kaitiaki, including their rights to acknowledgement and to have a reasonable degree of control over the use of *mātauranga* Māori. Just what is 'proper recognition' must depend on the circumstances. Kaitiaki relationships with their *mātauranga* will all be different, just as they often are with taonga species. There will be cases where a consent requirement is appropriate. In others, disclosure or consultation will be sufficient. The answer will depend on the balancing process in which the importance of the relationship will be weighed against the interests of

researchers or the holders of IP rights on a case-by-case basis.

These underlying principles underpin our specific recommendations for reform of the current bioprospecting, GM, and IP regimes.

In bioprospecting we have recommended that DOC should take the lead in developing a Treaty-compliant bioprospecting regime that is applicable within the conservation estate and relevant to Crown land outside the estate. The joint decision-making processes of its *pātaka komiti* that currently operate in respect of matters relating to customary use of and access to native flora and fauna on the DOC estate offer a potential avenue for protecting the kaitiaki interest in bioprospecting. We do not think a compulsory requirement for ABS and PIC is justified because not every bioprospecting proposal will interfere with the kaitiaki relationship with taonga species. As we have said in our discussion of the design principles, no one interest should have automatic priority, and a genuine case-by-case approach will be required to balance all countervailing interests in specific circumstances.

We also referred to extensive and dynamic international debate in this area, and some of the guidelines and solutions being offered at that level to assist domestic lawmakers. We were surprised to see that the Crown, in its effort to set up a transparent and robust policy, did not make use of international developments in this area, including developments in international law.

In respect of genetic modification, we have recommended four changes to the current regime to give greater recognition to the kaitiaki interest. First, we recommend the Methodology Order should be brought in line with the HSNO Act. That is, no automatic privilege should be given to physical risks as is currently the case under clauses 25 and 26. Secondly, we recommend an additional paragraph (c) in section 5 of the HSNO Act requiring all those exercising functions, powers, and duties under the Act to recognise and provide for the relationship between kaitiaki and their taonga species. Thirdly, we recommend Ngā Kaihautū Tikanga Taiao maintain its advisory role, but that it should be able to appoint at least two members to the Authority itself. Fourthly, we recommend that

Ngā Kaihautū give advice not only when the Authority requests it, but when Ngā Kaihautū considers an application to be relevant to Māori interests. Such active engagement would ensure that the Authority had early warning of the kaitiaki interest.

In IP we recommend a range of measures to protect the kaitiaki relationship with taonga species and mātauranga Māori. We recommend the establishment of a Māori committee to advise the Commissioner of Patents about whether inventions are derived from mātauranga Māori or use taonga species in some way. The purpose of this is twofold. First, the advice will inform the decision about whether a patent meets the patentability criteria. Secondly, even if the application meets the patentability criteria, the advice will be about whether a patent should not be registered because it conflicts with the kaitiaki relationship. But the committee should not function only at the behest of the commissioner. It should be able to advise the commissioner as it sees fit on tikanga Māori and patents. We also recommend that kaitiaki be able to notify their interest in particular species or mātauranga Māori by way of a register.

In addition, we recommend that the Patents Act include an *ordre public* exception as well as the existing morality exception. An *ordre public* exception would enable the commissioner to refuse registration of a patent on the basis that the invention to which the patent relates unduly interferes with the kaitiaki relationship with taonga species. We also recommend the law include a mandatory disclosure requirement. That is, a patent applicant must disclose any use of mātauranga Māori in the course of research, as well as the source and country of origin of any genetic or biological resources that contributed to the invention. We recommend that the law provide for consequences if that disclosure is not made. Those consequences could range from no sanction, because the effects on the kaitiaki relationship are limited, to the patent's being revoked or refused – when the merits of the case justify it. In the matter of PVRs, we reiterate that Māori have no proprietary rights in taonga species, but that the cultural relationship between kaitiaki and taonga species is entitled to reasonable protection. The Crown's proposed changes to the Plant Variety Rights Act are positive, but

we recommend that the commissioner be supported by a Māori committee which would advise on matters related to tikanga Māori.

All the reforms we recommend in this chapter can operate within the existing frameworks around bio-prospecting, GM, and IP. Those frameworks are sufficiently robust to take on board a new set of rights to be held by kaitiaki communities and individuals who will bring different and valuable perspectives to decision-making around the conduct of research in New Zealand.

We have referred to the considerable international debate around the issues at the heart of this chapter. These are important for the insight and impetus they provide for those working towards local solutions for protecting the interests of indigenous people while also ensuring access to information and knowledge that is essential for innovation and commerce. 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.

This issue is important not just to kaitiaki. It has important implications for all New Zealanders, many (perhaps most) of whom regard indigenous flora and fauna not merely as a resource to be exploited for commercial benefit. Many of the same species that Māori regard as taonga – pōhutukawa, harakeke, and many more that we have not referred to specifically in this chapter, including the kiwi – are seen by others as signifiers of a unique national identity and as having an intrinsic value that goes far beyond the species' economic potential. The protection of that which is valuable to Māori has important spin-offs for all. Reconciliation between world views does not have to mean that one must give ground to the other. Rather, by integrating them in the ways we have described, all those involved in research, science, and commerce will be equipped to make better decisions.

2.11 SUMMARY OF RECOMMENDATIONS

The kaitiaki relationship with taonga species is entitled to a reasonable degree of protection. In exceptional cases, such as the tuatara, kaitiaki can justifiably claim

an interest in each living specimen of a taonga species. But beyond this we do not think kaitiaki have rights akin to ownership in the genetic and biological resources of taonga species

Kaitiaki also have valid rights in respect of the mātauranga Māori associated with their taonga species, even though such rights do not amount to exclusive ownership of that knowledge, at least where the knowledge is already publicly available. Thus, activities involving the commercial exploitation of mātauranga Māori must give proper recognition to the prior interests of kaitiaki; they are entitled to acknowledgement, and to have a reasonable degree of control over the use of mātauranga Māori. 'Proper recognition' will depend on the circumstances. There will be cases where a consent requirement is appropriate. In others, disclosure or consultation will be sufficient. The answer will depend on the balancing process in which the importance of the relationship will be weighed against the interests of researchers or the applicants or holders of IP rights on a case-by-case basis.

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

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

1. *Bioprospecting*: We recommend that DOC take the lead in developing a bioprospecting regime that is applicable within the conservation estate and complies with the requirements of section 4 of the Conservation Act 1987. Joint decision-making between DOC's regional conservator and the pātaka komiti (which already deal with matters relating to the cultural harvest of native flora and fauna on the conservation estate) offers a potential avenue

for protecting the kaitiaki interest in bioprospecting: we therefore recommend an expanded role for the komiti. Its role would need to change from an advisory one to one of joint decision-making with the regional conservator. We do not think a compulsory requirement for access and benefit sharing and prior informed consent is justified because not every bioprospecting proposal will involve mātauranga Māori or affect the kaitiaki relationship with taonga species. No one interest should have automatic priority.

2. *Genetic modification*: We recommend the following changes to the current regime to give greater recognition to the Māori interest:

- The Methodology Order (which details how ERMA conducts its multi-disciplinary risk assessments) should be brought in line with the HSNO Act 1996. That is, no automatic privilege should be given to physical risks, as it is currently under clauses 25 and 26.
- An additional paragraph (c) in section 5 of the HSNO Act should require all those exercising functions, powers, and duties under the Act to recognise and provide for the relationship between kaitiaki and their taonga species.
- Ngā Kaihautū Tikanga Taiao (the specialist Māori committee that advises ERMA) should maintain its advisory role, but should be able to appoint at least two members to the Authority itself.
- Ngā Kaihautū should give advice not only when the Authority requests it, but when Ngā Kaihautū considers an application to be relevant to Māori interests.

3. *Intellectual property*: We recommend various measures to protect the kaitiaki relationship with taonga species and mātauranga Māori to a reasonable degree. Specifically:

- We recommend the law ensure that kaitiaki relationships with taonga species and mātauranga Māori are expressly protected in accordance with their proven depth (unless it can be demonstrated that other interests

deserve priority). This includes a mechanism to ensure that any mātauranga Māori is treated as a key factor in decisions about whether a patent application is novel or involves an inventive step.

- ▶ To ensure that mātauranga Māori is treated as a key factor, we recommend the establishment of a Māori committee to advise the Commissioner of Patents about whether mātauranga Māori or taonga species have contributed in any way to the invention, and whether the proposed use is consistent with or contrary to tikanga Māori. This advice should be relevant to the requirements of patentability and (even if the patentability criteria are satisfied) whether there are kaitiaki interests as risk.
- ▶ We recommend the commissioner be empowered to refuse patents that are contrary to *ordre public* as well as morality.
- ▶ The committee should not be reactive: the commissioner should be required to take formal advice from it, and work in partnership with a member of the Māori committee when making patent decisions that affect the kaitiaki relationship.
- ▶ We recommend kaitiaki be able to formally notify their interest in particular species or mātauranga Māori by way of a register. This would allow kaitiaki to demonstrate the importance of their relationship, while also giving patent applicants fair warning of the kaitiaki interest. That said, kaitiaki should always have a right to object to a patent application, whether or not they have registered their interest.
- ▶ We recommend patent applicants be required to disclose whether any mātauranga Māori or taonga species have contributed to the research or invention in any way. IPONZ must make these records publicly available. Patent applicants who fail to comply with a disclosure requirement can be subject to a range of outcomes, from no sanctions at all to the patent

being revoked, to be decided by the commissioner and the chair of the Māori committee (or his or her delegate) on a case-by-case basis.

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

In addition, we recommend that each of the advisory committees (that is, the pātaka komiti, Ngā Kaihautū, and the Māori advisory committee to the Commissioner of Patents) assists in the preparation of adequate ethical guidelines and codes of conduct relevant to their field for use by those in research and development, and in the education sector more broadly. They could range in subject matter from identifying when an issue in relation to tikanga Māori arises, to locating and engaging with kaitiaki. We would expect universities, private research institutions, CRIS, DOC, ERMA, and IPONZ all to be interested in, and contributing to, the preparation of such guidelines and codes.

Text notes

1. The Organisation for Economic Cooperation and Development (OECD) defines biotechnology as: 'the application of science and technology to living organisms, as well as parts, products and models thereof, to alter living or non-living materials for the production of knowledge, goods and services': Brigitte van Beuzekom and Anthony Arundel, *OECD Biotechnology Statistics 2009* (OECD, 2009), p 9.
2. Ernst & Young, *Beyond Borders: Global Biotechnology Report 2010* (Wellington: Ernst & Young, 2010), p 54
3. Document R8(c) (Department of Conservation and Ministry for the Environment, *New Zealand Biodiversity Strategy* (Wellington: Department of Conservation and Ministry for the Environment,

- 2000)), p 6. 'This level of endemism is remarkable internationally. Both species of New Zealand bat are endemic, as are all four frogs, all 60 reptiles, more than 90 percent of insects and a similar percentage of marine molluscs, about 80 percent of vascular plants, and a quarter of all bird species. In contrast, Great Britain, which separated from continental Europe only 10,000 years ago, has only two endemic species: one plant and one animal. Half a dozen islands in the Hauraki Gulf have a greater level of endemism than the whole of Britain': section 4.3.3.
4. Paper 2.314 (Waitangi Tribunal, statement of issues, July 2006), p 22
 5. In most living organisms (except for viruses), genetic information is stored in the molecule deoxyribonucleic acid, or DNA. In viruses, the main genetic material used is ribonucleic acid, or RNA: Albert Lehninger, *Principles of Biochemistry*, 3rd ed (New York: Worth Publishers, 2000), pp 907–930.
 6. Paper 2.314, pp 22, 89
 7. At the 1988 ethnobotany hui that was a catalyst for the Wai 262 claim, Professor Bruce Biggs noted that Polynesian words were adopted for some of the new plants in Aotearoa, but that the Polynesian botanical terms did not adequately cover the range of new species in the new islands: Bruce Biggs, 'A Linguist in the New Zealand Bush', *Nga Mahi Maori o te Wao Nui a Tane: Contributions to an International Workshop on Ethnobotany*, ed Warwick Harris and Promila Kapoor (Christchurch: Department of Scientific and Industrial Research, 1990), p 56.
 8. Witnesses who spoke in more detail regarding whakapapa include, in order of appearance: doc A27(b) (Hema Nui a Tawhaki Witana, confidential brief of evidence on behalf of Te Rarawa, undated), paras 10–39, 74–82; doc A32(a) (Raukura Robinson, brief of evidence on behalf of Ngāti Kuri, Ngāti Wai, and Te Rarawa, March 1998), pp 20–22; doc B13 (Pa Henare Tate, brief of evidence on behalf of Ngāti Kuri, Ngāti Wai, and Te Rarawa, undated); Dr Bruce Gregory, oral submission on behalf of Te Rarawa, 3rd hearing, 27 April 1998 (transcript 4.1.3, pp 6–10); doc B12 (Bruce Gregory, brief of evidence on behalf of Te Rarawa, undated), pp 3–4; doc C2 (Houpeke Piripi, brief of evidence on behalf of Ngāti Wai, undated), pp 5–11; doc K12 (Mana Cracknell, confidential brief of evidence on behalf of Ngāti Wai, Ngāti Kuri, and Te Rarawa, 6 February 2002); doc E1 (Te Kapunga (Koro) Dewes, brief of evidence on behalf of Ngāti Porou, 31 July 1998); doc E3 (Wayne Ngata, brief of evidence on behalf of Ngāti Porou, 31 July 1998), pp 13–31; Wayne Ngata, under questioning by the Tribunal, 5th hearing, 14 August 1998 (transcript 4.1.5, pp 538); doc G4 (Apirana Mahuika, brief of evidence on behalf of Ngāti Porou, 12 April 1999), pp 14–42; Maggie Ryland, oral submission on behalf of Ngāti Porou, 5th hearing, 13 August 1998 (transcript 4.1.5, pp 431–432); Murray Hemi, under cross-examination by Crown counsel, 11th hearing, 27 March 2001, (transcript 4.1.11, pp 132–133); and doc P54(a) (Hohepa Kereopa and Tauriroturangi Pouwhare, brief of evidence on behalf of Te Waka Kai Ora, August 2006).
 9. The first evidence we heard about tuatara in our inquiry was from Whetu McGregor, a noted Ngāti Wai kuia who received the QSO for her work on conservation of tuatara and other species (including her conservation work on Hauturu (Little Barrier Island) and Great Barrier Island). Whetu McGregor raised concerns with DOC regarding the practice of toe-clipping of tuatara for research identification purposes; the practice largely ceased after complaints from Ngāti Wai: doc A31 (Whetu McGregor, brief of evidence on behalf of Ngāti Wai, undated), p 3; doc R12 (Michael Gardiner and Rolien Elliot, brief of evidence on behalf of the Department of Conservation, 21 November 2006), p 12.
 10. Document K11 (Robert McGowan, 'The Contemporary Use of Rongoa Maori (Traditional Maori Healing)', MSocSc thesis, University of Waikato, 2000), p 67
 11. Reverend Hoturangi (Paul) Weka (trans Apirana Mahuika), oral evidence on behalf of Ngāti Porou, 8th hearing, 24 August 1999 (transcript 4.1.8, pp 78–79, 83); Reverend Hoturangi (Paul) Weka, oral evidence on behalf of Ngāti Porou, 8th hearing, 24 August 1999 (transcript 4.1.8(a), p 13); doc P28 (Connie Pewhairangi, brief of evidence on behalf of Ngāti Porou, 16 August 2006), pp 3, 5. See also chapter 4 on conservation issues and weaving.
 12. Reverend Hoturangi (Paul) Weka (trans Apirana Mahuika), oral evidence on behalf of Ngāti Porou, 8th hearing, 23 August 1999 (transcript 4.1.8, pp 78–79)
 13. W Colenso, 'Vestiges: Reminiscences Of The Ancient Maori', *Transactions and Proceedings of the New Zealand Institute*, vol 24 (1891), p 464 (quoted in Murdoch Riley, *Māori Healing and Herbal: New Zealand Ethnobotanical Sourcebook* (Paraparaumu: Viking Sevenses, 1994), p 126)
 14. Intellectual Property Office of New Zealand, 'History of Intellectual Property in New Zealand', Ministry of Economic Development, <http://www.iponz.govt.nz/cms> (accessed 22 July 2010)
 15. See, for example, New Zealand company Living Nature's products: Living Nature New Zealand, 'Living Nature', Living Nature New Zealand, <http://www.livingnature.com/catalog/main.cfm?t=h#harakeke> (accessed 12 March 2010)
 16. Ibid. For a waiata that relates the whakapapa of the harakeke, see doc P49 (Colleen Skerret-White, brief of evidence on behalf of the Te Arawa Confederation of Tribes, August 2006), p 3.
 17. Sue Scheele, *Harakeke: The Rene Orchiston Collection*, 3rd ed (Lincoln: Mana Whenua Press, 2005)
 18. In the United States, any living organism that becomes a product through some kind of human intervention can be patented: *Diamond v Chakrabarty* 447 US 303 (1980). As a result, plants are patentable subject matter: 35 USC 101. The United States has also extended patent protection to plants produced by either sexual or asexual reproduction and to plant parts including seeds and tissue cultures: *Ex parte Hibberd* 227 USPQ 433 (Bd Pat App & Int, 1985).

19. United States Patent and Trademark Office numbers pp 18,865 and pp 20,249: United States Patent and Trademark Office, 'Patent Full-Text and Full-Page Image Databases', United States Patent and Trademark Office: An Agency of the Department of Commerce, <http://patft.uspto.gov> (accessed 10 August 2010)
20. Patent 336288. Patents can be accessed via: Intellectual Property Office of New Zealand, 'Patents Homepage', Ministry of Economic Development, <http://www.iponz.govt.nz/cms/patents> (accessed 12 August 2010).
21. Patent 517467
22. Document s6 (Counsel for Ngāti Porou, closing submissions, 23 April 2007), pp 39–40
23. Document A27(b), para 93
24. RC Cooper and RC Cambie, *New Zealand's Economic Native Plants* (Auckland: Oxford University Press, 1991), p 118 (quoted in doc K6 (David Williams, 'Mātauranga Māori and Taonga: The Nature and Extent of Treaty Rights Held by Iwi and Hapu in Indigenous Flora and Fauna, Cultural Heritage Objects and Valued Traditional Knowledge', report commissioned by the Waitangi Tribunal, 2001), p 120)
25. James Herries Beattie, *Traditional Lifeways of the Southern Maori: The Otago University Museum Ethnological Project, 1920*, ed Atholl Anderson (Dunedin: Otago University Press, 2009), p 262 (quoted in Riley, *Māori Healing and Herbal*, p 237)
26. Cooper and Cambie, *New Zealand's Economic Native Plants*, p 118
27. One such company is Kiwi Kitz, which sells a 'Bitter Herb Tonic' called Koromiko Herb Action: Kiwikitz, 'Natural Therapies, Herbals, Natural health, Supplements, Weight Loss, Antiaging Cream', Kiwikitz, <http://www.kiwikitz.com> (accessed 26 July 2010). However, Cooper and Cambie observe 'it is somewhat surprising that so little work has been carried out on this plant': Cooper and Cambie, *New Zealand's Economic Plants*, p 118.
28. The DSIR was the predecessor of the CRIS. We discuss the CRIS' work in more detail in chapter 6.
29. Dr Ron Close, oral evidence, 18th hearing, 25 September 2006 (transcript 4.1.18, p 64)
30. Ibid
31. Cooper and Cambie, *New Zealand's Economic Native Plants*, p 56
32. 'Denmark goes big on Hebes,' *Commercial Agriculture* (November 1990), pp 36–38 (quoted in doc A15(i), p 4182 ('Koromiko or Hebe', file note, 8 July 1991, p 4))
33. Document A16 (Jim Rumbal, brief of evidence on behalf of Duncan & Davies Contracting Ltd, 3 March 1997), p 3
34. Gerard Hutching, *The Natural World of New Zealand: An Illustrated Encyclopaedia of New Zealand's Natural Heritage* (Auckland: Penguin Books, 1998), pp 273–274
35. Philip Simpson, *Pōhutukawa & Rātā: New Zealand's Iron-hearted Trees* (Wellington: Te Papa Press, 2005), pp 137, 143–144, 148–151
36. In another version of this story, Tawhaki is seeking not to avenge his father but to find his wife, and the flowers are not Tawhaki's blood but rather his eyes – Tawhaki, a healer, could cure blindness: Simpson, *Pōhutukawa & Rātā*, p 135.
37. Ibid, pp 140, 145–146
38. Cooper and Cambie, *New Zealand's Economic Native Plants*, p 61
39. Christina Macdonald, *Medicines of the Maori* (Auckland: William Collins, 1973), p 61
40. Document A16, p 3
41. Hutching, *The Natural World of New Zealand*, pp 168–169
42. The venue used for our updating hearings with Ngāti Porou, and our fifth hearing.
43. Document P25(a) (Tate Pewhairangi, brief of evidence on behalf of Ngāti Porou, 10 August 2006 (English translation))
44. Document P25(a), pp 5–6
45. Riley, *Māori Healing and Herbal*, p 369
46. Ibid
47. Document A27(b), para 80
48. Cooper and Cambie, *New Zealand's Economic Native Plants*, p 155
49. Ibid, p 30
50. Document K6, p 128
51. Document H11 (Benjamin Hippolite, brief of evidence on behalf of Ngāti Koata, undated), p 15; doc H16 (James Elkington, brief of evidence on behalf of Ngāti Koata, undated), p 25; doc H12 (Priscilla Paul, brief of evidence on behalf of Ngāti Koata, undated), p 5; Riley, *Māori Healing and Herbal*, pp 361, 404–411
52. Tiaki Hikawera Mitira, *Takitimu* (Wellington: Reed Publishing, 1972) p 62; Te Rangi Hiroa, *The Coming of the Maori*, 2nd ed (Christchurch: Whitcombe & Tombs, 1950), pp 38–39; Te Rangi Hiroa, 'The Value of Tradition in Polynesian Research', *Journal of the Polynesian Society*, vol 35, no 139 (1926), pp 181–203, p 201
53. Riley, *Māori Healing and Herbal*, p 361
54. RC Barstow, 'The Maori Canoe', *Transactions and Proceedings of the Royal Society of New Zealand*, vol 11 (1878), p 75
55. Cooper and Cambie, *New Zealand's Economic Native Plants*, p 168; LH Briggs, 'Constitution of Solanone (Solanine-s)', *Nature*, vol 144, no 3640 (5 August 1939), pp 247–248
56. Riley, *Māori Healing and Herbal*, p 364; Cooper and Cambie, *New Zealand's Economic Native Plants*, pp 168–169; J Kloosterman, 'Development of Steroid Synthesis from Natural Products', *Chemistry in New Zealand*, vol 43, no 4 (1979), pp 146–147

57. School of Biological Sciences, University of Auckland, 'Maori Uses: Medicinal Plants, Trees & Shrubs – Poroporo, Bullibul', University of Auckland, <http://web.auckland.ac.nz/uoa/science/about/departments/sbs/newzealandplants/maoriuses/medicinal/trees/poroporo-solanum.cfm> (accessed 20 January 2011)
58. Cooper and Cambie, *New Zealand's Economic Native Plants*, p169
59. Phillip Rasmussen, under cross-examination by Crown counsel, 18th hearing, 28 September 2006 (transcript 4.1.18, p 392)
60. For example: Hema Nui a Tawhaki Witana, confidential oral evidence on behalf of Te Rarawa, 1st hearing, 16 September 1997 (transcript 4.1.1, p 38); Ross Gregory, oral evidence on behalf of Te Rarawa, 3rd hearing, 27 April 1998 (transcript 4.1.3, p 82); doc E6 (Maggie Ryland, brief of evidence on behalf of Ngāti Porou, 31 July 1998), p 12; doc G6 (Laura Thompson, brief of evidence on behalf of Ngāti Porou, 9 April 1999), p 7; doc H12, p 4
61. Patent 528656
62. Document P18 (Philip Lewis Rasmussen, brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006), pp 2–4
63. See, for example, document P18, p 4.
64. Riley, *Māori Healing and Herbal*, p 278
65. Document E1, p 23; Te Kapunga (Koro) Dewes, oral evidence, 5th hearing, 11 August 1998 (transcript 4.1.5, p 92); Reverend Hoturangi (Paul) Weka (trans Apirana Mahuika), under cross-examination by counsel for Ngāti Porou, 8th hearing, 24 August 1999 (transcript 4.1.8, p 101)
66. Oral evidence of Ada Haig (trans Apirana Mahuika), under cross-examination by counsel for Ngāti Porou, 5th hearing, Pakirikiri Marae, August 1998 (te reo transcript 4.1.5(a), p 19); Piripi Aspinall also referred to the use of mānuka: doc E5 (Piripi Aspinall, brief of evidence on behalf of Ngāti Porou, 31 July 1998), pp 8–9.
67. Hirini Clarke, under cross-examination by counsel for Ngāti Porou, 7th hearing, 23 April 1999 (transcript 4.1.7 p 454)
68. Ibid, p 449
69. Ibid, p 455
70. British Broadcasting Corporation, 'Honey Trialled on Cancer Patients', British Broadcasting Corporation, http://news.bbc.co.uk/2/hi/uk_news/england/manchester/5157916.stm (accessed 20 August 2010)
71. Honey itself came to New Zealand with the settlers who brought the first honey bees in the late 1880s. But it appears to be the combination of mānuka and bee which is important. See citations in note 80 below.
72. Waikato Honey Research Unit, University of Waikato, 'Waikato Honey Research Unit', University of Waikato, <http://www.bio.waikato.ac.nz/honey> (accessed 12 March 2010)
73. Document P27 (Hirini (Syd) Clarke, brief of evidence on behalf of Ngāti Porou, 16 August 2006), p 4
74. Active Manuka Honey Association, 'Active Manuka Honey Association – the Official UMF Honey Producer's Site', Active Manuka Honey Association, <http://www.umf.org.nz/Licensees.html> (accessed 26 July 2010). Concerns about the marketing of mānuka honey prompted the launch of a new standard in late 2009. "The surging global demand for the proven health values of New Zealand mānuka honey is creating a major ethical concern in the way it is being marketed to consumers", says Professor Molan MBE, from the University of Waikato's Honey Research Unit. 'The 'Molan Gold Standard' is the new standard: University of Waikato, 'Manuka Honey's Medical Marvels Measured in Gold', University of Waikato, <http://www.waikato.ac.nz> (accessed 20 August 2010).
75. Deloitte, 'Deloitte Fast 50', Deloitte, <http://www.fast50.co.nz> (accessed 27 July 2010)
76. Ibid
77. For example, Ngāti Porou and Comvita, who make a substantial number of mānuka-related products, have a working relationship: Comvita, 'Comvita, Specialists in Natural Healthcare Products with a Bee Focus', Comvita, <http://www.comvita.com> (accessed 20 August 2010)
78. Document P27, p 7
79. Dee A Carter, Shona E Blair, and Julie Irish, *An Investigation into the Therapeutic Properties of Honey* (Canberra: Rural Industries Research and Development Corporation, 2010); B Zeiger, 'The Use of Active Leptospermum Honey Dressing to Re-initiate the Wound Healing Process', *Ostomy Wound Management*, vol 56, no 1 (2010), pp 1943–2720; Christopher J Adams, Cherie H Boulton, Benjamin J Deadman, Judie M Farr, Megan N C Grainger, Marilyn Manley-Harris, Melanie J Snow, 'Corrigendum to "Isolation by HPLC and Characterization of the Bioactive Fraction of New Zealand Manuka (*Leptospermum scoparium*) Honey"', *Carbohydrate Research*, vol 344, no 18 (2009), p 2609; Christopher J Adams, Marilyn Manley-Harris, Peter C Molan, 'The Origin of Methylglyoxal in New Zealand Manuka (*Leptospermum scoparium*) Honey', *Carbohydrate Research*, vol 344, no 8 (2009), pp 1050–1053; SE Blair, 'The Unusual Antibacterial Activity of Medical-grade Leptospermum Honey: Antibacterial Spectrum, Resistance and Transcriptome Analysis', *European Journal of Clinical Microbiology & Infectious Diseases*, vol 28, no 10 (2009), pp 1199–1208; Arne Simon, 'Medical Honey for Wound Care – Still the "Last Resort"?', *Evidence-based Complementary and Alternative Medicine*, vol 6, no 2 (2009), pp 165–173; Joy Bardy, 'A Systematic Review of Honey Uses and Its Potential Value within Oncology Care', *Journal of Clinical Nursing*, vol 17, no 19 (2008), pp 2604–2623; P C Molan and J A Betts, 'Using Honey to Heal Diabetic Foot Ulcers', *Advances in Skin & Wound Care*, vol 21, no 7 (2008), pp 313–316

80. Elvira Mavric, Silvia Wittmann, Gerold Barth, and Thomas Henle, 'Identification and Quantification of Methylglyoxal as the Dominant Antibacterial Constituent of Manuka (*Leptospermum scoparium*) Honeys from New Zealand', *Molecular Nutrition and Food Research*, vol 52, no 4 (2008), pp 483–489. Methylglyoxal is present in many foods and drinks, including coffee, and is produced during glycolysis and sugar fermentation: International Agency for Research on Cancer, 'Methylglyoxal (Group 3): 5. Summary of Data Report and Evaluation', *IARC Summaries and Evaluations*, vol 51 (1991), p 443.
81. 'The use of honey as a traditional remedy for bacterial infections is known since ancient times': Elvira Mavric et al, 'Identification and Quantification', p 483.
82. Professor Thomas Henle, interview by Gerry Ryan, RTÉ Radio, podcast audio, 18 September 2008, <http://www.rte.ie/podcasts/2008/pc/pod-v-180908-22m31s-weeklyryan.mp3> (accessed 26 August 2010)
83. Ibid
84. Patents 519778, 518044, 533368, 535038, 555191
85. Prior art refers to the publicly available information that might be relevant to an applicant's claim of novelty: see section 2.7.1.
86. United States Patent 6,514,539. Patents can be accessed via: United States Patent and Trademark Office, 'United States Patent and Trademark Office', United States Patent and Trademark Office, <http://www.uspto.gov> (accessed 23 August 2010).
87. United States Patent 4,946,682
88. The International Potato Centre in Lima reputedly holds seeds of more than 5,000 different varieties or forms of *Ipomoea Batatas*: doc R35 (Dr Ashley Gould, 'Kumara in New Zealand: Some Issues and Observations', report prepared for the Crown Law Office, 2007), pp 12, 23.
89. Riley, *Māori Healing and Herbal*, p 249
90. We note that recent research suggests Polynesians may in fact have made the long sea voyage to South America and there traded chickens for the sweet potato they took back with them to the islands: Alice A Storey, José Miguel Ramírez, Daniel Quiroz, David V Burley, David J Addison, Richard Walter, Athol J Anderson, et al, 'Radiocarbon and DNA Evidence for Pre-Columbian Introduction of Polynesian Chickens to Chile', *Proceedings of the National Academy of Sciences of the United States of America*, vol 104, no 25 (2007), pp 10335–10339.
91. For example, the well-known whakataukī in praise of modesty: Kāore te kūmara e kōrero mo tōna māngaro – The kūmara does not speak of its own sweetness.
92. Document A27(b), para 43
93. Margaret Orbell, *The Natural World of the Maori*, revised ed (Auckland: David Bateman Ltd, 1996), pp 63–64; doc K6, pp 112–113
94. Orbell, *Natural World of the Maori*, pp 63–64; doc K6, pp 112–113
95. Document A15(i), p 4093 (Pine Taiapa, 'How the Kumara Came to New Zealand', *Te Ao Hou*, vol 6, no 3 (1958), p 14)
96. Ibid, pp 4092–4094
97. Margaret Orbell, 'A Famous Oriori from Tauranga', *Te Ao Hou: The Maori Magazine* [electronic resource], National Library of New Zealand, <http://teaohou.natlib.govt.nz/journals/teaohou/issue/Mao53TeA/c12.html> (accessed 1 June 2011); see also Apirana Ngata and Pei Te Hurinui Jones, *Ngā Mōteatea*, 4 vols (Auckland: Polynesian Society, 2004), vol 1, pp 216–221
98. Document R35, p 13
99. Document R35, p 19. Dr Gould suggests that possibly only one of these three ancient lines of kūmara, Taputini, is pre-European (p 15). The others could be variations on varieties introduced in the nineteenth century. Claimant counsel, however, contested this assertion in their closing submissions, arguing that Dr Gould had not consulted with leading Māori experts on kūmara, and that, in their eyes, 'considerable doubt' had been cast upon the evidence relied on to suggest only the Taputini variety is pre-European: doc S3 (Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, closing submissions, 5 September 2007), p 262; also pp 261–266.
100. Louise Furey, *Maori Gardening: An Archaeological Perspective* (Wellington: Department of Conservation, 2006), p 12
101. Document A27(b), para 42
102. Ibid, para 60
103. Peter Adds, 'Kūmara – Tools and Storage Pits', *Te Ara Encyclopedia of New Zealand*, <http://www.teara.govt.nz/en/kumara/3> (accessed 1 June 2011)
104. Riley, *Māori Healing and Herbal*, pp 249–250 (quoted in doc K6, pp 114–115)
105. Ibid, p 250
106. Ibid, p 255
107. Document R35, p 14
108. Document Q16 (Horticulture New Zealand, brief of evidence as an interested party, 15 September 2006), p 3
109. Document R35, pp 14–15. Riley says waina is 'a transliteration of the English word "vine", [and] refers to the method of propagation, by vine cuttings, rather than by traditional root plantings': Riley, *Māori Healing and Herbal*, p 249.
110. Document Q16, p 4
111. Document R35, p 17
112. Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, submission on behalf of the claimants, 22nd hearing, 6 August 2007 (transcript 4.1.22, pp 174–175)

113. The New Zealand component of the collection was maintained by DSIR until the late 1970s, and by various individual scientists through to the mid-1980s: doc R35, pp 21, 169, 172–174.
114. Document A27(b), paras 70–72. We are aware that DNA analysis of all nine cultivars returned from Dr Yen's collection is ongoing under the auspices of Massey University and may yet yield more precise information about their provenance: doc S3, p 265.
115. Document R35, p 207
116. Document S3, p 297
117. Charles Daugherty and Susan Keall, 'Tuatara – Life History', Te Ara Encyclopedia of New Zealand, <http://www.teara.govt.nz/en/tuatara/1> (accessed 1 June 2011)
118. Hemi Nui a Tawhaki Witana, confidential oral evidence on behalf of Te Rarawa, 1st hearing, 16 September 1997 (transcript 4.1.1, p 41)
119. Document R15(j) (Department of Conservation, 'Tuatara Recovery Plan, 2001–2011'), pp 8–9
120. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, p 1306
121. We are aware that neighbouring Ngāti Kuia also claims some rights in Takapourewa and its resident tuatara. They were not represented in this inquiry and we would not wish any comments we make here to affect that claim one way or the other without having first heard from them. We apprehend, however, that whatever claims Ngāti Kuia make, they are most unlikely to be a denial of co-existing Ngāti Koata rights.
122. Document H8 (Alfred Elkington, brief of evidence on behalf of Ngāti Koata, undated), pp 6–7
123. Document H9 (Terewai Grace, brief of evidence on behalf of Ngāti Koata, undated), pp 15–16
124. Document H10 (Puhanga Tupaea, brief of evidence on behalf of Ngāti Koata, undated), p 12
125. Other research, carried out under the auspices of Victoria University's Professor Charles Daugherty and Dr Nicola Nelson, has occurred independent of Ngāti Koata's agreement with the Department of Conservation. Ben Hippolite and others spoke warmly of this particular work and relationship. Among other things, Professor Daugherty has been instrumental in setting up a scholarship with San Diego Zoo and Victoria University for Ngāti Koata youth to study tuatara, with the aim of 'returning reptiles to their Native environment for management by the Ngati Koata people': doc H16(b), p 161 (Victoria University of Wellington, 'Application for Support of a Conservation Program: Zoological Society of San Diego Conservation Fund', undated, p 1); doc R15 (Neil Clifton and Roy Grose, brief of evidence on behalf of the Department of Conservation, 21 November 2006), pp 27–28.
126. Document H16, pp 29–30; doc K2 (Robert McClean and Trecia Smith, 'The Crown and Flora and Fauna: Legislation, Policies, and Practices, 1983–98', report commissioned by the Waitangi Tribunal, 2001), pp 634–635
127. Document H11, p 20
128. Ibid
129. Previous application GMD03106: ERMA, *Annual Report: For the Year Ended 30 June 2004* (Wellington: ERMA, 2004), p 83
130. ERMA, *Environmental Risk Management Authority Decision: Application Code GMCO6005* (Wellington: ERMA, 2006), pp 3, 5
131. Donald Worster, *Nature's Economy: A History of Ecological Ideas*, 2nd ed (Cambridge: Cambridge University Press (1977), 1994), p 130; Stephen Jay Gould, *The Hedgehog, the Fox, and the Magister's Pox: Mending and Minding the Misconceived Gap Between Science and the Humanities* (London: Vintage, 2003), p 206
132. M P Singh and A K Sarma, *Textbook of Botany* (New Delhi: Anmol Publications, 2002), p 754
133. Document K5 (Cathy Marr, Robin Hodge, and Ben White, 'Crown Laws, Policies, and Practices in relation to Flora and Fauna, 1840–1912', report commissioned by the Waitangi Tribunal, 2001), p 55
134. Cooper and Cambie, *New Zealand's Economic Native Plants*, pp 5–7, 19–22; J R H Andrews, *The Southern Ark: Zoological Discovery in New Zealand, 1769–1900* (Auckland: Century Hutchinson, 1986), pp 8–9, 18
135. The Patents Act 1953, s 2, defines it thus: 'The Statute of Monopolies means the Act of the 21st year of the reign of King James the First, chapter 3, intituled "An Act concerning monopolies and dispensations with penal laws and the forfeiture thereof"'.
136. The statute was first introduced by Sir Edward Coke under the name a 'Bill for Free Trade'. This was not free trade in the modern sense; it was designed to protect English trade. The Bill was directed against unfair trade practices which interfered with employment, and was a response to the excesses of James I and previous monarchs. The Statute of Monopolies made charters and letters patent, which were solely to give monopolies over selling, making or using anything, 'utterly void and of none effect', and was directed at monopolies over important goods like starch, salt, paper, and glass: *Darcy v Allein (The Case of Monopolies)* (1602) 77 ER 1260 (KB).
137. Statute of Monopolies 1623 (UK), s 6. Grants were issued for a period of 14 years.
138. Section 2 of the Patents Act 1953 says: 'Invention means any manner of new manufacture the subject of letters patent and grant of privilege within section 6 of the Statute of Monopolies and any new method or process of testing applicable to the improvement or control of manufacture; and includes an alleged invention.'

139. Adam Smith, *An Inquiry into Nature and Causes of the Wealth of Nations* (Oxford: Oxford University Press, 1993), p 418; Christopher May and Susan K Sell, *Intellectual Property Rights: A Critical History* (Boulder: Lynne Rienner Publishers, 2006), p 98
140. Brad Sherman and Lionel Bentley, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (Cambridge: Cambridge University Press, 1999), p 109
141. *Ibid*, p 130
142. *Ibid*, pp 130–134
143. This at least is the theory. The question of whether some patents encourage and others stifle innovation is highly contentious.
144. One famous example is Louis Pasteur's invention of vaccines.
145. The importance of patents as an incentive for innovation and the importance of the public interest to a functioning patent system are reflected in the requirements of the TRIPS Agreement. See sections 1.3.3 and 1.4.1.
146. TRIPS Agreement, art 33; Patents Act 1953, s 33
147. Patents Act 1953, s 10
148. *Ibid*, s 10(4)
149. For the priority date of claims, see section 11 of the Patents Act 1953.
150. We will discuss in more detail below the legal requirements for patents, their applicability to genetic and biological resources, and the commercial utility of patents to their owners. We have introduced other forms of IP protection, such as copyright and trade marks, in the previous chapter.
151. The 2010 Budget allocated \$730 million in 2010/11 for non-departmental operational funding for RS&T: see New Zealand Government, *The Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2011* (Wellington: New Zealand Government, 2010), p 278.
152. Statistics New Zealand, *Research and Development Survey 2008* (Wellington: Statistics New Zealand, 2009), p 2
153. OECD, *OECD Science, Technology and Industry Outlook 2010* (Paris: OECD, 2010), p 23
154. The OECD defines biotechnology as 'the application of science and technology to living organisms, as well as parts, products and models thereof, to alter living or non-living materials for the production of knowledge, goods and services': van Beuzekom and Arundel, *OECD Biotechnology Statistics 2009*, p 9.
155. Ernst & Young, *Beyond Borders: Global Biotechnology Report 2009* (Ernst & Young, 2009), pp 24–25
156. Statistics New Zealand, *Bioscience Survey: 2009* (Wellington: Statistics New Zealand, 2010), p 7
157. Van Beuzekom and Arundel, *OECD Biotechnology Statistics 2009*, p 19; NZBIO, *New Zealand Biotechnology Industry Growth Report 2008* (Wellington: NZBIO, 2009), p 7
158. NZBIO, *New Zealand Biotechnology Industry Growth Report 2008*, p 25
159. *Ibid*, pp 20–21
160. Ernst & Young, *Beyond Borders: Global Biotechnology Report 2009*, p 122
161. David J Newman and Gordon M Cragg, 'Natural Products as Sources of New Drugs Over the Last 25 Years', *Journal of Natural Products*, vol 70, no 3 (2007), p 461. Natural products are chemical compounds derived from living organisms.
162. *World Atlas of Biodiversity: Earth's Living Resources in the 21st Century* (London: University of California Press, 2002)
163. United Nations Environment Programme, "'World Atlas of Biodiversity" First Map-Based View of Earth's Living Resource' (media release 2002/53, London, 1 August 2002)
164. One example is BioDiscovery New Zealand. This company 'currently has a collection of over 45,000 indigenous microbes, each screened for bioactivity against a panel of 10 plant pests and diseases; this research is ongoing. Central to BioDiscovery's research approach is its ability to legitimately access the diverse ecosystems of New Zealand, one of the world's least exploited natural resources': BioDiscovery New Zealand Limited, 'Biodiversity NZ Limited', BioDiscovery New Zealand Limited, <http://www.biodiscovery.co.nz/> (accessed 28 July 2010).
165. *In situ* refers to genetic and biological resources within their natural habitat, whereas *ex situ* genetic and biological resources are located outside their natural habitats.
166. Ministry for the Environment, 'Jurisdictional boundaries and areas defined by the United Nations Convention on the Law of the Sea (UNCLOS) and under domestic legislation', Ministry for the Environment, <http://www.mfe.govt.nz/issues/oceans/jurisdictional.html> (accessed 28 July 2010)
167. Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, 'United Nations Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples', E/CN.4/Sub.2/1993/28, 28 July 1993, para 20; doc P13(f) (S James Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State', *Arizona Journal of International and Comparative Law*, vol 21, no 1 (2004)), p 33
168. Richard W Spjut and Robert E Perdue, Jr, 'Plant Folklore: A Tool for Predicting Sources of Antitumor Activity?', *Cancer Treatment Reports*, vol 60, no 8 (1976), pp 979–985. See also Misaki M Koyama and Mariam Mayet, *Bioprospecting, Biopiracy and Indigenous Knowledge: Two Case Studies from the Eastern Cape Province, South Africa* (Johannesburg: African Centre for

- Biosafety, 2007), p 11; Josephine R Axt, M Lynne Corn, Margaret Lee, and David M Ackerman, *Biotechnology, Indigenous Peoples, and Intellectual Property Rights* (Washington DC: Congressional Research Service, 1993), p 11; Peter P Principe, 'Valuing the Biodiversity of Medicinal Plants', in *Conservation of Medicinal Plants*, ed Olayiwola Akerele, Vernon Heywood, and Hugh Syngé (Cambridge: Cambridge University Press, 1991), p 92; Norman R Farnsworth, Olayiwola Akerele, Audrey S Bingel, Djaja D Soejarto, and Zhengang Guo, 'Medicinal Plants in Therapy', *Bulletin of the World Health Organisation*, vol 63, no 6 (1985), pp 965–981; Matthew Suffness and John Douros, 'Drugs of Plant Origin', *Methods of Cancer Research*, vol 16 (1979), p 77.
169. We note that as of September 2008 there is 'no significant synthetic biology research activity in New Zealand': MORST, 'Futurewatch: Synthetic Biology – MORST', MORST, <http://www.morst.govt.nz/publications/a-z/f/futurewatch-synthetic-biology/> (accessed 28 July 2010).
170. Daniel G Gibson, John I Glass, Carole Lartigue, Vladimir N Noskov, Ray-Yuan Chuang, Mikkel A Algire, Gwynedd A Benders, et al, 'Creation of a Bacterial Cell Controlled by a Chemically Synthesized Genome', *Science Express*, vol 329, no 5,987 (2010), pp 52–56 (published online 20 May 2010 (10.1126/science.1190719)).
171. *Cry1Ca5* and *Cry1Ba1* genes. Crop and Food Research merged with HortResearch in 2008 to form Plant and Food Research Limited.
172. ERMA, 'ERMA: GM Brassicas', ERMA, <http://www.ermanz.govt.nz/news-events/focus/brassicas06/index.html> (accessed 2 August 2010); Crop and Food Research, 'Bt brassicas – Crop & Food Research', Crop and Food Research, <http://www.crop.cri.nz/home/research/plants/brassica-faqs.php> (accessed 2 August 2010)
173. ERMA, 'ERMA: Search the ERMA Registers (Superseded Database – No Longer Updated)', ERMA, <http://www.ermanz.govt.nz> (accessed 9 September 2010)
174. Royal Commission on Genetic Modification, *Report of the Royal Commission on Genetic Modification* (Wellington: Royal Commission on Genetic Modification, 2001), p 5. We are also aware of the definition of genetically modified organism in section 2 of the HSNO Act 1996, but we found this a less useful description for explaining the process of genetic modification.
175. Ministry for the Environment, 'New and Genetically Modified Organisms', Ministry for the Environment, <http://www.mfe.govt.nz/issues/organisms> (accessed 2 August 2010)
176. A new Environmental Protection Authority will be operational by 1 July 2011. It will combine the functions of ERMA with other national-level regulatory and consenting functions. The Environmental Protection Authority Bill was introduced into Parliament on 16 November 2010 and passed its third reading on 11 May 2011.
177. Statistics New Zealand, *Biotechnology in New Zealand 2005* (Wellington: Statistics New Zealand, 2006), p 16; Statistics New Zealand, *Bioscience Survey 2009* (Wellington: Statistics New Zealand, 2010), p 6
178. Van Beuzekom and Arundel, *OECD Biotechnology Statistics 2009*, p 71. The Patent Cooperation Treaty is a treaty administered by the Geneva-based World Intellectual Property Organization (WIPO – a specialised United Nations agency). The main purpose of the Patent Cooperation Treaty is to assist patent applicants in registering their patents in different countries. A Patent Cooperation Treaty application is not a global patent – no such thing exists. Rather, it is the internationally agreed means through which countries cooperate in enabling someone to apply for patents in different countries for the same invention. We discuss the details of patent law below.
179. Document P30(a) (Aroha Mead, brief of evidence on behalf of Ngāti Porou, 16 August 2006), pp 59–60
180. Document P30(f) (Aroha Mead, brief of evidence on behalf of Ngāti Porou, 17 September 2006), paras 28–30
181. Document P30(a), p 60
182. Document K10 (Robert McGowan, brief of evidence on behalf of Ngāti Kuri, Ngāti Wai, and Te Rarawa, 7 February 2002); Robert McGowan, oral evidence on behalf of Ngāti Kuri, Ngāti Wai, and Te Rarawa, 12th hearing, 7 May 2002 (transcript 4.1.12, pp 164–165)
183. Document K9 (Angeline Greensill, brief of evidence on behalf of the claimants), pp 10, 14–16
184. Murray Hemopo, under questioning by the Tribunal, 10th hearing, 2 August 2000 (transcript 4.1.10, p 285)
185. Document P56, attachment B (Jessica Hutchings, 'Te Whakaruruhau, te Ukaipo: Mana Wahine and Genetic Modification', PhD thesis, Victoria University of Wellington, 2002); doc K10, p 3; doc K11, p 10; doc J2 (Bevan Tipene-Matua, brief of evidence on behalf of Ngāti Kahungunu, 2001)
186. Professor Thomas Henle, interview by Gerry Ryan, RTÉ Radio, podcast audio, 18 September 2008, <http://www.rte.ie/podcasts/2008/pc/pod-v-180908-22m31s-weeklyryan.mp3> (accessed 26 August 2010)
187. Document P14 (Robert McGowan, brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006), p 7
188. Document F12 (Darrell A Posey and Graham Dutfeld, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996), pp 80–81. In 2000 the European Patent Office revoked a patent granted earlier (to a United States chemical company) to a fungicide derived from the Indian medicinal tree, neem, which has been in traditional use in India for many centuries.
189. Document P14, pp 7–8

190. Document T1 (Crown counsel, closing submissions, 21 May 2007), pp 63–65, 67
191. Paper 2.314, pp 37–38; paper 2.256 (Crown counsel, statement of response, 28 June 2002), pp 20–21
192. Document R16 (Mark Steel, brief of evidence on behalf of the Ministry of Economic Development, 21 November 2006), p 85
193. Ibid
194. Mark Steel, under cross-examination by counsel for the claimants, 20th hearing, 22 December 2006 (transcript 4.1.20, p 364)
195. 'Background on the Convention on Biological Diversity and the Access and Benefit Sharing Working Group', annex to Cabinet Business Committee, 'Convention on Biological Diversity: Negotiations for a Regime on Access and Benefit Sharing of Genetic Resources: New Zealand Position', Cabinet Business Committee Paper, CBC(05)382, 9 December 2005, para 19
196. Ibid, para 8; doc R34 (Gerard van Bohemen, brief of evidence on behalf of the Ministry of Foreign Affairs and Trade, 8 January 2007), p 86
197. Document R34, pp 58–59
198. For a general introduction, see doc P13 (Claire Charters, 'Developments in Indigenous People's Rights under International Law and their Domestic Implications', *New Zealand Universities Law Review*, vol 21 (2005)), pp 511–553.
199. New Zealand signed up to the CBD on 12 June 1992 and ratified it on 16 September 1993. The CBD entered into force on 29 December 1993.
200. List of Parties available at: CBD, 'List of Parties', CBD, <http://www.cbd.int/convention/parties/list> (accessed 2 August 2010)
201. CBD, art 37
202. Ibid, art 1
203. Vienna Convention on the Law of Treaties 1969, art 26
204. Disputes between the signatory states concerning the interpretation and application of the CBD are subject to arbitration or submission to the International Court of Justice: see article 27(3) and part 1 of annex 11 of the CBD). However, these avenues are theoretical. A state cannot generally sue another state for breach of international law unless it has suffered by the breach. The non-reciprocal character of the obligations under the CBD makes it impossible for any complaining state to meet this requirement.
205. CBD, art 1
206. Excluded from the scope of the ABS mechanism are the following genetic resources:
 - ▶ *ex situ* material that was obtained prior to the entry into force (29 December 1993) of the CBD;
 - ▶ human genetic resources;
 - ▶ resources situated beyond national jurisdiction (for example, the high seas); and
 - ▶ plant genetic resources for food and agriculture, which are subject to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).New Zealand is not party to the International Treaty on Plant Genetic Resources for Food and Agriculture, but that treaty contains similar access and benefit sharing provisions to those in article 15 of the CBD.
207. CBD, art 8(j)
208. Ibid
209. Document P30(a), pp 17–18
210. CBD, art 23
211. CBD, 'Convention on Biological Diversity', CBD, <http://www.cbd.int> (accessed 30 July 2010)
212. Conference of the Parties to the Convention on Biological Diversity, 6th meeting, The Hague, 7–19 April 2002, 'VI/24: Access and Benefit-Sharing as Related to Genetic Resources', *Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity* (UNEP/CBD/COP/6/20), 27 May 2002, pp 253–277
213. Secretariat of the Convention on Biological Diversity, *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (Montreal: Secretariat of the Convention on Biological Diversity, 2002), para 9
214. Ibid, para 24
215. See Conference of the Parties to the Convention on Biological Diversity, 3rd meeting, Buenos Aires, 4–15 November 1996, 'III/14 Implementation of Article 8(j)', *Report of the Third Meeting of the Conference of the Parties to the Convention on Biological Diversity* (UNEP/CBD/COP/3/38), 11 February 1997, pp 90–94; Conference of the Parties to the Convention on Biological Diversity, 4th meeting, Bratislava, 4–15 May 1998, 'IV/9 Implementation of Article 8(j) and Related Provisions', *Report of the Fourth Meeting of the Conference of the Parties to the Convention on Biological Diversity* (UNEP/CBD/COP/4/27), 15 June 1998, pp 111–115; Conference of the Parties to the Convention on Biological Diversity, 5th meeting, Nairobi, 15–26 May 2000, 'V/16: Article 8(j) and Related Provisions', *Report of the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity* (UNEP/CBD/COP/5/23), 22 June 2000, pp 139–146; Conference of the Parties to the Convention on Biological Diversity, 6th meeting, The Hague, 7–19 April 2002, 'VI/10: Article 8(j) and Related Provisions', *Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity* (UNEP/CBD/COP/6/20), 27 May 2002, pp 151–172; Conference of the Parties to the Convention on Biological Diversity, 7th meeting, Kuala Lumpur, 9–20, 27 February 2004, *Decision VII/16: Article 8(j) and Related Provisions* (UNEP/CBD/COP/DEC/VII/16), 13 April 2004; Conference of the Parties to the Convention on Biological Diversity, 8th meeting, Curitiba, 20–31 March 2006, *Decision*

- VIII/5: *Article 8(j) and Related Provisions* (UNEP/CBD/COP/DEC/VIII/5), 15 June 2006; and Conference of the Parties to the Convention on Biological Diversity, 9th meeting, Bonn, 19–30 May 2008, *Decision 1X/13: Article 8(j) and Related Provisions* (UNEP/CBD/COP/DEC/1X/13), 9 October 2008.
216. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, opened for signature 2 February 2011)
 217. At the time of writing, 21 signatory states: <http://www.cbd.int/abs/nagoya-protocol/signatories/> (accessed 15 May 2011).
 218. Document R34, p 53
 219. Nagoya Protocol, art 3
 220. CBD, art 16(2)
 221. WIPO, *Paris Convention for the Protection of Industrial Property*, WIPO, http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (accessed 31 March 2010)
 222. TRIPS Agreement, arts 2, 3(1). For a general overview regarding the TRIPS Agreement see: WTO, 'WTO | Understanding the WTO – Intellectual Property: Protection and Enforcement', WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (accessed 2 August 2010).
 223. TRIPS Agreement, art 27(1). See also the discussion in section 2.7.2 regarding the TRIPS Agreement and protection of plants as patents or under a *sui generis* PVR regime.
 224. Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 of the Agreement Establishing the World Trade Organization 1994
 225. CBD, art 22(1)
 226. See, for example, Pascal Lamy on the latest developments in the Doha Round: WTO, 'WTO 2010 News Item – Trade Negotiations Committee – Statement by Pascal Lamy to the TNC, 26 March 2010', WTO, <http://www.wto.org> (accessed 4 August 2010). The Doha Ministerial Declaration of the WTO instructed the TRIPS Council to examine the relationship between the CBD and traditional knowledge in the context of a review of the Trade-Related Aspects of Intellectual Property Rights Agreement, pursuant to article 71 of the TRIPS Agreement. This review has focused on article 27(3) of the Trade-Related Aspects of Intellectual Property Rights Agreement, which allows members to exclude plants and animals, and essentially biological processes for producing plants and animals, from patentability. Text available at: WTO, 'The Doha Declaration explained', WTO, http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (accessed 4 August 2010).
 227. A summary of the different proposals is available at: WTO, 'WTO Doha Development Agenda The July 2008 package – Briefing Notes – Intellectual Property: Geographical Indications and Biodiversity', WTO, <http://www.wto.org> (accessed 4 August 2010). For another excellent summary, see the Chatham House Report prepared by Alison Hoare and Richard Tarasofsky, *Disclosure of Origin in IPR Applications: Options and Perspectives of Users and Providers of Genetic Resources* (London: Royal Institute of International Affairs, 2006).
 228. For further details on the proposals and discussion before the TRIPS Council, see Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (London: Sweet & Maxwell/Thomson Reuters, 2008), paras 1.91–1.104.
 229. WTO, Trade Negotiations Committee, 'Draft Modalities for TRIPS Related Issues', TN/C/W/52, 19 July 2008
 230. WIPO, 'Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge', study no 3, UNEP/CBD/COP/7/INF/17, February 2004; WIPO, 'Genetic Resources', WIPO, <http://www.wipo.int/tk/en/genetic/> (accessed 24 August 2010): The WIPO Intergovernmental Committee (IGC) describes a 'key feature' of its work as having been 'coordination with and responsiveness to the work of the Convention on Biological Diversity (CBD), the Food and Agricultural Organization of the United Nations (FAO) and the United Nations Environment Programme (UNEP)'. The IGC's work has covered three main areas, which it describes as:
 - ▶ Defensive protection of genetic resources through measures which prevent the grant of patents over genetic resources that do not fulfil the requirements of novelty and non-obviousness. The measures taken by WIPO include the creation of improved search tools and classification systems for patent examiners when they examine patent applications which claim genetic resources.
 - ▶ IP aspects of access to genetic resources and equitable benefit-sharing arrangements that govern use of genetic resources. The IGC commissioned a database to serve as a capacity-building tool and to help inform policy debate. This database provides illustrative examples of the approaches actually taken when reaching mutually agreed terms concerning access and benefit sharing. The IGC has also worked on broad principles and draft materials on guidelines for IP aspects of equitable benefit-sharing arrangements, in line with the encouragement of the CBD's Conference of the Parties.
 - ▶ Disclosure requirements in patent applications that relate to genetic resources and associated TK used in a claimed invention. At the invitation of the CBD's Conference of the Parties, the IGC prepared a technical study on this issue, with input from many WIPO Member States. Additional work on this issue is being undertaken in WIPO, partly in response to a further invitation from the CBD's Conference of the Parties, including the development of a supplementary document which examines some specific issues raised by the conference in more detail.
 231. For example, Belgium, Denmark, Germany, Norway, and Sweden (prompted by Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of

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- Biotechnical Inventions), as well as Brazil, Columbia, Costa Rica, and Peru.
232. Wildlife Act 1953, s 57(3): but see exceptions in schedules 1, 3, 5, and 6 relating largely but not entirely to introduced species in the wild.
233. Wild Animal Control Act 1977, s 9(1)
234. Fisheries Act 1996, s 97(1)(a)(ii)
235. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 558 (CA)
236. National Parks Act 1980, s 44
237. Such material includes indigenous species (or parts thereof), fossilised plant or animal material, soils, rocks, and any other geological material: Department of Conservation, *Conservation General Policy*, amended ed (Wellington: Department of Conservation, 2007), pp 46–47.
238. Department of Conservation, *Conservation General Policy*, p 46. Section 11 of the *General Policy for National Parks* refers to ‘interests in research and monitoring relating to national parks’ and does not mention ‘cooperative arrangements’: New Zealand Conservation Authority, *General Policy for National Parks*, amended ed (Wellington: Department of Conservation, 2007), pp 55–56.
239. Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 3. This is the implementing Act of the international law of the sea. It determines New Zealand’s sovereignty, jurisdiction, and sovereign rights over the different zones in the marine environment, that is, internal waters, the territorial sea, the contiguous zone, the exclusive economic zone, and international waters. New Zealand ratified the United Nations Convention on the Law of the Sea (UNCLOS 1982) in 1996.
240. That is, the foreshore, seabed, coastal waters, and airspace above the water extending between mean high-water springs and the edge of New Zealand’s territorial sea: Resource Management Act 1991, s 2.
241. The Resource Management Act applies to the territorial sea only: Resource Management Act 1991, s 2: Derek Nolan, ed, *Environmental and Resource Management Law* (LexisNexis, online looseleaf version), para 5.86.
242. Resource Management Act 1991, ss 56–58A, 64
243. UNCLOS, arts 33, 56
244. Section 9 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 defines New Zealand’s exclusive economic zone as those areas of the sea, seabed, and subsoil that stretch from the seaward edge of the territorial sea out to 200 nautical miles from the baseline.
245. Fisheries Act 1996, s 97(4). Aquatic life (a) means any species of plant or animal life that, at any stage in its life history, must inhabit water, whether living or dead; and (b) includes seabirds (whether or not in the aquatic environment): Fisheries Act 1996, s 2(1).
246. UNCLOS 1982, art 246(2)
247. Continental Shelf Act 1964, s 6
248. Document R16(ff) (Ministry of Economic Development, *Bioprospecting in New Zealand: Discussing the Options* (Wellington: Ministry of Economic Development, 2002). See also the paper, Ministry of Economic Development, ‘Major Issues Raised in Submissions in 2002 | Past Consultation and Reviews | Archives: “Major Issues Raised in the Submissions to the Bioprospecting Discussion Document”’, Ministry of Economic Development, <http://www.med.govt.nz> (accessed 4 August 2010).
249. Ministry of Economic Development, *Bioprospecting: Harnessing Benefits for New Zealand; A Policy Framework Discussion* (Wellington: Ministry of Economic Development, 2007); Ministry of Economic Development, ‘Stakeholder Engagement | Phase 1: Engagement on Discussion Document | Consultation and Engagement’, Ministry of Economic Development, <http://www.med.govt.nz> (accessed 4 August 2010)
250. Ministry of Economic Development, *Bioprospecting: Harnessing Benefits*, p 36
251. Ibid
252. Ibid, pp 32–35
253. Ibid, p 32
254. Ibid, p 4; Minister of Energy, ‘Bioprospecting: Report on Recent Consultation’, paper to Cabinet Policy Committee, undated
255. Details available at: Ministry of Economic Development, ‘Phase 2a: Biodiversity Working Groups’, Ministry of Economic Development, <http://www.med.govt.nz> (accessed 4 August 2010; page now discontinued).
256. The Biodiscovery Taumata group, established in October 2009, evolved out of these four working groups. Details available at Ministry of Economic Development, ‘Biodiversity Taumata Notes’, 15 October 2009, which notes that ‘biodiscovery and bioprospecting are tending to be used interchangeably at the moment, as there isn’t yet a consensus about “biodiscovery” being the preferred term’ (p 3).
257. Document R34(ddd) (Minister of Foreign Affairs, ‘Negotiations on International Regime for Access and Benefit Sharing (Bioprospecting)’, Cabinet paper, undated), p 1
258. HSNO Act 1996, ss 2(1), 2A(1)(d). All GMOs are new organisms according to section 2A(1)(d) of the Act, and are therefore generally subject to its provisions. ‘New’ refers to an organism that belongs to a species that was not present in New Zealand immediately before 29 July 1998. An organism ceases to be a new organism once an approval has been given.
259. The HSNO Act came into force on 1 July 1998. For the development of the Act, see doc K2, pp 612–620.

- 260.** HSNO Act 1996, s 25(1)(b). Under the Hazardous Substances and New Organisms (Organisms Not Genetically Modified) Regulations 1998, certain organisms derived from specified processes are not regarded as genetically modified for the purposes of the Act. Regulation 3 excludes the following:
- (a) organisms that result solely from selection or natural regeneration, hand pollination, or other managed, controlled pollination:
 - (b) organisms that are regenerated from organs, tissues, or cell culture, including those produced through selection and propagation of somaclonal variants, embryo rescue, and cell fusion (including protoplast fusion or chemical or radiation treatments that cause changes in chromosome number or cause chromosome rearrangements):
 - (c) organisms that result solely from artificial insemination, superovulation, embryo transfer, or embryo splitting:
 - (d) organisms modified solely by —
 - (i) the movement of nucleic acids using physiological processes, including conjugation, transduction, and transformation; and
 - (ii) plasmid loss or spontaneous deletion:
 - (e) organisms resulting from spontaneous deletions, rearrangements, and amplifications within a single genome, including its extrachromosomal elements, e.g. organisms developed from tissue culture techniques, artificial insemination.
- 261.** Section 2 of the HSNO Act 1996 defines ‘develop’ as genetic modification of an organism; regeneration of a new organism from biological material, that cannot, without human intervention, be used to reproduce the organism; and fermentation of a micro-organism that is a new organism.
- 262.** ERMA, ‘ERMA: Who Makes the Decisions?’, ERMA, <http://www.ermanz.govt.nz/about-us/what/have-your-say/Pages/decision-maker.aspx> (accessed 30 April 2011)
- 263.** HSNO Act 1996, s 24A
- 264.** Ibid, s 4
- 265.** Ibid, s 5
- 266.** Ibid, s 9
- 267.** Hazardous Substances and New Organisms (Methodology) Order 1998 (SR 1998/217)
- 268.** Paper 2.513 (Crown Counsel, memorandum providing further information, 1 October 2009), p 10
- 269.** ERMA, ‘ERMA: What We Do’, ERMA, <http://www.ermanz.govt.nz/about/whatwe-do.html> (last accessed 4 August 2010; page now discontinued)
- 270.** HSNO Act 1996, ss 16(1), 15(1)
- 271.** Ibid, s 16(2)
- 272.** Ibid, s 61(3)
- 273.** HSNO Act 1996, s 126: but see the limited provision for full merits appeals to the District Court under section 125, part 6, and part 7 decisions.
- 274.** Ibid, s 68. ‘Call in’ means that the Minister and not the Authority becomes the consenting authority for a particular application.
- 275.** Ibid, s 68(1)(a)
- 276.** Ibid, s 17
- 277.** ERMA, *Annual Report for the Year Ended 30 June 2010* (Wellington: ERMA, 2010), p 14
- 278.** Document R18 (Robert Forlong, brief of evidence on behalf of ERMA, 21 November 2006), p 7
- 279.** Document R18, p 4
- 280.** HSNO Act 1996, s 24B(1)
- 281.** Ibid, s 24B(2)
- 282.** Document R18, pp 5–6
- 283.** HSNO Act 1996, s 24C(1)–(3)
- 284.** Document R18, pp 5–6
- 285.** Ibid, p 7
- 286.** HSNO Act 1996, ss 42B, 42A
- 287.** Hazardous Substances and New Organisms (Low-Risk Genetic Modification) Regulations 2003, cl 4. Clause 5 distinguishes between Category A and B low-risk genetic modification.
- 288.** Clause 7(1) defines a ‘category 1 host organism’ as an organism that:
- (a) is clearly identifiable and classifiable according to genus, species, and strain or other sub-specific category as appropriate; and
 - (b) is not normally able to cause disease in humans, animals, plants, or fungi; and
 - (c) does not contain infectious agents normally able to cause disease in humans, animals, plants, or fungi; and
 - (d) does not produce desiccation-resistant structures, such as spores or cysts, that can normally be disseminated in the air; and
 - (e) is characterised to the extent that its main biological characteristics are known; and
 - (f) does not normally infect, colonise, or establish in humans.
- For PC1 containment see regulation 5(1)(b) and 3. Section 2 of the HSNO Act 1996 defines ‘containment’ as restricting an organism or substance to a secure location or facility to prevent escape.
- 289.** Hazardous Substances and New Organisms (Low-Risk Genetic Modification) Regulations 2003, cls 4, 5(1), 5(2), 7
- 290.** Physical containment level 1 or 2: Hazardous Substances and New Organisms (Low-Risk Genetic Modification) Regulations 2003, cl 3.

291. Hazardous Substances and New Organisms (Low-Risk Genetic Modification) Regulations 2003, cls 5, 7
292. ERMA, 'ERMA: Project Approvals for Low-Risk Genetically Modified Organisms', ERMA, <http://www.ermanz.govt.nz/resources/publications/policy/no/lrgmo.html> (accessed 24 August 2010)
293. HSNO Act 1996, ss 42, 42A, 42B, 53(2)(b)
294. Ibid, ss 42A, 42B
295. The term 'project' is defined as 'a programme of work with defined objectives involving genetic modifications or GMOS, which is carried out within a containment structure, comprises the use of defined ranges of host organisms, vectors and donor material, and providing a sufficient description of the GMOS which will be produced to confirm that they conform with any prescribed constraints imposed on project approvals': 'Project Approvals for Low-Risk Genetically Modified Organisms' in ERMA, 'Policy Documents Relating to New Organisms', *ERMA New Zealand Policy Series* (Wellington: ERMA, May 2006), p 15.
296. ERMA, *Requirements for Delegation of Power* (Wellington: ERMA, 2007), p 7
297. HSNO Act 1996, s 19(2)(a)
298. ERMA, 'ERMA: Institutional Biological Safety Committees and Low-Risk Genetically Modified Organism Decision Making', ERMA, <http://www.ermanz.govt.nz> (accessed 4 August 2010)
299. For the exemptions see doc R18(b), pp 34–35 (ERMA, 'Māori Membership of Institutional Biological Safety Committees (IBSCs) and Consultation Requirements with the Māori Community', *ERMA New Zealand Policy Series* (Wellington: ERMA, May 2006), pp 1–2)
300. Document R18(b), p 1
301. Hazardous Substances and New Organisms (Low-Risk Genetic Modification) Regulations 2003, sch
302. HSNO Act 1996, s 53. See section 38G(2)(a) in relation to review of conditional release approvals. As noted above, provisions for public notification and a full submission process do not apply to development approvals made under rapid assessment provisions. See also sections 42, 42A, and 42B.
- Field testing is defined as 'the carrying on of trials on the effects of the organism under conditions similar to those of the environment into which the organism is likely to be released, but from which the organism, or any heritable material arising from it, could be retrieved or destroyed at the end of the trials': HSNO Act 1996, s 2.
303. HSNO Act 1996, s 53(2). As noted above, this does not apply to development approvals made under rapid assessment provisions.
304. See generally sections 52 to 67A of the HSNO Act 1996 as to process.
305. In 2009/10 there were no applications in the non-low-risk category 'GMO field test and outdoor developments', compared with 23 applications received and processed for the low-risk category 'GMO development in containment': ERMA, *Annual Report for the Year Ended 30 June 2010*, (Wellington: ERMA, 2010), p 19.
306. We are aware that a new policy on consultation with Māori is under consideration: ERMA, 'Māori National Network', *Te Pūtara*, issue 21 (March 2011), p 3. Some of the related documentation on ERMA's website has recently been archived as 'not current'.
307. The requirement in point (b) applies to the use of a human cell as the host (which is unlikely to occur under the HSNO Act 1996), or more commonly to the use of human DNA as donor material. It does not apply to the use of human cells that are not genetically modified, because such cells are not in themselves subject to the HSNO Act. Further detail regarding points (b) and (c) is provided in the policies: ERMA, 'ERMA: Requirements for Consultation with Māori on HSNO Applications that Involve Human Cell Lines and/or Human DNA', ERMA, <http://archive.ermanz.govt.nz/resources/publications/policy/no/consultmaorihuman.html> (accessed 30 April 2011; not current); doc R18(b), p 4.
308. Document R18(b), p 4
309. Ibid, p 5
310. Ibid, p 3
311. Ibid
312. However, any such agreement must be documented, for example, in the form of an MOU, and will be subject to audit by the parties and by 'Māori Membership of Institutional Biological Safety Committees (IBSCs) and Consultation Requirements with the Māori Community': see doc R18(b), p 3.
313. Document R18(b), pp 3–5
314. Document R18, pp 9–12; ERMA, 'Incorporating Māori Perspectives in Part V Decision Making: ERMA New Zealand Policy Series: Protocol 1' (Wellington: ERMA, 2004); ERMA, 'Working with Māori under the HSNO Act 1996: A Guide for Applicants' (Wellington: ERMA, 2005)
315. Paper 2.513 (Crown counsel, memorandum providing further information, 1 October 2009), p 9
316. Document R18(s) (ERMA, 'Kia Pūmau te Manaaki Strategy 2009–2010', 2009), p 5
317. Sixty-six participants attended the annual ERMA New Zealand Māori National Network hui held at Waiwhetū Marae in Lower Hutt on 29 and 30 July 2010: ERMA, *Annual Māori National Network Hui 2010* (Wellington: ERMA, 2010), <http://www.ermanz.govt.nz/Publications/MNN-Hui-2010-Summary-Report-Final.doc> (accessed 7 April 2011).
318. Document R18(s), pp 9–15
319. Document P56, p 51

320. Document P64 (Counsel for Ngāti Kahungunu, submission on behalf of Ngāti Kahungunu, 4 September 2006), pp 8–9
321. Document H16, p 30
322. Document J3 (Murray Hemi, brief of evidence on behalf of Ngāti Kahungunu, undated), pp 4–7
323. Dr Peter Wills, oral submission, 12th hearing, 8 May 2002 (transcript 4.1.12, p 237)
324. Ibid
325. Document K9, p 14; doc K12, p 20; doc S3, pp 244–245
326. Document J2, attachment c (Dr RM Roberts, ‘Genetically Modified Organisms and Maori: A Critique of the RMA Process for Assessing Cultural Effects Under the HSNO Act 1996’, 10 December 2000), pp 4–6
327. Document R18, p 8
328. Bevan Tipene-Matua, ‘The Maori Aspects of Genetic Modification’ background paper to the Royal Commission on Genetic Modification, August 2000, p 7; doc P9 (Bevan Tipene-Matua, brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006), pp 4–6; doc J2, p 10; doc K2, pp 633–634
329. Document J2, p 12
330. Document K12, pp 19–20
331. Document K9, p 13
332. Angeline Greensill, under cross-examination by counsel for Ngāti Koata, 12th hearing, 10 May 2002 (transcript 4.1.12, pp 429–430)
333. Hazardous Substances and New Organisms (Methodology) Order 1998, sch, cls 25, 26
334. Document K9, pp 13–14
335. Robert Forlong, under cross-examination by counsel for the claimants, 20th hearing, 19 December 2006 (transcript 4.1.20, p 149)
336. Document R18, pp 4–12
337. Professor Mason Durie, under cross-examination by Crown counsel, 12th hearing, 6 May 2002 (transcript 4.1.12, pp 51–53)
338. Document P9, pp 6–7
339. Gerrard Albert, oral evidence on behalf of Ngāti Koata, 17th hearing, 7 September 2006 (transcript 4.1.17, p 370)
340. Gerrard Albert, oral evidence on behalf of Ngāti Koata, 17th hearing, 7 September 2006 (transcript 4.1.17, p 370); Dr Peter Wills, under cross-examination by Crown counsel, 12th hearing, 8 May 2002 (transcript 4.1.12, p 269)
341. *Bleakley v ERMA* [2001] 3 NZLR 213
342. Document K2, pp 635–648
343. In 2010, AgResearch filed another application to develop, in containment, GM goats, sheep, and cattle to produce human therapeutic proteins. This application was notified to the public and received 1,545 submissions. Thirty-seven submitters presented their case at a hearing in Hamilton on 1 and 2 March 2010. On 15 April 2010, the committee released its decision to approve the application with controls. GE Free New Zealand filed a notice of appeal in the High Court against the decision of the Authority to approve the application. The High Court hearing was held in November 2010; the appeal was dismissed: ERMA, *Annual Report for the Year Ended 30 June 2010* (Wellington: ERMA, 2010), p 9; *GE Free NZ in Food and Environment Incorporated v Environmental Risk Management Authority and others*, 16 December 2010, Gendall J, High Court, Wellington, WN CIV-2010-485-000823.
344. Patents Bill 235–2 (2008)
345. Treaty of Waitangi Act 1975, s 6(6)
346. Document R16(t) (*Patents Bill: Draft for Consultation* (Wellington: New Zealand Government, 2004)); see also doc R16, pp 56–62; *AG v Mair* [2009] NZCA 625 per Baragwanath J
347. Patents Act 1953, s 2(1): ‘Patent means letters patent for an invention’.
348. There is a thin exception to this, which is that non-commercial experimental use of the patent may not infringe the patent. However, this defence will not be valid if the experimental use leads to commercialisation, no matter how minimal or indirect that commercialisation is: *Smith Kline & French Laboratories v Attorney General* [1991] 2 NZLR 560.
349. There is one Commissioner of Patents, Trade Marks and Designs and a separate Commissioner of Plant Variety Rights. For simplicity, we refer to the roles separately in their particular statutory contexts.
350. This level of examination was also the system in England under the now repealed 1949 Act. Patents are now fully examined before registration in Britain.
351. *Swift & Co’s Application* [1962] RPC 37 at 46; see adoption of this principle confirmed by the New Zealand Court of Appeal in *Pharmaceutical Management Agency v Commissioner of Patents* [2000] 2 NZLR 529, 535.
352. Patents Act 1953, s 21
353. Ibid, ss 41, 42
354. Ibid, s 2, which incorporates section 6 of the Statute of Monopolies 1623.
355. A patent specification must be interpreted so that if it ‘claims a new substance, the claim shall be construed as not extending to that substance when found in nature’: Patents Act 1953, s 10(7).
356. Hirini Clarke, under cross-examination by Crown counsel, 8th hearing, 25 August 2010 (transcript 4.1.8, p 220)

357. Methods of medical treatment for humans are excluded by the provision to the Statute of Monopolies, which is incorporated in section 2 of the Act, as confirmed by the Court of Appeal in *Pfizer Inc v Commissioner of Patents* [2005] 1 NZLR 362, which held such methods do not meet the definition of invention.
358. This differs from United States law, where disclosure of prior art from outside of the United States must be in written form: 35 USC 102(b).
359. The exact parameters of the obviousness test are disputed in New Zealand and overseas. This is a highly contentious area of patent law.
360. In its 2001 Utility Examination Guidelines, the United States Patent and Trademark Office stated, ‘where the application discloses a specific, substantial, and credible utility for the claimed isolated and purified gene, the isolated and purified gene composition may be patentable’: Department of Commerce: United States Patent and Trademark Office, ‘Notice: Utility Examination Guidelines’, *Federal Register*, vol 66, no 4, p 1093.
361. A similar provision is found in United Kingdom patent legislation: Patents Act 1977 (UK), s1(3).
362. IPONZ, ‘IPONZ Practice Guidelines: Contrary to Morality / Raising Objections Under Section 17(1)’, Ministry of Economic Development, <http://www.iponz.govt.nz> (accessed 6 August 2010)
363. Ibid
364. Patent Cooperation Treaty 1970, art 8(1)
365. Patent 324076
366. Patent 324836
367. IPONZ, ‘IPONZ Practice Guidelines’
368. Patent 537579
369. Senate of Australia, Community Affairs Reference Committee, *Gene Patents* (Canberra: Senate Community Affairs Committee Secretariat, 2010)
370. TRIPS Agreement, art 27(3)(b). ‘Variety’ is used not in the sense of a ‘botanical variety’ but rather as being synonymous with ‘cultivar’ or ‘cultivated variety’.
371. The Plant Variety Rights Act 1987 is modelled on the International Convention for the Protection of New Varieties of Plants 1978 (UPOV).
372. Plant Variety Rights Act 1987, s10(2)(d)
373. Ibid, s10(2)(a)
374. Ibid, s10(4)(a)
375. Trade mark 228415. Mr Dean appeared before us as a member of the NGIA team (doc Q14).
376. Plant Variety Rights Act 1987, s10(4)(b)
377. Document A16, p 1
378. TRIPS Agreement, art 1(1)
379. Ibid, art 27(1)
380. Ibid, art 33
381. Ibid, art 27(2), (3)(a), (b). Note that patents must be available for micro-organisms, and non-biological and microbiological processes for the production of plants and animals.
382. Daniel Gervais, ‘Patents: Ordre Public and Morality’, in United Nations Conference on Trade and Development – International Centre for Trade and Sustainable Development, *Resource Book on TRIPS and Development* (Cambridge: Cambridge University Press, 2005), pp 375–383
383. TRIPS Agreement, art 27(3)(b)
384. New Zealand is a member of the 1978 version of UPOV A, but not of the later version of UPOV agreed in 1991: UPOV, ‘Members of the International Union for the Protection of New Varieties of Plants’, UPOV, <http://www.upov.int/en/about/members/> (accessed 4 May 2011).
385. TRIPS Agreement, art 27(2)
386. Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 3rd ed (London: Sweet & Maxwell/Thomson Reuters, 2008), para 2.238
387. Daniel Gervais, ‘Patents: Ordre Public and Morality’, p 375
388. Ibid
389. The terms *ordre public* and morality are not defined in the TRIPS Agreement. Their meaning and interpretation have not been tested in a WTO dispute. However, in the event of a dispute the Dispute Settlement Body would interpret the term according to recognised principles – in particular, that ‘A treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’: Vienna Convention of the Law of Treaties 1969, art 31(1).
- Subject to that principle, other sources can assist in determining the meaning of *ordre public* and morality. Treaty interpretation principles permit other sources be used to find the ordinary meaning. Those other sources include WTO dispute decisions on similar provisions in other WTO agreements such as the General Agreement on Trade in Services (GATS), the European Patent Convention 2000, and the implementation of *ordre public* and morality in national laws. An example of another relevant source for the interpretation of ‘ordre public’ in TRIPS is the Dispute Settlement Body’s interpretation of ‘public order’ in GATS, which provides that members may take measures ‘necessary to protect public morals or to maintain public order’: TRIPS, art XIV(a). In a 2005 decision, *US – Measures Affecting the Cross-Border Supply of Gambling Services* WT/DS/285 R, Appellate Body Report, adopted 20 April 2005, the Dispute Settlement Body concluded that ‘public order’ goes beyond basic issues of public safety. At

paragraph 296, it referred to ‘the preservation of the fundamental interests of a society, as reflected in public policy and law’. If that is the case, it is reasonable to conclude that *ordre public* means at least that. The European Patent Convention, article 53(a) uses the expression *ordre public* and this article lies behind the inclusion of *ordre public* in the TRIPS Agreement: J Straus, ‘Implications of the TRIPS Agreement in the Field of Patent Law’, in *From GATT to TRIPS – The Agreement on Trade Related Aspects of Intellectual Property Rights*, ed Frederick Karl Beier and Gerhard Schriker (Munich: Max Planck Institute, 1996). Many European state patent regimes contain an *ordre public* and morality exclusion, for example section 1(3) of the Patents Act 1977 (UK).

390. The morality exclusion has its source in British patent law.
391. Document R16, pp 56–62
392. *Ibid*, p 59
393. Closing submissions from claimant counsel on the nexus of prior Māori rights and mātauranga include: doc s1 (Counsel for Ngāti Kahungunu, closing submissions, 16 April 2007), pp 17, 28–31; doc s3, pp 16–17, 301–303; doc s4 (Counsel for Ngāti Koata, closing submissions, 18 April 2007), pp 12–15; doc s5 (Counsel for Te Waka Kai Ora, closing submissions, 20 April 2007), pp 8–10; doc s5(a) (Counsel for Te Waka Kai Ora, further submissions, 8 June 2007), paras 2–14; doc s6, pp 26–34; paper 2.285 (Counsel for Ngāti Porou, memorandum regarding the draft statement of issues, 3 May 2006), pp 31–33; doc s7 (Counsel for Wairoa–Waikaremoana Maori Trust Board, closing submissions, 18 April 2007), pp 12–16.
394. Document Q13(a) (Rosemary F McCallion, A L J Cole, J R L Walker, J W Blunt, and M H G Munro, ‘Antibiotic Substances from New Zealand Plants: 11. Polygodial, an Anti-Candida Agent from *Pseudowintera Colorata*’, *Journal of Medicinal Plant Research*, vol 44 (1982)), p 134. Refers to: S G Brooker and R C Cooper, *New Zealand Medicinal Plants: A Handbook of the Auckland War Memorial Museum* (Auckland: Unity Press, 1962).
395. Riley, *Māori Healing and Herbal*
396. We address aspects of the publication of mātauranga Māori in our discussions on mātauranga Māori held by government archives and libraries (chapter 6), and on rongoā and commercialisation, for instance (chapter 7). Riley’s *Māori Healing and Herbal* is valued by Robert McGowan for its unadulterated information, as it does not purport to offer advice as to treatment: Robert McGowan, under cross-examination by Crown counsel, 12th hearing, 7 May 2002 (transcript 4.1.12, pp 196–197); doc K11, pp 21–22; Professor Mason Durie noted, with regard to the work of ethnologist Elsdon Best on mātauranga Tūhoe: ‘I think there is an appreciation of knowledge for the sake of knowledge . . . [Tūhoe] criticism is not so much that he collected the information but when he comes to interpret the information and to place his own understanding of it, there is some distortion, they feel, some distortion of the facts’: Professor Mason Durie, under cross-examination by Crown counsel, 12th hearing, 6 May 2002 (transcript 4.1.12, p 20).
397. Document s2 (Counsel for Ngāti Kahungunu, closing submissions, vol 2, 16 April 2007), p 33
398. Document G11 (Hirini Clarke, brief of evidence, 11 April 1999), pp 1–2; claim 1.1(e) (Counsel for Ngāti Porou, second amended statement of claim, 19 October 2001)
399. Document H11, p 19
400. Document H9, p 16
401. Document R6 (Dr Helen Anderson, brief of evidence on behalf of MORST, 21 November 2006), pp 13–18; doc R16, pp 76, 85
402. Document T1, p 52
403. Document R16, p 22
404. *Ibid*, p 90
405. *Ibid*, pp 87–93. The three stages of the programme involved capacity-building, engagement and information sharing; problem definition; and the development of options and consultation (to be followed by the standard policy process). The programme was set up in July 2004.
406. *Ibid*, p 92; doc R16(jj) (Simon Orme, David Moore, Daniel Garrett, and Mara Andrews, ‘Economic Significance of Māori Traditional Knowledge’, report commissioned by Ministry of Economic Development (draft), July 2006)
407. Document R16, p 93
408. Document A35 (David Penny, comments on Wai 262, 18 September 1997), pp 4–5
409. See also: Michael F Brown, *Who Owns Native Culture* (Cambridge, Massachusetts: Harvard University Press, 2003), pp 104–105; Sarah A Laird and Kerry ten Kate, ‘Biodiversity Prospecting: The Commercial Use of Genetic Resources and Best Practice in Benefit Sharing’, *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice*, ed Sarah A Laird (London: Earthscan, 2002), pp 241–286.
410. Document A35, p 6
411. The Tribunal received numerous letters from concerned nursery and garden centre operators and individuals with connection to botany and plant research (such as the noted botanical author Lawrie Metcalf) after the judicial conference in May 1997. Most people wished to be kept informed as to progress, register their interest, or expressed concern about the scope of the claim: MacGibbon (on behalf of Natural Logic); Hay (on behalf of Forevergreen Seedlings); Beer (on behalf of Greenridge Nursery); Morrison Kent (on behalf of Vegetable & Potato Growers Association of New Zealand Inc); Drain (on behalf of Christchurch City Council); Davidson (on behalf of Oratia Native Plant Nursery Ltd); Mawson (on behalf of Nursery & Garden Industry Association of New Zealand); Liddle;

- Greenwood (on behalf of Royal Forest and Bird Protection Society of New Zealand Inc); Jenkins (on behalf of Jenkins Native Plants); McBride (on behalf of Letzgo Native Nurseries); Payne (on behalf of Summersun Nurseries Ltd); Strong (on behalf of The Native Tree Company); Dean (on behalf of Naturally Native New Zealand Plants Ltd); Dart (on behalf of New Zealand Native Forests Restoration Trust Inc); Mugglestone (on behalf of Horticulture and Food Research Institute of New Zealand Ltd); Stent (on behalf of Manakau Village Nurseries); Cartman; Young (on behalf of New Zealand Alpine Garden Society Inc); Metcalf (on behalf of Greenwood Nursery); Brown (on behalf of Karioi Nursery); Crop and Food Research; Carson (on behalf of International Plant Propagators' Society); Aorangi Rock & Alpine Garden Club. See papers 2.28, 2.29, 2.30, 2.31, 2.32, 2.33, 2.34, 2.35, 2.36, 2.38, 2.39, 2.40, 2.41, 2.42, 2.43, 2.44, 2.46, 2.47, 2.48, 2.57, 2.61, 2.62, 2.65, and 2.66. The Wai 262 claim's focus on native plants was of immediate interest to commercial plant nurseries. Numerous nurseries wrote to offer their views during the first hearings in 1997.
412. Document Q14 (Nursery and Garden Industry Association, brief of evidence on the Wai 262 claim, 15 September 2006), p 3
413. Ibid, p 3; doc Q2 (Black Bridge Nurseries, brief of evidence on the Wai 262 claim, 11 September 2006), p 2
414. Document A16, p 2
415. Ibid, pp 3–4
416. Documents Q4 (Oratia Native Plant Nursery Limited, brief of evidence, 13 September 2006), pp 2–3; the *Guinness Book of Records* listed the plant, for example: Peter Matthews, Michelle D McCarthy, and Mark Young, *The Guinness Book of Records 1994* (New York: Facts on File, 1993)
417. For more regarding the critically endangered *Pennantia baylisiana* see Peter de Lange, Peter Heenan, David Norton, Jeremy Rolfe, and John Sawyer, *Threatened Plants of New Zealand* (Christchurch: Canterbury University Press, 2010), pp 194–195.
418. Document Q4, pp 2–4
419. Document A16, p 4
420. Document Q5(b) (Dr Ron Close, brief of evidence, 31 October 2006), p 5
421. Document Q14, pp 7–8
422. The webpage for the horopito-based product is at Forest Herbs Research, 'Kolorex Total Care – Horopito – the Ancient Herb', Forest Herbs Research, <http://www.kolorex.com/horopito.html> (accessed 1 June 2011).
423. Document Q13 (Forest Herbs Research Ltd, brief of evidence on the Wai 262 claim, 15 September 2006), p 3
424. Document Q15 (Paul Morgan, brief of evidence on behalf of the Federation of Māori Authorities, undated), paras 3.14, 4.7, 4.8
425. Crown Research Institute Taskforce, *How to Enhance the Value of New Zealand's Investment in Crown Research Institutes* (Wellington: MORST, 2009), p 17. The 2010 Budget allocated \$730 million in 2010/11 for non-departmental operational funding for RS&T: New Zealand Government, *The Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2011*, p 278.
426. Document R10 (Dr Rick Pridmore, brief of evidence on behalf of the Association of Crown Research Institutes, 21 November 2006), p 4
427. Crown Research Institute Act 1992, ss 4, 5
428. The Ministers of Finance and of Research, Science and Technology
429. Document R10, p 2
430. Document R24 (Dr Alvin Cooper, brief of evidence on behalf of NIWA, undated), p 3
431. Crown Research Institute Act 1992, s 5
432. Document R10, pp 5–8
433. GNS Science calls these Biological Material Transfer Agreements: doc R11(d) (GNS Science, 'Biological Material Transfer Agreement', template agreement)
434. Document R11(e) (Chief executive, GNS Science, to presiding officer, progress on initiatives relevant to the Wai 262 inquiry, 25 June 2009)
435. Document R24, pp 4–7; Dr Charlotte Severne and Tim Mahood, under questioning by the Tribunal, 19th hearing, 12 December 2006 (transcript 4.1.19, pp 153–155)
436. Document R9 (Dr Christopher Downs, brief of evidence on behalf of CFR, 21 November 2006), pp 6–7, 9
437. Ibid, p 9
438. Ibid, pp 4, 12
439. Scion provided case studies: doc R23 (Dr Tom Richardson, brief of evidence on behalf of New Zealand Forest Research Institute (Scion), 21 November 2006), pp 1–14; Scion, 'Molecular Breeding', Scion, <http://www.scionresearch.com/research/forest-science/tree-improvement/molecular-breeding> (accessed 1 June 2011).
440. Document R23, p 17
441. Document R22 (Warren Parker, brief of evidence on behalf of Landcare Research New Zealand, 21 November 2006), p 2
442. Ibid, pp 19–21; Sue Scheele, oral evidence on behalf of Landcare Research New Zealand, 19th hearing, 12 December 2006 (transcript 4.1.19, p 88). Landcare also assisted Christall Rata in the development of her patented flax-weaving methods (see section 2.2.2 above).
443. Document R22, pp 5–6

444. Document R22(a)
445. Dr Warren Parker, under cross-examination by counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, 19th hearing, 12 December 2006 (transcript 4.1.19, pp 85, 91)
446. Dr Warren Parker, under questioning by the presiding officer, 19th hearing, 12 December 2006 (transcript 4.1.19, pp 107–108)
447. Peter Spratt, oral evidence on behalf of the New Zealand Association of Science Educators, under questioning by the Tribunal, 18th hearing, 26 September 2006 (transcript 4.1.18, p 111)
448. Document Q12 (New Zealand Association of Science Educators, brief of evidence as an interested party, 15 September 2006)
449. Document Q20 (New Zealand Institute of Patent Attorneys, brief of evidence in relation to the indigenous flora and fauna and cultural intellectual property (Wai 262) inquiry, undated)
450. The staff of ERMA are organised into five working units: hazardous substances, new organisms, kaupapa kura taiao, strategy and analysis, and corporate services.
451. Document K9, p 13
452. *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, 216
453. Document R16, pp 60–61
454. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wellington: Waitangi Tribunal, 1983), p 52
455. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: Waitangi Tribunal, 1988), p 234
456. Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report* (Wellington: Legislation Direct, 1999), p 52; Waitangi Tribunal, *Radio Spectrum Management and Development Interim Report* (Wellington: Waitangi Tribunal, 1999), pp 6–7. The Petroleum Tribunal in 2003 likewise acknowledged that Māori did not know that oil lay under the lands when the Treaty was signed in 1840, but agreed with the comment before the House of Apirana Ngata in 1937: ‘Is the argument now, that, because the poor savage was ignorant in 1840 of the things that have been made possible by the pakeha, he is to have no benefit or advantage from them to-day? If so, it will not hold water’: Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), p 44.
457. Document Q12
458. Document R6, pp 17–18
459. *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, 287
460. ‘Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore: Policy Objectives and Core Principles’, annex to WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, ‘The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles’, secretariat document, WIPO/GTRK/IC/9/4, 9 January 2006, p 3
461. The Government endorsed the United Nations Declaration on the Rights of Indigenous Peoples in April 2010. We discuss the Declaration in section 1.3.4.
462. UNEP 1997, ‘The Workshop of Traditional Knowledge and Biodiversity, Report of the Workshop’, UNEP/CBD/TKBD/1/3, para 3. This interdependence is reaffirmed in the preamble of the CBD, which recognises:
- the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.
463. Treaty of Waitangi Act 1975, s 6(6); doc R16(t) (Draft Patents Bill, released for public consultation in 2004)
464. TRIPS Agreement, art 27(2)
465. This particular power would apply only in respect of patents granted after the date of the reform.
466. WIPO, ‘Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge’, study no 3, UNEP/CBD/COP/7/INF/17, February 2004, p 25
467. Ibid. This same source described an application that had been made to use oil extracted from kiwi to manufacture insect repellent. IPONZ raised a morality objection. The patent attorney for the applicant argued that use of kiwi to manufacture insect repellent was not culturally offensive, and therefore no consent was needed from any Māori. However, the application was subsequently amended, with all reference to kiwi being deleted from the patent specification: Patent 501679.
468. Document s3, p 297
469. Document A15(i), pp 4084–4085 (Minister of Science, ‘Release from the Hon Peter Tapsell, Minister of Science (DS18)’, media release concerning national ethnobotanical garden, 19 January 1990), pp 1–2)
470. The disclosure of the invention occurs through the written document which incorporates the specification and claims of the invention.
471. The existing disclosure requirements in most patent systems are usefully summarised by WIPO: ‘Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge’, p 4.

472. Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnical Inventions, OJL 213, 30 July 1998, p13
473. Patent Law of the People's Republic of China (as amended 2008), art 26(5); Heidi Zhang and Amy Feng, 'China: Patents and Genetic Resources Explained', Managing Intellectual Property: The Global IP Resource, <http://www.managingip.com> (accessed 20 August 2010)
474. For example, Belgium, Denmark, and Germany: 'Situation in the European Union and its Member States', annex to WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Policies, Measures and Experiences Regarding Intellectual Property and Genetic Resources: Submission by the European Union and its Member States', secretariat document, WIPO/GRTKF/IC/16/INF/15, 19 February 2010, p3.
475. Hoare and Tarasofsky, *Disclosure of Origin in IPR Applications*, p5
476. 'Revised Provisions for the Protection of Traditional Knowledge: Policy Objectives and Core Principles', annex to WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'The Protection of Traditional Knowledge: Revised Objectives and Principles', secretariat document, WIPO/GRTKF/IC/9/5, 9 January 2006, p19
477. It is only a proposal and is not before the House.
478. Some examples of international codes of conduct are: International Society of Ethnobiology, *Code of Ethics*, 2006 (with 2008 additions), <http://ethnobiology.net/code-of-ethics/> (accessed 1 June 2011) (also doc R22(a) (November 2006 version)); Belgian Co-ordinated Collections of Micro-Organisms, *Micro-Organisms Sustainable Use and Access Regulation International Code of Conduct*, updated September 2009, <http://bccm.belspo.be/projects/mosaic/> (accessed 19 April 2011); Organisation for Economic Co-operation and Development, *Code of Conduct for OECD Officials*, 24 June 2010, <http://www.oecd.org/dataoecd/16/38/4532776.pdf> (accessed 19 April 2011). The CBD website provides many examples of codes of conduct: CBD, 'Existing Instruments, Guidelines, Codes of Conduct and Tools Addressing ABS', CBD, <http://www.cbd.int/abs/instruments> (accessed 1 June 2011).

Sidebar notes

Page 177: See WIPO, 'Bioethics and Patent Law: The Case of the Oncomouse', WIPO, http://www.wipo.int/wipo_magazine/en/2006/03/article_0006.html (accessed 4 February 2011) for a useful summary of the complicated dispute and the contrast between the two outcomes.

Figure notes

Figure 2.1: 'Stages of bioprospecting'. Source: Waitangi Tribunal. See also Ministry of Economic Development, *Bioprospecting: Harnessing Benefits for New Zealand; A Policy Framework Discussion* (Wellington: Ministry of Economic Development, 2007), p6.

Figure 2.2: 'Access and benefit sharing: key themes'. Variation of a diagram developed by the Secretariat, Convention on Biological Diversity. Source: Secretariat, Convention on Biological Diversity.

Figure 2.3: 'ERMA's institutional structure'. Source: Based on ERMA, *Annual Report for the Year Ended 30 June 2010* (Wellington: ERMA, 2010), p84. Reproduced by permission of ERMA New Zealand.

Map notes

Map 2.1: 'Global distribution of biodiversity, 2001'. Cartography by Barry Bradley. Source: United Nations Development Program–World Conservation Monitoring Centre, National Biodiversity Index.

Map 2.2: 'Global distribution of international biotechnology patent applications under the PCT, 2006'. Cartography by Barry Bradley. Source: Brigitte van Beuzekom and Anthony Arundel, *OECD Biotechnology Statistics 2009* (OECD, 2009), pp71–75.

Table notes

Table 2.1: 'New organism decisions made by International Biological Safety Committees (IBSCs) under delegated authority for 2009/10, as at 30 June 2010'. Source: ERMA, *Annual Report for the Year Ended 30 June 2010* (Wellington: ERMA, 2010), tbl10.

Whakataukī notes

Page 110: Natalie Angier, *The Canon: A Whirligig Tour of the Beautiful Basics of Science* (New York: First Mariner Books, 2008), p19

Page 111: Hirini Moko Mead and Neil Grove, *Ngā Pēpeha a ngā Tipuna* (Wellington: Victoria University Press, 2001), p86

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

—Leonardo da Vinci



RELATIONSHIP WITH THE ENVIRONMENT



*Kei raro i ngā tarutaru,
ko ngā tuhinga o ngā tūpuna.*

Beneath the herbs and plants
are the writings of the ancestors.



A moa hunted by a Haast's eagle by Colin Edgerley. The moa was the main source of what historian James Belich has called 'a sustained protein boom' for Hawaiki settlers. Both species became extinct following Polynesian settlement.

RELATIONSHIP WITH THE ENVIRONMENT

3.1 INTRODUCTION

This chapter focuses on kaitiaki relationships with the environment, and how these are managed under New Zealand's resource management laws. In the two-thirds of New Zealand outside the conservation estate (which we discuss in chapter 4), land, waterways, and other environmental features have for the most part been the subject of cataclysmic change since 1840. Settlement, urban development, the razing of forests for farmland, the introduction of exotic species, pollution, extractive uses such as quarrying and mining – all have left their mark.

The claimants contended that these changes had severely compromised their ability to exercise kaitiakitanga over the environments of their rohe (traditional territories), and to preserve and pass on related mātauranga. The Resource Management Act 1991 (RMA) raised hopes by introducing requirements for the recognition of Treaty rights and kaitiakitanga, and mechanisms for iwi to exercise influence and control over the environment. Those hopes have not been met. In practice, the RMA has placed local authorities at the centre of decision-making about the environment and its resources. The claimants said that this had left them sidelined, and reduced to highly reactive but nonetheless resource-intensive roles, such as submitting on draft plans and resource consent applications.

This, they argued, was a breach of the Treaty guarantee of tino rangatiratanga. This guarantee, in their view, gives kaitiaki the right to control and regulate their relationships with the environment – those relationships, and the tikanga and mātauranga associated with them, being core aspects of the Māori culture itself. The claimants accordingly sought changes in both the Act and its operation.

The Crown, for its part, contended that the current legislative arrangements largely fulfil its obligations in relation to environmental management, that local authorities are not subject to the Treaty of Waitangi, and that the responsibility for preserving and transmitting mātauranga in respect of kaitiakitanga rests with iwi and not the Crown.

There are, of course, many other interests at play, not least the interests of the environment itself. We consider these interests in the course of our analysis.

We have structured this chapter around the following major headings:

- ▶ *Human impacts on the environment (section 3.2)*: We explain how whanaungatanga and kaitiakitanga underpin Māori relationships with the environment, and trace the history of human impacts on New Zealand's environment.
- ▶ *The Resource Management Act (section 3.3)*: We explain the promise that resource management law reform held out for Māori. Then we examine the Act's provisions for recognising Treaty and kaitiaki rights, and mechanisms for giving effect to those rights through delegation of powers and functions, influence on resource



Tree ferns. Māori culture evolved as part of an ongoing relationship with the plants, wildlife, climate, waterways, and landforms of Aotearoa.

management planning, and consultation or input into local government decisions about resource management.

- ▶ *Kaitiakitanga and the current legislative framework (section 3.4)*: We set out claimant and Crown views on Treaty rights in relation to the exercise of kaitiakitanga. In particular, we focus on whether the RMA currently provides sufficiently for the exercise of kaitiaki rights and the preservation and transmission of mātauranga in relation to kaitiaki.
- ▶ *Analysis (section 3.5)*: Here we examine the most significant issues raised by our examination of the RMA and the concept of kaitiakitanga, and by the parties' respective arguments. What is the nature of the relationship between kaitiaki and the environment,

and is it the subject of a Treaty interest? What other interests are there, and how should they be balanced alongside the kaitiaki interest? What are the essential features of a Treaty-compliant environmental management regime that provides fully for the kaitiaki interest, and are those features found in the RMA regime? We conclude in broad terms that the present regime does not sufficiently protect the interests of kaitiaki, and that it should do so to a greater degree.

- ▶ *Reforms (section 3.6)*: Here, we set out a way forward. Our recommendations are aimed at giving life to kaitiaki rights while also continuing to recognise and provide for other interests in natural and physical resources.

3.2 HUMAN IMPACTS ON THE ENVIRONMENT

This high-level summary focuses on the changes in land cover, land use, and biodiversity, and the impact of pollution. The significance of all these changes, for us, is their impact on mātauranga Māori and kaitiaki relationships with the environment.

3.2.1 Te ao Māori and the environment

We have already explained, in chapter 1, how the first settlers from Hawaiki shaped, and in turn were shaped by their environment. The world view of those settlers was infused by the concept of whanaungatanga. Often translated as 'kinship', whanaungatanga does not refer only to family ties between living people, but rather to a much broader web of relationships between people (living and dead), land, water, flora and fauna, and the spiritual world of atua (gods) – all bound together through whakapapa. In this system of thought, a person's mauri or inner life force is intimately linked to the mauri of all others (human and non-human) to whom he or she is related. This explains why iwi refer to mountains, rivers, and lakes in the same way as they refer to other humans, and why elders feel comfortable speaking directly to them.

We have also explained, in chapter 2, how, over the course of many generations, new relationships were formed with the environment. As one example, over time, in a much larger land than Hawaiki, the gods subtly realigned: Papa-tū-ā-nuku (the female Earth) took a much stronger role and, in most tribes, her son Tāne-mahuta (the male personification of the primordial forest ecosystem) assumed the senior position amongst his siblings. On a more prosaic level, people formed relationships with land, waterways, and flora and fauna, on which they relied for food and materials (such as timber and harakeke). These relationships were reflected in new kōrero explaining the characteristics of those plants, animals, landforms, and waterways.

Any kinship bond implies a set of reciprocal obligations, and these are encompassed in the concept of kaitiakitanga – the obligation to nurture and provide care. Kaitiakitanga is often translated as 'stewardship', but this term does not encapsulate its spiritual dimension, which is expressed as a responsibility to nurture the mauri of people, flora and fauna, landforms and waterways, that

collectively form one's whakapapa. This concept is defined more fully in chapters 1 and 2, and examples are provided in section 3.4.1, of its application to environmental management. In this context, kaitiakitanga is a community-based concept. It is not the obligation of an individual but of an entire tribal community. While the community exists, the obligation exists. It is central to the claimants' concerns about the RMA.

We also explained in chapter 2 that kaitiakitanga does not mean that the Māori world view requires humans to treat the environment as pristine and untouchable. All human communities survive by exploiting the resources around them and Māori were no exception. Whanaungatanga relationships with the environment of Aotearoa evolved over many generations. As we explain in more detail below, Māori in the first few hundred years after settlement did significant damage to the environment of Aotearoa. Then, over time, kaitiakitanga relationships reached a kind of environmental equilibrium, which appears to have remained relatively stable for several hundred years before the arrival of European settlers with their new approach to environmental management. 'Kaitiakitanga' in a modern resource management context can be seen as Māori environmental law, policy, and practice. Its exercise has relied on tikanga and mātauranga being transmitted from generation to generation for many hundreds of years, both prior to and since European settlement.

The environment, therefore, cannot be viewed in isolation. There is an old saying: 'Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tūpuna' (beneath the herbs and plants are the writings of the ancestors). Mātauranga Māori is present in the environment: in the names imprinted on it; and in the ancestors and events those names invoke. The mauri in land, water, and other resources, and the whakapapa of species, are the building blocks of an entire world view and of Māori identity itself. The protection of the environment, the exercise of kaitiakitanga, and the preservation of mātauranga in relation to the environment are all inseparable from the protection of Māori culture itself.

Having set out the key concepts, we now examine in more detail the impact of settlers from Hawaiki and, later, Māori on the environment.

Drawing based on *Digging with the Ko* by Gottfried Lindauer, 1907, depicting the preparation of a kūmara garden. Among the many crops brought from Hawaiki, the kūmara was the most successful. It is regarded as a taonga and has a considerable body of tradition, ritual, and story associated with it.



3.2.2 Māori impacts on the environment

By the time Cook arrived in 1769, there had already been extensive change to the natural environment. Polynesians had arrived perhaps some time around the crossover of the first and second millennia CE. Here, they encountered a land unlike any in their experience: massive beyond comprehension (as Janet Davidson points out, Rarotonga is roughly the size of Wellington Harbour¹), comparatively cold, and regionally diverse. Aside from waterways and mountains, the land was largely bush-clad, which presented particular challenges to a people initially intent on replicating the tropical horticulture of their homeland.

The settlers went about clearing the bush where they could, needing to replace forest with gardens as quickly as possible. As Atholl Anderson puts it, New Zealand conditions stretched the environmental adaptability of the Polynesians 'to the limit', and 'dense forest was consequently a significant obstacle to human existence'.² Attempts were doubtless made to acclimatise a range of crops, including coconut, banana, and breadfruit, but none of these staples of the tropical diet survived the New Zealand climate.³ Greater success was had with dogs

(which were a delicacy as well as a companion) and the kiore (Polynesian rat), as well as yams, gourds, and, of course, the kūmara. The cultivation of the latter through its transformation to an annual crop by the storage of tubers in pits during winter was a considerable accomplishment, as is described in section 2.2.2(9). Through the development of such techniques, kūmara cultivation eventually spread as far south as Banks Peninsula.

Horticulture was very dependent on climate, and there was thus extensive regional variation in patterns of subsistence. In the drier and cooler parts of Aotearoa, to the south and east, the economy was initially based on hunting giant flightless birds and sea mammals; they delivered – in James Belich's words – 'a sustained protein boom' to the first settlers.⁴ Aside from these animals, a further casualty of early settlement was the lowland forests, particularly of the eastern South Island, which were all but destroyed by fire over the century or two after 1300. To the extent that these fires were deliberately lit, it is likely that their consequences were greater than intended – that is, that small burn-offs to open tracts of forest fringe for gardening resulted in out-of-control events. But the

important point is that this destruction was generally beneficial from a human perspective, as the forest held relatively few food resources.

In this sense, though it is important to acknowledge the central places of whanaungatanga and kaitiakitanga in the Hawaiki and Māori world views, it is also important not to romanticise the early Polynesian impact on the environment of Aotearoa. In what might be seen as the initial phase of settlement, old kin relationships – with the land, water, flora, and fauna of Hawaiki – were fading, but new relationships with the environment of Aotearoa had not yet fully formed. Anderson reminds us that the pre-European Māori environmental impact was typical of colonisation everywhere. It involved ‘a powerful instinct to expand as rapidly as possible, using the richest resources with pitiless energetic efficiency.’⁵ Davidson describes the early human impact on Aotearoa as ‘catastrophic’, with dogs, rats, and fire rounding off any devastation that humans did not directly complete themselves.⁶ There is a particular reason why the impact on Aotearoa was so great. Here, the settlers – described by Anderson as a ‘super-predator, flanked by dangerous commensals’⁷ – arrived in an environment that had evolved slowly and in absolute isolation for tens of millions of years, and was thus enormously vulnerable to such agents of change.

Between the fourteenth and sixteenth centuries, Māori faced what Belich calls a ‘crisis’ brought on by the ‘progressive extinction of big game in region after region.’⁸ The main sources of protein became shellfish, fish, and smaller bird species and practically every edible plant and animal was made use of in the course of survival. Given the extent of regional variation, this adjustment will have come quicker to some parts of Aotearoa – such as non-horticultural areas like the Urewera – than to others.⁹ Geoff Park believes that for Māori the bush had become, by the time of first contact, their ‘most precious life-support system.’¹⁰ While that would not be true for the intensive horticultural zones of the northern parts of the country, and probably understates the importance to most communities of the bounty of the sea, it does correctly identify a shift that occurred in the Māori relationship with the natural environment when the exploitative phase had run its course. The point of this shift cannot be precisely identified, and will have varied throughout

Aotearoa. But by the time of Cook’s arrival Māori saw themselves very much as *part of* the natural world of Aotearoa, and connected to its animate and inanimate elements through whakapapa. As Margaret Orbell has put it, the Māori closeness to and intimacy with nature:

led to a view of the world which recognised the tapu, the sacredness, of other life forms and the landscape itself. By seeing themselves in the natural world and thus personifying all aspects of the environment, they acquired a fellow-feeling for the life forms and other entities that surrounded them, and they saw a kinship between all things.¹¹

By the time of Cook, therefore, Hawaikian culture had long since evolved into Māori culture, and the catalyst for that process had been the formation of new and more stable kin relationships between people and the plants, fish, birds, landforms, waterways, and other parts of the environment.

3.2.3 Te ao Pākehā and post-colonial impacts on the environment

While Māori saw the environment in terms of an intricate web of relationships and reciprocal obligations, the Europeans who came into contact with Aotearoa from the late 1700s brought with them a different world view, one in which – in very simple terms – property and other resources were available to be divided up among individuals and exploited. In this sense the enormous land-use changes that followed European settlement were a blow not just to the fragile environment, but also to classical Māori culture. While Māori had eventually become kaitiaki of the natural world, early European activities were extractive and damaging – from sealing and whaling, to timber-felling for ship-building. The rate of change accelerated greatly after 1840 with the rapid expansion of European settlement and the alienation from tangata whenua of vast areas of land, developments that were followed by further environmental changes such as land drainage, pasture conversion, land reclamation, and mining. As soil scientist Les Molloy notes:

in the half century from 1860–1910, New Zealand underwent possibly the most rapid landscape transformation of any

Felling a kauri tree in Northland, 1897. Bush clearances during the nineteenth and twentieth centuries profoundly changed New Zealand's landscape and severely compromised the ecosystems that supported many native species.



Cleared bushland in Northland, circa 1910.





Māori protest with tent pitched on bush railway line, 1910. Disputes over management of the environment have occurred throughout New Zealand's history.

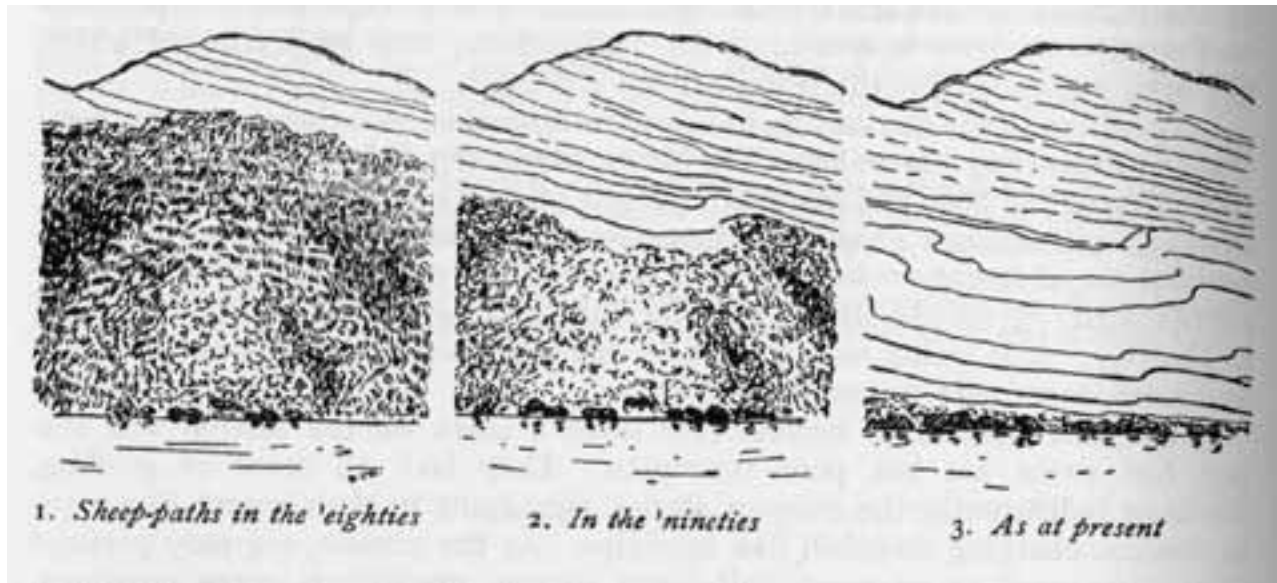
nation; over 6.5 million hectares of lowland forest (nearly 25 percent of the total land area) were cleared – as much as was destroyed by fires during 1000 years of Polynesian settlement.¹²

The speed and extent of this change has given New Zealand colonists something of a reputation. The great American environmental historian, William Cronon, has observed that the process of ecological change as the concomitant of human migration is longstanding and well understood, but rarely has it occurred with as much 'dramatic suddenness' and 'conscious intention' as in nineteenth-century New Zealand.¹³ Geographer Kenneth

Cumberland described the changes wrought by both Polynesians and Europeans thus:

Man's violent and disruptive impact on the New Zealand landscape is . . . tremendously compressed in time. It is confined to the last moment of man's existence so far, and to the last minute of his cultural evolution. It is so recent it is still fresh. Evidence of it is largely intact. . . . But in spite of the limited time involved, the transformation has been ruthless and profound.¹⁴

One of the main causes of this change has been the industry on which New Zealand has forged its prosperity:



The impact of sheep on the landscape, drawn by Herbert Guthrie-Smith, 1926. 'It is the sheep that have surveyed Tutira,' wrote Guthrie-Smith in his classic account of the central Hawke's Bay sheep station. 'In the early days they worked the tops and upper slopes. Later, owing to the destruction of fern, tutu, and koromiko, it became possible for them to tread a middle course; at length they were able to circle the bases of the hills.'



Cattle on the cleared land. While farming has been the mainstay of the New Zealand economy, it has also been the catalyst for profound environmental changes as, since the nineteenth century, millions of hectares of indigenous bush have given way to grassland.



Introduced as a hedge plant in the 1830s or earlier, gorse has become a major pest plant, found in varying densities on some 700,000 hectares of land. Gorse is one of many introduced species of flora that have become widespread in New Zealand. Though gorse is difficult to control, it can provide shady habitat to support the regeneration of indigenous bush.

farming. While many introduced animals have had a devastating impact on the native species, forests, and waters – such as deer, goats, possums, mice and rats, mustelids, trout, pike, and others – it is the farmed animals such as sheep and cattle that have arguably had the greatest effect. The impact of carving out a New Zealand sheep station is meticulously captured in Herbert Guthrie-Smith's classic account of his property at Tutira, where he describes the land's surface as having to be 'stamped, jammed, hauled, murdered into grass'.¹⁵ This process, repeated in different environments throughout New Zealand (pasture today covers 39 per cent of New Zealand's surface),¹⁶ has had an almost incalculable effect. Cumberland attempted to suggest its extent in 1981, referring to the 'thousands of millions of hoofs and jaws' that by then may have collectively amounted to some '7500 million "animal-years" of grazing and treading'.¹⁷

Perhaps surprisingly, given the destruction we have described, New Zealand still retains about half of its land area in native or regenerating cover of one kind or another. But of course this includes large areas of rock, snow, and ice, and much of the rest is inaccessible hill

country. In the areas where people have always lived – around the coasts and on the low flat country – very little of the original vegetation remains.¹⁸ Likewise, New Zealand now has only 10 per cent of its original wetlands.¹⁹ Moreover, environmental change has not stopped, even though the rate has slowed. Between 1997 and 2002, a total of 2,300 hectares of native forest was converted to other uses,²⁰ and the overall loss of indigenous ecosystems amounted to about 4,500 hectares per year during that period.²¹

Inevitably, New Zealand's unique biodiversity has been severely affected. Overall, since human settlement, 32 per cent of indigenous land and freshwater bird species, 18 per cent of seabird species, three out of seven frog species, at least 12 snail and insect species, one fish, one bat, and perhaps three reptile species have been made extinct by humans and their accompanying pests.²² While the concerted efforts by government and the community over recent decades have led to some improvements, 1,000 of the known indigenous species of flora and fauna are currently under threat.²³

By contrast, New Zealand's species count has exploded.

We now host about 10 per cent of the world's plants, of which 8 per cent are native and 92 per cent are introduced.²⁴ Of the introduced plants, 8 per cent have made themselves at home in the wider environment, with consequent changes to the habitats of birds and insects. The great bulk of these intruders have arrived since 1769.

The other major change in the environment is pollution, particularly as it affects water. We do not have the same quality of information on pollutants as we do on land use. But we do know that in 1800 there were no chemical sprays, toxic fumes,²⁵ discharges from factories, sewage plants, mining and drilling, runoff from fertilisers, or any of the many other pressures we put on today's land, water, and air. In 2009 the Cawthron Institute published research suggesting that the Manawātū River – which is subject daily to the discharge of large amounts of industrial, farming, and urban waste – is very unhealthy.²⁶ A 2007 Ministry for the Environment ranking of river bacteria levels found that parts of four other rivers were worse than any along the Manawātū.²⁷ The impact of this kind of pollution was referred to particularly in evidence from Ngāti Kahungunu, who (with the Te Tai Tokerau claimants) were also concerned about the removal of sands and gravels from the rivers within their rohe. While New Zealand's pollution levels usually compare favourably with other countries, the change in soil and water quality from 1800 to today has nonetheless been profound.

3.2.4 Kaitiakitanga today

The Reverend Māori Marsden, in his writings on kaitiakitanga (some of which he prepared for those developing the RMA), suggested that there are three basic principles deriving from a Māori world view that provide guidance as to the appropriate role of people in environmental management:

- ▶ humankind's contribution is to enhance and maintain the life support systems of Papa-tū-ā-nuku;
- ▶ people should treat Papa-tū-ā-nuku with love and respect in recognition of her life-supporting function, her role in the creation of the natural world, and her place in our own whakapapa; and
- ▶ we do not own Papa-tū-ā-nuku, but are recipients, and therefore stewards, of the natural environment.²⁸

This is a good representation of the highest ideals of

whanaungatanga and kaitiakitanga in respect of the environment. In evidence, many of the claimants explained what kaitiakitanga means to them. Their observations explained why iwi refer to mountains, rivers, lakes, harbours, and other significant places in the same way that they refer to close human relations, why elders feel comfortable speaking directly to those taonga, and why those taonga are viewed as having a distinct spiritual as well as physical existence.

In one such example, Murray Hemi explained the relationship between Ngāti Kahungunu kaitiaki and their waterways:

Water is a priceless taonga left by our ancestors for the life sustaining use of their descendants. We, in turn, are charged with a major kaitiaki duty, to ensure that these treasures are passed on in as good a state or indeed better to those following. This hereditary responsibility is to protect, preserve and enhance the mauri (life-force) within all natural resources and, thereby, assist in the growth of Ranginui and Papatuanuku. The preservation or restoration of mauri within the Kahungunu rohe is pivotal to the on-going relationship between us and our environment, is a rightful expression of tino rangatiratanga and a base function of our mana whenua, mana moana over our rohe.²⁹

We have spoken of the relationship between kaitiaki and taonga species, including harakeke, in chapter 2. Alfred Elkington of Ngāti Koata explained the practical side of the kaitiaki relationship when he described the tikanga associated with gathering flax that he had learnt from his grandmother. The location that was best for gathering the strongest flax was well known, and the rights to take flax from that place were defined by reference to whakapapa. The process for cutting the flax was also clearly defined. Mr Elkington's grandmother said that the best time for cutting was 'just when the sun came up' and she would speak to the flax, telling it that 'she had to cut it to make it look beautiful, and because if she didn't cut it then the flax would grow up ugly and untrimmed'. Mr Elkington's evidence also referred to the importance of cutting the flax correctly to ensure the sustainability of the resource. The off-cuts of flax were also disposed of carefully. A karakia was said over the off-cuts to make



Harakeke (flax, *Phormium tenax*). Claimants gave evidence about the tikanga associated with the harvesting of harakeke for weaving and the reverence with which it is gathered. These tikanga maintain the relationship between kaitiaki and taonga.

them tapu and then they were burned because the flax fibre would not otherwise break down.³⁰ The Ngāti Porou and Tai Tokerau weavers who gave evidence made it clear that this reverence continues today.³¹

Mr Elkington also gave evidence about the system for managing native forests, based around strict selection and the minimisation of waste. For example, the wood from the pāhautea (New Zealand cedar) was both soft and long-lasting, and was therefore reserved for specific limited uses. Except for making paddles and repairing boats, that type of tree would never be cut down. ‘We would leave

good trees to use for our next paddles.’ The process for selecting the right tree to cut down for carving or other purposes was also careful and deliberate. A crucial part of this process was the karakia to Tāne-mahuta. Mr Elkington stated that this karakia was a means of ‘asking for guidance’ to ensure that only the correct tree would be cut down. ‘We did not want to cut down the wrong tree, as that would be a waste.’³² This created a system for managing native forests based on the kaitiaki relationship.

Similar systems were in place for the management of kaimoana. Priscilla Paul and Jim Elkington both referred to the practice of managing and transplanting pipi, cockles, mussels, kina, pāua, oyster, and scallops for a variety of reasons, including sustainability.³³ Transplantation was managed according to the spawning cycles of the various species, and traditional regulatory mechanisms such as rāhui were used to ensure sustainable quantities of kaimoana developed before any harvesting took place.

Wero Karena of Ngāti Kahungunu also evoked the effectiveness of kaitiakitanga:

I recall my grandfather asking me and my brother when we were kids, “what are you going to be when you grow up?”. My brother would say he was going to be a policeman. My grandfather would tell him that Maori never had policemen. He would then ask us “how do you think Maori are able to manage their resources without needing policemen to stop people burgling the resources?”. The answer was that Maori had the ability to impregnate into the minds of Maori a system of checks and balances to stop this from happening. They had mechanisms which were a form of policing, spiritual mechanisms. They were highly effective.³⁴

During the hearings we were told how environmental changes since the time of Cook had affected relationships between kaitiaki and their environments. Claimants from Ngāti Wai and Ngāti Kuri gave evidence of their concerns about the removal of sand from Pākiri, Parengarenga, and Ngunguru. Rapata Romana pointed to the significance of Parengarenga and Te Kokota, in particular, as a source of pīngao and kaimoana.³⁵ Merereina Uruamo also viewed them as important places for gathering pīngao for use in weaving.³⁶ She said that sand mining at Te Kokota was stopping pīngao from growing by removing the sand

As well as being a highly prized weaving material, pīngao is a source of food and – for many claimants – has important cultural associations. According to claimants, sand mining is compromising access to pīngao by removing its habitat.



in which the pīngao grows.³⁷ Haana Murray noted that, in addition to being a source of food and weaving fibre, Ngāti Kuri had other specific cultural associations with pīngao. She referred to the saying ‘he pīngao ngā kaitiaki o ngā toheroa’ (the pīngao is the guardian of the toheroa). She also referred to an ancestor called Kaipīngao, who knew the pīngao was edible.³⁸

Laly Haddon’s evidence outlined Ngāti Wai’s associations with the sands at Pākiri.³⁹ These have special significance to Ngāti Wai for two reasons. According to the kōrero of Ngāti Wai, the sands originally came to be at Pākiri as a gift from the tūpuna in order to provide an environment in which food would be plentiful. The sandhills are also the site of a battle that took place in the 1820s and are now wāhi tapu (sacred places) because many

warriors from Ngā Puhi and Ngāti Whātua were slain and buried there. The sand has been excavated to be spread over Mission Bay. Mr Haddon described the removal of the sand from Pākiri as taking away the iwi, both in a literal and metaphorical sense.

Hori Parata referred to the sandspit at Ngunguru, which was also the site of a nineteenth-century battle and the remains of Te Waiariki warriors.⁴⁰ The sandspit



Dredging sand at Pākiri Beach. Since the 1950s sand from Pākiri Beach has been used in Auckland’s building industry and to replenish the city’s beaches. Ngāti Wai has a special relationship with Pākiri and sees the removal of sand as analogous to removal of the iwi itself.



Ngunguru Sandspit, Northland. The claimants gave evidence of their concerns about the removal of sand and subdivision proposals for this spit.

is privately owned, and subdivision created further concerns for Ngāti Wai about damage to the wāhi tapu.

Witnesses for Ngāti Kahungunu talked about their concern for their forests and waters, but also the impact of pollution on the rivers and lakes, as well as the air around them. In their opening submissions counsel for Ngāti Kahungunu described environmental degradation in Hawke's Bay thus:

Not only have populations of native fish been put under increasing pressure from the introduction of exotic species such as trout, but the rivers themselves, particularly in central Hawke's Bay, have been drastically modified with a significant destructive effect on the habitats of indigenous flora and fauna. Waters have and continue to be drawn off... stop banks were erected, and the course of rivers altered forever. Alterations to the water table and land fills saw the destruction of lake and swamp areas and depletion of eel stocks. Waterways throughout the rohe have also been increasingly

hit by plantation forestry of pine trees with their attendant destructive effects on the water table.⁴¹

Claimants echoed this picture in their description of the deterioration of the Karewarewa Stream at Bridge Pā. The late Kate Parahi said:

Last century our people lived on land which was located further towards Hastings. We had to move from there, and chose to move to our current site, at Bridge Pā. This decision was largely made because of this stream and the resources it could provide for us.⁴²

Alice Hopa added: 'Sadly, our stream has been almost destroyed over the years. The water level has dropped, the native plants on its banks have disappeared, and the life in the stream has practically disappeared.'⁴³

The destruction of the stream has of course had immediate human consequences and raised the question of

the effectiveness of environmental management systems. The flooding caused by changes to the stream is serious enough to disrupt tangihanga and other hui, and causes havoc with septic tanks. According to Mrs Hopa:

Over the years different councils have viewed things differently in regard to our stream. We have always been the people caught in the middle between farmers, developers of life-style blocks and local councils. Our concerns have never been listened to. It is a difficult issue because while we realise that to some extent we have to accommodate progress and changing lifestyles, it is still extremely important to us to retain the use of our stream. The stream is of fundamental importance to us. It is the reason we came to live here. It is a very important part of our life.⁴⁴

3.2.5 Summary

Centuries of human activity prior to the arrival of Cook meant that the environment was no longer in a 'state of nature'. Forests had been razed, and species extinguished. But, partly as a result of these changes, new and more stable relationships evolved between kaitiaki and the landscapes, waterways, flora and fauna, and other taonga in the environment with which they lived. As we have explained in the two previous chapters, these relationships are so crucial to Māori culture and identity that their survival cannot be separated from the survival of the culture itself.

The impact of the post-contact environmental changes on te ao Māori can be summed up quite briefly. The combined effects of the destruction, alteration, or pollution of the natural environment have transformed Aotearoa to the point that, in many parts of the country, the environment that created te ao Māori has disappeared. These changes have inevitably had a powerful effect on kaitiakitanga. As Robert McGowan said in the context of rongoā (traditional Māori healing), 'the greatest threat is the loss of contact with the natural world. That is the world out of which that knowledge grew and is sustained.'⁴⁵ The danger, then, is that the profound environmental changes since the time of Cook will make kaitiakitanga irrelevant to the lives of young Māori, and that therefore a core building block of the Māori world view will be removed completely.

3.3 THE RESOURCE MANAGEMENT ACT 1991

As we have seen, in the pre-European era environmental management practices were dictated by whanaungatanga and kaitiaki relationships. Over time, the Crown assumed responsibility for managing New Zealand's environment to the extent that it was able. Today, the Conservation Act 1987 and the RMA together carry the primary burden in the management of New Zealand's natural and physical resources. At the broadest level, land and resources held by the Crown under the Conservation Act are to be preserved and protected; the RMA, meanwhile, provides for natural and physical resources to be sustainably managed. The Crown Minerals Act 1991 and fisheries legislation also include considerable resource regulation.

Outside the conservation estate (which we consider in chapter 4), the RMA is the central piece of legislation affecting the claimants' ability to maintain a kaitiaki relationship with the environment, and it is our focus here. It sets out the basic powers, functions, and responsibilities of the regulatory agencies charged with environmental management. It also sets out mechanisms for influence on environmental decision-making by members of the public and interested parties, including iwi and hapū.

In the remainder of this section, we set out the RMA provisions in some depth. We do this because the workings of this Act are crucial to the claimants' argument that they are excluded from environmental decision-making. We structure our consideration as follows:

- ▶ In section 3.3.1, we explain the RMA's genesis, including the promise that was held out to Māori for greater involvement in environmental decision-making.
- ▶ In section 3.3.2, we explain the Act's provisions, with particular reference to provisions for Māori influence on or control of decisions about the environment.
- ▶ In section 3.3.3, we consider how the Act's provisions have been used in practice.

3.3.1 The promise of resource management law reform

The story of the RMA begins in the 1980s, when, following years of reports on poor environmental management, the Government started an extended process of law reform and structural change in government departments.⁴⁶ There had been a long history of piecemeal legislation which covered separate aspects of environmental

management in an incoherent and inefficient manner; the government of the day sought to preserve the best of the past while improving the efficiency and coordination of the resource management process.

The Resource Management Law Reform project (RMLR), which started in 1984, aimed to address administrative and procedural problems in the environmental management framework of the time, as well as the emerging international interest in environmental protection and sustainable development.⁴⁷ Altogether, it represented a major ideological shift in approach to New Zealand's natural resources, from one that was primarily exploitative, to one more focused on environmental well-being as an outcome in its own right. From a Māori viewpoint, it was clear from what we heard that there were great hopes for this law reform process when it was first being considered.

(1) Incorporation of Māori interests in previous legislation

The law that was in place at the time of the RMLR project did provide some recognition of Māori interests in environmental issues. Section 3(1)(g) of the Town and Country Planning Act 1977 declared that 'the relationship of the Maori people and their culture and traditions with their ancestral land' was a matter of national importance to be 'recognised and provided for'.⁴⁸ Planning Tribunal and High Court decisions on the application of this section provided mixed results for Māori. In any case, similar to legislative provisions that would follow, section 3(1)(g) did not provide any absolute rights to Māori, but instead declared that the relationship of Māori with their ancestral land would be one of many interests to be balanced in environmental decision-making.⁴⁹ In reality, this required the Māori interest to be overwhelming before it had any significant influence on planning decisions, but it did at least register Māori environmental interests across land generally.⁵⁰ The *Huakina* decision brought Māori spiritual interests and Treaty interests into the operation of the Water and Soil Conservation Act in 1987,⁵¹ thereby creating an express recognition of Māori interests in the management of water for the first time.

(2) Creating the bureaucracy

In December 1986, the Environment Act was passed into law, its main purpose being to establish the Ministry for

the Environment and the Parliamentary Commissioner for the Environment.⁵² The Ministry was given a policy role and did not initially have any direct responsibility for actually administering planning law.⁵³ The commissioner, meanwhile, was given responsibility for reviewing and investigating the effectiveness of environmental planning and management processes (its functions are explained in more detail in section 3.3.2(5)).

The new Ministry gave generally greater recognition to Māori interests than the previous policy processes had done.⁵⁴ It developed Treaty policies, and in 1987 established Maruwhenua, a Māori secretariat that – it was envisaged – would be a key player in the implementation and development of these policies.⁵⁵ Maruwhenua was, as far as we are aware, the first specialist Māori unit in any government department other than Te Puni Kōkiri and its predecessors. Equally innovative was the intention that the secretariat have 'dual accountability, formally to the Minister [for the Environment] and informally to the iwi'.⁵⁶

(3) Changing the law

The first role of the new Ministry was to run the RMLR project. That process included a great deal more incorporation of Treaty issues than ever before, including commissioning papers from people such as the Reverend Māori Marsden, and generating briefing papers for the Minister on Māori interests in natural resources. This was the first time that Māori interests in environmental management had moved from the reactive roles of protest and objection in tribunals and courts, to involvement in national policy formulation.

Much was made of this innovative and inclusive approach. Early in the process, Māori raised the issue of unresolved Treaty claims to the ownership of resources that would come to be regulated under the new law – minerals, geothermal energy, water, the foreshore and seabed, riverbeds, and so on – all of which had been the subject of long-standing political or legal claims. In response, the Government excluded ownership of resources from the RMLR project, on the basis that it would be addressed separately, and instead declared that the Act would only 'regulate' the use of resources.⁵⁷ It is fair to say that Māori were generally sceptical, especially

as consent access to resources such as water effectively secured their ownership.

The RMLR project did, however, provide for recognition of Māori 'cultural' interests in land, water, and other environmental resources in the principles and purpose of the new law (explained in section 3.3.2(1)). It also provided for the establishment of mechanisms to give those interests some degree of concrete expression (through influence over decision-making and, in some circumstances, delegated control). These provisions are explained in more detail below. Both parts of the puzzle – legal recognition of Māori interests, and mechanisms to give effect to those interests – created great hope that, for the first time in the post-settlement era, Māori would take up appropriate roles in environmental management.

(4) Local government reform

Alongside the RMLR project, another significant step in environmental management was the large-scale reorganisation of local government that took place in 1989. This significantly reduced the number of local councils with regulatory power over planning and land use, and generally called these territorial authorities city and district councils. Regional councils were established to control the key environmental parameters of water use, air quality, and soil erosion. This reorganisation was followed by legislative reform in 2002, which created new responsibilities for Māori involvement in local authority decision-making, which are explained in section 3.3.2(7).

3.3.2 The statutory framework for resource management

Following establishment of the Ministry for the Environment, and reorganisation of the local government sector, the third major change in environmental management was the enactment of the RMA.

The RMA is the legislative centrepiece of environmental management in New Zealand. Its purpose is 'to promote the sustainable management of natural and physical resources',⁵⁸ which are defined as including 'land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures'.⁵⁹

To achieve this purpose, its operational provisions

include a system of policies and plans that guide and control day-to-day decision-making – setting out, for example, which activities are permitted and which require the approval of a consenting authority. These plans essentially operate in a hierarchy: at the apex, central government is responsible for setting national policy and standards; regional councils are responsible for setting regional policies and plans; and territorial authorities are responsible for setting district plans.

If an activity or use is not permitted, a resource consent is required, and will be granted if the activity or use complies with the relevant policies, plans, and RMA provisions (especially part 2 which contains the Act's purpose and principles).

To a large extent the administration of the Act is delegated to local authorities, which not only set the policies and plans for their regions and districts, but also carry out the bulk of decision-making about resource consent applications. Other key functionaries are the Environment Court, the Ministers of the Environment and Conservation, the Parliamentary Commissioner for the Environment, and (since 2009) the Environmental Protection Authority. Their relevant functions and powers are explained in the following pages.

A key feature of the RMA is widespread community involvement.⁶⁰ The community has opportunities to contribute to every significant part of the RMA process – from public consultation on national and regional policies and national standards, to input into regional and district plans, to the ability to make submissions on any resource consent application that is notified (either to the public or to affected parties).⁶¹

In addition to these general consultation requirements, the Act contains several provisions that are specific to Māori. These include Treaty and Māori provisions in its principles and purpose, specific consultation requirements relating to regional and district plans, and provisions for resource management plans developed by iwi to influence councils when they are preparing regional and district plans.

Below, we explain the relevant sections of the Act. While our focus is on provisions that affect kaitiaki relationships with the environment, it is necessary to explain the RMA system as a whole, including the key question of

who makes decisions, in order for its impact on kaitiaki relationships to be understood. For that reason, the relevant provisions are explained in detail. The claimants, it will be remembered, argued that the Treaty guarantee of tino rangatiratanga gives kaitiaki the right to control and regulate their relationships with the environment, which were seen a core aspect of the Māori culture itself. As will be seen, the RMA largely reserves decision-making powers for the Crown and its delegates (including local authorities which, as we said above, carry out the bulk of day-to-day RMA decision-making). The Act does, however, recognise Māori interests in the environment in its purpose and principles (section 3.3.2(1)). It also provides opportunities for kaitiaki influence on RMA decision-making, for example as submitters under various policy and planning processes and objectors against resource consent applications (see sections 3.3.2(2) to 3.3.2(4), and section 3.3.2(7)). And, as section 3.3.2(6) sets out, it also contains provisions that can be used to provide for decision-making powers to be shared or delegated to kaitiaki.

(1) Purpose and principles

Part 2 of the RMA sets out the purpose and principles of the Act which govern its operation and interpretation. This includes the Act's overarching purpose, a list of matters of national importance that all persons exercising functions and powers under the Act must 'recognise and provide for', a list of other matters which all persons exercising functions and powers under the Act must have 'particular regard' to, and the principles of the Treaty of Waitangi which all persons exercising functions and powers under the Act must 'take into account'.⁶² Each of these phrases ('recognise and provide for', 'have particular regard to', and 'take into account') has a specific legal meaning which dictates how much weight will be given to the matters that follow. In this way, part 2 guides the RMA's operational provisions. In the context of this claim, its importance is that all RMA decision-making – whether by local authorities, ministers, courts or others – must conform to its provisions.

The purpose of the RMA is defined in section 5:

5. Purpose—(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, 'sustainable management' means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 6 lists matters of national importance, which RMA decision-makers must 'recognise and provide for'. One of these (highlighted below) concerns Māori cultural relationships with the environment, including 'ancestral lands'. Section 6 provides that:

6. Matters of national importance—In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

- (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development;
- (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development;
- (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;
- (d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers;
- (e) *the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga*: [emphasis added]
- (f) the protection of historic heritage from inappropriate subdivision, use, and development;
- (g) the protection of protected customary rights.

No internal guidance is provided as to the relative weight to be accorded to each of these matters of national significance. The obligation to recognise and provide for these matters is, however, subject to the overall purpose of promoting sustainable management as set out in section 5.

The next level down in the hierarchy is section 7, which sets out matters that RMA decision-makers must 'have particular regard to'. One of these matters is kaitiakitanga. Section 7 provides:

7. Other matters—In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

- (a) *kaitiakitanga*:
- (aa) the ethic of stewardship:
- (b) the efficient use and development of natural and physical resources:
- (ba) the efficiency of the end use of energy:
- (c) the maintenance and enhancement of amenity values:
- (d) intrinsic values of ecosystems:
- (e) [Repealed]
- (f) maintenance and enhancement of the quality of the environment:
- (g) any finite characteristics of natural and physical resources:
- (h) the protection of the habitat of trout and salmon:
- (i) the effects of climate change:
- (j) the benefits to be derived from the use and development of renewable energy. [Emphasis added.]

'Kaitiakitanga' is defined in the Act as 'the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship'.⁶³

The final matter addressed in part 2 is the Treaty of Waitangi. Section 8 states:

8. Treaty of Waitangi—In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection

of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

(2) Policy statements, standards, and plans

As explained above, the RMA sets up a hierarchy of policy statements and plans at national, regional, and district level. Subject to the purpose and principles referred to in section 3.3.2(1) above, these guide and control RMA decision-making in the territories they apply to. In this section, we explain the purposes of those plans, with particular reference to the opportunities provided for kaitiaki influence on their content.

(a) NATIONAL POLICY STATEMENTS AND NATIONAL ENVIRONMENTAL STANDARDS

At the apex of this system of policies and plans, national policy statements and national environmental standards set nationwide parameters on a range of issues.

National policy statements are approved by the Governor-General on the recommendation of the Minister for the Environment. Their purpose, as set out in section 45, is 'to state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act'.

All plans below the national level must give effect to national policy statements whenever they come into existence, and if they do not, such plans must be changed.

Section 46 provides that the Minister must seek comment from relevant iwi authorities before drafting any national policy statement. The approval process provides for members of the public – which of course may include kaitiaki – to make submissions on the draft statement.

National environmental standards are regulations promulgated by the Governor-General through Orders in Council. The standards may include technical standards, methods, or requirements addressing a range of matters – particularly in relation to contaminants; water quality, level, or flow; air quality; soil quality; noise; and monitoring.⁶⁴ Any proposed regulations for national environmental standards must be publicly notified and follow specific consultative procedures, which include requirements for iwi authorities to be notified and given opportunity to comment.⁶⁵

As we will see in section 3.3.3, only a handful of national policy statements and national environmental standards have come into force.

(b) REGIONAL POLICY STATEMENTS

Regional and district or city councils (as well as unitary authorities)⁶⁶ have significant environmental decision-making powers under the RMA, and plans and policy statements generally show how those powers will be used.

Regional councils have a statutory focus on the management of the coastal marine area, water, and air, with a limited role (with respect to soil erosion) in land management. Regional council boundaries generally include several districts or cities or both, and correspond to river catchments in order to integrate their management. They must have at least one regional policy statement in effect, the purpose of which is:

to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.⁶⁷

The RMA makes some provisions for kaitiaki influence in this context. Specifically, regional policy statements must state, among other things, the resource management issues of significance to iwi authorities of the region.⁶⁸ Councils preparing regional policy statements must also 'take into account' any relevant iwi management plan (we discuss these below).⁶⁹ Recently, the Marine and Coastal Area (Takutai Moana) Act 2011 introduced a provision for kaitiaki control in limited circumstances. Specifically, any council preparing a regional policy statement must 'recognise and provide for' any planning document prepared by a customary marine title group to the extent that the planning document applies to the group's customary marine title area. The Act also introduced a new influence provision under which any council preparing a regional policy statement must 'take into account' any customary marine title group's planning document to the extent that applies to the common marine and coastal area outside the group's customary marine title area.⁷⁰

In addition to these requirements, regional policy

statements must be prepared in consultation with iwi authorities and customary marine title groups in the relevant area.⁷¹ However, decisions about adoption of these policy statements rest with the regional council.

Primarily, regional policy statements are implemented through regional and district plans.

(c) REGIONAL PLANS

Regional councils may prepare one or more regional plans, which must include objectives, policies, and rules.⁷² Regional rules have the force and effect of regulations made under the Act.⁷³

There is a recent trend for regional councils to adopt a 'one plan' approach, combining the policy statement and regional plan(s) into a single statutory document. In the case of unitary authorities, such an approach produces a one-stop shop in which the policy statement, regional plan, and district plan are combined into a single document.

Aside from coastal plans, regional plans are not compulsory under the Act.⁷⁴ However, they are necessary, as they provide a means for regional councils to promulgate rules in order to carry out their statutory functions.⁷⁵ Regional plans generally address the same types of issues as regional policy statements, and must give effect to those statements as well as any national policy statements.⁷⁶

As with regional policy statements, councils preparing regional plans must 'take into account' relevant iwi management plans (discussed below). In addition, any council preparing a regional plan must 'recognise and provide for' any planning document prepared by a customary marine title group to the extent that the planning document applies to the group's customary marine title area, and 'take into account' the planning document to the extent that applies to the common marine and coastal area outside the group's customary marine title area.⁷⁷ In addition to these requirements, regional plans must be prepared in consultation with iwi authorities and customary marine title groups in the relevant area.⁷⁸

(d) DISTRICT PLANS

The focus of territorial authorities under the RMA is on the management of land, and the surface of fresh water

bodies. Every territorial authority is required to have a district plan, the purpose of which is 'to assist the authority to carry out its functions in order to achieve the purpose of the Act'.⁷⁹

District plans must give effect to any national policy statement, and applicable regional policy statement.⁸⁰ Also, a district plan must not be inconsistent with a water conservation order or specified types of regional plan.⁸¹ District plans may include district rules,⁸² which, like regional rules, have the force and effect of regulations made under the Act.⁸³

In preparing district plans, territorial authorities must 'take into account' relevant iwi management plans (see below), and must consult iwi authorities and customary marine title groups in the relevant area.⁸⁴

(e) IWI MANAGEMENT PLANS

As noted in the sections immediately above, the RMA provides for iwi authorities to formally influence the content of local authority policies and plans through planning documents which have come to be known as 'iwi management plans'. Specifically, councils preparing regional policy statements, regional plans, and district plans must 'take into account' these iwi planning documents.⁸⁵

These provisions are designed to ensure that iwi can have their vision for environmental management expressed in the key planning documents governing the use, development, and protection of natural and physical resources in their rohe. There is, however, nothing in the legislation setting out how these plans are to be prepared, nor what they are to contain.

In 2000, the Ministry for the Environment published advice on, and templates for, preparing these plans, suggesting that they may help iwi 'get out of the situation of continually reacting to resource consent applications or environmental problems that affect land and resources within their rohe'. The Ministry also said that preparing iwi management plans offered opportunities to do the following: clearly set out iwi kaupapa on environmental matters; enable whānau, hapū, and iwi to exercise tino rangatiratanga over resources within their rohe; directly influence how councils develop policy of significance to tangata whenua; state expectations about council

functions and responsibilities under the RMA; and set ground rules for consultation.⁸⁶

Where iwi management plans have been prepared, they usually set out key areas of concern for the relevant iwi in relation to the environment and natural resources within the iwi's rohe. This may include identifying wāhi tapu or other sites of significance. The plan may set out the way the iwi wishes to exercise its kaitiaki responsibilities. In some instances this will include strategies, processes, and procedures that the iwi has determined should be followed in consent and planning processes.

In practice, these documents are uneven in style and content. Their quality depends on iwi having the resources to get legal and technical advice, consult on and develop the plan, and engage in RMA processes.

In addition to these iwi management plans, the Marine and Coastal Area (Takutai Moana) Act provided for customary marine title holders to prepare planning documents identifying issues relevant to the regulation and management of customary marine title areas, and setting out regulatory and management objectives and policies relating to those areas. As explained above, local authorities preparing regional policy statements and plans must 'recognise and provide for' the matters contained in these planning documents to the extent that they apply to the customary marine title area and 'take into account' those matters to the extent that they apply to parts of the common marine and coastal area outside the customary marine title area.⁸⁷ It is expected that the circumstances in which these provisions will apply will be very limited.

(3) *The resource consent process*

We now turn to consider the resource consent process, which of course is where the day-to-day decision-making about use and development of the environment takes place. The consenting process is subject to the Act's overall purpose and principles, and to any applicable national environmental standards or rules set out in regional or district plans. If kaitiaki concerns are not represented in the relevant standards or plans, therefore, there may be nothing to trigger consideration of those interests in a consent decision. The consent process does, however, provide opportunities for kaitiaki influence as objectors

to notified consent applications, as we will explain. First, though, we set out in general terms how the consenting process works.

Under the RMA, regional or district plans can classify activities into any of three categories: permitted (no consent required); controlled, discretionary, or non-complying (for which a consent is required); and prohibited.⁸⁸

Section 95A of the Act requires consent authorities to publicly notify resource consent applications in some circumstances – such as if the application involves effects on the environment that are more than minor. The Act also provides the consent authority with discretion to publicly notify the application even when that is not required.⁸⁹ If a consent application is publicly notified, members of the public (including iwi and hapū) are able to make written submissions,⁹⁰ and a public hearing may be held if the consent authority considers it necessary, or if the applicant or a submitter requests one.⁹¹

Under some circumstances, a consenting authority can opt for limited notification of a consent application. This means that any ‘affected persons,’ or any affected protected customary rights group or affected customary marine title group, is notified and can make submissions.⁹² Protected customary rights groups and affected customary title groups are defined under the Marine and Coastal Area (Takutai Moana) Act. The RMA defines the circumstances under which those groups are ‘affected’ for RMA purposes and therefore must be notified of consent applications.⁹³

If a consent application is not publicly notified or is subject to limited notification, there are no opportunities for public input. This is the case for most consent applications. A national survey of local authorities for 2007 and 2008 found that 4.7 per cent of applications were publicly notified (2,409 of 51,960), while 1.9 per cent were given limited notification status (975 of 51,960). The surveys show that, since 1996, public notification has ranged between 4.1 and 6 per cent of all applications.⁹⁴

(a) ENVIRONMENT COURT

A local authority’s decision to grant or decline a resource consent can be appealed to the Environment Court by the applicant, consent holder, anyone who made a

submission, or in some circumstances by the Minister of Conservation.⁹⁵ This means that in practice appeal opportunities for kaitiaki and others are limited. If a consent was not notified, and kaitiaki therefore did not have an opportunity to submit, they cannot subsequently appeal against the consent decision. The Court can also hear appeals on policy statements and plans.

The Court is made up of environment judges, and environment commissioners who come from a range of backgrounds.⁹⁶ The Court’s decisions therefore take into account environmental and social science factors, as well as legal arguments. The Act provides for Māori Land Court judges to be appointed as alternate environment judges; they may then act as environment judges ‘when the Principal Environment Judge, in consultation with the Chief District Court Judge or Chief Maori Land Court Judge, considers it necessary’.⁹⁷ To date, two Māori Land Court judges have been appointed as alternate environment judges.

The Court has some powers of enforcement and some jurisdiction to make declaratory judgments. In the absence of national environmental standards (see section 3.3.3), the Court has set some significant directions for the administration of the RMA.

While decisions on resource consent applications can only be appealed to the Environment Court by specified persons, section 274(1)(d) provides that others may become parties to appeal hearings if they can demonstrate that they have an interest greater than that of the general public.⁹⁸ In determining such an interest, the Environment Court must have regard to relevant statutory acknowledgements of iwi relationships with specified areas of land, water, and other geographic features.⁹⁹

It is only possible to appeal from the Environment Court to the High Court in relation to questions of law.¹⁰⁰ Appeals beyond the High Court are only available by leave.¹⁰¹ In any event, the decision of a consent authority cannot be sent to judicial review before that decision has been appealed to the Environment Court.

(b) CONSENT FAST TRACK

The 2009 RMA amendments introduced new and strengthened existing processes for the fast-tracking of resource consent applications.

Resource consent applicants may now have their applications transferred direct to the Environment Court if the consent authority agrees;¹⁰² this process therefore involves a single hearing in which, as noted above, appeals are possible only on questions of law.¹⁰³

Some of the claimants regarded this fast-tracking process as further limiting kaitiaki opportunities for influence, as we will see in section 3.4.3.

(c) THE MARINE AND COASTAL AREA (TAKUTAI MOANA)**ACT 2011**

The Marine and Coastal Area (Takutai Moana) Act, which was passed in March 2011, restricts the ability of local authorities to grant resource consents for some activities affecting the exercise of customary rights.¹⁰⁴

The Act also establishes a new 'RMA permission right' under which customary marine title groups are empowered to give or decline permission for some activities within their customary marine title area.¹⁰⁵

(4) Role of central government

As well as developing national policy statements and national environmental standards (see section 3.3.2(2)), ministers and central government agencies retain a number of other key functions under the RMA, some of which are relevant to the Crown's Treaty obligations in respect of environmental management.

(a) MINISTERIAL POWERS

Section 142 of the RMA gives the Minister for the Environment power to 'call in' resource consent applications that the Minister considers to be of 'national significance'. In deciding whether a proposal is nationally significant, the Minister may consider, among other things, whether it 'is or is likely to be significant in terms of section 8' (that is, the Treaty of Waitangi provision).¹⁰⁶ Such proposals are heard directly by either a board of inquiry or the Environment Court.¹⁰⁷ Again, appeals are only possible on questions of law.¹⁰⁸

The Minister for the Environment also exercises a

number of other functions under the RMA, including approving heritage protection authorities (which we refer to in section 3.3.2(6)); making water conservation orders; and oversight functions such as monitoring implementation of the RMA, and monitoring the relationship between the functions of central and local government.¹⁰⁹

The Minister of Conservation also has responsibilities under the RMA, in relation to the coastal environment¹¹⁰ approving regional coastal plans, monitoring the effect and implementation of national coastal policy statements, and carrying out functions relating to the control of recognised customary activities that have a significant adverse effect on the environment.¹¹¹

(b) ENVIRONMENTAL PROTECTION AUTHORITY

The 2009 RMA amendments established the Environmental Protection Authority (EPA) as an office within the Ministry for the Environment, with the aim of streamlining and centralising the RMA decision-making process for matters of national significance (which include, as noted above, those likely to be significant in terms of the Treaty).¹¹² Applicants can lodge resource consent applications directly with the EPA, which then advises the Minister for the Environment on whether the matter is of national significance and should be referred to the Environment Court or an independent board of inquiry.¹¹³ A board of inquiry will hold hearings and make a decision independently of the EPA and the Minister.¹¹⁴

These reforms signal a shift towards central control of consenting for nationally important projects, and a greater emphasis on national standard-setting. As we noted above, and will come back to in section 3.4.3, some of the claimants expressed disquiet about this development.

The Environmental Protection Authority Act 2011 established the Authority as a Crown entity independent of the Ministry. This new agency will retain existing EPA functions while also assuming responsibility for regulating hazardous substances and new organisms, and administering the Emissions Trading Scheme. The Act makes some provisions for Māori influence on decision-making. Specifically, in section 8 it provides for a board of six to eight people, of whom at least one must have 'knowledge and experience relating to the Treaty of Waitangi and tikanga Māori (Māori customary values and practices)'.

And, in section 9, it requires that the Board members collectively have knowledge and experience of matters relevant to the Authority's functions, including the Treaty and tikanga Māori. In sections 17 to 20 the Act also provides for the establishment of a Māori Advisory Committee to provide 'advice and assistance' to the Authority on matters relating to 'policy, process, and decisions of the EPA' under the EPA Act or other environmental Acts.

(5) Parliamentary Commissioner for the Environment

As we noted in section 3.3.1(2), the Parliamentary Commissioner for the Environment was established in 1986 with responsibilities for reviewing and investigating the effectiveness of environmental planning and management processes and agencies. The commissioner's specific functions include (among other things):

- ▶ reviewing the system of agencies established to manage the allocation, use, and preservation of natural and physical resources;
- ▶ investigating 'the effectiveness of environmental planning and environmental management carried out by public authorities';
- ▶ investigating matters in which, in the commissioner's opinion, the environment has been adversely affected;
- ▶ carrying out inquiries on the direction of the House of Representatives;
- ▶ undertaking and encouraging the collection and dissemination of information relating to the environment; and
- ▶ encouraging preventive measures and remedial actions for the protection of the environment.¹¹⁵

The commissioner reports on the results of investigations and reviews to the House of Representatives.¹¹⁶

In carrying out its functions, the Commissioner is required to 'have regard' to, among other things, 'any land, water, sites, fishing grounds, or physical or cultural resources, or interests associated with such areas, which are part of the heritage of the tangata whenua and which contribute to their wellbeing'.¹¹⁷

In practice, in keeping with the wide-ranging environmental oversight role Parliament has granted it, the commissioner has inquired into and reported on a huge range of topics, from possum control to climate change

to the environmental impacts of farming and tourism. Of particular relevance to this inquiry, the commissioner has inquired into and reported on kaitiaki involvement in RMA processes. We refer to this report in section 3.3.3.

(6) Transfer and sharing of local authority functions and powers

As we have said, to a large extent the administration of the RMA is delegated to local authorities, who develop policy statements and plans, and administer resource consent applications. Although there are opportunities for kaitiaki to have some influence on decision-making through these processes, the power remains with the relevant council. The RMA does, however, contain some provisions for local authority functions and powers to be delegated or shared with other authorities, including iwi authorities. In light of the claimants' argument that the Treaty gives kaitiaki the right to control and regulate their relationships with the environment, these are of particular relevance. We therefore explain their content in some detail.

(a) TRANSFER OF POWERS

Under section 33 of the RMA, a local authority (a regional, district, or city council) is able to 'transfer any 1 or more of its functions, powers, or duties under this Act, except this power of transfer, to another public authority'. A 'public authority' may include an iwi authority.¹¹⁸

However, section 33(4) sets out several conditions that must be met before a local authority can transfer these powers. Here, we set these out in full:

(4) A local authority shall not transfer any of its functions, powers, or duties under this section unless—

- (a) it has used the special consultative procedure set out in section 83 of the Local Government Act 2002; and
- (b) before using that special consultative procedure it serves notice on the Minister of its proposal to transfer the function, power, or duty; and
- (c) both authorities agree that the transfer is desirable on all of the following grounds:
 - (i) the authority to which the transfer is made represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty:

- (ii) efficiency:
- (iii) technical or special capability or expertise.

The special consultative procedure sets out detailed requirements for informing residents and receiving submissions about proposed changes in local authority activities. It is typically used for major local authority decisions such as the adoption of bylaws and annual plans, and changes in the way that 'significant' council activities are delivered. The procedure requires the local authority to issue public notices, make a statement of proposal available for all residents to view, receive, and consider written submissions, and allow submitters to appear in person to present their views.¹¹⁹

Section 33(6) provides that any transfer of functions, powers, or duties must be by agreement between the authorities, and section 33(8) gives local authorities power to revoke the transfer at any time.

The Act does not contain any provision requiring local authorities to consider, let alone use, section 33.

Transfers of powers under section 33 have occurred, for example, from regional to district councils,¹²⁰ but not to iwi authorities.

(b) HERITAGE PROTECTION AUTHORITIES

Section 188 of the RMA provides a second option for delegating local authority powers, through the establishment of heritage protection authorities (HPAs). In essence, an organisation with HPA status over a place (such as a heritage building or area of land) has authority to control the use and development of that place.

Under section 188, HPAs include any minister of the Crown, local authority (acting on its own initiative or on the recommendation of an iwi authority), the New Zealand Historic Places Trust, and any other body corporate approved by the Minister for the Environment.

Any body corporate can apply for approval if it has 'an interest in the protection of a particular place' ('place' being defined broadly as including 'any feature or area, and the whole or part of any structure') and is seeking HPA status 'for the purpose of protecting that place'.¹²¹

Section 188(4) provides that the Minister 'may' approve the application and may impose terms and conditions,

and section 188(5) sets out the conditions that must be met before the Minister can grant HPA status:

- (5) The Minister shall not issue a notice under subsection (4) unless he or she is satisfied that—
 - (a) the approval of the applicant as a heritage protection authority is appropriate for the protection of the place that is the subject of the application; and
 - (b) the applicant is likely to satisfactorily carry out all the responsibilities (including financial responsibilities) of a heritage protection authority under this Act.

Old Government Buildings, Wellington. Heritage protection is one of the key purposes of the Resource Management Act. The Act's heritage provisions are commonly used to protect buildings such as this.



Before making the decision to grant HPA status, the Minister can make any inquiries he or she considers necessary. In addition, section 188(6) gives the Minister the power to revoke HPA status if he or she is satisfied that the authority is unlikely to satisfactorily protect the place, or carry out its HPA responsibilities.

Once approved, an HPA can put in place a heritage order which restricts the use of the relevant land, and gives the HPA power to control that use. Specifically, no one can use or subdivide the land, or change the 'character, intensity or scale' of its use in any way that would partly or wholly nullify the effect of the order, *unless* they have written consent from the HPA.¹²² Heritage orders can apply, among other things, to 'any place . . . of special significance to the tangata whenua for spiritual, cultural, or historical reasons'.¹²³

Since 1992, five organisations have been approved as HPAs under section 188: three relating to areas of forest (the Royal Forest and Bird Protection Society, the Taupo Orchid Society, and the Orchid Council of New Zealand) and two relating to urban sites (the Save Erskine College Trust and the Friends of Mount Street Cemetery).¹²⁴

(C) JOINT MANAGEMENT AGREEMENTS

In 2005, in response to the fact that section 33 was not being used, section 36B was inserted into the RMA.¹²⁵ This section provides a less empowering and conversely more palatable mechanism for local authorities to reach joint management agreements with, among others, iwi authorities and groups that represent hapū. These agreements allow the parties to jointly exercise any of the local authority's functions, powers, or duties under the RMA.

As with the transfer of power under section 33, the section 36 partnership mechanism is only available if certain conditions are met. These are set out in section 36B(1), which we repeat here in full:

- (1) A local authority that wants to make a joint management agreement must—
 - (a) notify the Minister that it wants to do so; and
 - (b) satisfy itself—
 - (i) that each public authority, iwi authority, and group that represents hapu for the purposes of this

Act that, in each case, is a party to the joint management agreement—

- (A) represents the relevant community of interest; and
- (B) has the technical or special capability or expertise to perform or exercise the function, power, or duty jointly with the local authority; and
- (ii) that a joint management agreement is an efficient method of performing or exercising the function, power, or duty; and
- (c) include in the joint management agreement details of—
 - (i) the resources that will be required for the administration of the agreement; and
 - (ii) how the administrative costs of the joint management agreement will be met.

Under section 36D, any decision made by a group delegated responsibility under a joint management agreement has the same effect as if it was made by the local authority.

Section 36B has been used once to establish a joint management agreement between a local authority and an iwi authority – in an agreement between the Taupō District Council and Ngāti Tūwharetoa (see section 3.5.4(2)).

Again, the Act does not contain any provision requiring local authorities to consider or use section 36B.

(7) Local Government Act consultation requirements

The RMA is not the only Act providing for iwi and hapū influence on local authority decision-making. The Local Government Act 2002 requires local authorities to: provide opportunities for Māori to contribute to decision-making processes; consider ways to foster the development of Māori capacity to contribute to decision-making processes; and provide relevant information to Māori for the purposes of enabling them to contribute to decision-making.¹²⁶ A local authority can address these requirements by ensuring that processes are in place for consulting with Māori.

Section 4 of the Local Government Act says that the aim of these provisions for Māori involvement is 'to recognise and respect the Crown's responsibility to take

appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes.¹²⁷

These provisions apply to all local authority decision-making, and so provide for Māori input and influence when a local authority is setting its regional or district plan, or other environmental planning and policy documents.

(8) Summary

The RMA recognises Māori interests in land, water, and other environmental resources. Specifically, it recognises Māori interests in ancestral lands, water sites, wāhi tapu, and other taonga as ‘matters of national interest’, that all who exercise powers under the Act must ‘recognise and provide for’. It also requires all who exercise powers under the Act to ‘have particular regard to’ kaitiakitanga and to ‘take into account’ the principles of the Treaty of Waitangi. These requirements bind all bodies carrying out functions under the Act, whether setting national policies or standards, setting regional or district policies and plans, or making decisions about individual resource consent applications.

In addition to general mechanisms for public involvement in decision-making, the Act provides specific mechanisms for iwi and hapū influence and, in some circumstances, partnership or delegated control. These include:

- ▶ provision for transfer of local authority powers, functions, and duties under the RMA to iwi authorities;
- ▶ provision for joint management agreements between local authorities, and iwi and hapū; and
- ▶ provision for iwi authorities to be approved as heritage protection authorities.

In addition, RMA planning and resource consent, and Environment Court processes make specific provisions for iwi input into environmental decision-making in some circumstances (for example, through iwi management plans, notification of some resource consent applications, and provisions for consultation of iwi authorities). The Local Government Act furthermore requires local authorities to involve Māori in decision-making – including decisions relating to the use of natural and physical resources.

Thus, the Act provides statutory recognition of the Māori relationship with the environment, the kaitiakitanga interest, and the Treaty in the context of environmental management, and makes some provision for Māori involvement in decision-making processes.

3.3.3 How the RMA has worked

In the preceding section, we explained the provisions of the RMA, particularly as they relate to iwi aspirations to exercise kaitiakitanga. Now we consider how these provisions have been used in practice. Following this, we will proceed in section 3.4, to consider claimants’ views on this matter and the Crown’s response.

(1) National policies and standards

When the RMA was enacted, it was fully expected that the setting of national standards and policies would provide significant guidance to the regional and territorial authorities, and to other agencies overseeing management of natural and physical resources.

There was also much scope for the involvement of Māori in environmental management. With goodwill and negotiation between iwi or hapū and councils, powers could have been transferred to iwi in some circumstances, and other mechanisms could have been used to provide more meaningful recognition and exercise of kaitiaki rights.

As it turned out, things took quite a different path. Central government did not take up the leadership role envisaged by the national policy statement and national environmental standard framework, and created very few national statements and standards. Between 1991 and 2008, only one national policy statement was created – a mandatory statement on coastal policy, produced in 1994.¹²⁸ In 2008, a policy on electricity transmission was created, and in 2010 a new coastal policy statement came into effect.¹²⁹ In April 2011 a national policy statement on renewable electricity generation was gazetted, and this was followed in May 2011 by a policy on freshwater management.

Of the three most recent policies, the freshwater and coastal policy statements make some provision for Māori interests. The freshwater management policy requires local authorities to take reasonable steps to involve iwi



National policy statements on electricity transmission and renewable energy generation are amongst four such statements currently in force.

and hapū in freshwater management, and identify tangata whenua values and interests in fresh water and fresh-water ecosystems and reflect those values and interests in decision-making.¹³⁰ The 2010 coastal policy statement has, as one of its objectives, to ‘take account of’ the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki, and provide for tangata whenua involvement in the management of the coastal environment. This objective is supported by specific Treaty and Māori heritage policies, one of which calls for the incorporation (with tangata whenua consent) of mātauranga Māori into regional policy statements, plans, and consideration of applications for resource consents.¹³¹ At the time of writing, a policy on biodiversity

was in gestation, and scoping work had been carried out for a policy on urban design.¹³² The first national environmental standards were not created until 2004 – a set of air quality standards – and three others have been created since, in June 2008 (drinking water), October 2008 (telecommunication facilities), and January 2010 (electricity transmission).¹³³ None of these standards contains any reference to iwi control or influence.¹³⁴

In the absence of meaningful national direction for most of the period since 1991, the Environment Court’s decisions became more far-reaching than might have been contemplated, as no other entity was available to fill the guidance gap. But the Court’s role was to deal with particular resource consent cases, not to set down policies and standards for general application. Invariably, local authorities were left to take what guidance they could from the Court, and fill in the gaps themselves.

This proved a huge challenge for all of them, as it did for non-resourced iwi and hapū wishing to take up a role in environmental management within the rubric of the RMA. National standards and policies could have removed a great deal of work for local authorities by providing necessary guidance for them to apply and implement in a manner suited to the expertise and resources available at council level. The requirement to make every decision from scratch must have put great pressure on them, and no doubt caused duplication of effort around the country.

(2) Transfer of powers and functions to iwi and hapū

The lack of nationwide policies and standards is no doubt one reason why local authorities struggled to develop effective relationships with iwi and hapū. Certainly, between 1991 and 2010 no local authorities delegated powers or functions to iwi as provided for under section 33.¹³⁵ In this, the view of iwi was unequivocal: councils showed themselves perfectly willing to transfer powers to other public authorities – but just not to iwi authorities. This has not been for want of trying; we are aware of numerous occasions in which iwi have sought transfer of powers under this provision.¹³⁶ The Parliamentary Commissioner for the Environment, in a 1998 report *Kaitiakitanga and Local Government: Tangata Whenua Participation in Environmental Management*, said that tangata whenua reported ‘widespread reluctance’ on the part of councils

Table 3.1: Local authority engagement with Māori, 1997–2004

	2004		1997	
Councils with Māori standing committee	20%	(17 out of 86 councils)	17%	(11 out of 64 councils)
Council with iwi representatives on working parties or subcommittees	49%	(42 out of 86)	39%	(25 out of 64)
Councils with formal relationship agreement with iwi	51%	(44 out of 86)	34%	(22 out of 64)
Councils with iwi liaison or Māori policy staff	37%	(32 out of 86)	31%	(20 out of 64)
Councils holding formal consultation with Māori when the need arises	80%	(69 out of 86 local authorities)	25%	(16 out of 64 local authorities)
Councils holding regular informal consultation with Māori	92%	(79 out of 86)	17%	(11 out of 64)

to even consider devolution of powers. The commissioner also commented that ‘tangata whenua generally perceive councils to be fearful and distrustful of the idea of devolution to Māori.’¹³⁷ The commissioner recommended that councils seek opportunities to transfer functions under section 33, and also that the Crown develop a national policy statement on kaitiakitanga, the Treaty, and Māori relationships with ‘ancestral lands, water, sites, wāhi tapu, and other taonga.’¹³⁸ Thirteen years on, neither recommendation has been implemented.

There are, as we have said, no mechanisms under the RMA by which iwi and hapū can require local authorities to use the powers of delegation provided by section 33. The decision on whether to transfer or devolve powers or functions rests with the local authority.

Furthermore, between 1991 and 2010 no iwi authority was approved as an HPA, as provided for under section 188. Ngāti Pikiao’s application to be approved as an HPA in relation to part of the Kaituna River was declined, even though the Minister for the Environment had been advised by the Ministry that the application should be approved.¹³⁹ While Ngāti Pikiao were successful in their judicial review of the Minister’s decision, the RMA was subsequently amended to prevent heritage orders being made in respect of water.

(3) Local authority engagement with Māori

Local Government New Zealand surveys found significant improvements between 1997 and 2004 in the number of local authorities engaged in consultation with Māori, as shown in table 3.1.

The 2004 survey also found that:

- ▶ nearly two-thirds of councils provided funding targeted at joint initiatives with Māori, and internal training on subjects such as statutory obligations, the Treaty, Māori language and culture, and marae-based protocols;
- ▶ half the councils held iwi management plans; and
- ▶ a quarter of the councils had an informal co-management regime with local Māori for managing a site, activity, or resource.¹⁴⁰

More generally, in part because of the gap in national guidance, the operation of the RMA is now driven by regional and district plans (see section 3.3.2(2)). They are the engine room of the RMA process. Though iwi management plans are held by half the councils nationwide, the claimants told us that those plans were having little or no effect on RMA administration.¹⁴¹ As noted in section 3.3.2(4), around 95 per cent of the activities subject to resource consent are not notified. On the remaining 5 per cent of activities, everyone (including iwi and hapū)

is able to make submissions on the activity, but this is entirely a reactive role.

Having described in general terms the core Māori values of particular relevance in environmental matters (in section 3.2.1), and having set out how the modern system of environmental management operates (in section 3.3), we can now turn to the crucial question: can the voice of mātauranga Māori, impelled as it is by whanau-ngatanga and kaitiakitanga, be heard in the operation of such a system, and if so is it heard in such a way that it is given due weight and effect?

3.4 CLAIMANT AND CROWN ARGUMENTS

We turn now to consider the claimants' concerns about environmental management in New Zealand in general, and the operation of the RMA in particular. We then (in section 3.4.2) consider the Crown's response.

3.4.1 Claimant arguments

The claimants contended that tino rangatiratanga gives kaitiaki the right to control and regulate their relationship with the environment. In the claimants' view, the Crown has never protected this right. Rather, the exercise of kaitiakitanga has been severely compromised – by land loss, long-term environmental degradation, changes in land use, and a statutory framework that reserves decision-making powers for the Crown and its delegates.

The claimants argued that the default position should either be joint management of the environment or outright kaitiaki control, although they recognised that compromise would be required to accommodate other vested interests. Without kaitiaki being at the centre of environmental decision-making, the claimants contended, the voice of mātauranga Māori could not be heard when it counted.

They argued also that the Crown has a duty of active protection under article 2 of the Treaty to protect kaitiaki relationships with taonga in the environment, and ensure the preservation and development of those relationships from generation to generation (as we have already discussed in chapter 2).

The claimants said that taonga in the environment,

in respect of which kaitiaki rights and obligations apply, included natural resources; indigenous flora and fauna and the ecosystems and habitats that support them; geographic features such as rivers, lakes, maunga, and swamps; and sites such as pā and wāhi tapu.

The claimants contended that the Crown has consistently breached these obligations. They said that ongoing environmental change and degradation has affected flora and fauna, habitats, and other taonga in the environment. Human settlement, the introduction of exotic species, the clearing of land for farming, the taking and use of resources, and the discharge of sediment and pollution without iwi consent were given as examples of this. We set out some claimant comments about this ongoing environmental degradation in section 3.2.4.

The claimants also argued that kaitiaki rights have never been protected under New Zealand law, and are also not protected under the current legal framework. They provided several reasons for this view.

First, the claimants said that kaitiakitanga is not protected because, under the RMA, environmental decision-making power rests with the Crown and its statutory delegates (mainly local authorities). They argued that although many of the Crown's decision-making powers were delegated to local government, the Crown still was responsible for the observation of Treaty responsibilities in relation to the administration of the RMA. Counsel for Ngāti Kahungunu submitted that 'the RMA regime continues to be administered by local government and the Crown continues to fail to ensure that its statutory delegates meet their Treaty obligations to Maori'.¹⁴²

Secondly, the claimants said that the RMA provides only limited mechanisms for tangata whenua influence and delegated control over taonga in the environment, and then only at the discretion of the Crown and local authorities. Furthermore, they said that where those mechanisms are available they have either not been used or have not been effective. For example, as we noted earlier, the statutory mechanisms available under sections 33 (transfer of powers) and 188 (HPAs) have never resulted in any delegation of powers to iwi authorities,¹⁴³ although councils have used section 33 to transfer powers to other public authorities. Where iwi management plans have

been prepared, they are having little practical effect on local authorities' resource management decisions.

Thirdly, the claimants said that when Māori participation is possible it is reactive (for example, through resource consent processes or as consultees on local authority policies and plans) and dependent on councils' willingness to engage.

Finally, the claimants argued that the provisions in part 2 of the Act do not accord sufficiently high priority to tangata whenua interests. As counsel for the Tai Tokerau claimants submitted:

There is no recognition of this kaitiaki relationship as being a primary consideration in the management of the environment. Section 6(e) has been interpreted by the Courts as to not allow for a Maori right of veto based on their relationship with the environment, but rather the relationship is one of various matters to be taken into account in the overall balance.¹⁴⁴

As an example, in practice, of the low priority given to kaitiaki interests, witnesses pointed out that even where Māori continue to own land and resources, they cannot manage it to protect their taonga against the adverse effects of neighbouring activities. Waka Gilbert of Ngāti Kahungunu explained why the eels had disappeared from a lake still owned by his hapū:

Lake Rotonuihia is on our property . . . This lake has become polluted. It has also been infested with a weed, which smells bad and causes the fish to die. I believe that the growth of this weed is linked to the phosphorus that the farmers put on their land, as the weed always grows after topdressing has taken place. However, because it is part of a system of three connected lakes, we don't have any ability to clean out our own lake. For example the lake that leads into our lake contains effluent from a killing shed. We can't clean our lake in isolation from the others.¹⁴⁵

Overall, then, the claimants said that the RMA does not provide an appropriate level of Māori control and influence over taonga in the environment.¹⁴⁶ As Mr Elkington said when he spoke for Ngāti Koata:

The government has overridden our system to the point that we cannot implement our system of preservation ourselves. We should have been made equal partners in managing our resources. The government has never considered our systems at all.¹⁴⁷

The claimants said that the practical consequence of these perceived failings in the RMA system is that they cannot fulfil their kaitiaki obligations to protect and nurture taonga. And if they cannot fulfil their obligations, it is not only the taonga that suffer: also lost are the kaitiaki relationships, and with them the tikanga and mātauranga associated with those taonga. Mr Haddon of Ngāti Wai summed up this concern:

Our young people today have been cut off from the knowledge and value systems of our tupuna by all of this development. They do not know the tikanga of the ngahere because there is no ngahere. They do not know the tikanga of the kukupa because there are no kukupa. They do not know about the tawhara because there are none left. Our young people today do not know how to protect our taonga, because there are no taonga to protect.¹⁴⁸

Counsel for Ngāti Kahungunu summed up the prevailing sentiment by concluding: 'To continue with the current regime without addressing the issues which are blindingly obvious, and have been for years, constitutes a fundamental and ongoing breach of the principles of the Treaty.'¹⁴⁹

3.4.2 Crown arguments

In general terms, the Crown argued that its regulatory control of the environment is consistent with its Treaty obligations and that it attempts 'to recognise and provide for the kaitiaki's relationship with the environment where possible and appropriate.'¹⁵⁰ It did not accept that kaitiakitanga includes any right for kaitiaki to make or enforce laws; nor did it agree that kaitiaki have a right to control or regulate taonga.¹⁵¹

It noted that 'as part of its duty of active protection, the Crown informs itself of Māori interests in the environment and involves Māori in that management [of the



The Ruamāhanga River, Wairarapa. As an example of claimant concerns about the operation of the Resource Management Act, Ngāti Kahungunu claimants gave evidence about the extraction of gravel from the riverbeds of the Wairarapa plain.

environment] as appropriate.¹⁵² The Crown contended that recognition of all appropriate aspects of the kaitiaki relationship is achieved through existing legislative and policy mechanisms. These mechanisms include provisions in the RMA such as sections 6(e), 7(a), and 8, which require that 'Māori interests [are] considered at both the plan creation stage and the consent granting stage',¹⁵³ as well as a range of programmes relating to Māori participation in environmental processes that are run through the Ministry for the Environment.¹⁵⁴

The Crown provided a table listing more than 30 parts of the RMA where tangata whenua and customary activities were acknowledged in some way, ranging from the permitted use of geothermal energy in accordance with tikanga, to the obligation on councils to send one copy of policies and plans to tangata whenua.¹⁵⁵ It concluded that '[t]he combination of these provisions gives significant protection to Māori interests'.¹⁵⁶

The Crown also presented evidence that, since the RMA had been passed, the Ministry had run a wide range of

programmes directed at enhancing Māori participation in environmental decision-making processes. The Ministry also provided direct support for the development of iwi management plans through the Sustainable Management Fund.¹⁵⁷ The programmes cited by Lindsay Gow (then deputy chief executive) as evidence of the Ministry for the Environment delivering on the Treaty interest were:

- ▶ iwi, local government, and central government CEOs forum;
- ▶ local authority iwi liaison office annual hui;
- ▶ a National Kaitiaki Hui for iwi or hapū RMA practitioners and environmental managers;
- ▶ three Whole of Government Officials forums;
- ▶ maintaining strong networks with tangata whenua;
- ▶ providing regular pānui to tangata whenua practitioners and iwi liaison officers;
- ▶ producing publications to 'better enable Māori to engage with resource management';
- ▶ encouraging Māori to attend the Making Good Decisions Programme;
- ▶ contracting Māori law specialists to deliver two-day workshops on RMA processes to iwi and hapū groups;
- ▶ supporting iwi and councils to develop and implement iwi planning documents;
- ▶ working with councils and iwi to identify sustainable development opportunities; and
- ▶ development of the Cultural Health Index for Streams and Waterways.¹⁵⁸

The Crown argued that the reasons there have not been any transfers of power to iwi under section 33 include a lack of research about the implications of transferring powers and functions to iwi or hapū; unrealistic demands and expectations by iwi or hapū; insufficient understanding by iwi or hapū of the processes involved; and a lack of ability of iwi or hapū to meet the criteria in section 33.¹⁵⁹

The Crown did concede, however, that more effective use could be made of iwi management plans to influence local authority decision-making about natural and physical resources. In its closing submission, the Ministry said that 'iwi planning documents can be the most effective means to ensure that the views of Māori are expressed, clearly understood, considered and incorporated into planning processes.'¹⁶⁰

In terms of the interaction between the Crown's Treaty obligations and the administration of the RMA, the Crown said:

The RMA administration is delegated by the Crown to local authorities. Local authorities are not part of the Crown. They are separate body corporate . . . and creatures of statute. They do not act on behalf of the Crown for the purposes of the Treaty of Waitangi Act 1975 . . . The Crown's responsibility lies with the statutory framework and with ensuring that the broad parameters of legislative schemes are Treaty compliant.¹⁶¹

Finally, in terms of the effects of the RMA regime on kaitiaki relationships and mātauranga Māori, the Crown argued that its responsibilities relate primarily to regulating environmental management rather than preserving, developing, and transmitting mātauranga Māori (as expressed through the kaitiaki relationship). It contended that preservation of the kaitiaki relationship and transmission to future generations is 'essentially a role for Māori'. It said, however, that the Crown can assist this process in acting consistently with its Treaty obligations.¹⁶² The Crown also said that it could not ensure the preservation of tikanga Māori and mātauranga Māori because that preservation 'depends on the actions of others.'¹⁶³

3.4.3 Submission on the Resource Management Act reforms 2009

In 2009, Parliament amended the RMA. These changes created the Environmental Protection Authority (referred to in section 3.3.2(4)) and streamlined some processes for decision-making about plans or policies and resource consent applications.

In February 2010 we received a submission from counsel for Ngāti Kahungunu, arguing that the reforms aimed at streamlining and simplifying consent processes were detrimental to iwi and hapū. Counsel specifically objected to provisions:

- ▶ allowing resource consent applications to bypass council hearings and proceed directly to the Environment Court;
- ▶ relating to fees and costs, ministerial call-in, and public notification of consents; and limiting appeals

against policies, plans, and decisions made by the Minister under the call-in provisions.¹⁶⁴

The amendments, it was argued, would limit Māori participation in resource management processes including: hearing of consent applications, Environment Court proceedings, and setting of policies and plans. Counsel for the iwi said:

The changes introduced by the 2009 Amendment Act have added significant additional prejudice to kaitiaki attempting to protect their relationship to the environment and these should be addressed in the Tribunal's report.¹⁶⁵

We called for Crown submissions on these allegations.¹⁶⁶ The Crown response rejected claimant counsel's assertions:

The Amendment Act was not intended to alter the fundamental operation of the RMA. The Amendment Act has not, as suggested, made it "even more difficult for kaitiaki to effectively participate in RMA processes in order to protect their relationship with the environment". The Māori right to participate is unchanged.¹⁶⁷

3.4.4 Summary

The claimants contended that tino rangatiratanga gives kaitiaki the right to control and regulate their relationship with the environment, including taonga such as natural and physical resources, ecosystems, flora and fauna, and significant places such as waterways, wāhi tapu, and pā sites. In their view, the Crown has never protected this right. Rather, the exercise of kaitiakitanga has been severely compromised by land loss, long-term environmental degradation, changes in land use, and laws reserving control of environmental decision-making to the Crown and its delegates.

The RMA raised hopes that iwi would finally be able to exercise kaitiaki rights within their rohe. These hopes, however, have not been fulfilled. Iwi contend that the legislation is faulty in several respects. First, they contend that it breaches the Treaty by placing control of the environment in the hands of the Crown and local authorities, and providing for tangata whenua control and influence only with the consent of those authorities. Secondly, they

argue that neither kaitiakitanga nor the principles of the Treaty are given sufficient pre-eminence in the principles and purposes of the legislation. And thirdly, where the RMA has provided for iwi or hapū control or influence over the environment – for example, through delegation of powers and through iwi management plans – its promise has not been fulfilled.

The claimants also submitted that 2009 amendments to the RMA further limited their ability to participate in environmental decision-making.

The Crown argued that it was not responsible for the preservation and transmission of environment-related mātauranga and tikanga, and that the current framework already largely fulfils its obligations in respect of the exercise of kaitiakitanga over the environment. It acknowledged, however, that better use could be made of some mechanisms, such as iwi management plans. The Crown also contended that local authorities are not part of the Crown and therefore not required to comply with the Treaty; the Crown's obligation ends with ensuring that the statutory framework meets Treaty obligations.

3.5 ANALYSIS

Having set out the claimants' and Crown's views, we now turn to our analysis. Our initial focus is the applicability of the Treaty to kaitiakitanga interests, what other interests there are in the management of New Zealand's environment, and how those interests might be balanced. We also consider the essential features of a truly Treaty-compliant environmental management regime that adequately protects kaitiaki interests, and the extent to which the RMA does – or does not – provide those features.

3.5.1 What is the nature of the relationship between kaitiaki and the environment, and is it the subject of Treaty interest?

As we have discussed in section 3.2.1, in te ao Māori the relationship between kaitiaki and the environment is founded in whanaungatanga – the web of relationships that embraces living and dead, present and past, human beings and the natural environment. Whanaungatanga is the basis on which the world is ordered, the organising principle of mātauranga Māori, the source of whakapapa,



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

and the origin of all rights and obligations – including kaitiakitanga over the environment.

Thus, although kaitiakitanga is described by the RMA in terms of guardianship, this definition overlooks the deeper spiritual dimension of kaitiakitanga that derives from the whanaungatanga at its source. Kaitiaki nurture and care for the environment and its resources – not necessarily by forbidding their use, but by using them in ways that enhance rather than damage kin relationships. The kaitiaki relationship with the environment is not the transactional or proprietary kind of the Western market, and does not rest on ‘ownership’. Rather, like a family relationship, it is permanent and mandatory, binding both individuals and communities over generations and enduring as long as the community endures.

The ability to exercise kaitiakitanga in this full sense is what the claimants in this inquiry are seeking. This, they argue, is what the Treaty guarantee of tino rangatiratanga means in the context of the environment: it obliges the Crown to protect their ability as kaitiaki to control and regulate their relationship with the environment, that relationship being a core aspect of the Māori culture. At present, they say they can rarely do so because the statutory authority to exercise formal kaitiakitanga is vested in the Crown and local government. Instead, the claimants say, the default position should be either joint management of the environment, or outright kaitiaki control.

We agree (as we have already stated in section 2.8) that the Treaty obliges the Crown to actively protect the continuing obligations of kaitiaki towards the environment, as one of the key components of te ao Māori. Indeed, one of the features of the reorganisation of the environmental management regime that resulted in the RMA is that we now have legislation specifically recognising the principles of the Treaty, the Māori interest in the environment, and the concept of kaitiakitanga. As we have noted, this direct infusion of indigenous values into mainstream environmental regulation may well be unique in the world (even though, as we have seen, the potential protections the RMA offers for kaitiaki to participate in environmental management and maintain relationships with the environment in reality deliver far less).

But in finding that the relationship between kaitiaki and the environment is the subject of Treaty interest, we note some important provisos.

First, we do not consider the environment as a whole to be a taonga, in the sense that the term is used in the Treaty. Such an all-encompassing interpretation devalues the status of taonga and the rights and obligations that flow from them. In mātauranga Māori, the environment is the manifestation of the atua themselves – Rangi-nui, Papa-tū-ā-nuku, Tāne-mahuta, Haumia-tiketike, and so on – who transcend and have dominion over taonga. Thus, taonga are the particular iconic mountains or rivers, for example, or specific species of flora and fauna. Whether a resource or a place is a taonga can be tested, as it can for taonga species (we have discussed this in chapter 1, too, in relation to taonga works). Taonga have mātauranga Māori relating to them, and whakapapa that can be recited by tohunga. Certain iwi or hapū will say that they are kaitiaki. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have kōrero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested.

Secondly, we do not accept the Crown’s argument that its Treaty obligation to protect the kaitiaki relationship with the environment is absolved by the statutory devolution of its environmental management powers and functions to local government. The Crown argued that, given this devolution, its only remaining concern was to ensure that the framework for administration was Treaty compliant – which, the Crown submitted, it is.¹⁶⁸ But this argument has been repeatedly rejected by the Tribunal and the courts. The *Ngawha* report, for example, found that:

The Treaty was between the Maori and the Crown. The Crown obligation under article 2 to protect Maori rangatiratanga is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or regional authorities. If the Crown chooses to so delegate, it must do so in terms which ensure its Treaty duty of protection is fulfilled.¹⁶⁹

The High Court endorsed this view in 2005, stating that:

It is the responsibility of successors to the Crown, which in the context of local government includes the council, to accept responsibility for delivering on the second article promise. Nowadays the Crown is a metaphor for the Government of New Zealand, here delegated by Parliament to the council, which is answerable to the whole community for giving effect to the Treaty vision in the manner expressed in the RMA. The due application of that statute will assist to “avert the evil consequences which must result from the absence of the necessary Laws and Institutions” needed to secure justice to all New Zealanders.¹⁷⁰

Thus, the Crown’s Treaty duties remain and must be fulfilled, and it must make its statutory delegates accountable for fulfilling them too.

The final point to be made about the Treaty is that although the English text guarantees rights in the nature of ownership, the Māori text uses the language of control – *tino rangatiratanga* – not ownership. Equally, *kaitiakitanga* – the obligation side of *rangatiratanga* – does not require ownership. In reality, therefore, the *kaitiakitanga* debate is not about who owns the *taonga*, but who exercises control over it. (We have also made this point clearly in the preceding chapters.)

In the end, it is the degree of control exercised by Māori and their influence in decision-making that needs to be resolved in a principled way by using the concept of *kaitiakitanga*. The exact degree of control accorded to Māori as *kaitiaki* will differ widely in different circumstances, and cannot be determined in a generic way. Finding the appropriate degree of control will depend on several factors. We discuss these in more detail in section 3.5.3, but they include the importance of the *taonga* in question to the *iwi* or *hapū*, the health of that *taonga*, and any competing interests in it.

3.5.2 What other interests exist?

There are, of course, many legitimate interests in the environment that must be balanced with the *kaitiaki* interest. These include the interests of the environment itself, along with those who wish to use or develop

environmental resources, others who are affected by those uses, and the community as a whole.

The ‘environment’ has many aspects. It includes coastal areas, lakes, and rivers; landscapes and landforms; ecosystems and habitats; plants and wildlife; the atmosphere and climate systems; and resources – including land, water, and air – that support life and contribute to economic activity. In the context of resource management, it also includes the urban environments of New Zealand’s towns and cities, including their character and heritage. While the term ‘environment’ might summon images of mountains and lakes, in reality, much of the environment that is the concern of this chapter has already been modified, whether by urbanisation or by changes in use of rural land (such as the conversion of areas of indigenous bush for forestry or farming). Where clashes of interest occur, they often do so over proposals for further modification. The ‘environment’, therefore, does not represent a single interest, but rather a wide range of interests.

There is an equally wide range of interests in the use and development of the environment. In the commercial world, resource users include: primary producers such as farmers, fishers, and foresters; extractive industries such as mining and petroleum exploration; energy generators (whether using hydro, wind, coal, or other technology); and other forms of industry – all of which rely on modification of the environment to carry out their business. Other interests include: the tourism industry, which relies to a significant extent on preservation of the environment; recreational users; land and property developers; local authorities and other organisations charged with developing infrastructure such as transport, water supply, and drainage networks; and individuals such as homeowners.

The list of those affected by the use and development of the environment is equally broad. Neighbours will be affected by noise and emissions from a nearby factory, or by a property development that threatens to destabilise their land. Those downstream will be affected by discharges of farm effluent or factory waste into a waterway, and those who wish to use land or water for recreational purposes or to preserve it for its intrinsic values will be affected by a proposal to adopt another use, such as mining or developing a hydro scheme. Uses that change the



Project West Wind turbines, Makara, Wellington. Resource management decisions can involve a delicate balance of competing and intersecting interests. As one example, proposals to generate electricity from low-emission sources such as hydro or wind can attract opposition based on concerns about wildlife, visual impacts, and noise pollution.

character or qualities of a place – such as a change in land use, or the destruction of a heritage building – will affect those who have strong cultural or historical connections with it. The environment itself will of course be affected by resource use – for example, if a change in land use is likely to reduce habitat for indigenous plants or wildlife.

Those affected may also include future generations, as is the case with emissions of greenhouse gases; serious pollution; irrevocable changes in land use or landscapes; decline in ecosystems and habitats; extraction of non-replaceable resources; or decline in the productive capacity of land.

Cutting across all of these interests are those of property owners and the owners of resources. Property owners may wish to use their property, and may also be affected by other users. As we noted in chapters 1 and 2, property rights of all kinds are accorded considerable weight in *te ao Pākehā*, and are often prioritised if drawn into competition with other interests, although they are never absolute.

Finally, the community as a whole can be said to have an interest in the environment that is separate from the interests of the individuals who make up that community. The community benefits from the amenity and resources

the environment provides, and from the contribution of the environment to community identity and to overall quality of life.

It can be seen that the interests at play are many, varied, and complex. Indeed, they are so complex that even individuals can have conflicting interests: everybody uses electricity, for example, yet many electricity users are opposed to the environmental harm that inevitably results from its generation. Likewise, there are differing views of what constitutes a healthy environment. To one person, the crucial element might be preservation of landscapes; to another, minimising emissions or other pollution. To one, some level of river pollution might be acceptable so long as it does not harm human health; to others, that pollution will be unacceptable if it upsets the balance of river ecosystems. Certainly, the interests at play will differ from case to case.

The RMA regime, of course, is nothing if not a mechanism for balancing these interests. This is apparent in the Act's purpose, which explicitly balances the use of resources to advance 'social, economic and cultural well-being and . . . health and safety' against the health of the environment.¹⁷¹ The health of the environment is further broken down into three distinct interests, two of which

are about human welfare (capacity to support life, and capacity to meet the needs of future generations), and one of which is about ‘avoiding, remedying or mitigating’ adverse effects on the environment itself. The balancing exercise is apparent not only in the interests accorded to the environment, but also in the types of well-being – ‘social, economic and cultural’ – that the Act seeks to facilitate.¹⁷² While these imperatives may sometimes overlap, they will also often conflict.

The RMA balancing exercise can also be seen at the operational level, for example in the resource consent process which seeks to balance the interests of the consent applicant against those affected by the proposed activity, the wider community (whose views are reflected in relevant policies and plans, as well as in submissions on specific consent applications), and the environment. In this claim, some of the claimants expressed a view that the current balance was wrong – that despite the many checks in place the process was in fact weighted in favour of resource users.¹⁷³

The range and complexity of interests means that there can be no one-size-fits-all approach to environmental management. Policies and standards may be set at national and regional levels to provide necessary and principled guidance, and general approaches may develop, but ultimately every decision about use or development of a resource will be centred around its own particular set of circumstances and interests, and will therefore be unique.

Before we turn to consider how kaitiaki interests might be accommodated, one final point needs to be made. The boundaries between kaitiaki and other interests are porous. Kaitiaki are members of their communities. They may run businesses, or have recreational interests in a resource. They certainly share wider community interests in access to resources such as water and energy, and in the overall amenity of the environment they live in. Even for kaitiaki, the kaitiaki interest may be one among many. The Crown’s obligation is to give proper weight to the kaitiaki interest, alongside all others.

3.5.3 How should the kaitiaki interest and other interests be balanced?

As the preceding section indicates, there is no one-size-fits-all mechanism for balancing kaitiaki interests against

those of others. In any given situation, not all interests will be in competition – some may be quite readily reconciled. Where they do conflict, not all will carry the same weight – some interests will be entitled to greater protection than others. Moreover, not all taonga are the same: some may be more important to iwi or hapū identity than others, as evidenced by the body of mātauranga associated with them, and some may be more deserving of protection than others because they are in more fragile health.

Thus, we can provide no blanket answer to all the claimants’ environmental claims. The claimants sought Māori control of taonga Māori, but we can see that there are cases where this cannot – and should not – occur. The kaitiaki interest is important, and protections for it must be more than token, but it is not a trump card. Likewise, the Crown argued for Crown or local authority control of all decision-making affecting taonga in the environment; in some instances this may be appropriate, but in others, entirely inappropriate.

There can, therefore, be no standard template for environmental decision-making that privileges one set of interests over others. Rather, what is needed is an environmental management system that allows all legitimate interests (including the interests of the environment itself) to be considered against an agreed set of principles, and balanced on a case-by-case basis.

Where, in the balancing process, it is found that kaitiaki should be entitled to priority, the system ought to deliver kaitiaki *control* over the taonga in question. Where that process finds kaitiaki should have a say in decision-making but more than one voice should be heard, it should deliver *partnership* for the control of the taonga, whether with the Crown or with wider community interests. In all areas of environmental management, the system must provide for kaitiaki to effectively *influence* decisions that are made by others, and for the kaitiaki interest to be accorded an appropriate level of priority. And the system must be transparent and fully accountable to kaitiaki and the wider community in delivering these outcomes.

These are the key requirements of an environmental management regime that is Treaty compliant and provides adequately for the kaitiaki interest: it must deliver kaitiaki control, partnership, and influence, whichever of those outcomes is appropriate. We now turn our attention

to considering the extent to which the present regime is putting these principles into practice.

3.5.4 Does the current RMA system provide for kaitiaki control, partnership, and influence?

Nominally, of course, the RMA regime already provides for kaitiaki control (through provisions such as section 33 and section 188 delegations), partnership (through section 36B), and influence in environmental management through the special Treaty and Māori provisions in part 2. But, as we have seen, it is not delivering – or, at least, not anywhere near enough. In 20 years, there have been no transfers of power to iwi authorities, and only one very recent and limited sharing of power. Of the handful of national policy statements that have been issued, until very recently none had set policy for kaitiaki participation in environmental management. While half of all councils hold iwi management plans, they are having little impact on RMA activities. For many iwi, their role in environmental decision-making remains much as it always has been: they are consultees, and they react when they can, often as objectors when the law gives them standing to object.

The RMA, in other words, has not fulfilled its promise. It has not delivered appropriate levels of control, partnership, and influence for kaitiaki in relation to taonga in the environment. Indeed, the only mechanisms through which control and partnership appear to have been achieved are historical Treaty and customary rights settlements (some examples of which are referred to below).

For many reasons, the settlement process should not have to be the solution. Iwi should not have to spend valuable Treaty credits in full and final settlements to achieve what the RMA was supposed to deliver in any case. Nor should those that have not yet settled have to wait for rights the RMA should already have delivered over the past 20 years.

What is needed is a fair, transparent, principled system for balancing kaitiaki and other interests in all parts of New Zealand. Historical settlements cannot deliver that, because they are, by their nature, local and ad hoc. Negotiations are subject to high levels of political pragmatism and leverage, not to broadly applicable standards or accountabilities. Big iwi get more, not only in terms

of financial redress but also in ongoing opportunities for partnership and control; small iwi get less. Some of the more recent settlements, too, have delivered more in terms of partnership than older settlements. Using the settlement process to determine resource management issues is, in short, a recipe for unfairness and inconsistency – not only in the balancing of kaitiaki and other interests, but also in environmental outcomes. Having said that, we entirely understand iwi seeking to utilise the settlement process in the absence of any other alternative.

We asked the Crown whether options such as kaitiaki control or co-management of taonga can only be implemented in the context of historical Treaty settlements. The Crown did not argue that historical loss is a necessary precondition for those relationships to be explored, and nor did it maintain that the formal recognition of the kaitiaki role depends on the acknowledgement of a Treaty breach. It did, however, argue that the negotiations for settling historical claims are a suitable forum for discussing such relationship arrangements.¹⁷⁴

As we have stated in section 3.5.1, and preceding chapters, the appropriate level of influence or control for kaitiaki depends on the nature and significance of their relationship with taonga, balanced alongside the other valid interests at play. It does not depend on kaitiaki proving a Treaty breach, or the existence of aboriginal title or any other legal rights (though, in some cases, these may be coincidental with the kaitiaki relationship). Indeed, the Minister of Māori Affairs acknowledged as much in October 2010, when he expressed concern that claimants were spending ‘valuable negotiations capital, and claimant funding, on negotiating for assurances that government will do the basic job that taxpayers fund it to do’. This applied, he said, not only to social services, but also to natural resources:

The statutory framework is quite clear – and it provides for opportunities for Māori involvement in decision-making over natural resources. These opportunities extend right through to the transfer of powers from local government. But these provisions, and therefore the intent of Parliament, are consistently not given effect to.¹⁷⁵

We acknowledge that the Treaty settlement process has been a useful vehicle for bringing together all relevant parties to consider the kaitiaki relationship. But this vehicle has crowded out all others. There is value in having all parties around the table, but this does not have to occur only in the context of historical settlement negotiations. If the Crown and iwi must negotiate current kaitiaki relationships in that context, all parties involved must at least recognise that such matters are not based on historical breach and restitution, but rather the quality and significance of the kaitiaki relationship.

For these reasons, and others outlined above, what is needed is change to the RMA system. In the remainder of this chapter, we discuss the extent to which the RMA is currently delivering (or failing to deliver) genuine kaitiaki control, partnership, and influence. We then recommend a series of new environmental management mechanisms or enhancements to the RMA system. Underpinning them all is a new way of thinking about iwi and hapū involvement in RMA matters – involvement that is compulsory, formal, and proactive.

(1) *Kaitiaki control*

As we have set out in section 3.3.2(6), the RMA contains two mechanisms that are capable of giving kaitiaki control of taonga in the environment. The first, contained in section 33, allows local authorities to transfer any of their functions, powers, or duties to iwi authorities, foreshore and seabed reserve boards, or other statutory authorities. This includes the ability to transfer the power to promulgate RMA planning instruments and grant resource consents. But, for this transfer to take place, the Minister for the Environment must be informed, the local authority must consult its community using a special consultative procedure that was designed for the most significant decisions, and several conditions must be met – including that the transfer is desirable on the grounds of community of interest, special capability, and ‘efficiency.’¹⁷⁶ Furthermore, as we said earlier, in any event where the local authority does agree to transfer power, it can revoke that agreement at any time.

The second potential control power relates to HPAs under section 188. As we have explained, this provides that any body corporate with an interest can apply to the

Minister for the Environment to be made an HPA for the purpose of protecting ‘any place’. Once a body corporate is granted HPA status, it is generally empowered to make a heritage protection order over the place for which it has such status. If an order is made, no use of the place which contravenes the order is permitted.

Both powers are significant, and intended to be so. But, as we have noted, in the years since the RMA was enacted these provisions have never been invoked in favour of iwi, despite attempts (several in the case of section 33) to do so. The process set out in section 33 is complex and cumbersome. It appears – in the consultation processes, the conditions it demands, and the discretion it provides to local authorities – to be weighted against transfer. Certainly, there appears to be nothing that iwi can do to achieve its use. As Mr Gow of the Ministry for the Environment commented:

We can’t force a council to do anything except by directions through the legislation, and as we’ve mentioned that is a possibility but the way the current system’s structured it’s certainly not the Government’s way of doing it.¹⁷⁷

Similarly, any transfer under section 188 is at the discretion of the Minister, and again there is nothing that iwi can do to require the mechanism to be used.

Given the thoroughgoing infusion of Māori values into part 2 of the RMA, this must be seen as a major gap in the Act’s credibility. Central and local government have put forward various reasons for this, including a lack of capacity on the part of iwi. To the extent this means a lack of resourcing, that certainly has been the experience.¹⁷⁸ However, any assertion that iwi lack the ability to translate centuries of kaitiakitanga of the environment into an RMA context is emphatically rejected.

We are aware of one situation in which the Crown has agreed to iwi having substantial regulatory control over some resources, but this agreement was reached in the context of negotiations for recognition of customary title under the Foreshore and Seabed Act 2004, not through the RMA. Under Ngāti Porou’s deed of agreement with the Crown, Ngā Hapū o Ngāti Porou will have consenting authority for any resource consent applications relating to a large territorial customary rights area.¹⁷⁹ This authority

is triggered whenever the application is likely to have an adverse effect on the relationship of Ngā Hapū o Ngāti Porou with the environment in that area.¹⁸⁰ In addition, the deed provides that the constraints contained in the RMA will not apply to hapū that have customary rights in the area when they are considering consent applications. The deed also provides for Ngā Hapū o Ngāti Porou to make bylaws restricting and prohibiting fishing within the territorial customary rights area.¹⁸¹ At the time of writing, legislation to give effect to the deed of settlement had been introduced into the House and was awaiting its first reading.

There is no question that this agreement represents a substantive transfer of regulatory control over the marine and coastal area. This shows that it is possible for the Crown to deliver control of taonga to kaitiaki, but also underscores our point that such outcomes are being delivered only through settlement processes when they should be delivered through the RMA. While the existence of an ongoing customary relationship with resources may be one basis for the transfer of significant powers to kaitiaki, it should not be the only way. The provisions of the RMA make it clear that transfers of this kind should be possible in the ordinary course of business.

But when is kaitiaki control likely to be appropriate? We have already described how this can only be decided on a case-by-case basis, and that reaching an answer will involve balancing several factors – the nature of the kaitiaki relationship, the health of the taonga in question, the interests of those who wish to use resources, and so on. Each case will be different, and there is little to be gained from trying to predict all possibilities, but common sense suggests some general principles may assist. First, if there is a significant body of mātauranga Māori about the taonga (for example, kōrero telling its stories, describing its qualities and characteristics, explaining its importance to iwi identity, and describing how the kaitiaki relationship should be conducted), that will be an indication of its importance to iwi; and the greater the evidence of the taonga's importance, the greater the need to consider kaitiaki control as the appropriate outcome. Secondly, as we have said, third-party interests must be considered – for example, where the interests of property owners or resource users will be affected by restrictions

proposed by kaitiaki, an exclusive control model may well be inappropriate. We would, however, caution against assuming that the interests of kaitiaki and private right-holders are automatically in conflict. In our experience, this is not necessarily the case at all.

(2) Partnership

In recent years, we have seen the development of partnership arrangements in different parts of the country. So far, these appear to be effective in enabling Māori involvement in RMA decision-making, without excluding central or local government or wider communities of interest. However, all but a handful have been delivered through the Treaty settlement process rather than through the operation of the RMA – despite the Act having been amended, ostensibly to enable greater iwi and hapū involvement in environmental management. We look at four such partnership arrangements below.

(a) NGĀTI TŪWHARETOA

As we said in section 3.3.2(6), in 2005 Parliament enacted section 36B to provide for joint management agreements. Such agreements can be entered into between local authorities and iwi authorities, and they can provide for the joint performance of any of the local authority's functions, powers, or duties under the RMA relating to natural or physical resources. Again, it is clearly intended that joint management bodies exercise significant RMA powers.

It was anticipated by many that this watered-down version of section 33 might achieve a meaningful level of local government uptake. However, in the years this provision has been in force, we are aware of only one example of it being used – in the joint management agreement between Ngāti Tūwharetoa and the Taupō District Council, which was reached after our hearings ended.

While a unique and laudable initiative, it remains unproven and appears to be somewhat tentative – perhaps a first step towards partnership, rather than a fully realised partnership. Though it might appear at first glance to have wide coverage, several layers of restriction come into play. First, it applies only to notified resource consents and private plan changes on, or affecting, multiply owned Māori land. Secondly, while the resource consent

or private plan change applicant is notified of the option of having the application heard by a joint committee, the applicant can opt out – in which case the process is controlled by the council. Thirdly, if a joint committee is convened, the council and Ngāti Tūwharetoa each choose two qualified commissioners. The council chooses a fifth commissioner and chairperson if agreement cannot be reached between the parties, and that chairperson has a casting vote in the event of a split vote.

(b) WAIKATO RIVER

Another kind of partnership model has emerged out of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. Here, Waikato-Tainui have achieved a degree of co-governance in respect of the management and rehabilitation of the Waikato River – which is a tribal icon and a severely compromised national resource. The range of interests in the river cannot be overstated. There are a number of a iwi interests along its length from Lake Taupō to Port Waikato; there are electricity-generation businesses; a significant proportion of the country's dairy farmers; and dozens of communities, city and district councils, one regional council, and central government. If genuine partnership can work here, it can work anywhere.

The Act essentially effects a complex joint management agreement aimed at achieving the settlement's overarching purpose: to 'restore and protect the health and wellbeing of the Waikato River for future generations'.¹⁸² It provides for the establishment of the Waikato River Authority, a statutory body comprising five members representing the interests of Waikato River iwi (Waikato-Tainui, Te Arawa, Raukawa, Ngāti Tūwharetoa, and Ngāti Maniapoto) as well as an equal number of members appointed by the Crown (including two recommended by the regional and local authorities).¹⁸³ This body is responsible for achieving the settlement's overarching purpose, including the promotion of a coordinated approach to the river's management.¹⁸⁴ The co-management arrangements themselves take a number of forms. They include joint management agreements between Waikato-Tainui and the relevant local authorities, as well as two important environmental plans: the Waikato-Tainui Environmental

Plan and the Integrated River Management Plan. The first is prepared by the Waikato Raupatu River Trust on behalf of Waikato-Tainui. Local authorities preparing planning documents must 'recognise' this plan in the same manner as they would an iwi management plan,¹⁸⁵ and consenting authorities exercising resource consent functions under the RMA must 'have regard to' it.¹⁸⁶ There is no express connection to the Department of Conservation, but anyone exercising powers under conservation legislation must 'have particular regard to' the plan and anyone exercising powers under fisheries legislation must 'recognise and provide for' it.¹⁸⁷

The Integrated River Management Plan aims to bring together Waikato-Tainui, Crown agencies, and relevant local authorities 'to achieve an integrated approach . . . to the management of aquatic life, habitats, and natural resources' in the river.¹⁸⁸ The plan includes conservation, fisheries, and regional council components (the regional council addresses resource management, biosecurity, local government, and other relevant functions). The conservation and fisheries components are deemed to be conservation management and freshwater fisheries management plans under the relevant Acts.¹⁸⁹ The plan may also include other components agreed by the Trust and agencies with functions or responsibilities relating to the river. Any local authority preparing planning documents under the RMA must 'have regard' to the regional council component.¹⁹⁰

While the provisions of this settlement appear to provide for a material level of co-governance, the arrangements remain in their infancy. Their actual impact will depend, first and foremost, on the relationships that develop between the Trust and the various local authorities and Crown agencies that have authority over the river. Should those relationships ever be tested, the impact of this settlement will depend on the interpretation of terms such as 'recognise' (in relation to the environmental plan) and 'have regard to' (in relation to the river management plan). Certainly, Waikato-Tainui will be hoping its environmental plan has a greater impact than any iwi management plan has had before.



The 2010 Waikato River Treaty settlement provides for a form of co-governance over the management and rehabilitation of the iconic Waikato River.

Agreements between the Crown and the other river iwi are reflected in the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act, which was passed by Parliament in October 2010.

(c) TE ARAWA AND TAUPŌ LAKES

Yet another form of partnership model can be found in the Te Arawa (Rotorua) and Taupō lakes agreements.

Under Te Arawa's settlement, the Bay of Plenty Regional Council and the Rotorua District Council were required to establish a joint committee known as the Rotorua Lakes Strategy Group.¹⁹¹ Two of the group's members are appointed by the Te Arawa Lakes Trust, with each of the councils appointing two others.¹⁹² The group's aim is to provide for the sustainable management of the Rotorua lakes, and for Te Arawa's kaitiaki relationship to be exercised.

The group's functions include:

- ▶ providing leadership in relation to the management of the lakes;

- ▶ preparing, approving, monitoring, evaluating, and reviewing agreements, policies, and strategies to achieve integrated 'outcomes' (as defined in the deed of settlement) for the lakes;
- ▶ identifying, monitoring, and evaluating actions by the organisations represented on the group and other relevant organisations;
- ▶ being involved in the preparation of statutory plans in relation to significant issues; and
- ▶ being involved in applications for significant activities that are not addressed by the existing policies of the co-management partners – this may include involvement in applications for resource consents, designations, heritage orders, water conservation orders, and so on.

The fee simple estate in each Te Arawa lakebed is vested in the Te Arawa Lakes Trust, though this is subject to a number of restrictions. For example, recreational use is permitted without the Trust's consent; structures existing at the time of settlement can remain in place; commercial



Lake Rotomahana falls under the settlement in 2006 of Te Arawa's Treaty claims concerning the lakes within their rohe.

activities that were taking place at the time of the settlement can continue; and public utilities can build structures (subject to the Trust's consent, which may not be withheld 'unreasonably').¹⁹³

In relation to the RMA, the settlement provides for statutory acknowledgement of the Te Arawa interest in the water and in the air above the lakes. Consenting authorities, the Environment Court, and the Historic Places Trust must 'have regard to' this statutory acknowledgement in resource consent decisions, and must provide the Trust with summaries of consent applications before decisions are made. The power to make decisions, in other words, remains with the Crown and its delegates.¹⁹⁴

Similarly, as part of a settlement agreement between Ngāti Tūwharetoa and the Crown, in 1992 the Taupō waters were revested in Ngāti Tūwharetoa. The Taupo-nui-a-Tia Management Board was set up in 1996 and given a mandate to manage and administer the beds of the Taupō waters, in a partnership between Ngāti Tūwharetoa and the Crown. These two partners each appoint half of the eight-member board. A new deed of settlement was signed in September 2007, giving the Tūwharetoa Māori

Trust Board the right to license commercial users of the lake, and new Crown and private structures.

(d) REGIONAL COUNCIL PLANNING COMMITTEES

In May 2011, the Hawke's Bay Regional Council established a joint council-iwi Regional Planning Committee with power to review and prepare changes to the council's regional plans and policy statements. The committee will also oversee consultation on proposed changes before referring those changes to the council for adoption. Iwi and the council will have equal representation on the committee. The committee's establishment had been foreshadowed in a July 2010 announcement by the council and the Minister for Treaty Negotiations, which acknowledged that similar provisions had been made through Treaty settlements, and that those models created complexity – for example, by creating more than one partnership structure for a single river. The joint committee model was seen as simpler and more efficient than the Waikato River co-governance arrangements.¹⁹⁵

The Wellington Regional Council in October 2009 established a similar committee, known as Te Upoko

Taiao, to oversee its regional planning process. Te Upoko Taiao has equal representation from the council and mana whenua.

(e) CONCLUSION

Partnership models are appropriate for the management of taonga that are subject to multiple and potentially conflicting interests. While there is no doubt that the models we described above are innovative, their true impact on kaitiaki relationships remains to be seen. Some appear to be relatively weak models of partnership, providing for formal kaitiaki influence while reserving genuine decision-making powers for local authorities or the Crown. Others have potential to provide strong protection for kaitiaki relationships, but are too new to be fully assessed. In either case, with the exception of the Ngāti Tūwharetoa–Taupō District Council agreement and the very recent Wellington Regional Council initiative, all have developed out of the Treaty settlement process. Again, it is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business when the mechanisms to do so have long existed. It is equally disappointing to see that Māori are being made to expend the potential of their Treaty settlement packages or customary rights claims to achieve outcomes the Resource Management Law Reform project (now two decades ago) promised would be delivered anyway. As we have pointed out, the Crown accepts that the transfer of exclusive or shared decision-making power should not depend upon proof of customary title or historical wrongs. It follows that what must be proven is the existence of a kaitiaki relationship with the taonga in question. That ought to be enough. The RMA regime should make this clear.

(3) *Kaitiaki influence*

Even where circumstances do not justify control or partnership outcomes for kaitiaki, there is nonetheless a strong case for a general principle of kaitiaki influence throughout the operation of environmental regulation within iwi rohe.

Currently that influence is expressed in two ways – through district or regional policy and planning instruments, and in individual resource consent applications.

Councils must consult with tangata whenua in the preparation of planning instruments, and while there is no obligation to consult in respect of resource consent applications, applicants will often be advised to do so as a matter of best practice. Certainly, tangata whenua can always participate with notified consent applications within their rohe, and with limited notified applications upon receipt.

In all these circumstances, the degree of Māori influence is triggered by the priority accorded to Māori interests in part 2 of the RMA, and by the cogency of the issue the tangata whenua wish to bring forward. In reality, these influence triggers produce piecemeal and inconsistent results. If the relationship between iwi and the local authority is healthy and well resourced, Māori priorities stand a fair chance of being heard. If not, the Māori voice is effectively silenced through neglect.

It was no doubt for this reason the Local Government Act 2002 introduced provisions to enhance Māori input into local authority decision-making (see section 3.3.2(7)). In addition, Ministry for the Environment officials who appeared before us referred to a number of the Ministry's programmes aimed at encouraging local authorities to incorporate kaitiaki perspectives into their processes (see section 3.4.2). Nonetheless, it seems to us that there has been a significant downgrading of the priority given to Māori programmes within the Ministry itself. The Ministry was one of the first Crown agencies to establish a Māori unit, Maruwhenua. In the past, the unit's influence was considerable – its work ensured that Māori perspectives influenced the RMLR project, for example. However, Maruwhenua's impact appears to have diminished since the 1980s, and this is borne out by looking at the priorities and resources allocated to Māori-specific issues over the past few years. For the most part the Ministry's annual reports from 2004 through to 2009 do not include any specific reference to Māori or iwi issues (the one exception was 2007/08, which referred to the establishment of Māori reference groups on climate change and water).¹⁹⁶ The iwi-related activities that were funded during this period tended to involve building the capacity of the Crown or local government, rather than of iwi – for example, advice to other Crown agencies in relation to Treaty claims and settlements, and foreshore and seabed

negotiations. Programmes were targeted at helping councils, not kaitiaki.

Overall, it is fair to say that the main way in which Māori can currently influence the RMA system is by reacting to priorities being set by local councils and applicants. While this is an advance on the pre-RMA position, there are obvious structural shortcomings in this approach. Other than the almost entirely unused control and partnership mechanisms to which we have referred above, there are few opportunities for Māori to take the initiative in resource management. Māori are usually consigned to the less positive role of objectors. That is how the system is designed.

The one important exception is that of iwi management plans, which provide the only mechanism whereby iwi can influence resource management decisions by setting out their own issues and priorities, without any consulting council or applicant filter. They form the only means by which Māori can be proactive in resource management without needing the consent of a minister, a local authority, or an official.

One problem is that iwi do not generally have access to the resources to fund the necessary technical and democratic processes. To date, there are few management plans with a sufficient technical basis to influence local authorities decisively. The other problem is the relatively weak statutory provision for iwi management plans; as we have said, the RMA is silent on their purpose and content, and requires only that they be 'take[n] into account' when councils are preparing their plans.

Thus, the potential of iwi management plans as effective influence tools has never fully been realised. This shortcoming needs to be urgently remedied, and our suggestions for a way forward are outlined in the next section.

We note, finally, the Ngāti Kahungunu submission of February 2010, which argued that 2009 amendments aimed at streamlining RMA processes were detrimental to Māori influence on environmental decision-making.¹⁹⁷ It is not yet clear what the effect of the 2009 amendments will be for iwi; it is clear, however, that reform is needed in legislation, policy, and practice in order to properly recognise and give life to kaitiaki rights. The recommendations we set out in the following section are not aimed specifically at addressing the 2009 amendments,

but rather at restoring the balance of the RMA system as a whole, so that kaitiaki can be restored to their proper place in environmental decision-making.

3.6 REFORMS

We have seen that, while the RMA originally promised considerable protection for kaitiaki interests in mātauranga Māori and taonga Māori, it has failed to deliver on that promise. Some significant gaps in the legislation and in its implementation have diluted that protection, so it today remains a shadow of what it should be (and of what it was intended to be). Despite potentially powerful provisions such as the section 33 transfer power and the section 188 HPA option, despite the section 36B joint management provision, and despite the extensive references to Māori in part 2, the RMA regime has not led to kaitiaki control over iconic taonga, nor to kaitiaki involvement in effective partnerships in which control of taonga is shared, and nor even to effective kaitiaki influence in decision-making. The operation of the RMA is therefore not Treaty compliant.

On occasion, potentially good outcomes have been achieved for kaitiaki, such as the agreement giving Waikato-Tainui co-governance of the Waikato River. However, most of these initiatives are relatively recent and, while laudable, remain largely untested. Moreover, they have occurred outside the RMA system through either historical claim settlements or customary title applications. Otherwise, iwi influence in resource management generally remains inconsistent, reactive, and reliant on the resources available to the iwi, and their relationship with the relevant local authority. The patchiness of Māori engagement in environmental management persists despite the various mechanisms for transfer of control, and for partnership and consultation in the RMA and the Local Government Act 2002.

In the claimants' view, a general change in decision-making under the Act might be brought about by amending section 8, so that decision-makers must act consistently with the Treaty rather than merely taking account of it. Other Tribunals have recommended this amendment, although it was noted recently that this alone would not be enough to effect real change.¹⁹⁸ We have a similar view;

amendment of section 8 on its own is not the answer, and we prefer the suite of interlocking reforms recommended below.

3.6.1 Enhanced iwi management plans

The first requirement of a Treaty-compliant RMA system is for iwi involvement to become a compulsory and formal component of the RMA system. Though the current regime provides mechanisms for control and partnership, decision-makers cannot be held accountable for their lack of use. Likewise, although there are mechanisms for influence, these occur almost exclusively through consultation and the resource consent processes in which kaitiaki have opportunities only to object to, or comment on, others' proposals. Little, if anything, can be done to force decision-makers to infuse kaitiaki priorities into their planning and rule-making.

This absence of compulsion is the most glaring omission in the present legislation. Unless kaitiaki can compel the other parties who have power under the Act to engage with them, their ability to exercise control, partnership, and influence will always be limited. If the system is to be Treaty-compliant, therefore, this must change. It is time that compulsory, formal, and proactive engagement became – to use Mr Gow's words – 'the Government's way of doing it'.¹⁹⁹

This can be achieved through enhanced iwi management plans – which we call iwi resource management plans (IRMPs). Indeed, these should become the lynchpin of a Treaty-compliant RMA system.

Although these plans have been part of the Act from the outset, their promise has never been fulfilled. Enhanced iwi management plans could enable iwi to become integral and positive voices in environmental management, instead of being sidelined in the role of perpetual objectors. All that is required is some minor legislative reforms (described below), determination at local government level, and the provision of Ministry for the Environment resources and expertise to iwi.

IRMPs would be prepared by iwi in consultation with local authorities. The plans would name the areas over which Māori control, partnership arrangements, or

influence is sought – that is, places and resources of particular importance to kaitiaki. Specific section 33 control and section 36B partnership opportunities would be identified for formal negotiation with councils. The plans would also identify section 188 HPA opportunities in respect of iconic areas for the iwi. They would set out the iwi's general resource management priorities in respect of taonga and resources within their rohe.

Once an iwi had finalised its IRMP, a formal statutory negotiation process between iwi and local authority representatives would be convened to confirm it. During this phase, there may be compromise. Once agreement was reached, the IRMP would bind local government just like any other district or regional plan or policy statement, as the case may be (for example, where the IRMP applies to land use planning issues, it would have the same status as a district plan; where it concerns water and air discharges, it would have the same status as a regional plan; where it concerned broad matters of regional policy, it would have the same status as a regional policy statement). District and regional plans would have to give effect to the agreed parts of the IRMP; agreed iwi priorities, in other words, would become regional and local council rules.

Where any part of the IRMP could not be agreed by the local authority and the iwi, the iwi would have three options open to it:

- ▶ 'Agree to disagree', in which case those parts of the IRMP that are not agreed and confirmed may still be relevant to the exercise of functions under the RMA, but will not be binding;
- ▶ Refer the matter to formal mediation by the Environment Court or via an alternative agreed process; or
- ▶ Refer the matter to the Environment Court for determination. When determining such matters, the Court would need to include at least one commissioner who is expert in mātauranga Māori or one alternate environment judge who is also a Māori Land Court judge.²⁰⁰ The Court could require the local authority to confirm any part of the IRMP which is the subject of the reference, or it could confirm the local authority's decision, or it could come

to some position between the two. The Court's decision would be binding.

We therefore recommend that the RMA be amended to implement this IRMP concept. As we said earlier, there is no mechanism in the Act to make councils or ministers turn their minds to control or partnership for iwi. That is why sections 33 and 188 have never been used, and section 36B used in a limited way on a solitary occasion. The RMA now needs a formal accountability mechanism, because the current regime does not work.

Compulsory engagement will only work, of course, if iwi have the resources and capacity to make that engagement meaningful. To develop IRMPs, iwi will need access to relevant experts: lawyers, planning consultants, heritage experts, scientists (in areas such as soil, air, water, and ecology), engineers, and so on. Iwi should be funded to participate in IRMP processes unless they make an active decision not to engage. For this purpose, the Government could contribute dedicated amounts into the Environmental Legal Assistance Fund, administered by the Ministry for the Environment, or to a separate kaitiakitanga fund. The primary aim of any such funding must be to enhance Māori participation in resource management processes, and ensure that all iwi have access to the resources and expertise necessary to prepare robust plans. That will ensure two things – first, that plans comprehensively state all relevant iwi interests, and secondly, that the plans are articulated in a way that can be easily integrated into the wider system. Iwi capacity to take part in RMA processes is further addressed in section 3.6.3.

Finally, for the IRMP process to fully achieve its objectives, Māori and the Crown (with its statutory delegates) must engage in it in good faith, each respecting the other's aspirations. Both must acknowledge the interdependence that exists between the Treaty partners and their mutual responsibilities. On the Crown side, there is the obligation to provide opportunities for Māori to engage in environmental decision-making in ways that allow Māori aspirations to have a real influence. In this context, the partnership principles we set out in section 6.8, might be helpful. On the Māori side, iwi, hapū, and other kaitiaki must use the IRMPs to express their aspirations for kaitiakitanga if they are to influence environmental decision-making.

3.6.2 Improved mechanisms for delivering partnership and control

As we have seen, though the RMA contains mechanisms for delegation and transfer of powers (sections 33 and 188), none has ever been used to deliver kaitiaki control over environmental taonga. The more recent provision for joint management (contained in section 36B) has been used, but only once. Modifications are clearly needed.

The key problems are that the RMA neither requires nor provides incentives for such mechanisms to be used. Section 33, in particular, is so bureaucratic and conditional as to discourage its use. Nor are kaitiaki able to require such options to be explored. A kaitiaki body seeking designation as an HPA can trigger the process by applying to the Minister (though they may be understandably reticent to pursue this course, given the unfortunate conduct of local and central government in response to the Ngāti Pikiao application). But use of section 33 can only be initiated by the local body in question, and the RMA does not allow for kaitiaki to challenge a local authority which decides not to utilise this provision.

Reforms are needed. First, the provisions should be easier to use. They should not impose unnecessary barriers to partnership or transfer of power. In section 33, the procedural requirements must be simplified. Use of the special consultative procedure should not be triggered automatically as it is now; it should rather be triggered by the actual significance of the proposed power transfer. Further, the conditions in these sections should be reviewed to encourage transfer of control or partnership where that is appropriate, rather than to discourage such transfers as they do now. Nor should local authorities be allowed at any time to unilaterally revoke transfers of power under section 33, as they currently can. We recommend that the RMA be amended to implement these reforms.

The problems with sections 33 and 36B also underscore the need for compulsion which we have already outlined. Local authorities should be required to explore options for delegation to kaitiaki (as we recommended above in relation to IRMPs). They should also be obliged to regularly review their activities to see whether they

are making appropriate use of sections 33 and 36B. They should report on this to the Parliamentary Commissioner for the Environment, explaining why they made delegations under section 33, or formed partnerships under section 36B, in some cases and not in others.²⁰¹ This is particularly important where kaitiaki have sought such delegations. In turn, the annual report of the commissioner to Parliament should set out the performance of every local authority in making delegations to kaitiaki, as well as the steps kaitiaki have taken in administering resources over which power has been delegated. We recommend that the relevant Acts be amended to implement these reforms.

In addition, the Ministry for the Environment should be required to proactively explore options for kaitiaki to be designated as HPAs under section 188. Just as local authorities should report to the commissioner on their use of sections 33 and 36B, the Minister for the Environment should annually report to Parliament on the designation of kaitiaki as HPAs. Again, we recommend statutory amendment to implement this reform.

Of course, to effectively carry out the functions of an HPA, or delegated resource management duties, a kaitiaki body must have the necessary mix of skills, resources, and infrastructure. The fact that few kaitiaki groups do so at present is a significant obstacle to realising the potential of the mechanisms we have described. The need for capacity building, and the role of the Ministry and local authorities in leading this, is discussed further below.

3.6.3 A commitment to capacity building

As we described in section 3.4.2, the Ministry for the Environment funds and runs a range of programmes to enhance Māori participation in environmental decision-making. Most, however, are directed primarily at central and local government.

There is also significant scope to develop programmes aimed at raising the capacity of the kaitiaki themselves to engage effectively in environmental decision-making processes. Indeed, as we have said, our recommended introduction of IRMPs hinges on the capacity of iwi to prepare robust plans that articulate iwi interests in environmental management comprehensively, and appropriately

integrate those interests with other aspects of the resource management system.

At the moment, although many iwi are fully engaged in RMA processes, some are not yet ready to take control of the management of important taonga or to manage them in partnership. Without more support, some will struggle to complete quality IRMPs. This is where the Ministry must step up with funding and expertise, to ensure that kaitiaki are not prevented from exercising their proper role by a lack of resources or technical skills. Here, we emphatically reject the suggestion sometimes made by local and central government that iwi 'lack capacity' to translate centuries of kaitiakitanga of the environment into an RMA context: what iwi lack is not this kind of ability nor knowledge, but some of the technical skills, and the resources and infrastructure necessary to engage effectively with the RMA system. Accordingly, we recommend that the Ministry for the Environment commit to building Māori capacity to participate in RMA processes and in the management of taonga.

It is not only iwi whose capacity needs enhancing. Māori issues must once again receive priority within the Ministry itself. The Maruwhenua unit was once a ground-breaking unit within the public sector, and it must be again. Its structure and resourcing must be adequate for it to properly engage with Māori communities, and to inform decision-makers of Māori views. Maruwhenua must also be the face of the Crown's effort to reform the RMA system, by assisting all iwi to prepare effective IRMPs and encouraging kaitiaki to take up greater responsibilities under the Act.

3.6.4 Greater use of national policy statements

We have already commented that a lack of central government leadership throughout most of the 20 years since the RMA was enacted has resulted in some local authorities losing focus on the need for iwi engagement in environmental management, and that the Crown has thus neglected its Treaty obligations. Under the RMA, national policy statements are key instruments by which central government may set the framework within which local authorities carry out their resource management

functions. While we commend the Government for making provisions for Māori interests in the recent coastal and freshwater policy statements, it should go further.

Section 24 of the RMA gives the Minister for the Environment the power to recommend that a national policy statement be issued to 'state objectives and policies for matters of national significance' that are relevant to achieving the purpose of the Act.²⁰² In determining whether to issue a national policy statement, the Minister can take into account a range of matters, including 'anything which is significant in terms of section 8 (Treaty of Waitangi)'.²⁰³ Thus, the Government can use a national policy statement to ensure that its Treaty obligations are met.

We recommend that the Ministry for the Environment develop national policy statements on Māori participation in resource management processes.²⁰⁴ Local authorities would need to amend regional policy statements and plans to give effect to its provisions, which would include policies for achieving consistent implementation across iwi and local authorities of:

- ▶ policies for achieving nationally consistent implementation of IRMPs;
- ▶ use of mechanisms giving control over appropriate aspects of environmental management to kaitiaki;
- ▶ use of partnership or joint-management mechanisms; and
- ▶ other measures by which Māori may influence environmental decision-making.

3.7 CONCLUSION

New Zealand's environment has been irrevocably changed over centuries of human settlement. New patterns of land use, pollution, and species depletion have all left their imprint.

Before the arrival of Europeans, Māori were kaitiaki of the natural environment, nurturing and protecting the mauri of people, flora and fauna, landforms, and waterways that collectively formed their whakapapa. They were bound to the natural world by the reciprocal forces of kaitiakitanga and whanaungatanga, concepts derived from

the Polynesian past but shaped by centuries of intimate interaction with the landscape of Aotearoa.

When Māori first encountered Europeans, this world view came up against one in which land and resources could be bought, sold, divided, exploited, or preserved in a pristine state. Eventually – and despite the Treaty requiring the Crown to protect the continuing obligations of kaitiaki towards the environment, as one of the key components of te ao Māori – the European view of the environment and how it should be managed came to prevail.

The result was not only the transformation of the environment itself, but a transformation in the way that Māori were permitted to interact with the environment. In successive legislative regimes, their role as kaitiaki was either ignored completely or relegated to the margins.

The RMA, and the reform process that led to it, was a beacon of hope for Māori. For the first time, it seemed that they might be able to take more positive and proactive roles in environmental decision-making than those they had become accustomed to under earlier legislation. The Act's principles and purpose gave legal recognition to Māori interests in ancestral land, water, and other resources, and required local authorities and others with powers to 'have particular regard to' both the Treaty and the concept of kaitiakitanga. Moreover, the Act contained mechanisms whereby kaitiaki interests could be expressed. Section 33 made it possible for local authorities to transfer powers to iwi authorities, section 36B (added nearly 15 years after the RMA was enacted) provided for joint management agreements between the same parties, and section 188 provided for iwi authorities to become HPAs over specific sites in which they had an interest.

Nearly 20 years after the RMA was enacted, it is fair to say that the legislation has delivered Māori scarcely a shadow of its original promise. With central government stepping back from the national leadership role envisaged in the Act, interpreting and implementing the legislation has fallen mainly to local authorities. Very few have chosen to use the available mechanisms for delegating powers to iwi or sharing control. Between 1991 and 2010, not a single section 33 delegation of powers or functions to iwi

occurred. Nor were any iwi authorities approved as HPAS during the same period. In some cases, good relationships between councils and local iwi enabled Māori to exercise a semblance of kaitiakitanga over specific sites or taonga, but for the most part they remain in the role of reactive consultees.

Nor have iwi – for the most part desperately under-resourced and generally lacking in the necessary technical skills to engage with the RMA system – found it easy to demand or take up opportunities to participate in environmental decision-making and management. Nonetheless, some have prepared iwi management plans as a basis for their engagement with local authorities; for the most part, they report that these plans have little or no influence on environmental management decisions.

More recently, we have seen instances where greater kaitiaki control, partnership, or influence have been achieved – the Ngāti Porou–Crown Deed of Agreement that gives the iwi some regulatory powers, the joint management agreement between Ngāti Tūwharetoa and the Taupō District Council, and Waikato–Tainui's co-governance, with local authorities and government agencies, of the Waikato River. Such initiatives are laudable, but our enthusiasm is qualified. First, they are very recent and remain unproven. Secondly, and perhaps more importantly, they have largely arisen through the Treaty settlement process or customary rights claims. They have not been achieved through the normal operation of the RMA, even though the Act provides for exactly this kind of kaitiaki partnership and control.

This is frustrating, on many levels. The Crown has acknowledged that sharing or delegating powers to iwi need not be contingent on historical grievances or proof of customary title – it depends only on the kaitiaki relationship with the taonga in question. We therefore fail to see why Māori should have to deplete their Treaty settlement packages in order to assert this – especially when the RMLR process initially promised considerable statutory protection for kaitiaki interests in mātauranga Māori and taonga Māori.

However, the fact that we *can* point to such initiatives as the Waikato River co-governance agreement, and

the Ngāti Tūwharetoa and Taupō District Council Joint Management Agreement gives us cause for hope. Clearly, it is possible for the Crown and its delegates to find ways of sharing and delegating environmental management powers with kaitiaki. It is happening already; it is just that it is not happening within the environmental management regime as it should.

However, with a combination of systemic change, central government leadership, local authority will, and enhanced iwi capacity, the genuine exercise of kaitiakitanga can become a unique feature of the New Zealand environmental decision-making regime.

3.8 SUMMARY OF RECOMMENDATIONS

The relationships between kaitiaki and the natural environment – entwined as they are with the fundamental concept of whanaungatanga – are crucial to Māori culture and identity. Under the Treaty, the Crown must actively protect the continuing obligations of kaitiaki towards the environment.

Kaitiakitanga is extensively acknowledged in the Resource Management Act 1991. The Act purports to 'recognise and provide for' Māori relationships with their ancestral lands, waters, sites, wāhi tapu, and other taonga as 'matters of national interest'. It also specifically requires those who exercise powers under the Act to 'have particular regard to' kaitiakitanga and to 'take into account' the principles of the Treaty.

We have found that a Treaty-compliant environmental management regime is one that is capable of delivering the following outcomes, by means of a process that balances the kaitiaki interest alongside other legitimate interests:

- ▶ *control* by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority;
- ▶ *partnership* models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision-making but other voices should also be heard; and
- ▶ *effective influence and appropriate priority* to the

kaitiaki interests in all areas of environmental management when the decisions are made by others.

The RMA regime has the potential to achieve these outcomes through provisions such as sections 33, 36B, and 188. But they have virtually never been used to delegate powers to iwi or share control with them. Where some degree of control and partnership has been achieved, this has almost always been through historical Treaty and customary rights settlements. We do not believe that iwi should have to turn to Treaty settlements to achieve what the RMA was supposed to deliver in any case.

Accordingly, we recommend that the RMA regime be reformed, so that those who have power under the Act are compelled to engage with kaitiaki in order to deliver control, partnership, and influence where each of these is justified. Specifically:

1. *Enhanced iwi management plans*: We recommend that the RMA be amended to provide for the development of enhanced iwi resource management plans; that these plans be developed by iwi in consultation with local authorities; that these plans identify iwi resource management priorities and opportunities for delegation of control to kaitiaki or establishment of partnerships; and that these plans be confirmed during a joint statutory negotiation process between iwi and local authority representatives, during which there may be compromise. We recommend that, once adopted, these plans have the same status under the RMA as any district or regional plan or policy statement as the case may be.
2. *Improved mechanisms for delivering control*: We recommend that the RMA's existing mechanisms for delegation, transfer of powers, and joint management be amended to remove unnecessary barriers to their use. We recommend that local authorities be required to regularly review their activities to see if they are making appropriate use of sections 33 and 36B, and be required to report annually to the Parliamentary Commissioner for the Environment explaining why they made delegations or established partnerships in some circumstances and not in others. We also recommend that the Ministry for the Environment should be required to proactively

explore options for delegations under section 188, and to report annually to Parliament on this.

3. *A commitment to capacity-building*: We recommend that the Ministry for the Environment commit to building Māori capacity to participate in RMA processes and in the management of taonga, and that this commitment should include providing resources to assist kaitiaki with the development of iwi resource management plans, and assisting kaitiaki to develop the resources or technical skills needed to exercise their kaitiaki roles.
4. *Greater use of national policy statements*: We recommend that the Ministry for the Environment develop national policy statements on Māori participation in resource management processes, including iwi resource management plans, and arrangements for kaitiaki control, partnership, and influence on environmental decision-making.

Text notes

1. Janet Davidson, *The Prehistory of New Zealand* (Auckland: Longman Paul Ltd, 1984), p 1
2. Atholl Anderson, 'A Fragile Plenty: Pre-European Māori and the New Zealand Environment', *Environmental Histories of New Zealand*, ed Eric Pawson and Tom Brooking (Melbourne: Oxford University Press, 2002), pp 25–26
3. Pigs and chickens were probably brought but immediately replaced by seals and moa.
4. James Belich, *Making Peoples: A History of the New Zealanders: From Polynesian Settlement to the End of the Nineteenth Century* (Auckland: Allen Lane, 1996), p 35
5. Atholl Anderson, 'A Fragile Plenty', p 32
6. Janet Davidson, *The Prehistory of New Zealand*, pp 39–40
7. Atholl Anderson, 'A Fragile Plenty', p 30
8. James Belich, *Making Peoples*, p 67
9. Janet Davidson, *The Prehistory of New Zealand*, p 40
10. Geoff Park, *Ngā Uruora: The Groves of Life: Ecology and History in a New Zealand Landscape* (Wellington: Victoria University Press, 1995), p 13
11. Margaret Orbell, *The Natural World of the Maori* (Auckland: David Bateman, 1996), pp 120–121

12. Les Molloy, *Soils in the New Zealand Landscape: The Living Mantle*, 2nd ed (Lincoln: New Zealand Society of Soil Science, 1998), p 226 (as quoted in Ministry for the Environment, *Environment New Zealand 2007* (Wellington: Ministry for the Environment, 2007), p 44)
13. William Cronon, foreword to *Tutira: The Story of a New Zealand Sheep Station*, by Herbert Guthrie-Smith (Auckland: Random House, 1999), pp xii–xiii
14. Kenneth Cumberland, *Landmarks* (Sydney: Reader's Digest, 1981), p 6
15. Guthrie-Smith, *Tutira*, p 166
16. Ministry for the Environment, *Environment New Zealand 2007*, p 228
17. Cumberland, *Landmarks*, p 182
18. Ministry for the Environment, *Environment New Zealand 2007*, p 367
19. *Ibid*, p 368
20. *Ibid*, p 228
21. Document R8(d) (Wren Green and Bruce Clarkson, *Turning the Tide? A Review of the First Five Years of the New Zealand Biodiversity Strategy: The Synthesis Report*, report submitted to the Biodiversity Chief Executives, November 2005), p 16
22. Document R8(c) (Department of Conservation and Ministry for the Environment, *New Zealand Biodiversity Strategy* (Wellington: Department of Conservation and Ministry for the Environment, 2000)), p 4
23. *Ibid*, p 4
24. *Ibid*, p 8
25. Except perhaps those emitted by volcanic activity.
26. Cawthron Institute, 'Ecosystem Metabolism in the Manawatu River', Cawthron Institute, <http://www.cawthron.org.nz/news/news.html> (accessed 22 June 2010)
27. Ministry for the Environment, 'New Zealand's National River Water Quality Network: Recreational River Water Quality League Table: Water Quality and *Escherichia Coli* Bacteria Levels', Ministry for the Environment, <http://www.mfe.govt.nz> (accessed 16 December 2009)
28. Document R19(v) (Māori Marsden, 'The Natural World and Natural Resources: Maori Value Systems and Perspectives', Resource Management Law Reform Working Paper, no 29, pt A, report commissioned by Ministry for the Environment, July 1988), p 23; this essay has also been reprinted in Te Ahukaramū Charles Royal, ed, *The Woven Universe: Selected Writings of Rev Māori Marsden* (Ōtaki: Estate of Reverend Māori Marsden, 2003), p 46.
29. Document J3 (Murray Hemi, brief of evidence, undated), pp 14–15
30. Document H8 (Alfred Elkington, brief of evidence on behalf of Ngāti Koata, undated), pp 7–10
31. Document D3 (Niki Lawrence, brief of evidence on behalf of Ngāti Kuri and Te Rarawa, undated), pp 7–8; doc D5 (Mata Ra-Murray, brief of evidence on behalf of Ngāti Kuri, undated), pp 3–4; doc D6 (Haana Murray, brief of evidence on behalf of Ngāti Kuri, undated), pp 14–15; doc D7 (Merereina Uruamo, brief of evidence on behalf of Ngāti Kuri, undated), pp 2–3; doc P28 (Connie Pewhairangi, brief of evidence on behalf of Ngāti Porou, 16 August 2006), pp 3–4
32. Document H8, p 13
33. Document H12 (Priscilla Paul, brief of evidence on behalf of Ngāti Koata, undated), pp 18–19; doc H16 (James Elkington, brief of evidence on behalf of Ngāti Koata, undated), pp 13–15, 20
34. Document I17 (Wero Karena, brief of evidence on behalf of Ngāti Kahungunu, 2000), p 12
35. Document D2 (Rapata Romana, brief of evidence on behalf of Ngāti Kuri, undated), p 6
36. Document D7, p 3
37. *Ibid*, p 7
38. Document D6, p 13
39. Document A30 (Laly Haddon, brief of evidence on behalf of Ngāti Wai, undated), pp 7–10
40. Document A33 (Hori Parata, brief of evidence on behalf of Ngāti Wai, undated), pp 11–14
41. Document I28 (Counsel for Ngāti Kahungunu, opening submissions, 31 July 2000), p 10
42. Document I9 (Kate Parahi, brief of evidence on behalf of Ngāti Kahungunu, 2000), pp 2–3
43. Document I14 (Alice Hopa, brief of evidence on behalf of Ngāti Kahungunu, 2000), p 2
44. Document I14, p 4
45. Document K10 (Robert McGowan, brief of evidence on behalf of Ngāti Kuri, Te Rarawa, and Ngāti Wai, 7 February 2002), p 7
46. See McClean and Smith's extensive background to the reform processes: doc K2 (Robert McClean and Trecia Smith, 'The Crown and Flora and Fauna: Legislation, Policies, and Practices, 1983–98', report commissioned by the Waitangi Tribunal, 2001), chs 3, 4.
47. Document K2, chs 3, 4
48. Town and Country Planning Act 1977, s 3(1)(g)

49. Though note that in 1989 the Court of Appeal overturned a long line of decisions by deciding that ‘matters of national importance’ (which included s (3)(1)(g)) should be given greater weight than other considerations: see *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257 (CA)).
50. *Mahanga v Whangarei County Council Appeal* 210/78
51. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188; doc K2, p 129
52. Document K2, pp 146–150
53. *Ibid*, p 146. It should be noted that the Ministry has since acquired administrative powers, through the Environmental Protection Authority, as explained in section 3.2 of the Resource Management Act 1991.
54. *Ibid*, p 145
55. *Ibid*, p 150
56. Ree Anderson, ‘Policy Paper 3: Embodying the Principles of the Treaty of Waitangi’, in Parliamentary Commissioner and Ministry for the Environment Establishment Unit, *Policy Discussion Papers* (Wellington: State Services Commission, 1986), p 10; doc K2, p 150
57. Document K2, p 167
58. Resource Management Act 1991, s 5(1)
59. *Ibid*, s 2
60. This is a similar philosophical approach to the degree of community involvement afforded by the Conservation Act.
61. It is worth noting that about 95 per cent of resource consents are not publicly notified: see Ministry for the Environment, *Proposals for Amendment to the Resource Management Act* (Wellington: Ministry for the Environment, 1998), p 33; Ministry for the Environment, ‘Proposals for Amendment to the Resource Management Act’, Ministry for the Environment, <http://www.mfe.govt.nz> (accessed 25 June 2010).
62. Resource Management Act 1991, ss 6, 7, 8
63. *Ibid*, s 2. There is considerable case law on the application of ‘kaitiakitanga’ in decisions made under the Act.
64. *Ibid*, s 43
65. *Ibid*, s 44
66. A territorial authority which has the responsibilities, duties, and powers of a regional council conferred on it by statute. The Auckland Council is an example of a unitary authority.
67. Resource Management Act 1991, s 59
68. *Ibid*, s 62(1)(b)(i)
69. *Ibid*, s 61(2A)
70. Marine and Coastal Area (Takutai Moana) Act 2011, ss 85, 93; Resource Management Act 1991, s 61(2A)
71. Resource Management Act 1991, sch 1, cls 2, 3(1)(d), 3(1)(e)
72. *Ibid*, s 67
73. *Ibid*, s 68(2)
74. *Ibid*, s 64(1)
75. *Ibid*, s 68(1)
76. *Ibid*, s 67(3). In addition, under section 67(4), a regional plan must not be inconsistent with a water conservation order, any other regional plan for the region, or a determination or reservation order in respect of fisheries.
77. Marine and Coastal Area (Takutai Moana) Act 2011, ss 85, 93; Resource Management Act 1991, s 66(2A)
78. Resource Management Act 1991, s 66(2A), sch 1 ss 2, 3(1)(d), 3(1)(e)
79. *Ibid*, ss 72, 73
80. *Ibid*, s 75(3)
81. *Ibid*, s 75(4)
82. *Ibid*, s 76
83. *Ibid*, s 76(2)
84. *Ibid*, s 74(2A), sch 1 pt 1, ss 2, 3(1)(d), 3(1)(e)
85. *Ibid*, ss 61, 66, 74
86. Ministry for the Environment, *Te Raranga a Mahi: Developing Environmental Management Plans for Whanau, Hapu and Iwi* (Wellington: Ministry for the Environment, 2000), p 22
87. Marine and Coastal Area (Takutai Moana) Act 2011, ss 85, 93. These planning documents may include any matter that can be regulated under the RMA, Local Government Act 2002, Conservation Act 1987, or Historic Places Act 1993, including matters relevant to sustainable management of natural and physical resources of the customary marine title area, and protection of the customary marine title group’s cultural identity and historic heritage.
88. Resource Management Act 1991, s 87A
89. *Ibid*, s 95A
90. *Ibid*, s 96
91. *Ibid*, s 100
92. *Ibid*, s 95B
93. *Ibid*, ss 95F, 95G
94. Ministry for the Environment, *Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008* (Wellington: Ministry for the Environment, 2009)

95. Resource Management Act 1991, s 120
96. Ibid, s 265
97. Ibid, ss 249–252
98. Ibid, ss 120, 274(1). Section 274(1) also provides for the Minister for the Environment, a local authority, the Attorney-General representing a relevant aspect of the public interest, or submitters in the original consent hearing to become parties to the appeal provided certain conditions are met.
99. Ibid, s 274(6), sch 11. Statutory acknowledgements are provided through Treaty settlements.
100. Ibid, s 299. The sole exception is that the Environment Court has discretion to order a rehearing if ‘new and important evidence becomes available or there has been a change in circumstances that in either case might have affected the decision’ (s 294).
101. Ibid, s 140(3)
102. Ibid, s 87D
103. Ibid, s 299
104. Specifically, under section 55 of the Act local authorities may not grant a resource consent for an activity in a customary rights area if the activity ‘will, or is likely to, have adverse effects that are more than minor on the exercise of a protected customary right’ unless the customary rights group gives written consent. The Act provides exceptions for some activities including existing aquaculture activities, emergency activities, local and national infrastructure, and mining activities.
105. Marine and Coastal Area (Takutai Moana) Act 2011, ss 64–68. The RMA permission right applies to activities that are to be carried out under a resource consent to the extent that the activity is within the customary marine title area. The customary marine title group may give or decline permission on any grounds. The permission right does not apply to ‘accommodated’ activities, which include specified local and national infrastructure; activities required for management of reserves, sanctuaries, and concessions; existing aquaculture activities; emergency activities; specified Crown and regional council scientific and monitoring activities; and prospecting, exploration, and mining activities.
106. Resource Management Act 1991, s 142(3)(g)
107. Ibid, s 142(2)
108. Ibid, s 149V
109. Ibid, ss 24–27
110. These include preparing and recommending coastal policy statements, approving coastal regional plans, and monitoring the effect and implementation of national coastal policy statements.
111. Resource Management Act 1991, s 28, sch 12
112. Environmental Protection Authority, ‘Legislation’, Environmental Protection Authority, <http://www.epa.govt.nz/> (accessed 28 August 2010)
113. Environmental Protection Authority, ‘Applying to the EPA’, Environmental Protection Authority, <http://www.epa.govt.nz/> (accessed 28 August 2010)
114. Environmental Protection Authority, ‘About Boards of Inquiry’, Environmental Protection Authority, <http://www.epa.govt.nz/> (accessed 28 August 2010)
115. Environment Act 1986, s 16
116. Ibid
117. Ibid, s 17(c)
118. Resource Management Act 1991, ss 33(1) and (2). Iwi authority is defined to mean ‘the authority which represents an iwi and which is recognised by that iwi as having authority to do so’.
119. Local Government Act 2002, ss 83–88, 90
120. The Quality Planning Project (website administered by the Ministry for the Environment) cited the transfers between the Northland Regional and District Councils (Whangarei, Kaipara, and Far North) as an example of best practice: Quality Planning: The RMA Planning Resource, ‘Monitoring: Delegations and Transfers’, Ministry for the Environment, <http://www.quality-planning.org.nz/monitoring/deleg-transfer.php> (accessed 2 July 2010).
121. Resource Management Act 1991, s 188(1), (2)
122. Ibid, s 193; Derek Nolan, *Environmental and Resource Management Law*, 3rd ed (Wellington: LexisNexis, 2005)
123. Resource Management Act 1991, s 189
124. For heritage orders and heritage protection authorities, see the Ministry for the Environment website: Ministry for the Environment, ‘New Environment Protection Authority Announced’, Ministry for the Environment, <http://www.mfe.govt.nz/rma/central/heritage/index.html> (accessed 17 December 2010). The Taupo Orchid Society’s HPA status was revoked in 2009.
125. As confirmed in the Crown evidence: Lindsay Gow, under questioning by the presiding officer, 20th hearing, 19 December 2006 (transcript 4.1.20, pp 128–129); doc T2, app 1 to Crown closing submissions, 21 May 2007, p 67.
126. Local Government Act 2002, s 81
127. Ibid, s 4
128. The New Zealand Coastal Policy Statement is the only national policy statement required by statute.
129. Ministry for the Environment, ‘National Policy Statement on Electricity Transmission’, Ministry for the Environment, <http://www.mfe.govt.nz/publications/rma/>

- nps-electricity-transmission-mar08/index.html (accessed 6 May 2011); Department of Conservation, *New Zealand Coastal Policy Statement 2010* (Wellington: Department of Conservation, 2010)
130. Ministry for the Environment, *National Policy Statement for Freshwater Management 2011* (Wellington: Ministry for the Environment, 2011), p 10
131. Department of Conservation, *New Zealand Coastal Policy Statement 2010* (Wellington: Department of Conservation, 2011), pp 9, 11–12
132. See Ministry for the Environment, ‘National Policy Statements’, Ministry for the Environment, <http://www.mfe.govt.nz> (accessed 2 July 2010)
133. See Ministry for the Environment, ‘National Environmental Standards’, Ministry for the Environment, <http://www.mfe.govt.nz> (accessed 27 August 2010)
134. Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009; Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007; Resource Management (National Environmental Standards for Telecommunication Facilities) Regulations 2008; Resource Management (National Environmental Standards Relating to Certain Air Pollutants, Dioxins, and Other Toxics) Regulations 2004
135. Lindsay Gow, under cross-examination by counsel for Ngāti Kahungunu, 20th hearing, 18 December 2006 (transcript 4.1.20, p 81); Janet Stephenson, ‘Recognising Rangatiratanga in Resource Management for Maori Land: A Need for a New Set of Arrangements?’, *New Zealand Journal of Environmental Law*, vol 5 (2001), p 188
136. For example, proposals by Ngāti Whātua, Ngāti Wai, Ngāti Hine, and Ngāpuhi are referred to in Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government: Tangata Whenua Participation in Environmental Management* (Wellington: Office of the Parliamentary Commissioner for the Environment, 1998), pp 35, 36, 70.
137. Document K2, pp 219–221; Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government*, p 70
138. Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government*, pp 122–123
139. Document S2 (Counsel for Ngāti Kahungunu, closing submissions, 16 April 2007), p 88; *Te Runanga o Ngati Pikiao v Minister for the Environment* unreported, 15 June 1999, Gallen J, High Court, Wellington, CP133–196
140. Local Government New Zealand, *Local Authority Engagement with Māori: Survey of Current Council Practices* (Wellington: Local Government New Zealand, 2004), pp 13, 60–61
141. Document S2, pp 89–90; doc S3 (Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, closing submissions, 5 September 2007), p 221
142. Document S1 (Counsel for Ngāti Kahungunu, closing submissions, 16 April 2007), p 58
143. Document S3, p 218
144. *Ibid*, pp 213–214
145. Document 123 (Waka Gilbert, brief of evidence on behalf of Ngāti Kahungunu, 2000), p 3
146. Document S1, pp 54–59; doc S3, pp 205–209; doc S4 (Counsel for Ngāti Koata, closing submissions, 18 April 2007), pp 84–85
147. Document H8, p 29
148. Document A30, p 18
149. Document S1, p 58
150. Document T2, p 50
151. Paper 2.314 (Waitangi Tribunal, statement of issues, July 2006), p 5; doc T2, pp 47–50, 65
152. Document T2, p 48
153. Document R19 (Lindsay Gow, brief of evidence on behalf of Ministry for the Environment, 21 November 2006), p 7
154. *Ibid*, pp 7–15
155. *Ibid*, pp 56–61
156. Document T2, p 61
157. This fund has since been amalgamated into the Community Environment Fund: see Ministry for the Environment, ‘Community Environment Fund’, Ministry for the Environment, <http://www.mfe.govt.nz/withyou/funding/community-environment-fund/index.html> (accessed 9 March 2011).
158. Document R19, pp 9–13
159. Document T2, p 67
160. *Ibid*, p 62
161. *Ibid*, pp 52–53. To back up these paragraphs, the Crown also provided extracts from Waitangi Tribunal reports referring to definitions of the Crown in relation to courts.
162. *Ibid*, p 50
163. *Ibid*, p 30
164. Paper 2.525 (Counsel for Ngāti Kahungunu, memorandum providing an update on resource management and local government issues, 24 February 2010), pp 3–12
165. *Ibid*, p 12
166. Paper 2.530 (Presiding officer, memorandum-directions, 25 March 2010)

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167. Paper 2.531 (Crown counsel, memorandum in response to the memorandum on behalf of Ngāti Kahungunu providing an update on resource management and local government issues dated 24 February 2010, 23 April 2010), p 2
168. Document T2, pp 52–54
169. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker & Friend Ltd, 1993), p 153. *He Maunga Rongo*, the report of the Waitangi Tribunal on the Central North Island claims, said similarly: ‘Even if any previous or current system required the devolution of environmental or natural resource management responsibilities to statutory bodies such as regional and local councils, the Crown cannot divest itself of its Treaty obligation actively to protect the tino rangatiratanga of the iwi and hapū of the Central North Island’: Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, 4 vols, 2nd ed (Wellington: Legislation Direct, 2008), vol 4, p 1246.
170. *Ngati Maru Ki Hauraki v Kruithof* [2005] NZRMA 1, 14
171. Resource Management Act 1991, s 5
172. *Ibid*, ss 6, 7
173. Laly Haddon of Ngāti Wai, for example, said the RMA process always resulted in ‘take, take, take’ and gave power to those who had money: doc A30, p 14.
174. Crown counsel, under questioning by the presiding officer, 23rd hearing, 13 June 2007 (transcript 4.1.23, pp 229–233)
175. Pita Sharples, Minister of Māori Affairs, ‘Treaty Relationships Need Rebalancing’ (press release, Wellington, 21 October 2010)
176. Resource Management Act 1991, s 33(4)
177. Lindsay Gow, under cross-examination by counsel for Ngāti Kahungunu, 20th hearing, 19 December 2006 (transcript 4.1.20, p 95)
178. This issue was also highlighted in *The Report on the Management of the Petroleum Resource*, in which the Tribunal said: ‘We are disturbed by the extent to which the current regime depends for its protection of Māori interests on the ad hoc involvement of Māori individuals and groups who are ill-resourced to bear the burdens involved.’ Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), p 172.
179. Ngā Hapū o Ngāti Porou and the Crown, ‘Ngā Hapū o Ngāti Porou Foreshore and Seabed Deed of Agreement’, 2008. For the purposes of the Deed, ‘territorial and customary rights’ had the same meaning as in section 32 of the Foreshore and Seabed Act 2004.
180. *Ibid*, pp 11–12
181. *Ibid*, p 12
182. Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 3
183. Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss 4(d), 22(1), sch 6
184. *Ibid*, ss 10–14, 22
185. *Ibid*, s 40(1)
186. *Ibid*, s 40(2)
187. *Ibid*, s 40(4)
188. *Ibid*, s 35(3)
189. *Ibid*, s 37
190. *Ibid*, s 37(4)
191. Te Arawa Lakes Settlement Act 2006, pt 3
192. Te Arawa and the Arawa Maori Trust Board and Her Majesty the Queen in Right of New Zealand, *Schedules to the Deed of Settlement of the Te Arawa Lakes Historical Claims and Remaining Annuity Issues* (2004), p 9
193. Te Arawa Lakes Settlement Act 2006, ss 23, 32(2), 33(2), 36(3), 38(3)
194. *Ibid*, ss 62, 63, 66
195. Christopher Finlayson, Minister for Treaty of Waitangi Negotiations, ‘Crown Supports Regional Council Planning Committee for Hawke’s Bay’ (media release, Wellington, 21 July 2010)
196. Ministry for the Environment, *Report of the Ministry for the Environment for the Year Ended 30 June 2008* (Wellington: Ministry for the Environment, 2009), pp 119–120, 122
197. Paper 2.525
198. Waitangi Tribunal, *The Report on the Management of the Petroleum Resource*, pp 169–170
199. Lindsay Gow, under cross-examination by counsel for Ngāti Kahungunu, 20th hearing, 19 December 2006 (transcript 4.1.20, p 95)
200. This approach echoes the urging of Lord Cooke in *McGuire v Hastings District Council* [2002] 2 NZLR 577 at page 596 that it:
might be useful to have available for cases raising Maori issues a reserve pool of alternate Judges and Deputy Commissioners. At all events their Lordships express the hope that a substantial Maori membership will prove practicable if the [Maguire] case does reach the Environment Court.
201. We note that in *The Report on the Management of the Petroleum Resource*, the Tribunal recommended the establishment of a Treaty commissioner to monitor the Treaty compliance of local authorities and other bodies that have been delegated responsibilities by the Crown. This commissioner would be established as an officer of Parliament with functions modelled on those of the Parliamentary Commissioner for the Environment. Should such a body be established, local authorities could report to it on their

3–Notes

use of sections 33 and 36B. See Waitangi Tribunal, *The Report on the Management of the Petroleum Resource*, pp 183–184.

202. Resource Management Act 1991, s 45

203. Ibid, s 45(2)(h)

204. We note that in *The Report on the Management of the Petroleum Resource*, the Tribunal recommended the adoption of a national policy statement on protection of taonga and wāhi tapu in terms of petroleum activities. The national policy statement we propose could of course include such activities. See Waitangi Tribunal, *The Report on the Management of the Petroleum Resource*, p 177.

Table notes

Table 3.1: ‘Local authority engagement with Māori 1997–2004.’

Source: Local Government New Zealand, *Local Authority Engagement with Māori: Survey of Current Council Practices* (Wellington: Local Government New Zealand, 2004), pp 60–61.

Whakataukī notes

Page 232: Leonardo da Vinci, *Leonardo da Vinci’s Note-books*, trans Edward McCurdy (New York: Empire State Book Company, 1923), p 76

Page 233: Source unknown

*The conservation of natural resources is the
fundamental problem. Unless we solve that problem
it will avail us little to solve all others.*

—Theodore Roosevelt

*Whatungarongaro te tangata,
toitū he whenua.*

People disappear,
but the land remains.

TAONGA AND THE CONSERVATION ESTATE





Pūpū harakeke (flax snail) at Te Paki trig, North Cape

TAONGA AND THE CONSERVATION ESTATE

4.1 INTRODUCTION

This chapter is about Māori interests in the land, water, flora and fauna, and other taonga administered by the Department of Conservation (DOC).

The conservation estate covers more than eight million hectares, including native forests, rivers, mountains, wetlands, and other precious landscapes and ecosystems. DOC's jurisdiction also covers marine reserves, and all types of indigenous flora and fauna including many rare and vulnerable species. Altogether, the department is responsible for most of the surviving examples of the environment that greeted Kupe and, indeed, Cook; and its role in safeguarding these landscapes and species is of fundamental importance to all New Zealanders, Māori and non-Māori alike. But for Māori the concern is of an altogether different nature and quality, because DOC has charge of much of the remaining environment in which mātauranga Māori evolved, and which Māori culture needs for its ongoing survival. The flora and fauna of the bush are taonga species, and the Māori relationship with them is one of kaitiakitanga. To name only a few examples: leaves and herbs provide medicine, can accompany sacred ceremonies such as tohi (baptism) or pure (rites of cleansing), and are used as adornments in other ceremonies such as tangi; feathers adorn cloaks; plant fibres are woven; trees yield timber for carving and bark for medicine; birdsong inspires whaikōrero (formal speech-making), karanga (ceremonial calling or chanting), and mōteatea (song poetry); and relationships with forests or marine areas embody deep values built up through generations of interaction.

At the heart of the claims made about DOC and the legislation it administers is the question of whether the Crown has supported kaitiaki relationships with the taonga under the department's control. The claimants thought the Crown had not done enough, and provided numerous examples to back up their claims. In fact, on no issue were there more claimant submissions than the management of the conservation estate. Those we mention in this chapter are a representative sample of the thrust of claimant opinion. The Crown, in general, argued that its Treaty responsibilities were fulfilled by existing legislation, policies, and practices, which include extensive DOC engagement and consultation with Māori.

This chapter complements the previous one, which concerned environmental management under the Resource Management Act (RMA). Together, that Act and the legislation administered by DOC cover almost the entirety of New Zealand's resource base.

We have structured the remainder of this chapter as follows:

- ▶ 'The Department of Conservation' (section 4.2) introduces DOC and explains its legislative functions.
- ▶ 'The Claimants' Concerns' (section 4.3) sets out the claimants' issues with DOC.

These arise firstly, from the impacts of land loss and environmental degradation, which have cut off their relationships with taonga such as plants and wildlife, and secondly, from DOC-administered legislation, policies, and practices concerning protected places and wildlife.

The claimants acknowledged that, in some cases, they had worked collaboratively with DOC. But they also argued that Crown ownership and control of the conservation estate and protected wildlife (as expressed in DOC-administered legislation, policies, and practices) impeded the exercise of kaitiakitanga, and in doing so hampered their ability to retain and transmit mātauranga Māori.

A related concern was that kaitiaki lacked access to taonga for traditional uses such as weaving and carving – this is known as ‘customary harvest’ or ‘customary use’. A third concern related to perceived tangata whenua exclusion from opportunities for decision-making about, and participation in, commercial activity on the conservation estate.

Having set out the claimants’ concerns, we then consider each of these issues in turn, examining relevant legislation, policies, and practices, and claimant and Crown submissions, before drawing our conclusions. Thus:

- ▶ in ‘Treaty Principles in Conservation Legislation and Guiding Policy’ (section 4.4) we consider how the principles of the Treaty are reflected in DOC legislation and guiding policies, and consider whether those policies adequately reflect the Treaty principles established by the courts and the Waitangi Tribunal;
- ▶ in ‘Māori Involvement in Conservation Decision-Making’ (section 4.5) we consider the efforts DOC has made to involve Māori in decision-making, and whether DOC’s policies and practices are consistent with the department’s Treaty obligations;
- ▶ in ‘Customary Use’ (section 4.6) we consider whether the Crown complies with its Treaty obligations in its legislation, policies and practices relating to customary use of taonga;
- ▶ in ‘Commercial Activity in the Conservation Estate’ (section 4.7) we consider tangata whenua involvement in, and involvement in decisions about, commercial activity on the conservation estate;

- ▶ in ‘National Parks’ (section 4.8), we consider the status of national parks in light of kaitiaki aspirations, and express views about possible ways forward; and
- ▶ in ‘Kaitiaki Conservation’ (section 4.9) we conclude our analysis and set out recommendations for reform, and in ‘A Final Word to the Executive’ (section 4.10) we comment on the Executive’s overall approach to Crown–Māori relationships.

Overall, we conclude that although there is much to admire in DOC’s legislation, policies, and practices, and in the goodwill shown by DOC staff and tangata whenua on the ground, existing structures and relationships do not fully meet Treaty obligations to actively protect kaitiaki relationships with taonga in the environment. We make several recommendations for change, which together can be seen as supporting a new form of conservation management – one that is based on the Treaty principle of partnership, and aims to achieve positive results for both mātauranga Māori and conservation.

4.2 THE DEPARTMENT OF CONSERVATION

DOC was established through the Conservation Act 1987. Like many of the other major government reforms of the 1980s, the department’s creation was a response to the political momentum arising from the social and attitudinal changes that began in the 1960s and 1970s. Its creation was also part of a shift to more efficient government, drawing most government conservation functions together in a single department. This included those of the former Wildlife Service, some government science functions, the research and protection elements of the former Forest Service, and a number of responsibilities of the Department of Lands and Survey. The Conservation Act consolidated those parts of the Forest Service and Department of Lands and Survey land base held for conservation, reserve, and recreation purposes. As McClean and Smith put it in their research report for this inquiry:

Crown-owned indigenous forests were managed by the New Zealand Forest Service for production, conservation, recreation, water supply and soil protection values equally. Now DOC manages these forests for the primary purpose of

conservation, with other uses (such as recreation) being of secondary importance.¹

DOC was set up to 'do work' for the Government, much more than to 'think about work', though of course it does provide some advice. It is charged with administering the Conservation Act 1987 and the 22 Acts contained in its first schedule (only a handful of which are less than 20 years old). Most of these Acts have been tinkered with since they came into force, but there has been no attempt to rethink or even update the fundamental policy positions behind them. They include, among others, the Wildlife Act 1953, the Reserves Act 1977, the Marine Mammals Protection Act 1978, the Marine Reserves Act 1971, the National Parks Act 1980, and the Native Plants Protection Act 1934.

The Conservation Act and other legislation DOC administers show that its primary obligation is to the environment.² Section 6 of the Conservation Act requires DOC to:

- ▶ manage land and other natural and historic resources for conservation purposes;
- ▶ preserve as far as practical all indigenous freshwater fisheries, protect recreational fisheries, and freshwater habitats;
- ▶ advocate for conservation of natural and historic resources;
- ▶ promote the benefits of conservation (including in Antarctica and internationally);
- ▶ provide conservation information;
- ▶ foster recreation and allow tourism, to the extent that these uses are not inconsistent with conservation; and
- ▶ advise the Minister on matters relating to the duties as listed, or on conservation generally.

The Act defines various categories of land held for conservation purposes, and imposes restrictions on sale.³ It also establishes a range of policy structures such as conservation boards (see section 4.5.1) and fish and game councils; policy and planning instruments such as general policies (section 4.4.2) and conservation management strategies; and decision-making processes including consultation requirements. While many decisions are

delegated to conservation boards and other committees, others are reserved for the Minister or Director-General.

Altogether, the department is responsible for more than eight million hectares of land, about one third of New Zealand, along with 1.28 million hectares of marine reserves. It is also responsible for the conservation of marine mammals and protected wildlife.⁴

The department is organised into 11 regional conservancies. Head office provides support to the Minister and to conservancies on strategy, policy, and public and international relations.

Most decisions about how money is spent are made in the conservancies, where the on-the-ground conservation work takes place. This means that the balance of power between head office and the regions is more equal than might normally be expected for a government department.⁵

In 2009, DOC had about 1,830 full-time staff and about 250 temporary staff, and was operating with a government vote of \$281 million.⁶ From 2001 to 2009, the percentage of Māori staff in the organisation remained steady at about 10 per cent, though the percentage of local contract workers who are Māori may be higher.⁷

4.3 THE CLAIMANTS' CONCERNS

The claimants are kaitiaki over their taonga and wish to discharge their obligations to those taonga, as they have for many centuries. According to the claimants, those taonga include the species of flora and fauna indigenous to their rohe (tribal areas). They also include the ecosystems and habitats that support these species; geographic areas and features such as forests, lakes, rivers, mountains, wetlands, coastal areas, and offshore islands; sites such as pā (village) sites and wāhi tapu (sacred places); as well as the mātauranga and tikanga associated with the environment.

The claimants argued that the guarantee of tino rangatiratanga in article 2 of the Treaty gives kaitiaki the right to control and regulate their relationships with these taonga, and obliges the Crown to actively protect those relationships. We have already explained kaitiakitanga in each of the previous chapters. In brief, it involves an ongoing

relationship in the nature of kinship, in which kaitiaki are responsible for the mauri, or spiritual well-being, of the taonga. In the context of taonga under DOC jurisdiction, the claimants explained that there are many aspects to the exercise of kaitiakitanga. It includes access to taonga, actively conserving and nurturing them, and carefully using them in accordance with traditional mātauranga and tikanga. It also includes having the authority to make decisions about them – for example, over who else has access, and when they are available for research, customary use, or other purposes. As we said in chapters 2 and 3, it is the relationships with those taonga that created both the wider Māori culture and, within that, distinctive tribal cultures, so it is essential to the maintenance of those cultures that ongoing interaction is sustained.

But, because kaitiaki have lost so much of their land since the time of Cook, and because of the destruction of so much natural habitat and the decline of so many species (explained in section 4.3.3; also see section 3.2.2), kaitiaki are now unable to exercise their obligations. From a historical perspective, much of the land that was alienated from Māori as a result of historical Crown actions has ended up in the DOC estate.⁸ This explains why much of the land held for conservation purposes either is or has been subject to claims for return in historical Treaty settlements, and why conservation issues have figured prominently in most settlements since Ngāi Tahu in 1997.

In terms of present-day relationships, which are the subject of this inquiry, a large proportion of the mōrehu (surviving remnants of taonga places and species) are now under DOC control. The ‘ancestral whenua, taonga species, ngahere, waahi tapu, sources of rongoa, and kai’ are now subject to DOC jurisdiction, as are most surviving examples of the ecosystems, habitats, and landscapes among which mātauranga Māori evolved. DOC, likewise, is responsible for tuatara, kererū (New Zealand pigeon), tītī (muttonbird), tohorā (whales), and many other species of wildlife with which kaitiaki seek to maintain their kinship ties. As counsel for the Te Tai Tokerau claimants (Ngāti Kuri, Ngāti Wai, and Te Rarawa) put it, it is on the conservation estate that ‘te ao turoa’, in its pre-Treaty form, can be experienced.⁹

Since DOC controls access to and relationships with these taonga, it sits between Māori and their exercise of

kaitiakitanga. In other words, it controls the relationship between Māori and the places and species among which their culture developed. And, while DOC is required by legislation to give effect to the principles of the Treaty (see section 4.4.1), many Māori see the department as actually preventing the enjoyment of their article 2 rights.

Before getting to the nub of these complaints, however, we note that various recent DOC initiatives have found favour with the claimants. Where kaitiaki have been included in decision-making and respected for their knowledge, DOC has won praise. Indeed, a few of the criticisms levelled at DOC during the earlier phase of our inquiry, in the late 1990s, now seem to have been superseded by DOC recognition of claimant concerns. We set out here a number of examples of positive collaboration between iwi and DOC, as they show that the two sides’ aims are by no means incompatible. These arrangements may also offer generally applicable solutions to some of the matters over which DOC and iwi remain in dispute.

4.3.1 Examples of collaboration

When Haami Piripi gave evidence on behalf of Te Rarawa in 2006, he argued that the iwi was ‘totally marginalised from any decision-making role in relation to flora and fauna’. As a result, he said, there had been ‘ongoing destruction of culturally significant sites’. With the loss of the habitats of native species had come ‘the destruction of the spiritual nature of our existence’. DOC, for its part, had ‘failed to meaningfully involve tangata whenua in the design, delivery or the evaluation of conservation strategies and initiatives’; rather, iwi and hapū were marginalised from conservation planning and policy decisions.¹⁰

Shortly after our hearings closed in 2007, however, Te Rarawa signed an Agreement in Principle (AIP) with the Crown for the settlement of their historical Treaty claims. The agreement includes provision for an annual meeting between Te Rarawa and the Minister of Conservation (or the Minister’s delegate) ‘to discuss issues related to conservation policy, strategy, management and implementation of projects for Conservation Land within Te Rarawa’s Area of Interest’. It also provides for the establishment of a relationship process between Te Rarawa and DOC that ‘involves Te Rarawa in conservation strategy and management, and the implementation of projects’ on DOC land,



Tohorā (whale) at Ruawharo marae, Opoutama. Tohorā are central to the identity of many iwi. Ruawharo, the tohunga of the *Tākitimu* canoe, is said to have attracted whales to the Māhia Peninsula by planting their mauri (life force) on shore. Ruawharo whānau say that the tradition lives on in their fishing and seagoing today.

and 'enables the parties to explore ways that Te Rarawa can exercise kaitiakitanga over their ancestral lands, natural and historic resources and other taonga currently administered by the Department of Conservation.'¹¹

This development seems to have gone some way to overturning the earlier concerns about marginalisation. Mr Piripi was reported as describing the agreement in May 2009 as laying:

a cloak over the conservation estate and provid[ing] a basis for any other arrangement that may be put in place to protect certain principles, activities, ideas or interests. . . . Everybody willing, we should be able to develop a beautiful model that's an example to the rest of the world.¹²

Ngāti Wai, the people of the waters (as their name suggests) and land of Northland's east coast, have a defining traditional relationship with whales, having always harvested resources from the many whales washed up or stranded in their area. This relationship, and the ongoing issue of the use of stranded whale carcasses (especially for bone used in carving), have prompted local collaboration

between DOC and Ngāti Wai. The department has issued two successive protocols specifically for dealing with the iwi, whose rohe straddles the Northland and Auckland conservancies. Each deals with Ngāti Wai's rights to teeth and bone from dead marine mammals. Scientific interest is also catered for.¹³

Laly Haddon of Ngāti Wai provided an example of how this collaboration with DOC is working in practice:

My appearance here today is not just as another interest group but as the tangata whenua of this rohe and most importantly as a Treaty partner with the Crown, and I think, members of the Tribunal, that's the basis that I would like to work on, that partnership with the Crown. And I'd just like to point out that we, it is starting to work in terms of tikanga that's coming through, because if you look over there you'll see some whale bones and at the Pakiri beach 2 weeks ago we worked in conjunction with the Crown, with the Conservation Department, that an 18 metre Bryde's whale was washed up, so along with the resource manager Hori Parata and a team of people, we exercised our rangatiratanga on that tohora. We had an exemption to protect it, to bury

4.3.1

A pair of whale ribs formerly marked the entrance to Waikawa Marae, Picton, which opened in 1994.



it and to preserve the taonga and we did exactly that. And that was a matter that was being dealt with over the last 8 months because before that the Conservation Department just got a big digger and buried it. And it's so important because the whale as a tohora has been part of our history, of the Ngāti Wai history through all these years, and it was a great feeling to be carrying out the traditions and encouraging younger people to be part of that and to know that we are carrying out the obligations that, in true terms, are part of what the Treaty is all about. And I felt confident in that, and I suppose that's the whole basis that we can work comfortably together.¹⁴

Under the Ngāti Wai whale protocols, by 2007 the tribe had been involved in resource recovery from over 130 whales.¹⁵

Morere is a 364-hectare scenic reserve of forest remnant on the East Coast, within the rohe of Ngāti Rakaipaaka (a hapū of Ngāti Kahungunu). The reserve contains significant quantities of kiekie, a plant vital to the practice of weaving. From the early 1990s, DOC began informing Ngāti Rakaipaaka about all requests from weavers to take quantities of kiekie from the reserve, until eventually the

volume of requests caused Ngāti Rakaipaaka to become concerned about the amount of material being taken. Joint studies were undertaken, rats were trapped, and an agreement was reached under which management of the resource was effectively devolved to Ngāti Rakaipaaka. This has included the imposition of rāhui to promote regeneration.¹⁶ As DOC told us in 2006:

Agreement has now been reached within Rakaipaaka for them to advise DOC on amounts of kiekie that can be harvested and the way that this plant is to be harvested. DOC then permits the kiekie weaver to take what is recommended by iwi. This works extremely well with iwi taking responsibility for the sustainable cultural harvest of kiekie within Morere Scenic Reserve.¹⁷

Takapourewa (Stephens Island) lies just to the north of Rangitoto ki te Tonga (D'Urville Island) in Cook Strait. This 150-hectare island was taken from Ngāti Koata by the Crown in 1891 for lighthouse purposes and eventually became a wildlife sanctuary in 1966. It is now classified as an outstanding ecological area by virtue of its tuatara population and its restored habitat.¹⁸ Both the island and the



Tuatara, Takapourewa/Stephens Island. For Ngāti Koata, the tuatara of Takapourewa in the Marlborough Sounds are a taonga. The iwi's kaitiaki obligations towards these ancient creatures are a source of pride and identity. Around 50 per cent of the world's tuatara now live on Takapourewa in the rohe of Ngāti Koata.

tuatara remain of immense importance to Ngāti Koata, as can be seen in the comments of kaumatua (and DOC staff member from 1990 to 1997) Benjamin Hippolite:

Takapourewa is the outermost boundary of our rohe meaning it was very sacred to us. We went there and used it as a place of wānanga such as taiaha wānanga, wānanga for spiritual things and things like that. We learnt things from our old people that were never taught elsewhere, such as things about the endangered species there. That island had a spirit of its own, had a wairua of its own, and that is one of the reasons why we used to go there. We had marvellous times growing up there. We were told many stories on that island.

At one of these wānanga we learnt that the tuatara in our iwi is the kaitiaki of the stream of knowledge. We were told that the tuatara is the kaitiaki of the stream of knowledge because of its longevity.¹⁹

Mr Hippolite told us Ngāti Koata collaborate with biology experts and share mātauranga Māori with them in projects that have helped boost tuatara populations. The iwi has a joint management agreement with DOC in respect of Takapourewa and its tuatara. The relationship

has not been without difficulty, as we explained in chapter 2. But, overall, the claimants told us that working together to help the taonga has been positive.

4.3.2 Examples of concerns

The foregoing, then, are examples of generally successful collaboration between iwi and DOC over the management of taonga subject to the department's jurisdiction. They show that DOC and iwi share many objectives, and that devolving responsibility to Māori communities can reap significant benefits for conservation.

The relationship, however, is not always as smooth. In other cases, the claimants expressed frustration with what they saw as their exclusion from any influence or control over their taonga. In some instances, claimants said they were not even consulted about DOC actions affecting taonga; in others, their views were sought, but consultation was as far as the relationship went. We set out some of these complaints below.

Pūpū harakeke (flax snail), an ancient form of land mollusc, is a threatened remnant species found only in a small area at North Cape within the traditional territory of Ngāti Kuri. The Ngāti Kuri people treasure them

because they are so rare and beautiful. But in Ngāti Kuri traditions they are most revered as the guardians of the tribe. Haana Murray explained how, during tribal warfare, pūpū harakeke had been crushed under the feet of invading warriors. The sound they made as they died warned Ngāti Kuri of the looming danger, and so: 'We owe our survival to this taonga.'²⁰

The snails are endangered, largely due to the impact of introduced predators – such as rats, possums, and pigs – and damage to habitat from introduced weeds and animals such as horses and cattle.²¹ Of those that survive, many are found on a DOC-administered scientific and nature reserve, where access is by permit only. The department informed Ngāti Kuri about efforts to protect these taonga, and also contracted a member of the iwi to carry out protection work.²²

Ngāti Kuri acknowledged the department's efforts, but said they fall well short of supporting them to exercise kaitiakitanga. Mrs Murray said the iwi was 'excluded, barred and locked out' from exercising rangatiratanga over pūpū harakeke sites.²³ And Nellie Norman, who won the DOC contract for recovery work, said it was not appropriate for DOC to make decisions without full involvement from the iwi. 'Ngāti Kuri are the rightful decision-makers on issues concerning our taonga tuku iho.'²⁴

Many of the other concerns about access and decision-making related to customary use. The claimants viewed a requirement to seek DOC permission for gathering plant materials as degrading, especially when they perceived DOC as having a limited understanding of both the species and how iwi wished to use them. Apera Clark of Ngāti Kahungunu described being 'incensed' by DOC access restrictions and the department's questioning of his rongoā gathering.²⁵ Connie Pewhairangi of Ngāti Porou put it like this:

The harakeke is plentiful here . . . What we do lack is kiekie and pingao in any quantity. They are difficult sources to find. The possum has played havoc with the tarawhata in the bush. It is a major problem. DOC does give permits to take the Kiekie from DOC lands, but the trouble is the staff are telling you where to take it. It has to be in a certain area . . . But they should listen to us weavers, we know if the kiekie from any one place is good enough to work with. DOC staff do not



Pūpū harakeke (flax snail) at Te Paki Trig.

necessarily know this. So we don't bother with the permits, it's a major hassle.'²⁶

Ngāti Koata had similar experiences in respect of customary use. Mr Hippolite explained that:

We had employed a Ngati Kahungunu carver to come down to carve his ancestor Tutepourangi for Whakatu Marae in Nelson. He brought his wife, who was a weaver, and who was

A possum climbs a tree at Ngongotaha Hatchery grounds. Introduced species such as possums have devastated the environment of Aotearoa, destroying habitat and threatening the destruction of taonga species such as the pūpū harakeke (flax snail), as well as many species of native bird.





Pingao in the Pouto Dunes, Northland.

► Pingao, prized as a weaving material for its brilliant gold colour, is also the source of many stories that demonstrate the relationship between environment and whakapapa in te ao Māori. This coastal sedge is sometimes said to be the eyebrows of Tāne-mahuta, which he plucked as a peace offering for his brother Tangaroa, and sometimes a seaweed child who left the ocean out of love for kākaho (also known as toetoe or cutty grass). Threatened by introduced competitors such as marram and lupin, pingao has declined significantly in abundance since European settlement.



also from Ngāti Kahungunu. She was a specialist in gathering harakeke and kiekie, however, she had to go to a young person at DOC to get permission to use those plants, simply because he had a degree. The elders said to that young DOC employee 'come with us – we will show you about the harakeke'. At the end of the day, the employee said that he had learned more in that day with the elders showing him about the plants than he had during his education at university. You could not tell where the elders had gathered the harakeke, as they had so carefully selected the plants, but still they had a sufficient supply for their needs. It is therefore belittling to Maori that, with all our extensive knowledge, we have to get a permit from someone from DOC with little or no knowledge about the resource or the area.

When we were constructing the Whakatu Marae, we wanted the kiekie from Moncrieff Reserve, which is on the way to Matapihi along the road to French Pass. However, because we have to go to DOC each time we want to go into a reserve to get our plant, we decided not to use kiekie. Puhanga Tupaea decided that the weaving should instead be done using coloured plastic. If the authorities try and take our mana away, we will adopt and use a different material. So all the tukutuku in Whakatu Marae are made of coloured plastic.²⁷

It is not just the requests for permission to gather material that the claimants find demeaning. There was also great concern about the Crown's ownership of wildlife, including materials such as feathers, as provided for in the Wildlife Act 1953.²⁸ Although a permit can be obtained to transfer the material to iwi, hapū, or individuals, some witnesses viewed the need for a permit as a limitation on the tino rangatiratanga promised by the Treaty. Niki Lawrence of Ngāti Kuri feared that any cloak she made for her children might be confiscated since 'at the end of the day it belongs to the government'. She added that:

The plants and some materials available to my mum and her weaving friends are no longer accessible to my generation without DOC's permission. Many of the plant materials etc are growing in our native bush reserves. We are not to take them, even though we exercise our tupuna matauranga and

our own conservation expertise. DOC and its methods insult Maori tikanga.²⁹

Kathleen Hemi, of Ngāti Apa ki te Rā Tō (but giving evidence on behalf of Ngāti Koata), summed up the problems faced by all weavers seeking to use feathers for kākahu (clothing or garments):

Feathers are important for all weavers. The feathers were used for kakahu. Today we have to apply to DOC for the use of feathers. DOC keeps birds that have been found in storage and if we want to use the feathers then again we have to apply to DOC for permission to use them. However, the problem is that DOC do not ever tell us what they have – we have to write in and ask them what they have in order to find out. The worst part is that we are never able to own the feathers that are put onto these garments. We do not legally own anything that comes out of the forest that the Crown has control over. So, whatever taonga we use on our kakahu, in our whare, we will never own. The Wildlife Act 1953 prevents all Māori from having ownership of some of our taonga.³⁰

'This is not in keeping with the notion of partnership in the Treaty,' she added. 'In accordance with Article 2 of the Treaty of Waitangi, I believe my full and exclusive rights remain intact.'³¹

The claimants explained that these restrictions appeared to show a lack of trust in Māori methods of conservation, both from within DOC and in the wider conservation community. As an example of this distrust, when DOC began to devolve all kiekie harvest decisions at Morere to Ngāti Rakaipaaka, a local environmental lobby group argued that 'transfer of permit issuing functions to Māori groups is a dangerous and unfortunate precedent which will open the floodgates to unsustainable harvesting of threatened species'.³²

Several claimants saw great irony in such Pākehā concerns. Phil Aspinall of Ngāti Porou said that, when he was a child living on a farm, 'in the appropriate season when the miro was ripe we went into the bush and snared and shot pigeons or kereru and tui which was quite a delicacy'. However, the cutting of forests and the introduction



Dame Whina Cooper wearing a kahu-kiwi (kiwi feather cloak) in Hamilton during the Māori Land March, 1975.

Detail of a kahu-kiwi showing kiwi feathers.



of ‘wonderful animals like possums, stoats, ferrets and whatever have you’ had reduced the numbers of birds. Mr Aspinall continued:

Now if I was alive in 1800 I wouldn't let the Pakeha bring these things in. But how am I to know that they were no good. You see? It's like everything else. They bring it in, they ruin the country and then they tell us don't kill the pigeons, don't kill the pigeons, you're killing all the birds but they're the ones that did it. They brought these beautiful animals here, possums, stoats and of course when they brought them in, my tipuna, there were no animals here. We only had birds. And that's all we had. They brought a kiore that they ate but when all these other animals came in here, well you've just seen the millions of rabbits down Otago and on TV the other night the man was that happy that they stuck that poison down that the land's starting to look like land again. 90 million possums was it? What a wonderful country we live in. How can paradise be paradise when all these pests and these things that have been introduced by, I'll just say it, by the Crown. And in this country, what a wonderful country if none of these things were here. That's why I'm living here in paradise. There's no possums here we got rid of all those. There's a few rats.³³

The late Rapine Murray of Ngāti Kurī likewise argued that it was ‘not because of Maori that the kukupa became extinct and yet they are the ones who say they are conservationists’.³⁴ In his opinion, it was possums and chemical use that were the major source of decline.³⁵

And Ruruku Hippolite of Ngāti Koata described how environmental changes were impeding customary use: ‘You can't go to Otarawao for eels. That was our place, and the owners before never bothered us. Now we can't. The owner has filled in the lake now at Greville Harbour.’³⁶ Jim Elkington said that the principal eel resource was now to be found in DOC-controlled areas such as national parks, which Ngāti Koata could not access:

The National Parks Act is depriving Māori people of their customary right to catch eel. . . . I have a problem in that I cannot exercise my customary right in a National Park as far

as the Conservation Act is concerned . . . this is not consistent with section 4 [of the Conservation Act], it is not consistent with the Treaty responsibilities . . . The customary taking of eels in what are now designated National Parks has been a long standing practice . . . This denial of the Māori role is tiresome, and unacceptable.³⁷

The claimants expressed the view that the lack of trust in Māori conservation methods was entirely unjustified. To underline this point, several gave examples of their methods of kaitiakitanga. Mr Clark described collecting plant materials for rongoā thus:

We practise a number of different conservation methods when collecting our rongoa. When we collect leaves from a tree, we pick only one in four. We leave one for the tree, one for the wairua, one for the land, and pick one for us to use in rongoa. We care for the trees, pruning them so that they grow strongly and healthily. We have a policy of planting rongoa plants in the areas that we collect material from. We locate different areas where the same plant is found and take turns in collecting from each place, to allow the other areas to rest.³⁸

Similarly, Puhanga Tupaea referred to Ngāti Koata's gathering of flax on Rangitoto ki te Tonga when she was young:

This required access to and control of the resources, and I was well aware of the strict rules that applied about who could gather the materials, how much could be gathered, which parts, and how much left to ensure that they grew again. It was obvious to me then that there was a full list of laws and practices which were known to and enforced by all the adults amongst our people and anyone else in the area, as they had been down through the generations.³⁹

The last claimant concern we will mention at this point is DOC's concessions arrangements, whereby private operators apply to and pay the department for licences to carry out commercial activities on the conservation estate. Some claimants alleged that they were either excluded by DOC from decisions about the awarding of concessions or that they were seldom awarded concessions themselves.

Counsel for the Te Tai Tokerau claimants argued in closing in 2007 that 'the concessions regime alienates the kaitiaki from their environment by providing no legal avenue for the sharing of benefits from commercial use of a resource.'⁴⁰

In sum, then, here is the essence of the claimants' concerns about DOC. They wish to be involved in conservation policy, management, strategy, and implementation in their respective rohe. They wish to have the opportunity to practise kaitiakitanga and assume responsibility for the conservation of taonga species. They want DOC to recognise their conservation expertise, and they wish to make decisions about taonga, in particular about matters such as access, and how and when they are available for research, customary use, or any other purpose.

They object to Crown ownership and control of their taonga and the need for them to seek permission or apply for a permit before gathering or using plant or animal material. They object to their exclusion from decisions about the award of concessions as well as the non-prioritisation of iwi as concession-holders. And they feel dual frustration about their limited opportunities to exercise kaitiakitanga outside the conservation estate (due to species and habitat decline and land loss), and the official barriers to their exercise of kaitiakitanga within it.

4.3.3 Environmental decline

We turn now to consider what other constraints exist on the exercise of kaitiakitanga, aside from DOC. We have already noted in section 4.3 that historical land losses have impeded the relationships of iwi and hapū with their taonga, effectively depriving them of their own 'conservation estates'. The other factors, alongside Crown ownership and control of taonga, are, first, the declines of species, which despite recent conservation efforts remain a serious and ongoing concern; and, secondly, the prevailing Western ethos of preserving 'nature'.

As we set out in chapter 3, New Zealand's natural environment has undergone vast modification over the last 1,000 years, leading to a dramatic decline in our unique biodiversity including the extinction of numerous bird species. As Professor Jared Diamond has put it: 'In New Zealand today we are not studying an avifauna but the wreckage of an avifauna.'⁴¹ Recent research suggests that



Puawānanga (New Zealand clematis) is found throughout Aotearoa, both in gardens and in DOC-managed areas of bush. Though this species, *Clematis paniculata*, is relatively common, some indigenous species are declining as a result of competition from introduced species such as old man's beard.

over 26 million native bird eggs and chicks fall victim to predation every year.⁴² More specifically, the following table summarises DOC's assessment of the taonga species named in the original Wai 262 statement of claim on a scale from 'not threatened' to 'nationally critical' (the most extreme state before extinction). The range of species does not allow easy generalisation, but at the broadest

level, it is probably fair to say that most plants are generally not as threatened as most birds, animals, or fish.

Kiore and toheroa, which claimants also named as taonga, are not under DOC management. Under the New Zealand Threat Classification System, kiore would most likely be 'introduced and naturalised'. Evidence from DOC notes the kiore's range is restricted to Rakiura and some offshore islands; under schedule 5 of the Wildlife Act it is specifically not protected.⁴³ The only legal take of toheroa is customary use by local iwi, which requires a permit. According to Te Tiaki Mahinga Kai, toheroa are found on only a few beaches, with some populations stable or recovering while others are declining.⁴⁴

Much of DOC's work is designed to protect, and support the recovery of, endangered species. The department told us that it was undertaking specific management of 176 species, which is only a fraction of the 2,400 species assessed as threatened in some way.⁴⁵ Put another way, DOC's budget allowed it in 2005 to provide intensive management over only 2.7 per cent of its total holdings. An additional 32 per cent of the land received limited management, and 'about 55% of the lands administered by DOC where management would also be beneficial received only limited or no management'.⁴⁶

DOC also pointed out that:

Table 4.1: Threat classifications for taonga species

Species description	How threatened is it?
Pōhutukawa (12 species known)	Species range from nationally critical to no threat
Koromiko (hebe – more than 65 species)	Species range from nationally endangered to no threat
Puawānanga (clematis – several species)	Range from gradual decline to no threat
Pūpū harakeke (three species)	Species range from nationally endangered to nationally critical
Tuatara (three species)	Range from nationally endangered to sparse
Kererū/kūkupe	Not threatened, except in Northland. Increases dependent on conservation management.
Kūaka	Migrant species
Pīngao	Gradual decline
Harakeke (many species)	'Probably not threatened' (not assessed)

only a minority of these [threatened species] can potentially benefit from species-specific recovery programmes. This is because most native species can be supported only through whole-of-ecosystem management (eg general animal pest and weed control and island quarantine work) if their ongoing wellbeing is to be ensured. . . . An ecosystem needs to be functioning properly as a whole . . . For example, kererū/kūkupa and tūi numbers can improve significantly simply as a result of controlling possums and rats which eat both the young in their nests and the flowers and fruit the birds depend on for food.⁴⁷

In a 2008 update, while 19 species of birds had increased in number, 13 had declined.⁴⁸ It is clear that recovery efforts are an ongoing struggle. And for many plant species, there is very little information. The loss of species is all the more regrettable given the uniqueness of New Zealand's biodiversity. We have a remarkable number of species that are found nowhere else on earth (see chapter 2). As explained in the New Zealand Biodiversity Strategy:

Half a dozen islands in the Hauraki Gulf have a greater level of endemism than the whole of Britain. The ecosystems in which these species live are also highly distinctive. The kauri forests of the northern North Island, the braided river systems of the eastern South Island, and our geothermal systems are some examples.⁴⁹

The principal threats to native species are twofold. First, there is the destruction of habitat and food sources, so that only pockets of 'nature' are left, surrounded by fields and fences. Insects, birds, and plants that need room to spread (and ground over which to creep) are made vulnerable by being so caged in. Currently, the main agents of decline for birds are fisheries by-catch, changes in oceanic productivity near breeding islands, and changes in land-use, particularly conversion of sheep farms to dairy production.⁵⁰ The second principal threat is the ever growing collection of imported species that do so well in New Zealand's welcoming soils and climate. Possums, deer, stoats, rats, barberry, and boneweed all make inaction impossible if we are to retain what is left.



Tuna (longfin eels) are a traditional staple of the Māori diet, but numbers have been declining since the 1960s due largely to commercial harvesting and habitat changes. Now, claimants say, tuna are concentrated in the conservation estate, where permits are needed for access and harvesting.

For toheroa (which are mainly found on the beaches of Northland), it seems that excessive harvesting was the initial issue, but modern activities are now inhibiting recovery. Access to toheroa was regulated in 1932, and commercial harvest closed in 1969. As we noted above, the only legal take of toheroa now is customary use by local iwi.⁵¹ Claimants said that the use of Te Oneroa a Tōhē (Ninety Mile Beach) as a road had reduced the fishery greatly.⁵² Other fish species are also threatened, including eels, a longstanding staple of the Māori diet. In 2009, Mike Joy, an ecologist from Massey University, launched a petition calling for a ban on the commercial harvest of longfin eels, and requested expressions of support from environmental organisations and iwi.⁵³



Tuna harvest at Waiwera. Every autumn, mature female tuna (eels) start their migration from Te Roto o Wairewa (Lake Forsyth) to the Pacific Ocean. As they leave the lake, the tuna have to cross a shingle bar and it is a traditional customary harvest for the people of Wairewa to capture some of them and store them for eating later in the year.

Mr Piripi summed up the impact on kaitiakitanga of environmental decline:

Flora and fauna depend on the whenua. It is simply not possible to have 80% of the country's forest cover obliterated, and have some 65 million acres taken from Maori hands, and still retain the ability to practically exercise our kaitiakitanga.⁵⁴

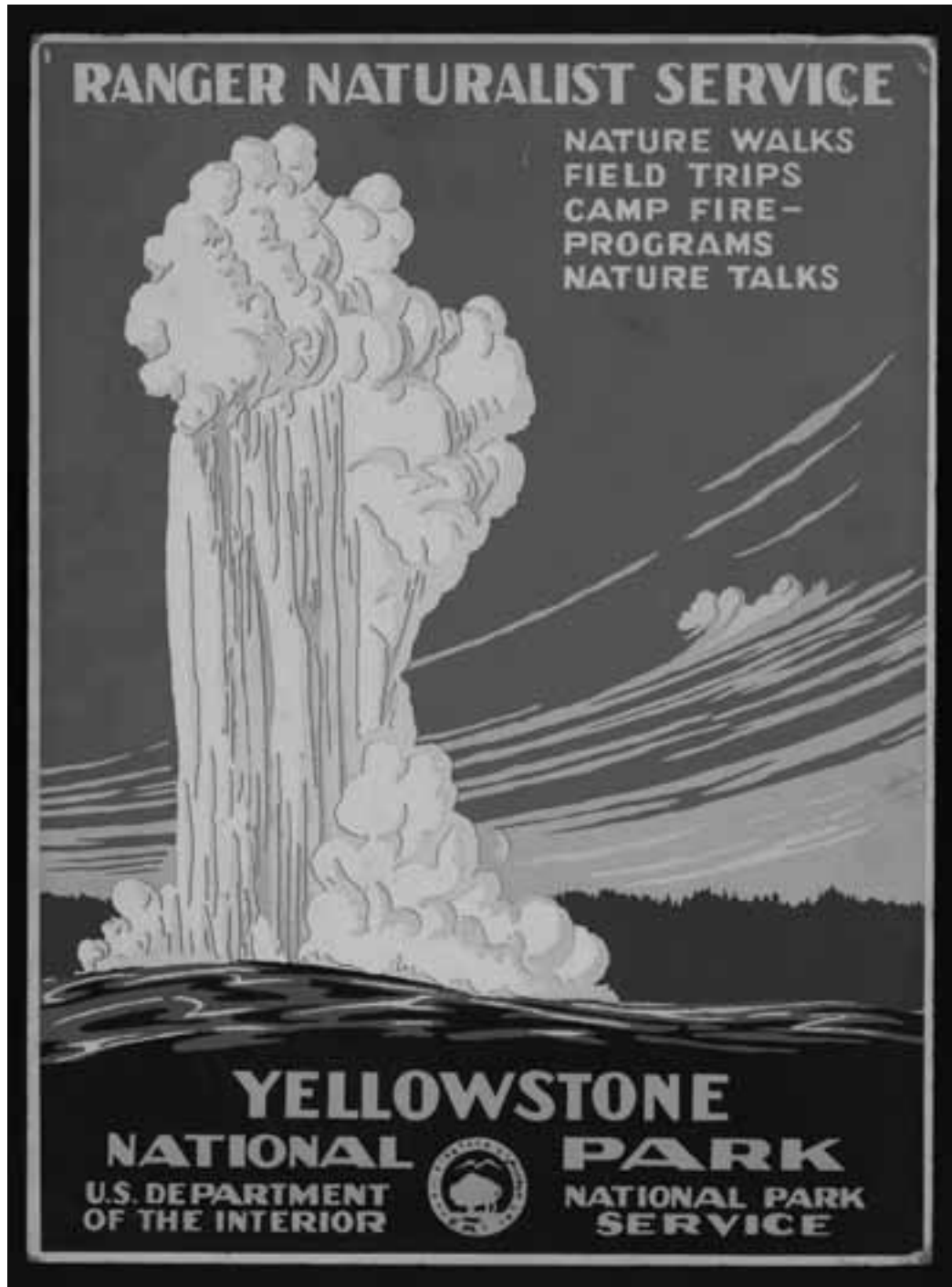
4.3.4 Divergent world views

The Crown and claimants agreed that the taonga species were in declining health, despite at times valiant efforts which are making a difference in some places. In this sense, the existence of the species themselves, and the ecosystems within which they live, are interests which impinge upon kaitiakitanga (as we have also discussed in chapters 2 and 3). The Court of Appeal in the *Whales* case put the preservation and protection of the species above all else, including Treaty rights.⁵⁵ All parties would agree

that the survival of a species should always be the first object of human engagement with it.

Despite this, there is much suspicion at the prospect of any Māori control of conservation management in New Zealand, as well as, in some cases, outright opposition. We see two reasons for this. The first is the underlying philosophies which have shaped conservation policy in New Zealand over many years, and the second (as we saw in section 4.3.2 and will explore further below), is the lack of understanding of and trust in mātauranga Māori among the other groups in New Zealand who focus on flora and fauna.

We introduced the concept of kaitiakitanga earlier, and explained that it involved an ongoing relationship in the nature of kinship, in which kaitiaki are responsible for the mauri, or spiritual well-being, of the taonga. Wero Karena of Ngāti Kahungunu described kaitiakitanga as involving an ingrained set of checks and balances in the



National Park Service poster showing Old Faithful erupting at Yellowstone National Park, c. 1938. The Park, established in 1872, introduced a model of environmental management in which areas of outstanding scenery were preserved and people excluded.

use of resources.⁵⁶ As we said in chapter 3, it can be characterised as a Māori system of environmental law, policy, and practice.

By contrast, the conservation legislation is largely based on a philosophy of preservation, which is opposed to any extractive use of the land and species it protects (although scientific uses have privileged access). This approach first grew out of an urge in the nineteenth century to create a new identity for New Zealanders through retaining landscapes, rather than because of the effect on species and ecosystems. It was preceded by moves to preserve at least some forest for its useful timber, but by the turn of the century there was also a movement for preserving picturesque landscapes untouched, usually when the site was already useless for farming.⁵⁷ Geoff Park, in his review for this inquiry of the interactions between the Crown and Māori in the last century, observed that:

Scenery preservation's core doctrine of protecting nature – permanently excluding human habitation and almost all use – still dominates the primary principles of Crown policy towards the indigenous flora and fauna. . . . Scenery preservation is an effective conserver of indigenous plant and animal life, but it is also an example of one culture's perception of land and its native life overwhelming another culture's very different perceptions.⁵⁸

Non-extractive uses are generally welcomed, except in the relatively few areas where public access is prohibited. The resilience of the idea of 'hands-off' conservation has been considerable and it has persisted through numerous changes in policy and legislation. 'Hands-off' conservation is, for many conservation-minded Pākehā, an unquestionable component of the definition of 'conservation'. Counsel for the Te Tai Tokerau claimants described it as 'the "Yellowstone National Park approach", which has [been] said to derive primarily from the traditional Western concept of a dichotomy between "man" and "nature".'⁵⁹ Contrast this with Wai 262 claimant Hema Nui a Tawhaki Witana's summary of the mātauranga Māori conceptualisation of the environment:

To imagine the bush is pristine and that we are to be only observers of it and not fully participants is a peculiar notion

that has arisen amongst some conservationists in recent times. To fully interact with the environment we must become part of it, then we can never abuse it for we would be abusing ourselves.⁶⁰

In addition to having strongly held views about the correct way to protect flora and fauna, there is a significant body of people who do not acknowledge the fact that te ao Māori has its own effective systems for regulating behaviour, enforcing laws and norms, punishing transgressions, and looking after the environment. This issue is described in the New Zealand Conservation Authority's (NZCA) 1997 customary use document, referring to frameworks for management:

Many submissions opposed to Maori customary use focused on the worst-case scenario, assuming that harvesting would inevitably lead to disaster. . . . Many of these respondents believed that if Maori were given access to any wild species there would be no constraints and no accountability. These submissions typically used strongly emotive vocabulary – particularly the word 'slaughter'. A number of non-Maori respondents stated that Maori couldn't be trusted and that Maori lack the skills, knowledge, sophistication and commitment for modern conservation management. . . . Perhaps as a part of this focus on the potential for loss, many of the non-Maori submissions emphasised the need for strong controls, insisting on continuing Crown authority over conservation management and access to protected traditional species. . . . Management by DOC was upheld as the only system in which these respondents had faith, and the only way to achieve accountability, transparency and professionalism.⁶¹

This lack of understanding and of trust cannot be regarded as an insurmountable obstacle to change, but we acknowledge that it is a significant one. We acknowledge that the fears felt by these groups are exacerbated by the almost unparalleled loss of species, many unique, during New Zealand's two distinct waves of settlement – leading to a belief that birds such as kererū and kūaka could be hunted to another level of decimation, if not extinction.

4.3.5 Summary

The claimants' concerns can be summed up as follows. They seek to exercise kaitiakitanga in respect of environmental taonga under DOC jurisdiction, and to preserve and transmit related mātauranga. Those taonga include landforms, waterways, ecosystems, places such as wāhi tapu, and indigenous species of flora and fauna that have significance in mātauranga Māori.

The claimants explained that kaitiakitanga involves conserving, nurturing, and carefully using taonga as part of an ongoing relationship in the nature of kinship. They submitted that their ability to exercise kaitiakitanga has been severely compromised since the time of Cook, both by land loss which has cut them off from taonga, and by ongoing environmental changes which have dramatically affected habitats and led to the extinction of some taonga species and to many others becoming threatened or vulnerable.

They described many experiences in their relationships with DOC. On the positive side, in some instances DOC and iwi have developed partnership arrangements allowing kaitiaki to make decisions about, and care for and utilise, taonga while achieving DOC's aim of preserving the natural environment. But for the most part the claimants submitted that their exercise of kaitiakitanga had been impeded. They said that DOC ownership and control of the conservation estate and indigenous species restricted their access to, relationships with, and ability to make decisions about taonga; indeed, lack of involvement in decision-making was a central theme of their concerns.

As well, they said they were excluded or sidelined from decisions about and involvement in commercial opportunities associated with taonga places, and were demeaned by requirements to seek permission for customary use and by legislation vesting ownership of taonga in the Crown. Such restrictions were seen as reflecting an unjustified lack of trust in kaitiaki traditions and in the mātauranga kaitiaki had derived from centuries-old relationships with those taonga.

Finally, claimants explained the divergent world views that underpin differing approaches to managing the conservation estate and indigenous species. Whereas Māori relationships with the environment take place in a context of whanaungatanga and kaitiaki obligations, the legislative

arrangements that have developed in te ao Pākehā parcel up the environment into areas for preservation (under conservation and related legislation) and areas for use and development (under the RMA, covered in chapter 3). These diverging approaches sometimes lead to tensions, for example, between environmentalists whose sole aim is to avoid human impacts on conservation areas, and kaitiaki, who seek to both preserve and interact with taonga as part of living relationships.

For the claimants, the restrictions on their ability to fully express kaitiaki relationships are a matter of overwhelming importance. It was through these relationships that the Māori culture evolved. Relationships with taonga, as we said above, were integral to the development of ceremonies such as tangi and pure; and to whaikōrero, karanga, and mōteatea; to weaving and carving; and many other tikanga. The mātauranga gained through those relationships, and the interwoven responsibilities of rangatiratanga and kaitiakitanga, are essential elements of what it is to be Māori. Without ongoing relationships between kaitiaki and taonga, these central features of te ao Māori cannot survive.

We will address the Crown's responses to the issues raised by claimants in later sections of this chapter.

4.4 TREATY PRINCIPLES IN CONSERVATION LEGISLATION AND GUIDING POLICY

Having set out, in general terms, the claimants' concerns, we now examine how Treaty principles and responsibilities are defined in the legislation and policies that control DOC's relationships with Māori.

We first consider the Treaty responsibilities set out in the Conservation Act 1987. We then consider how those responsibilities are reflected, first, in the statutory policies that control most of DOC's work and with which DOC must comply in all of its operations, and, secondly, in Crown guidelines on relationships with Māori. These guidelines influence DOC and other government agencies in their interpretation of Treaty responsibilities. The claimants' view is that these policies and guidelines fail to adequately reflect the principles of the Treaty, and that the department is therefore in breach of its statutory obligations.

Before considering that view, we set out what the Courts and past Waitangi Tribunal reports have had to say about Treaty principles. Finally, we form our conclusions and set out some recommendations for reform.

This analysis will be followed, in section 4.5, by consideration of how DOC involves Māori in decision-making and the extent to which that is consistent with its Treaty obligations.

4.4.1 Treaty principles in the Conservation Act

As we have noted, DOC is the Crown's caretaker of many of the places and species that Māori view as taonga subject to their kaitiakitanga. This was, no doubt, one of the reasons behind the weighty Treaty responsibility set out in section 4 of the Conservation Act, which says: 'This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.'

Section 4 provides one of the strongest legislative requirements for the Crown to give effect to its Treaty obligations. Other agencies which administer Treaty obligations are generally required in the relevant legislation to 'have regard to' or 'take into (appropriate) account' or even 'recognise and respect' the principles of the Treaty. To 'give effect to' is a significant step up, requiring the agency so charged to ensure that the principles of the Treaty can be seen to be in action in the way that the Act operates. This was acknowledged by DOC's first director-general, Ken Piddington, who said that one of his department's principal tasks was to uphold the Treaty, which he said was 'actually a Treaty about conservation rights and obligations . . . I think we've got a central role in the whole discussion about the Treaty because of that.'⁶² Section 4, in other words, puts DOC in a different league from all the other agencies covered by the Wai 262 claim, and is the reason for our focus on Treaty principles in this chapter.

Section 4 does not, however, attempt to define the Treaty principles DOC has to give effect to. Nor is there elsewhere any definitive list of Treaty principles. Since 1975, when the Treaty of Waitangi Act came into force, the courts and Waitangi Tribunal reports have developed various principles which explain how the Treaty, written in 1840, could be applied to current concerns and Crown activities. But they have always done so in the context of the problem they were dealing with at the time. Indeed,

the Court of Appeal has said that there could never be a final list, as: 'The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change.'⁶³ At various times, the Executive and Parliament have also had their say on what they think the principles are.

Nor does the Act contain any prescription about how the department should go about giving effect to those principles. Instead, as an interpretation provision, section 4 applies to all other provisions in the Conservation Act. This includes all of the department's functions, such as managing land for conservation purposes, fostering recreation, and allowing tourism. It also includes the department's various ownership, policy, planning, and decision-making powers, and its administration of other Acts under its jurisdiction.⁶⁴

We will now consider how DOC's guiding policies have interpreted and given effect to the department's Treaty responsibilities. This was a significant concern for the claimants.

4.4.2 Treaty principles in the Conservation General Policy

Conservation general policies (CGPs) can be prepared by the Director-General and approved by the Minister under section 17B of the Act. A rigorous process of public consultation, submissions, and hearings is required before a CGP can take effect. Once a CGP is approved, all other policy documents within the department must be consistent with it. Thus, other than DOC's controlling legislation, the CGP is the most important and powerful statement of the department's ongoing policies. It is designed to have day-to-day application, so it is a comprehensive treatment of a broad range of DOC functions. It is really the conservation equivalent of a national policy statement under the RMA.

The current CGP was approved by the Minister in May 2005 and covers all policy relevant to the department's operations under the Conservation Act, the Wildlife Act, the Marine Reserves Act, the Reserves Act, the Wild Animal Control Act, and the Marine Mammals Protection Act. It therefore applies to all lands, waters, and resources administered by the department, excluding national parks.⁶⁵ The CGP prescribes how DOC will



Kauri, Trounson Kauri Park, Northland. While national parks preserve the most iconic scenery and ecosystems, well over half of the DOC estate is held in reserves and other forms of landholding such as Trounson Kauri Park, which are subject to the Conservation General Policy.

exercise its powers under all of the above Acts, and covers the full range of DOC activities, including interpretation of policies, Treaty responsibilities, public participation in conservation management, conservation of natural resources, historical and cultural heritage, planning, and so on.⁶⁶

The CGP guides and directs decisions not only of the Minister and the Director-General of Conservation, but also the NZCA and conservation boards (see section 4.5.3), fish and game councils, and DOC conservators and staff. It sets the parameters for all strategies and plans developed by the Conservation Authority and conservation boards, and by regional fish and game councils. It therefore determines the way in which decisions are made, goals are set, and operations conducted throughout the organisation, from contract workers and staff to the highest levels of management and governance.⁶⁷

The CGP's goal is integrated conservation management at a national level.⁶⁸ This management focuses on the statutory requirement for 'the protection and preservation of natural and historic resources', but allows for public recreation and other use of public land where that does not compromise conservation.⁶⁹

(1) *Treaty responsibilities in the CGP*

The CGP uses key phrases to identify the level of discretion bestowed on relevant officials or boards. Where the CGP is firm on achieving particular outcomes or outputs, it uses mandatory language to require them. Where discretion is to be vested in the relevant officials or boards, discretionary language is used. Generally speaking, the more important the outcome or output is to the department's mission, the more mandatory the language will be. Thus, outcomes and outputs either 'will', 'should', or 'may' be required, and similarly, activities and responsibilities either 'will', 'should', or 'may' be carried out. The difference is explained in the early provisions of the CGP as follows:

1(d) The words 'will', 'should' and 'may' have the following meanings:

- i. Policies where legislation provides no discretion for decision-making or a deliberate decision has been made by the Minister to direct decision-makers,

state that a particular action or actions 'will' be undertaken.

- ii. Policies that carry with them a strong expectation of outcome without diminishing the constitutional role of the Minister and other decision-makers, state that a particular action or actions 'should' be undertaken.
- iii. Policies intended to allow flexibility in decision-making, state that a particular action or actions 'may' be undertaken.⁷⁰

It is a relatively straightforward task to assess the importance of outcomes, outputs, activities, and responsibilities in relation to iwi. In terms of its Treaty responsibilities, the department 'will' take part in Treaty settlement processes. It 'will' seek and maintain relationships with tangata whenua to enhance conservation; consult tangata whenua when statutory planning documents are being developed; consult tangata whenua on specific proposals involving places or resources of significance to them; encourage tangata whenua involvement and participation in conservation on public lands and waters; and seek to avoid actions that would breach the Treaty. It 'should' encourage partnerships to enhance conservation and recognise mana; and develop public information and interpretation about places of significance to tangata whenua. It 'may' negotiate protocols and agreements to support relationships and partnerships; and it may authorise customary use of traditional materials and indigenous species subject to applicable legislation and other conditions.⁷¹

Other sections of the CGP also set out responsibilities in relation to Māori. In matters of historical and cultural heritage, the policy provides that 'tangata whenua . . . will be invited to participate in the identification, preservation and management of heritage of significance to them on public conservation lands and waters.'⁷² The policy requires the identification of landscapes, landforms, and geological features of significance to tangata whenua. It provides that mātauranga Māori and tangata whenua interests in conservation research and monitoring 'should be recognised and may be supported by cooperative arrangements.'⁷³ It requires consultation of tangata whenua over the development of conservation management strategies and plans.⁷⁴

In the marine context (policy 4.4), the CGP says that tangata whenua, as kaitiaki, will be 'invited to participate in the protection of marine species of cultural importance to them'. The policy also makes provisions for tangata whenua to be notified of and involved in the management of marine mammal strandings, and provided with access to dead marine mammals for customary use (see section 4.6.3). Provisions are also made for tangata whenua to be consulted over which marine habitats and ecosystems need protection, and for tangata whenua to be invited to 'participate in' the planning, establishment, and management of marine reserves.⁷⁵

(2) Definition of Treaty principles in the CGP

The CGP also ventures into the definition of relevant Treaty principles for the administration of its legislation. In its glossary it defines the 'Treaty principles' to be applied by those exercising powers and functions under the policy as 'the principles . . . identified from time to time by the Government of New Zealand'.

It also – in an introductory note to the Treaty responsibilities section – lists five Treaty principles which were published by the fourth Labour Government in 1989. They are:

- ▶ the principle of government (the kāwanatanga principle);
- ▶ the principle of self-management (the rangatiratanga principle);
- ▶ the principle of equality;
- ▶ the principle of reasonable cooperation; and
- ▶ the principle of redress.⁷⁶

So far, this is the only statement of Treaty principles published by the Executive (although, as will be seen in section 4.4.4, the Crown has since tightened its view on what statements its agencies may make about Treaty principles in written agreements with Māori).

The policy goes on to say that the application of these principles will depend on the circumstances of each case, including the statutory conservation framework and the significance to tangata whenua of the land, resource, or taonga in question.⁷⁷

In terms of engagement with Māori, the significance of

the CGP is that it overrides other DOC policy documents, and therefore its statements on Treaty responsibilities, and on consultation and engagement, are definitive.⁷⁸

4.4.3 Treaty principles in the General Policy for National Parks

Section 44 of the National Parks Act 1980 provides for the Director-General to prepare, and the NZCA to approve, a general policy for national parks. The current General Policy for National Parks, published in 2005 and amended in 2007, contains the same definition and statement of 'Treaty principles' as the CGP. It also contains statements of Treaty responsibilities that are almost identical to those in the CGP. The only substantive differences relate to customary use (explained in section 4.6.3); and interpretive signage, where the CGP refers to 'places or resources of significance to tangata whenua' and the General Policy for National Parks refers to 'places or resources of spiritual or historical or cultural significance'.⁷⁹

In its chapter on historical and cultural heritage, the General Policy for National Parks provides for tangata whenua participation in the identification, preservation, and management of their historical and cultural heritage in national parks; this is a 'should', whereas in the CGP it is a 'will'. The General Policy for National Parks also requires DOC to 'recognise' mātauranga Māori and tangata whenua interests in research and monitoring. It also imposes consultation obligations in relation to the establishment and management of national parks, and to the development of hazard and risk management plans.⁸⁰

The Treaty principles and responsibilities defined in the CGP and General Policy for National Parks were of considerable concern to the claimants, as we will see in section 4.4.5.

4.4.4 Treaty principles in the Crown–Māori Relationship Instruments guidelines

We turn now to consider the *Crown–Māori Relationship Instruments: Guidelines and Advice for Government and State Sector Agencies*.⁸¹ This document was published in 2006 by the Ministry of Justice and Te Puni Kōkiri, following a Cabinet directive in 2004 aimed at standardising

the Crown's approach to informal relationships with 'Māori collectives', that is to say, whānau, hapū, iwi, Māori organisations, or Māori communities.

The guidelines provide detailed instructions on negotiating and drafting Crown–Māori Relationship Instruments (CMRIs), the process for finalising them, and mechanisms for evaluating and reporting on them.⁸² As government-wide policy, these guidelines influence DOC, both in its interpretation of its Treaty responsibilities (which we are considering in this section) and in its engagement with Māori (considered in section 4.5).

In the guidelines, a CMRI is defined as:

A document agreement or arrangement, signed by both parties, that establishes or recognises an ongoing collaborative relationship between Ministers, government agencies or Crown entities, and a whānau, hapū, iwi, Māori organisation or Māori community.⁸³

The guidelines require that, in drafting any CMRI, government agencies (such as DOC) are authorised to use three sources of statements about the Treaty (including statements about the principles of the Treaty). These sources are all essentially government-sanctioned interpretations of the Treaty's meaning, and include:

1. approved statements of government policy on the Treaty which are already in use in a variety of contexts including legislation, government goals and policy frameworks
2. statements based on Treaty statements which the government has previously used in submissions to the courts or the Waitangi Tribunal and which represent the Crown's understanding
3. statements drafted especially to meet the particular circumstances or relationship, which satisfy the conditions set out for such statements.⁸⁴

An appendix provides further detail on those statements. Those in the first category (approved statements) include the 1989 principles which we listed in section 4.4.2(2), clauses in legislation and government policy documents, and approved recommendations from the

1988 Royal Commission on Social Policy.⁸⁵ Those in the second category (statements used in submissions) include references to the Treaty as 'a founding document of New Zealand', and the following references to Treaty principles:

The Crown acknowledges that it has an obligation to act in an informed manner when it forms policy or acts in ways that affect Māori interests.

The Crown acknowledges that it is under a duty of active protection in relation to Māori rights and interests guaranteed pursuant to Article 2.

The parties each have an obligation to act in good faith, fairly, reasonably and honourably towards the other.

Central to the Treaty relationship and implementation of Treaty principles is a common understanding that Māori will have an important role in implementing (policies/services) for Māori and that the Crown and Māori will relate to each other in good faith and with mutual respect, cooperation and trust.

In order to recognise and respect the principles of the Treaty of Waitangi, the parties have agreed to establish (mechanisms/processes/structures) to enable (the Māori Collective) to contribute to the (planning/policy development/decision-making/delivery) of (the agency's) specified (policies/functions/services).

In order to recognise the Crown's obligations to act in an informed manner, (the agency) will (provide information/seek input/give adequate time for response/consider submissions) on the exercise of (particular) functions.⁸⁶

In evidence, DOC made it clear that it was guided by Crown statements about Treaty principles, as might be expected for a government department.

4.4.5 Claimant and Crown arguments

As we have said, the claimants argued that the guarantee of tino rangatiratanga in article 2 of the Treaty gives them a right to exercise kaitiakitanga over environmental taonga within their rohe. They also said that article 2 requires the Crown to actively protect kaitiaki relationships, and that this includes providing for kaitiaki control and regulation of environmental taonga, and ensuring that those

relationships can be preserved from generation to generation. The claimants said that, contrary to this principle, DOC ownership and control of these taonga has impeded their kaitiaki relationships. Most of the claimants argued that this was not caused by flaws in the Conservation Act itself, at least not with section 4, so much as by failings in DOC's interpretation and implementation of the Act.

Ngāti Kahungunu, Ngāti Porou, and the Te Tai Tokerau claimants were all of the view that the strength of section 4 should mean that their needs can largely be met within the existing legislative framework. Counsel for the Te Tai Tokerau claimants, for example, said in closing submissions that section 4 'contains language that is demonstrative of a Treaty partnership' and there was 'therefore no statutory impediment to the Act being administered in a manner which provides for the exercise of tino rangatiratanga'.⁸⁷ Counsel went on to say, however, that kaitiaki-tanga was restricted because it is the Crown, not kaitiaki, that decides how section 4 is interpreted and enforced. And all three of these claimant groups said that the department had read down section 4 to the point where it regarded consultation as sufficient to give effect to the principles of the Treaty.⁸⁸

Ngāti Koata felt that DOC had:

sought refuge in a statutory framework which whilst it promotes and requires Treaty compliance does so without prescription as to how the Treaty rights of iwi authority/decision making are to be recognised. The result is that DOC hides behind this lack of prescription and Ngāti Koata continue to be left out of decision making.⁸⁹

All claimants were concerned about the way DOC had 'defined' the Treaty principles in the CGP (see section 4.4.2).⁹⁰ Counsel for Ngāti Kahungunu contended that:

It is no exaggeration to say the attempt to minimise the Crown's obligations under section 4 through the glossary of the CGP is manifestly disingenuous and a serious breach of the Crown's obligation to act with utmost good faith towards Maori.⁹¹

Claimants were of the view that the CGP had little to offer them, in part because of the way it treated the Treaty

principles, and in part because of what they saw as a lack of substantive commitment to iwi in the other sections of the document.⁹² All claimants acknowledged that DOC staff in their rohe had built constructive relationships, but this was almost despite the CGP.

The Crown, in response, submitted:

Section 4 imposes an obligation on DOC to actively protect Māori interests in undertaking its management of land and resources, to the extent that to do so in a particular case would not be clearly inconsistent with the statutory regime. Section 4 does not prescribe outcomes for Māori in relation to the lands and other natural and historic resources held under the Conservation Act or Acts in the First Schedule. Outcomes will vary depending on the strength of the Māori interest and conservation factors.⁹³

Though it acknowledged a duty of active protection, the Crown argued that this did not extend to the control and decision-making powers that the claimants sought.⁹⁴ It also submitted that the statutory provisions in the Conservation Act and other statutes DOC administers could 'generally' be implemented in a manner that is consistent with Treaty obligations, but 'in the event of a clear inconsistency between Treaty obligations and statutory provisions, the statutory provisions prevail'.⁹⁵ The Crown asserted that it sought to recognise the Māori belief that they have a different relationship with taonga land and species in the policies and legislation that currently exist.⁹⁶

On the CGP, the Crown submitted that it is the policies in the CGP's 'Treaty responsibilities' chapter (as distinct from the list of principles in the glossary) that set out how the department gives effect to its Treaty responsibilities.⁹⁷

4.4.6 Treaty principles in court and Waitangi Tribunal decisions

The Treaty principles defined by the courts and the Waitangi Tribunal have sought to explain how the Treaty, written in 1840, could be applied to current concerns and Crown activities. The principles seek to articulate the essence of the promises the Crown and Māori made to each other in the Treaty, in a way that can be useful to those engaging with the issues. 'Treaty principles, as interpreted by the Courts and the Waitangi Tribunal, are



Whale-watching at Kaikōura. The Court of Appeal's *Whales* case considered DOC's Treaty obligations to tangata whenua in the context of Ngāi Tahu's Kaikōura whale-watching operation.

derived from the spirit, intent, circumstances and terms of the Treaty.⁹⁸ Before turning to our analysis of the claimant and Crown submissions, we pause first to describe how the courts have interpreted 'Treaty principles,' and particularly so in one notable Court of Appeal decision in the context of conservation.

(1) What have the courts said about Treaty principles?

Although the principles of the Treaty are not defined in the Conservation Act, there has been considerable judicial interpretation of this phrase in general and some on section 4 in particular. The Conservation Act was passed shortly before the Court of Appeal released its decision in the *Lands* case, which was the first case in that court to address the implications of the legislative incorporation of Treaty principles. As is now well known, the Court of Appeal found that the Treaty relationship was in the nature of a partnership and Treaty principles required that the Treaty partners 'act towards the other reasonably and with the utmost good faith'. The Court also

found that the Treaty was a living instrument and that its principles should be capable of adaptation to changing circumstances.⁹⁹ In 1990, as we said in section 4.4.1, the then President of the Court of Appeal determined that '[t]he Treaty obligations are ongoing. They will evolve from generation to generation as conditions change.'¹⁰⁰ As a consequence, it would not be appropriate to lay down a closed list of Treaty principles, and neither the courts nor the Tribunal have attempted to do so.

In 1995, the Court of Appeal considered section 4 of the Conservation Act in a dispute between the Ngāi Tahu Māori Trust Board and the Director-General of Conservation (referred to hereafter as the *Whales* case).¹⁰¹ Ngāi Tahu at the time held the only permits for commercial whale watching off Kaikōura and were challenging the intention of the Director-General of Conservation to issue permits to other operators. The Court found that Ngāi Tahu was entitled to be consulted before the permits were granted, and that weight should be given to their views in the final decision-making process. The

Director-General had listened to Ngāi Tahu's views, but did not consider that his duty went beyond listening. The Court's reasoning was that the Treaty required active protection of the Māori interest, and mere consultation without any intention to give weight to Ngāi Tahu's interest in the final decision-making process was never going to be enough.

In coming to its decision, the Court found that although a commercial whale watching business is not a taonga, it was 'so linked to taonga and fisheries that a reasonable treaty partner would recognise that treaty principles were relevant'. On that basis, the Ngāi Tahu interest was entitled to 'a reasonable degree of preference' alongside other interests.¹⁰²

The Court furthermore said that statutory provisions for giving effect to the principles of the Treaty of Waitangi should not be 'approached narrowly', and nor, contrary to the Crown's argument, should they be limited to mere procedural safeguards such as consultation.¹⁰³ Having said that, the Court unhesitatingly accepted that the Treaty gave the Crown power to enact comprehensive legislation for the protection and conservation of the environment and natural resources, and that the Crown's overriding obligation was to the environment itself.¹⁰⁴

(2) What has the Waitangi Tribunal said about Treaty principles?

The Waitangi Tribunal has long held that the Treaty bestowed upon the Crown a right to govern and therefore to pursue the policy agenda upon which it was elected to office, but that right is qualified by the obligation to protect the tino rangatiratanga of iwi Māori. As the Tribunal said in the *Petroleum Report*:

The starting point in our view is the essential exchange in the Treaty. By its terms, Māori agreed to give up sufficient authority to enable the Crown to establish and operate a system of central government based on the English Westminster model. The Crown accepted that new authority and promised to exercise it so as to protect both the traditional authority of iwi and hapū – their tino rangatiratanga, and the resource rights of those communities.¹⁰⁵

The Tribunal in the Muriwhenua fishing claim made a similar point in the specific context of conservation:

The cession of sovereignty or kawanatanga gives power to the Crown to legislate for all matters relating to 'peace and good order'; and that includes the right to make laws for conservation control. Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike. The right so given however is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second.¹⁰⁶

In the *Petroleum Report*, the Tribunal found that the Treaty contained fundamental rights analogous to those in the Bill of Rights Act 1990. That Tribunal found that the Crown could only override fundamental Treaty rights if override was reasonably necessary to achieve a legitimate policy objective; there was no reasonable alternative method of achieving the statutory objective; and the interference was the minimum necessary to achieve it.¹⁰⁷

The relationship created out of this exchange of promises has been characterised by the Tribunal as a partnership giving rise to mutual obligations. On the Māori side, there is an obligation of reasonable cooperation. On the Crown side, the obligation is to act reasonably, honourably, and in good faith, and to actively protect the Māori Treaty interest.¹⁰⁸

4.4.7 Analysis

The obligation section 4 imposes on DOC is one of the strongest Treaty provisions in any New Zealand statute, as befits the importance of DOC-controlled taonga to Māori culture. Section 4, then, is not an issue for the claimants. Rather, their concerns are with the way DOC has interpreted and implemented that provision.

The dominant policy instruments relevant to DOC's interpretation of Treaty principles are the CGB, the General Policy for National Parks, and the CMRI guidelines, none of which correctly express those principles in the broad and unquibbling way the courts require.¹⁰⁹ Rather, they declare a suite of Treaty principles and statements or

restatements of those principles that is skewed to the interests of the Executive. That is predictable and perhaps even understandable. It begins with the statement of five principles issued by the Labour Government more than 20 years ago (see section 4.4.2). These principles (one assumes deliberately) do not include the core principle of Treaty partnership expressed by the Court of Appeal in the *Lands* case and confirmed time and again by the Waitangi Tribunal. They reduce the tino rangatiratanga guarantee to a principle of 'self-management'. Much water has passed under the bridge since that first, modest attempt by the Executive to draw a line in the sand on Treaty principles, and events have long since overtaken the 1989 list. The CMRI guidelines are a more recent restatement but they, too, adopt an Executive-centred approach, as can be seen from the examples of 'Treaty principles' set out in section 4.4.4.

As Palmer points out, many institutions have a role in declaring and defining Treaty principles.¹¹⁰ The Executive does play such a role, along with the Waitangi Tribunal, the ordinary courts, and a reluctant legislature. We acknowledge that there is a paradox here in the section 4 directive requiring DOC to comply with the principles of the Treaty of Waitangi. DOC is a part of the wider Executive and directly answerable to Cabinet through its Minister; and the Executive itself claims a role in defining Treaty principles. Nonetheless, section 4 has imposed upon the department an obligation to take a wider view of Treaty principles than that espoused by the Executive alone. In fact, the Treaty principles that must be given effect by the department are those declared in the law and not those expressed in Executive policy and practice except to the extent that they are consistent with the law. In the absence of express particularisation from the legislature, it is Treaty principles as expressed by the ordinary courts (and not the Tribunal) which must be applied and given effect by the department.

As we have said, the courts have found that no list of Treaty principles can be definitive. Nonetheless, it is clear from court decisions that some principles are not only well established but also of particular relevance to DOC. The right of the government of the day to govern is well

established as a principle of the Treaty, but so is the Māori right of tino rangatiratanga and the concomitant duty on the Crown to protect that rangatiratanga principle. Similarly, there is an obligation on the Crown to actively protect the Māori interest and to act reasonably, honourably, and in good faith in dealing with Māori under the Treaty. The Crown's duty is akin to that of a fiduciary. For their part, Māori owe an obligation of loyalty, reasonable cooperation, and respect for the Government's role. All of these ideas are woven together through the over-arching Treaty principle of partnership. Thus, although neither the general policies nor the CMRI guidelines make reference to that principle,¹¹¹ it is nonetheless one DOC must give effect to.

Several other Treaty principles lie beneath this over-arching principle, all of which speak to the mutual rights and responsibilities encompassed by partnership. Such principles include the government or kāwanatanga principle, which affirms the Crown's right to govern, and the rangatiratanga principle, which obliges the Crown to protect the tino rangatiratanga of iwi and hapū to the greatest extent practicable. The right of tino rangatiratanga – upon which the claim for kaitiaki control of taonga is based – is never absolute, but is nonetheless an important right that should not lightly be set aside. This right sometimes means that it is legitimate to give reasonable priority to the tangata whenua interest over others. By virtue of section 4, all of these principles, and the rights and responsibilities that arise from them, must infuse DOC's day-to-day work.

DOC's then acting general manager of policy, Ms Johnston, explained in her evidence how there had been 'considerable debate' within DOC when the CGP was being developed about how to express Treaty principles, particularly in light of the fact that there is no definitive list, 'and at the end of the day the conclusion was reached that because of the evolving nature of the principles, that we would go back to relying on the 1989 version as published by the Government'.¹¹²

Johnston argued that crafting lists of Treaty principles was a role better suited to a policy ministry, not an operational department such as DOC, and she also argued that

in any event a revised list of principles would make little practical difference in DOC's day-to-day work.¹¹³ While we acknowledge the danger that debate about Treaty principles can become over-lawyered and too abstracted from the day-to-day work of an operational department such as DOC, ultimately we are not convinced by this argument.

Nonetheless, DOC has acknowledged that its relationship with Māori and the Māori interest in the natural environment administered by DOC are of great importance to its mission. And the department also acknowledges its obligation under section 4 to give effect to the principles of the Treaty. Both of these factors make it important that DOC gets its list of principles right, and that the Treaty responsibilities defined in the CGP and the General Policy for National Parks derive transparently and in good faith from those principles. They are not abstract for a department like DOC. On the contrary they are, according to section 4, the primary drivers of a major category of the department's policies and operations. If they are not driving the construction and implementation of policy, then section 4 is not doing its job and neither is the department.

Although the general policies did not include partnership in their lists of Treaty principles, the Treaty responsibilities sections in each policy did make partnership a 'should' responsibility (and protocols to support partnership a 'may' responsibility). We acknowledge this, but we do not think it goes far enough. If partnership is the intellectual framework for the principles of the Treaty, as the Court of Appeal found in the *Lands* case, then it must be seen in every aspect of DOC's work. The department must be looking for partnership opportunities in everything that it does. Partnership should be a 'will' obligation under the CGP and the General Policy for National Parks, and opportunities to share power with tangata whenua should be a core performance indicator for the department, rather than – as we will see in section 4.5 – the exceptional outcome driven by the wider pressures of Treaty settlements it now is.

Similarly, the government or kāwanatanga principle affirms DOC's right to give primacy to its conservation mission, but where that mission can be achieved in a manner consistent with the tino rangatiratanga of hapū

and iwi in conservancies, then Treaty principle suggests that is the outcome which is to be pursued. Again, to use the CGP's terms, that is a 'will' obligation rather than a 'should' or 'may' one.

In conclusion, the CGP and General Policy for National Parks must be amended to reflect the full range of relevant Treaty principles as articulated by the courts. The terms of section 4 plainly make that mandatory. Indeed DOC's failure to include these in its lead general policy documents probably renders those documents in breach of that section. While Treaty principles as articulated by the Tribunal do not bind the department as a matter of law, it would be unduly restrictive for the department to treat them as irrelevant to its work. They too must be given due consideration. In addition, as both the courts and the Tribunal have said, Treaty principles are not set in stone. They can and must evolve to meet new circumstances. This too must be adequately reflected in general policies. We recommend that the policies be amended accordingly.

The Treaty responsibilities in these general policies also need to be amended, in particular, to incorporate the principle of partnership and the obligation to actively protect kaitiaki interests as 'will' obligations. Amendments to these general policies should of course have flow-on effects to other DOC policies and practices, bringing partnership and other Treaty responsibilities to the forefront of DOC's day-to-day conservation operations.

We acknowledge, in this context, that there is a role for the Executive in helping departments to define the Treaty responsibilities that are relevant to their functions. As an operational department, DOC may need assistance in redefining its Treaty responsibilities. But, when it guides departments, the Executive must do so in a manner that is consistent with the terms of the Treaty and with any views expressed by the courts. That means it must articulate the full range of Treaty principles that are defined in law; it cannot choose those that suit it. It must also do so in a manner that is consistent with the spirit of the Treaty and with case law – that is, it must take a broad and unquibbling approach, one that is based on forward-looking partnership, not on damage control. We have no doubt that the CMRI guidelines have influenced DOC's approach,

and that of other departments, in a way that has encouraged a narrow interpretation of Treaty principles. In these guidelines, therefore, what is needed is a much more objective and legitimate set of Treaty principles, along with acknowledgement that the guidelines cannot restrict or override section 4 of the Conservation Act, or indeed any department's statutory responsibilities in respect of the Treaty. We will have more to say about the Executive's role in section 4.10.

4.5 MĀORI INVOLVEMENT IN CONSERVATION DECISION-MAKING

In the previous section, we set out DOC's statutory responsibilities under the Treaty and explained how the department interprets those responsibilities. In this section, we consider how the department seeks to give effect to its Treaty responsibilities by engaging with Māori over management and decision-making in relation to taonga in the environment.

First, we describe the various structures and policies for involving Māori in decision-making about conservation. This includes Māori representation on the statutory advisory bodies that guide DOC's work, the NZCA and the regional conservation boards. It also includes DOC's direct engagement with tangata whenua at conservancy level through the department's network of liaison managers known as Pou Kura Taiao, and DOC's policies for consulting and engaging with Māori. Of these, the most influential is of course the CGP, which we considered and made findings on in section 4.4.

We then consider several Crown policies and initiatives that are relevant to DOC's engagement with Māori. These include Crown-wide policies such as the CMRI guidelines (which we also considered in section 4.4) and the New Zealand Biodiversity Strategy. We then consider the impact of ministerial funds aimed at supporting biodiversity on Māori-owned land, and the retention of mātauranga Māori in relation to the environment. We also consider the impact of Treaty settlements on DOC engagement with Māori.

Finally, we set out and analyse the claimant and Crown submissions about these mechanisms for Māori

involvement in decision-making. In general, the claimants were happy with DOC's approach to consultation, but felt the department should go further – what they sought was not merely the right to be heard, but also the right to make decisions about their taonga.

4.5.1 Māori membership of statutory advisory bodies

DOC is unique among government agencies in the extent to which the community is involved in key strategic roles. This perhaps reflects the fact that community support and, indeed, high levels of community involvement (much of it from volunteers) are necessary for DOC to fulfil its statutory functions. Community involvement in conservation strategy and planning is formally managed through the NZCA at a national level, and through 13 regional conservation boards. A Māori voice is integrated into these structures.

In general, the claimants welcomed that voice, but felt that its place as one among many meant that it fell short of what they were seeking.

(1) *New Zealand Conservation Authority*

The NZCA was established by section 6A of the Conservation Act. It is serviced by DOC. Its extensive functions are set out in section 6B. Some of the more important ones are:

- ▶ approving, reviewing, and amending all conservation management strategies and conservation management plans in operation at conservancy level, as well as considering and approving national park plans;
- ▶ reviewing and reporting to the Minister or the Director-General on the effectiveness of the department's administration of general policies under associated legislation for which the department is responsible;
- ▶ investigating any conservation matter it considers of national importance and advising the Minister or the Director-General on the same; and
- ▶ advising the Minister and Director-General annually on all expenditure priorities.

These functions go to the heart of DOC's work. Conservation management strategies are 10-year

4.5.1(2)

strategies for managing and protecting the natural and historical features and wildlife of a region; they are powerful documents. Approving them, and other strategies and plans, is a significant decision-making ability which has been given to the community.

Under section 6D of the Act, the Conservation Authority comprises 13 members, who are appointed by the Minister of Conservation 'having regard to the interests of conservation, natural earth and marine sciences, and recreation.'¹¹⁴ Of those 13, the Minister appoints two after consultation with the Minister of Māori Affairs, two after consultation with the Minister of Tourism, and one after consultation with the Minister of Local Government. Four are appointed following public nominations. Others are appointed or recommended by Te Rūnanga o Ngāi Tahu, the Royal Society of New Zealand, the Royal Forest and Bird Protection Society of New Zealand, and the Federated Mountain Clubs of New Zealand.

(2) *Conservation boards*

The 13 conservation boards were established under section 6L of the Act. While the NZCA has a national view, the boards have their own 'territories' which correspond more or less with the 11 conservancy boundaries. Their more important functions, as set out by section 6M of the Act, include:

- ▶ recommending that the NZCA approve the conservation management strategy for its territory;
- ▶ approving, reviewing, and amending conservation management plans applying to its territory;
- ▶ advising the NZCA and Director-General on the implementation of the conservation management strategies and conservation management plans applying to its territory; and
- ▶ advising the NZCA and Director-General on any conservation matter relating to any area within the jurisdiction of the board.

Again, these functions go to the heart of DOC's operational work. And, again, the membership of these boards is the subject of careful balancing of stakeholder interests.

Under section 6P of the Act, each board has up to 12 members, appointed by the Minister after a public nomination process. The importance to Māori of the taonga under DOC jurisdiction is reflected in an expectation

that special provision be made for tangata whenua in each board. It is also implicit in the requirement that any appointment representing tangata whenua be preceded by consultation with the Minister of Māori Affairs. There are positions as of right for the following:

- ▶ the ariki of Ngāti Tūwharetoa on the Tongariro board;
- ▶ nominees of the Taranaki Māori Trust Board and the Whanganui River Māori Trust Board on the Taranaki/Whanganui board;
- ▶ the head of Kāhui Ariki on the Waikato board; and
- ▶ two nominees of Te Rūnanga o Ngāi Tahu on each of the boards wholly within its rohe; and one on the Nelson/Marlborough board.

Section 6N of the Conservation Act allows for conservation boards to create sub-committees, appoint 'suitable persons' as members, and delegate functions to those sub-committees. The Ngāi Tahu and Ngāti Awa claim settlements have taken advantage of this capacity.

The arrangements for Ngāi Tahu to appoint representatives to the NZCA and South Island conservation boards (referred to above) were introduced by the 1998 Ngāi Tahu settlement. Also as a result of the settlement, a sub-committee of the Southland Conservation Board was set up to provide for Ngāi Tahu's input into the management of Whenua Hou, or Codfish Island (a small island nature reserve off Rakiura, or Stewart Island), where most of the world's kākāpō live. The committee has four Ngāi Tahu representatives and four conservation board members. Its first task was to set a policy for access to the nature reserve.

Under the Ngāti Awa Claims Settlement Act 2005, Ngāti Awa has two committees set up to guide the management of significant conservation areas within their rohe. One of them, the Joint Management Committee, has members from Ngāti Awa, DOC, and the East Coast Bay of Plenty Conservation Board. It carries out management planning, acts as the Conservation Board, and exercises a number of ministerial powers delegated under the Reserves Act 1977 over Moutohorā (Whale Island) Wildlife Management Reserve, Tauwhare Pā Scenic Reserve, and Ōhope Scenic Reserve (sections 71 to 77). It also issues access permits to Moutohorā. The legislation spells out the funding arrangements and the committee's

relationships with the department, board, and Minister (sections 72 to 85).

4.5.2 Pou Kura Taiao—DOC—iwi engagement

DOC's Kaupapa Atawhai unit is based in the department's head office and is tasked with providing leadership and advice on conservation matters relating to tangata whenua and Māori. The unit is headed by a Deputy Director-General, Kaupapa Atawhai, who reports directly to the Director-General and is a member of DOC's general management team. This deputy director-general sets an overall direction for DOC's work with tangata whenua and provides guidance and tools for staff.¹¹⁵

At a local level, the department has a nationwide network of Pou Kura Taiao – conservancy-based staff whose role is to facilitate relationships with tangata whenua.¹¹⁶ Pou Kura Taiao report directly to conservators, with some oversight and guidance from the Deputy Director-General, Kaupapa Atawhai. Pou Kura Taiao appointments are made from the ranks of iwi within whose rohe the conservancy lies, and they are chosen for their mana within the Māori community and their knowledge of tangata whenua, tikanga, and te reo Māori. Conservancy boundaries only coincidentally line up with iwi boundaries and in the case of many of the conservancies numerous iwi are represented by a single officer. However, in the combined Tongariro, Whanganui, and Taranaki conservancy there are three Pou Kura Taiao, and in the Wellington Hawke's Bay conservancy there are two.¹¹⁷

The network was established in the early 1990s (with staff originally known as Kaupapa Atawhai Managers, not Pou Kura Taiao). It is seen by DOC as central to its efforts to give effect to Treaty principles. Its official position, as described to us by Ms Johnston, is to monitor and sustain departmental capability to achieve effective engagement between Māori and the department. 'The system aims to build capacity and diversity of Māori in DOC', she said.¹¹⁸

Benjamin Hippolite, a Ngāti Koata kaumatua and a former Kaupapa Atawhai Manager from the Nelson/Marlborough conservancy, gave his impression of what the job entailed:

In the very first hui after I was appointed Iwi Liaison Officer, they had a Māori man come down from Head Office. While

we were on one of the islands in the Marlborough Sounds I took him aside and I asked him what my responsibilities were. He looked me in the eye and he said I should go by the wairua. I'm familiar with that. All my life I have been guided by the wairua and so that came naturally to me. Later on I realised that I did have responsibilities, but the wairua would help me to comply with these. My first responsibility was to be the bonding agent between the Crown and iwi Māori. My second responsibility was to try and find a win-win situation for both sides.¹¹⁹

Peter Williamson, of the former East Coast/Hawke's Bay conservancy, was one conservator who gave evidence on the understanding of traditional Māori communities, networks, and attitudes which has resulted from the work of the network:

For the East Coast Hawke's Bay conservancy the most important and most frequent contact in terms of consultation, day-to-day operational work and kanohi ki te kanohi contact with Māori is at the hapū level. This is because we acknowledge that the hapū is the manawhenua within each parcel of land managed by us. Any proposed or current operational programmes on such lands that we are aware will significantly impact (either positively or adversely) on iwi/hapū interests are preceded by a series of meetings with the hapū to discuss, inform, seek hapū perspective and issues, and hopefully, agreement to support.

Day to day operational presence out in the field, informal chats, formal meetings, staff and hapū working together on conservation programmes on public conservation lands and private Māori land, the kapu ti round and the attendance at tangi of local people, are all building blocks for sustainable and positive working relationships between staff and hapū within the conservancy.¹²⁰

Pou Kura Taiao are above all a conduit between iwi or hapū and DOC for information, initiatives, and the testing of ideas. It seems that Pou Kura Taiao are primarily cross-cultural mediators between iwi and the department.

In 2006, the Director-General set out a strategic direction for the (then) Kaupapa Atawhai network and DOC's engagement with tangata whenua. This document identifies the purpose of DOC's relationships with tangata

whenua as being 'to achieve positive conservation outcomes', and says that relationships with tangata whenua should be based on the following principles:

- ▶ Protecting Māori cultural values on land managed by DOC and protecting conservation values on land owned by Māori
- ▶ Empowering Māori communities to fulfil their customary duty as kaitiaki of taonga and encouraging their participation in conservation delivery
- ▶ Balancing cultural/social and ecological values in decision making
- ▶ Interacting (to the appropriate extent) with Māori on all issues that either party may raise to manage potential risk and maximise opportunities
- ▶ Engendering tangata whenua and Māori support for Conservation and the Department of Conservation
- ▶ Giving effect to the principles of the Treaty of Waitangi.¹²¹

As we will see, the claimants appreciate the relationship-building role played by Pou Kura Taiao, but say that it falls short of the control and shared decision-making roles they are seeking.

4.5.3 DOC policies on engagement with Māori

Having described the structural arrangements through which DOC conservancies and offices engage with iwi and hapū at regional and local levels, we now turn to the policies guiding DOC engagement and consultation with Māori, and DOC's implementation of those policies. These include the CGP, *Te Kete Taonga Whakakatohi: A Conservation Partnerships Toolbox*, and general DOC consultation policies and guidelines.

(1) *Conservation General Policy and General Policy for National Parks*

We have already described the CGP and General Policy for National Parks in section 4.4. There, we noted that the CGP's status as a statutory policy gives it overarching importance. It controls all DOC activities, and all other policies are subordinate to it. As we explained, the CGP sets out Treaty responsibilities relating to consultation,

engagement, and partnerships with tangata whenua, and to direct tangata whenua involvement in conservation activities. Likewise, the General Policy for National Parks controls all other DOC policies and actions in relation to national parks.

We also found that these policies did not represent the full range of relevant Treaty principles articulated by the courts, and that they must be amended to give effect to that full range of principles, as well as reflecting due consideration to the principles as the Tribunal has articulated them. In particular, we said that partnerships with tangata whenua should be a 'will' obligation under the policy and should be sought at every opportunity, and that to the greatest extent practicable DOC should carry out its work in a manner that is consistent with the tino rangatiratanga of hapū and iwi.

The CGP controls and overrides all of the DOC policies that follow.

(2) *Te Kete Taonga Whakakatohi: A Conservation Partnerships Toolbox*

DOC's evidence about engagement with Māori included a discussion on *Te Kete Taonga Whakakatohi: A Conservation Partnerships Toolbox* (the *Kete*).¹²² The *Kete* 'aims to provide guidance on the ways and means to forge effective and successful partnerships with tangata whenua.'¹²³

It was presented in the department's evidence as part of its commitment to partnership and the implementation of section 4.¹²⁴ As far as we are aware, it remains in draft form, so its practical impact is impossible to determine.¹²⁵ The *Kete*'s introduction makes clear that it is a guidance document intended to assist staff to develop relationships, rather than a formal policy document that must be followed. Ms Johnston, in her evidence, reinforced this view by describing the intention behind the *Kete* as being 'to provide practical advice' to staff on the tools available for developing closer working relationships and partnerships with tangata whenua.¹²⁶ Certainly, in any case where the *Kete* is inconsistent with the CGP, the *Kete* is – by virtue of the CGP's overriding status – invalid.

The *Kete* describes a 'partnerships continuum', ranging

from informing and consulting to involvement in decision-making, all the way to devolution of authority and transfer of title.¹²⁷ It refers to ‘partnership concepts’ as covering five areas: building relationships; involvement in consultation processes; participation in decision-making; delegation and devolution of decision-making authority; and sharing in practical conservation activities. The *Kete* includes a list of practical shared conservation activities such as joint restoration projects, iwi involvement in species transfers, and tangata whenua management of wāhi tapu. It also lists mechanisms for delegation of decision-making authority and for transferring ownership. The mechanisms include partnership agreements directly with the department for conservation purposes,¹²⁸ membership of ministerial advisory committees, partially or fully devolved management of reserves and marginal strips, and delegated ministerial powers under the Wildlife and Marine Mammals Protection Acts. Most of these mechanisms require the approval of the Minister of Conservation, and are more commonly used to delegate power to local authorities.¹²⁹ The mechanisms for transferring ownership are available under the Conservation Act, Reserves Act 1977, and Te Ture Whenua Maori Act 1993. All are subject to conditions, and the *Kete* acknowledges that they are rarely used, except in the case of Treaty settlements.¹³⁰

(3) DOC consultation policies

DOC has a consultation policy and consultation guidelines, which have broad application to all stakeholder groups. These apply not only to the Pou Kura Taiao network but to all departmental staff. The consultation policy sets out DOC’s commitment to ‘consulting with tangata whenua, associates, and the community’.¹³¹ It notes that consultation helps the department to ‘get more information to help make better decisions for conservation’, and to meet legal requirements including those under section 4.¹³² In their ‘principles’ sections, both the policy and guidelines say: ‘The department will undertake consultation with tangata whenua and act in accordance with its responsibility to give effect to the principles of the Treaty of Waitangi’.¹³³

The department describes this as showing respect to tangata whenua in various ways, including acting in good faith, making informed decisions, considering whether active steps are needed to protect Māori interests, recognising the Government’s need to govern, and acknowledging special relationships that have been defined through Treaty settlements.¹³⁴

This is further elaborated upon in the consultation guidelines under the section headed ‘Consultation Rights and Responsibilities’, which says (among other things) that DOC has the right to ‘make final decisions/make final recommendations to the Minister’, while tangata whenua have a responsibility to ‘accept that the department has the right to make this final decision, even if the decision does not reflect the position of the . . . tangata whenua’.¹³⁵

A special section, ‘Consulting Tangata Whenua’, names iwi, hapū, whānau, Māori authorities, trust boards, rūnanga, incorporations, marae committees, Māori executives, whānau trusts, and individual Māori landowners as those to consult. It also contains insights into the ways in which traditional communities operate, the place of te reo and tikanga, and the best models for communicating complicated ideas in a marae setting. The Pou Kura Taiao are seen as a crucial contact point, and Māori protocols are to be respected. The importance of feedback to those consulted is also discussed.¹³⁶

4.5.4 Relevant government-wide policies

(1) Crown–Māori Relationship Instruments guidelines

In section 4.4, we described the CMRI guidelines and explained their overarching status as, in effect, rules for relationships between government departments and Māori. There, we found that the guidelines had influenced DOC towards a narrow interpretation of Treaty principles, which was not consistent with its statutory obligations. Here, we explain other provisions that are relevant to the department’s relationships with Māori.

In one of those provisions, the guidelines state that no instrument may admit to any breach of the Treaty unless there has been a previous admission of the same breach in the Treaty settlement process.¹³⁷ CMRIs cannot refer to Tribunal findings of breaches that have not been admitted

4.5.4(2)

by the Crown. Nor can they contain apologies for Treaty breaches.¹³⁸

CMRIS are furthermore described as ‘aspirational’ in nature; the guidelines say they ‘should generally not be legally binding’.¹³⁹

The guidelines also set out a strict approval process. All draft CMRIS must be presented to an officials committee,¹⁴⁰ which assesses them for compliance with the guidelines. Any deviation from the guidelines must be approved by the Cabinet Policy Committee.¹⁴¹

As can be seen, the CMRI guidelines set the boundaries for the development of DOC’s engagement with Māori. The extent of their impact can be felt by the way they are referred to in the *Kete*, which requires that any relationship DOC has with Māori that is ‘formalised by a written agreement’ must comply with the guidelines. The *Kete* includes a diagram for the approval of CMRIS and, in a section on ‘[w]ritten partnership agreements’, refers the reader to the CMRI guidelines for all further guidance on the development of such agreements. The approval process for any written agreement requires sign-off by the DOC chief legal adviser before the draft agreement is referred to the officials committee. Only after this vetting process has been completed can the final, non-binding agreement be signed between the local DOC officers and tangata whenua.¹⁴²

(2) *New Zealand Biodiversity Strategy*

The 1992 Convention on Biological Diversity is an international agreement aimed (among other things) at the conservation of biological diversity and encouraging its sustainable use. New Zealand ratified the convention in 1993.¹⁴³ (We scrutinised the convention in section 2.5.2.) Reflecting international acceptance that there is a ‘direct relation between cultural diversity, linguistic diversity and biological diversity’, and that the accelerated loss of traditional knowledge is leading to a serious decline in biological diversity,¹⁴⁴ article 8(j) of the convention stresses the vital role of traditional knowledge in conserving biodiversity, stating that ‘Each Contracting Party shall, as far as possible and as appropriate’:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and



A kākāpō chick at Southern Islands Quarantine facility.

local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.¹⁴⁵

In 2000, the New Zealand Government launched its Biodiversity Strategy, partly to fulfil New Zealand’s obligations under the convention¹⁴⁶ and partly in response to growing concern about the state of New Zealand’s biodiversity. The Government supported the strategy with \$187 million in funding over five years.¹⁴⁷ The strategy aims to integrate biodiversity considerations across all sectors of government and local government.

The strategy acknowledges the ‘holistic’ Māori view of the environment, along with key concepts such as mauri and kaitiakitanga, and says that ‘[u]nderstanding and valuing the Maori world-view is an essential step towards a bicultural approach to biodiversity management’.¹⁴⁸

The strategy also contains several provisions that are relevant to DOC’s engagement with Māori. Under goal 2, which relates to the Treaty of Waitangi, the strategy aims to ‘Actively protect iwi and hapu interests in indigenous biodiversity, and build and strengthen partnerships

between government agencies and iwi and hapu in conserving and sustainably using indigenous biodiversity.¹⁴⁹ This is explained as providing for:

the active protection of tangata whenua interests in biodiversity, reflecting the principles of kawanatanga, rangatiratanga, kaitiakitanga, and the Crown's duty of active protection of Maori interests as laid down in the Treaty. It also endorses the creation and strengthening of partnerships between government agencies and iwi and hapu in the shared management of indigenous biodiversity. This reflects the Treaty principle of partnership.¹⁵⁰

The strategy also recognises mātauranga Māori as an 'important source of knowledge', but one that is 'currently under-used and vulnerable to ongoing erosion and loss'. The strategy's many objectives for Māori include greater recognition and use of kaitiaki knowledge in conservation.¹⁵¹

DOC has responsibility for coordinating overall government implementation of this strategy.

4.5.5 Ministerial dialogue and funding – Ngā Whenua Rāhui

Having set out DOC's policies and structures for engagement with Māori in the preceding sections, we now turn to consider another model of Māori influence on conservation management, in which Māori have direct dialogue with the Minister of Conservation and directly allocate funds aimed at the protection of indigenous ecosystems on Māori land.

The Ngā Whenua Rāhui Komiti is a six-member committee, appointed by the Minister of Conservation.¹⁵² It was established in the early 1990s to administer the Ngā Whenua Rāhui Fund. It has been chaired by Tumu Te Heuheu, arikinui of Ngāti Tūwharetoa, since its formation.¹⁵³ The komiti also advises the Minister on natural heritage values on Māori land and integration between public conservation land and Māori land.¹⁵⁴ The komiti administers two funds: the Ngā Whenua Rāhui Fund, and the Mātauranga Kura Taiao Fund. It is serviced by the Ngā Whenua Rāhui Unit, which is made up of DOC staff, but the komiti itself is not part of the department. It has also partnered with the department and Te Puni Kōkiri in



Transmitter being attached to a captive North Island kōkako before being released in Hawke's Bay. Like most other indigenous bird species, kōkako are absolutely protected under the Wildlife Act and DOC is responsible for managing their recovery.

the development of Tauira Kaitiaki Taiao – a conservation cadetship scheme for Māori.¹⁵⁵

The Ngā Whenua Rāhui Fund is designed to protect indigenous ecosystems on Māori-owned land, not DOC land. Whereas DOC's Nature Heritage Fund¹⁵⁶ tends to purchase land outright so that it can be managed for conservation by an agency such as a local authority, or DOC itself, the work of Ngā Whenua Rāhui is 'geared towards [Māori] owners retaining tino rangatiratanga (ownership and control)' over their lands.¹⁵⁷ DOC told us 'Ngā Whenua Rāhui enables Māori to exercise their kaitiaki responsibilities and use their mātauranga to retain core cultural values associated with their land and achieve specific biodiversity outcomes.'¹⁵⁸ The principal mechanisms used are Ngā Whenua Rāhui kawenata (covenants) and



Peketua (Hochstetter's frog). The rare Hochstetter's frog and kārearea (New Zealand falcon, below) are two of the indigenous species benefiting from the regeneration of indigenous forest at Tunapahore, near Opotiki, in a project supported by Ngā Whenua Rāhui. The regenerating 600-hectare site also supports many rare plants, and populations of kiwi, kākā, and kōkako.

a supporting management agreement, the Ngā Whenua Rāhui Deed (using section 29 of the Conservation Act). Smaller areas can be formally protected under section 338 of Te Ture Whenua Māori Act 1993, providing for the setting aside of areas as Māori reservations, and public access with permission of the owners.¹⁵⁹

In return for covenanting and allowing some public access, Māori groups secure their indigenous ecosystems long-term under a kawenata, sensitive to both spirituality and tikanga. In some cases, Māori reservation provisions are used, with more restricted access to the public.¹⁶⁰

The Ngā Whenua Rāhui Komiti advises the Minister of Conservation on how to spend the fund, with the final decisions made by the Minister. In 2007/08 it committed

Kārearea (New Zealand falcon).



to spending about \$3.4 million.¹⁶¹ As at July 2009, according to the Ministry for the Environment, Ngā Whenua Rāhui legally protected approximately 159,200 hectares of land,¹⁶² including indigenous forests, wetlands, dune-lands, and tussock-lands.

In some respects the Ngā Whenua Rāhui Fund works in parallel with the Queen Elizabeth II National Trust. That Trust is now more than 30 years old. It pioneered the principle of covenanting private land for conservation purposes. Working generally with farmers to protect smaller tracts of land, in 2009 the Trust had just under 3,200 registered covenants, protecting about 90,000 hectares. Its income from the Crown in 2008/09 was \$2.874 million, with approximately \$550,000 additional income from donations and revenue.¹⁶³ As these figures demonstrate, Ngā Whenua Rāhui has protected more land than the Trust, and in a shorter timeframe.

The komiti also administers the Mātauranga Kura Taiao Fund, which is focused on the preservation and transmission of mātauranga Māori in biodiversity management.¹⁶⁴ The fund recognises that 'conservation is more than looking after, preservation and restoration of the land'. Indeed, the Mātauranga Kura Taiao Fund kaupapa 'fully affirms spirituality and cultural history are inseparable in Maori conservation/biodiversity initiatives'.¹⁶⁵

The fund was set up to 'preserve, protect and promote the use of traditional Maori knowledge and practices in biodiversity management'. It aims to:

- ▶ Recognise and uphold the importance of tangata whenua participation in the management of biodiversity consistent with customary knowledge and practices
- ▶ Revive and maintain traditional kaitiaki (guardianship) responsibilities which unite the spiritual with the cultural and physical caretaking of natural resources
- ▶ Recognise and remedy the under-use and ongoing loss of traditional Maori knowledge and practices which are integral to the management of biodiversity.

The fund endorses fully the systematic collection and archiving of knowledge embracing both old and new methods to ensure that what remains is preserved for the future.¹⁶⁶ DOC's website states: 'A wealth of knowledge has been lost and is in danger of disappearing forever. Many

kaumatua have traditional knowledge related to cultural activities and experiences associated with our native biodiversity'.¹⁶⁷

Since the 2005/06 financial year, the fund has provided \$2.2 million to 73 projects.¹⁶⁸ Mātauranga Kura Taiao supports wānanga, oral history projects, and hui, funding projects across the country.¹⁶⁹ Projects can cover the documentation of traditional knowledge and practices; wānanga; developing frameworks for customary use; developing education opportunities to transmit traditional knowledge and practices; ecosystems restoration and protection using traditional knowledge and practices; rongoā practices; environmental monitoring; and revival of traditional practices for biodiversity management.¹⁷⁰

4.5.6 The impact of Treaty settlements

In chapter 3 we explained how iwi, frustrated at lack of progress under the RMA, had turned to the Treaty settlement process as a path towards recognition of kaitiaki rights. We referred in that chapter to settlements relating to the Waikato River and Te Arawa Lakes, as well as to the Ngāti Porou foreshore and seabed settlement. Kaitiaki aspirations, of course, are not restricted to those parts of the environment covered by the RMA; rather, as we have noted, many surviving taonga in the environment – including indigenous species of flora and fauna, and significant landforms and waterways – are under DOC jurisdiction.

The settlements referred to above, and many others, have almost invariably included conservation land and conservation management. The types of settlements reached cover a full spectrum, with full transfer of title to iwi at one end and obligations to consult at the other. Between those two poles lie other solutions such as statutory recognition of iwi interests in land, and co-governance or co-management arrangements.

Each settlement is, of course, negotiated on a case-by-case basis, between iwi negotiators and ministers, with its content depending on the specific circumstances for which iwi have sought redress, and also on the political context at the time. But, in general, it is Treaty settlements – not DOC policies or initiatives – that have led the way in sharing or transferring control over conservation taonga. While this has led to meaningful progress for some iwi,



Aoraki/Mount Cook, the highest peak in New Zealand, was transferred to Ngāi Tahu ownership under the Ngai Tahu Claims Settlement Act 1998. Ngāi Tahu then gifted the maunga back to the people of New Zealand. The act of giving was seen as recognition of the iwi's mana over and relationship with the mountain.

it has also meant that conservation redress is sought and delivered in an inconsistent and ad hoc fashion.

The models of redress that have been delivered so far include:

- *Full transfer of title with commitment to protect conservation values:* This has occurred for some portions of conservation lands, such as occurred in the Ngāti Awa settlement in the case of six sites. All but one of these areas were transferred to Ngāti Awa subject to their continued management (by Ngāti Awa) as reserves under the Reserves Act 1977, meaning the ongoing maintenance of public access. In the other

case, however, title was transferred without rights of public access, but subject to Ngāti Awa's agreement to protect the land's conservation values. The December 2010 Deed of Settlement between Ngāti Porou and the Crown provided for the return of title to 14 sites, subject to conservation covenants (for five of those sites) or establishment as reserves. The deed provides for a range of governance and management arrangements. For most, Te Runanga o Ngāti Porou will be the reserve administrative body. However, for one site DOC will be the administrative body for five years, and will also be responsible for day-to-day

management; and for four other sites DOC will be responsible for day-to-day management under Ngāti Porou oversight.¹⁷¹

- *Transfer of title and gifting to the nation:* For some significant sites, Treaty settlements have transferred title to iwi, which have then immediately gifted them back to the nation. This occurred with Aoraki/Mt Cook under the Ngāi Tahu Claims Settlement Act 1998, and is currently provided for with the Te Heru o Tureia and Limestone Ridge conservation areas under Ngāti Pahauwera's September 2008 AIP with the Crown, as well as Kapiti Island in Ngāti Toa Rangatira's February 2009 AIP. It also occurred, in the pre-settlements era, with Taranaki Maunga under the Mount Egmont Vesting Act 1978.¹⁷²
- *Iwi and DOC co-management or co-governance of land:* An important recent example is Ngāti Porou's December 2010 Deed of Settlement, which provides for a 'dual authority' strategic partnership between Ngāti Porou and the Crown over management of conservation land within the Ngāti Porou rohe. This includes a separate section of the East Coast Bay of Plenty conservation management strategy covering that land, to be agreed between the Director-General of Conservation and Ngāti Porou. This separate section will contain 'policies, objectives or outcomes for the integrated management of the natural and historic resources' over conservation land to which Ngāti Porou has connections. The Ngāti Porou settlement also provides for a range of shared governance and management arrangements for individual reserves, as outlined above. Ngāti Whare's settlement provides for 'the co-management of Whirinaki Conservation Park through the development of a conservation management plan that is approved jointly by the East Coast Bay of Plenty Conservation Board and Te Rūnanga o Ngāti Whare'.¹⁷³
- *Co-management of species subject to conservation legislation:* An instance is the appointment (as provided under the Tainui Taranaki ki te Tonga Agreement) of Ngāti Koata as kaitiaki to provide advice directly to the Minister of Conservation regarding the management of threatened native species (such as tuatara, Stephens Island frog, fairy

prion, and Stephens Island green and striped geckos) on Takapourewa and another nearby island scenic reserve, Whakaterepapanui.¹⁷⁴

- *Retention in the conservation estate but with an 'overlay classification' acknowledging the iwi's traditional, cultural, spiritual, and historical associations with a particular area:* An overlay classification requires DOC to have particular regard to iwi values in relation to the area and manage it according to agreed principles that aim to avoid harm to those iwi values. Examples from recent AIPs include recognition of Ngāti Koata's interests in Takapourewa and D'Urville Island Scenic Reserve, and Ngāti Toa Rangatira's interests in Kapiti Island.¹⁷⁵ Similarly, the Te Uri o Hau settlement in 2002 provided overlay classifications for Manukapua Wildlife Management Reserve and Pouto stewardship area.¹⁷⁶
- *Recognition of iwi interests through statutory acknowledgement:* Some settlements have provided for statutory acknowledgement of iwi interests in conservation land. These require consenting authorities to forward resource consent applications over those areas to the iwi, and (along with the Historic Places Trust and the Environment Court) to have regard to the iwi interest in making decisions. While DOC controls access to conservation land, resource consents are still required for some activities, including mining, discharges of water and sewage, and some building activities; these activities are often carried out by third parties, in which case they will require concessions (see section 4.7).¹⁷⁷ As examples, Ngāti Koata are to have a statutory acknowledgement over Moawhitu Bay on D'Urville Island and Ngāti Porou will have acknowledgements over the Waiapu and Uawa Rivers as well as a range of conservation lands. Ngāa Rauru Kiiitahi received statutory acknowledgements over eight areas in its settlement legislation.¹⁷⁸
- *Customary harvest of species subject to conservation legislation:* An example, which has no parallel in subsequent settlements, is the transfer of both the ownership and management of the Titi Islands from the Crown to Ngāi Tahu under the Ngāi Tahu Claims Settlement Act 1998. The islands are to be managed as if they are a nature reserve, except for the fact that



Rangitoto ki te Tonga (D'Urville Island), where recent Treaty settlement negotiations have led to recognition of Ngāti Koata's customary interests.



Hunting tītī (muttonbirds). The 1998 Ngāi Tahu settlement returned the Titi Islands to Ngāi Tahu ownership. The islands are managed by Rakiura (Stewart Island) Māori as though a nature reserve, but provision is made for the sustainable harvest of tītī in accordance with traditional practice.



Tītī (muttonbird) chicks being cleaned of wax and down, Big South Cape Island, 1961. Tītī have been a traditional food source for lower South Island Māori for many centuries.

Ngāi Tahu's rights to sustainably harvest tītī (otherwise known as muttonbird or sooty shearwater) from the islands are maintained.¹⁷⁹ The Kurahaupō ki te Waipounamu AIP also deals with customary harvest. It acknowledges Ngāti Apa's association with eels in the Nelson Lakes National Park, and confirms that Ngāti Apa 'may apply to the Minister of Conservation for cultural take of eels' from the Nelson Lakes National Park where (a) there is no

alternative source of eels accessible; and (b) there are extraordinary cultural circumstances such as tangi of Rangatira.¹⁸⁰

- *Regular meetings between iwi leaders and the Minister:* Examples of this include the aforementioned annual meeting between Te Rarawa and the Minister of Conservation (or Director-General or senior delegate) to discuss conservation issues in Te Rarawa's area of interest, and an annual meeting between the Minister of Conservation and Ngāti Porou to discuss co-governance of conservation areas in the Ngāti Porou area of interest.¹⁸¹
- *Obligation to consult:* For example, the Ngāi Tahu Claims Settlement Act requires DOC to consult and 'have particular regard to the views of' Ngāi Tahu about policies for protecting, managing, and conserving taonga species.¹⁸² Many other settlements include deeds of recognition acknowledging the special relationships between iwi and particular sites, which similarly provide for iwi to be consulted and regard to be had for their views.

One or two of the foregoing mechanisms are already available under existing legislation, as we mentioned in section 4.5.3(2) on the *Kete*. As one example, transfers of management to iwi (with the Crown retaining underlying ownership) can be effected under provisions of the Reserves Act, albeit via a process first requiring extensive (and expensive) public consultation and often survey of the land. In settlements, by contrast, transfers are made by legislation without any consultation beyond the select committee process in Parliament, and the survey process is specifically funded.

4.5.7 Claimant and Crown arguments

As we have explained, at the heart of this claim is the ability of tangata whenua to exercise kaitiakitanga in the full sense. This, the claimants argued, is what the Treaty guarantee of tino rangatiratanga means in the context of the environment: it obliges the Crown to protect their ability as kaitiaki to control and regulate their relationship with the environment. Kaitiakitanga does not mean merely a right to be informed or consulted; it means full expression

of relationships and mātauranga that have developed over many hundreds of years. Though this expression is guaranteed by the Treaty, the claimants argued, it has not been honoured; rather, control and regulation of those relationships have been vested in the Crown.

As kaitiaki, the claimants recognised the interests of flora and fauna themselves, and acknowledged the health of species and ecosystems as paramount. On that basis, they accepted that in many cases DOC is best placed to carry out day-to-day management of taonga. Nonetheless, they sought decision-making roles that allow them to fulfil their kaitiaki obligations.

At a national level, the claimants suggested a range of options for protecting Māori interests in taonga currently under DOC's jurisdiction. Ngāti Kahungunu suggested that one solution 'would be to jointly vest the conservation estate in both DOC and tangata whenua'.¹⁸³ The iwi emphasised the importance of the taonga under DOC jurisdiction:

The reason that the conservation estate is of major importance to the Crown, and New Zealanders generally, is that it represents the overwhelming majority of remaining islands of indigenous flora and fauna, and that is the very reason that the estate is also of paramount importance to both the claimants and iwi generally.¹⁸⁴

Ngāti Wai sought 'official acknowledgement of their kaitiaki status' over taonga species and 'co-management and equal decision-making with the Crown and its agencies'.¹⁸⁵ Ngāti Kuri, Ngāti Wai, and Te Rarawa were of the view that there needed to be a '*fundamental transformation* in the way the Crown and kaitiaki interact and share responsibilities for the management of the environment' (emphasis in original). They said that this transformation was consistent with the Crown's own goal of encouraging Māori participation in the protection of biodiversity, and that it would lead to a 'new relationship based on good will, trust, effective partnership, good faith and the Treaty guarantee of tino rangatiratanga' which would also enhance environmental objectives.¹⁸⁶ Counsel for Ngāti Koata said that 'the only effective way of meeting the Treaty obligation is to ensure that Maori have the

decisive voice in some instances, and a decisive voice in other instances'.¹⁸⁷

The Crown, on the other hand, acknowledged a duty of active protection of kaitiaki interests where these were consistent with the Conservation Act, but submitted that this duty did not extend to the kind of control or regulatory powers the claimants sought. Nor did it extend to protecting the ability of kaitiaki to preserve environment-related mātauranga and transmit that knowledge to future generations; this was said to be a responsibility for kaitiaki themselves. Rather, the Crown submitted that, in general, existing policies and structures provided appropriately for kaitiaki interests. It described DOC provisions for engagement with Māori in the following terms:

DOC accords importance to the relationship of Māori with indigenous flora and fauna, and therefore establishes relationships with tangata whenua that enable and encourage tangata whenua participation in conservation management.

... DOC is committed to finding practical ways to work with Māori to manage natural, historic and cultural resources on the land it is responsible for and to involving Māori in decision making within the existing statutory framework. DOC also acknowledges that there is no single solution to how DOC and tangata whenua can work in partnership, given that the conservation requirements of particular places vary, as do the requirements of tangata whenua who, as kaitiaki, traditionally managed places and resources according to tikanga.¹⁸⁸

Ms Johnston, in her evidence, suggested that although the department was comfortable in consultation mode, any move towards substantive power-sharing was a challenge in terms of DOC's statutory conservation mandate:

We have to operate within the existing statutory framework. And so if the existing statutory framework is found not to give that then we can't acknowledge it we can only work within our existing framework, which we try to flexibly and creatively to take account of tangata whenua interests.¹⁸⁹

We will return to this question in our analysis, but first we will consider claimant and Crown submissions on

the specific structures and policies through which DOC engages with Māori.

(1) Conservation boards and the New Zealand Conservation Authority

The claimants told us that the membership of conservation boards was not an adequate protection for their kaitiaki relationships with taonga. Ngāti Kahungunu said that the Māori memberships of conservation boards were 'relatively minor matters and of themselves provide no particular benefit to iwi'.¹⁹⁰ Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa remarked that conservation boards do not allow for the kaitiaki relationship with the environment because they are only advisory.¹⁹¹ Ngāti Porou took the view that, because the Māori membership of both NZCA and the conservation board was a minority position, the appointments were not effective.¹⁹²

We were told by the Crown that, in 2008, on average, 31 per cent of conservation board members were Māori, and as of October 2009, three of the 13 members of the NZCA were Māori.¹⁹³ Crown counsel submitted in closing that tangata whenua membership of conservation boards enabled them 'to influence board decision-making'.¹⁹⁴

(2) DOC-iwi relationships

In closing submissions, the claimants generally acknowledged that goodwill and positive relationships existed between DOC conservancy staff and members of iwi, but argued that these relationships were not a substitute for the control and partnership they were seeking.

Counsel for Ngāti Kahungunu said that working relationships depended on the individual efforts of conservators, area managers, and tangata whenua, and that the failure to give effect to Treaty obligations was with the 'DOC leadership'.¹⁹⁵ Ngāti Koata acknowledged that local DOC staff had built positive relationships with individual iwi members but added that it was 'important to establish working relationships with the iwi' as a whole.¹⁹⁶ Ngāti Kahungunu and the Te Tai Tokerau claimants generally agreed with Ngāti Porou that:

the attitude and goodwill of individuals in various agencies, such as DOC, currently allows for the recognition and

protection of Māori interests. It is submitted, however, that while such individuals should rightly be acknowledged, it is unacceptable that the protection of Ngāti Porou interests is determined in such an ad hoc way.¹⁹⁷

(3) Consultation and engagement policies

We have already referred (in section 4.4.5) to claimant criticisms of the CGP. There were no criticisms of DOC's other consultation policies or processes. Rather, the criticisms were that DOC consulted and did no more. Counsel for Ngāti Kahungunu spoke for all when they said that '[i]nstead of broad partnerships, the obligations of section 4 have been read down in internal policies and conservation strategies as mere obligations to consult or to be notified' and that this was especially evident in the CGP.¹⁹⁸

Crown counsel, as we noted above, said that there was no 'single solution' to how DOC and tangata whenua can work in partnership. Counsel also noted in this regard the Director-General's May 2006 statement of guiding principles for engagement with Māori.¹⁹⁹

(4) Ngā Whenua Rāhui

Overall, the claimants regarded the Ngā Whenua Rāhui Fund as limited but useful. Ngāti Kahungunu regarded the fund as helpful in its place but of course of marginal benefit in its own case, given the iwi's few land holdings.²⁰⁰ Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa added to this that the kaitiaki relationship with the land supported by Ngā Whenua Rāhui was protected by the fact of ownership of the land, rather than the Ngā Whenua Rāhui covenants.²⁰¹ Ngāti Porou believed that the covenants can protect the kaitiaki relationship with the land, depending on the terms agreed.²⁰²

Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa also commented that the Mātauranga Kura Taiao Fund made only very limited provision for the preservation and transmission of mātauranga Māori:

It is the claimants' view that a contestable fund cannot be considered an adequate discharge of the Crown's obligations to protect mātauranga. Also, the scale and scope of this initiative does not reflect the significance of mātauranga as a taonga.²⁰³

Crown counsel described Ngā Whenua Rāhui as supporting Māori ‘to exercise their kaitiaki responsibilities.’ Counsel also cited the benefits of the Mātauranga Kura Taiao Fund, but added that ‘because the act of transmission can only be done by kaitiaki, the Crown cannot be responsible for it.’²⁰⁴

(5) *Treaty settlements*

In a reflection, no doubt, of the way the Treaty settlements environment has rapidly evolved in the last few years, neither Crown nor claimant counsel addressed settlements other than occasionally mentioning the Ngāi Tahu Claims Settlement Act.

4.5.8 Analysis

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. That finding was reflected in chapters 2 and 3 and applies with even more force to those parts of Aotearoa that are under DOC control, because it is largely there that the plants, birds, ecosystems, iconic landforms, and other taonga that inspired te ao Māori can still be found. Without those ongoing relationships, an integral part of Māori culture will be lost.

Under the government or kāwanatanga principle, as we said in section 4.4, DOC can give primacy to its conservation mission in accordance with the relevant statutes, but where that mission can be achieved in a manner that is consistent with the tino rangatiratanga of hapū and iwi, as far as practicable it should be. While tino rangatiratanga implies a right to control relationships with taonga, that right is not absolute; again, in accordance with Treaty principle, it must be balanced against other interests.

In the context of DOC, the paramount interest must surely be the health of the environment itself and of the species and ecosystems within it, a point we have also made in chapters 2 and 3 in respect of taonga species and the environment under RMA control respectively. We have already referred to the *Whales* case, in which the Court of Appeal put the preservation and protection of the species above all else, including Treaty rights.²⁰⁵ All parties in this claim shared a concern for the state of the environment

and the taonga within it; and all would agree that the survival and health of a species should be the first object of human engagement with it. For kaitiaki, there can be no relationship with taonga if the taonga no longer exist; nor, without the taonga, can the mātauranga survive.

There are also many other interests in the land and species under DOC’s control. Indeed, conservation is an issue that arouses great passion in New Zealanders. Clearly, the many thousands of community volunteers who contribute to conservation throughout New Zealand have an interest in how the conservation estate is managed, as do the large numbers of people who use parts of the conservation estate for recreation, and the others who value the conservation estate even if they do not actively engage with it. Those who carry out science and research relating to ecosystems or indigenous species also have interests, as do those who rely on that research for educational, conservation, commercial, or other purposes. The tourism industry – among New Zealand’s largest export earners – also has a significant stake in conservation, as is shown by the way in which the country markets itself internationally and by the large number of international tourists who visit parts of the conservation estate each year. Other businesses also have interests, from small concession-holders to major infrastructure companies such as those that wish to develop hydroelectricity schemes affecting DOC land. Finally, there is a question of identity, for individuals of both Māori and non-Māori descent who have close connections with areas of conservation land, and for communities, and indeed, New Zealand as a whole. South Island alpine scenery, areas of protected bush or coastline, iconic species such as kākāpō and kiwi – all are essential to what it means to be a New Zealander.

In any system for protecting the environment, all of these interests must be considered alongside those of kaitiaki and subject to the overriding interest of the environment itself. In chapter 3, we considered how interests might be balanced in the context of the RMA. We found there that the various interests at play must be balanced *case by case* against an agreed set of principles. We said that such a process should deliver kaitiaki control in circumstances where the kaitiaki interest in a taonga was entitled to priority, partnership where kaitiaki interests

are entitled to a degree of priority but other voices are also entitled to be heard, and influence with an appropriate degree of priority in all other areas of environmental management. The extent of the kaitiaki interest, we said, could be determined through the evidence provided by mātauranga Māori – for example, the kōrero that explain a taonga's history, qualities, and characteristics; demonstrate its importance to iwi or hapū identity; and describe how the kaitiaki relationship should be conducted.

In the case of DOC, the default setting should be partnership. This recognises the overriding importance of DOC-controlled taonga to the ongoing exercise of kaitiakitanga and therefore to the survival of the Māori culture. This is consistent with the partnership principle, and also with tino rangatiratanga, which as we have said is not an absolute right but nonetheless is one that should not be lightly set aside. This partnership should be based on two imperatives: first and foremost, that the survival and recovery of the environment is paramount; and, secondly, that iwi have a right to exercise kaitiakitanga and maintain their culture. As we said in section 4.4.7, DOC is obliged by Treaty principle to seek partnerships in every aspect of its work.

Within an overall partnership framework, there will of course be situations in which the kaitiaki interest is of overwhelming significance, and in those situations it may be appropriate to devolve control over those taonga, or indeed to transfer ownership of land – subject, as we have said, to the primacy of the environmental interest. This might occur in respect of places or species that are of great significance to iwi or hapū identity – the relationship of Ngāti Koata to tuatara within their rohe is one example. There will also be circumstances in which the health and needs of taonga themselves, or the competing interests at play, will mean that the kaitiaki interest is most appropriately provided for by influencing decisions made by DOC or others; in these cases, consultation will be sufficient. Partnership itself can mean many things, as we discussed in section 4.5.3(2) in relation to the *Kete*. The starting point should be shared decision-making. But the exact form of partnership – how decisions are made, and at what level, and who is responsible for day-to-day management of taonga – can be considered case by case.

Within the overall framework of partnership, therefore, what is needed are processes to allow DOC and iwi to determine the extent of kaitiaki control over each place or species that is currently under DOC control.

The Crown has already acknowledged that it is ready to accept such a framework. Through the Treaty settlement process, we have seen many examples of innovation, including transfers of ownership, and devolved or shared control, including the significant step of establishing 'dual authority' as provided for in the Ngāti Porou deed. But there is very little reason for such devolution or transfer to occur only in the context of settlements. Ms Johnston acknowledged in her evidence that such transfers could take place outside the settlement framework,²⁰⁶ and the *Kete*, as we have seen, sets out some of the available provisions. Indeed, as we said in chapter 3, historical settlements cannot deliver a transparent, nationally consistent approach to iwi involvement in environmental management because settlements are, by their nature, local, ad hoc, and subject to high levels of political pragmatism. When kaitiaki control and partnership are delivered only through historical settlements, this is a recipe for unfairness and inconsistency, both in terms of the forms of power-sharing that result and the environmental outcomes that follow. Iwi should not have to spend their Treaty settlement credits in this way, and nor should those who have not yet settled have to wait before they get a say in decision-making about environmental taonga. Nor, indeed, should smaller iwi have to settle for less in the way of influence over taonga simply because they lack political leverage to win seats on conservation boards or influence around the Cabinet table, nor iwi who reached settlements some time ago get less than those who have settled more recently. If innovative approaches to land ownership and power-sharing can be achieved under the intense pressure of Treaty settlements, they ought also to be possible in the ordinary course of DOC's business.

In summary, then, we see a Treaty-compliant framework for conservation management as being one that is based on partnership and shared decision-making; that provides for joint decisions about who should control and manage each taonga; and that places the interests of the environment first, while also providing for the ongoing



Te Rerenga Wairua (Cape Rēinga). Te Rarawa witness Te Witi (Wiremu) McMath told us of the spiritual pathways throughout New Zealand that spirits tread before leaving this world on their journey to te ao mārama – the world of light. The last terrestrial point in their pathway is Te Rerenga Wairua, the leaping place of the spirits. Te Rerenga Wairua is sacred to the iwi of Te Tai Tokerau, and indeed to all Māori. Several claimants expressed concern about management of this taonga place. Te Rerenga Wairua has since been the subject of an agreement in principle for settlement of historical claims between Far North iwi and the Crown.

expression of kaitiaki relationships, and appropriate consideration of other interests. In the following sections, we will consider the extent to which DOC's current policies and practices are consistent with this approach, and in the conclusions we will make some suggestions for reform.

(1) DOC's engagement with Māori

(a) CONSERVATION BOARDS AND THE CONSERVATION AUTHORITY

The NZCA and the conservation boards provide for an unusually high level of community involvement in

conservation strategy and planning. With the exception of district health boards, we are not aware of any other examples in the State sector of such a level of structural partnership between a department and the community. It is, frankly, rare indeed for government anywhere to give up this much power.

In the context of DOC, however, this model makes perfect sense. The New Zealand model for conservation proceeds on the assumption that the Government lacks the people and resources to do justice to the task of stewardship. The job can only be done when government

resources and expertise are combined with widespread community support.²⁰⁷ As counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa pointed out, there is a general movement in the understanding of environmental management 'as necessarily involving and affecting the local community, and is therefore best developed through collaboration with this community'.²⁰⁸

We acknowledge that specific room is made for the Māori voice at both NZCA and conservation board levels. We gathered from the evidence of conservators that the department valued and welcomed the Māori voice. We would not wish to diminish the willingness of the Government to integrate Māori voices into its partnership structures, and nor would we wish to undervalue the contribution those voices have made. But in reality, the Māori voice is included only as one stakeholder amongst many on governance boards. Given that the department must interpret and administer the Act so as to give effect to the principles of the Treaty of Waitangi, and given that the law is clear that the Treaty signified a partnership between the Crown and Māori, it must be time to move to a model which gives the Māori voice its own space. The integrated model is useful as far as it goes, but it is not a Treaty partnership.

(b) POLICIES ON ENGAGEMENT

It is clear that consultation is at the heart of what DOC does. The very nature of much of its work means that it cannot act without its communities of interest being affected and involved. Consultation is essential for the department to be able to maintain public support, work with its many neighbours, manage the sensitivities involved in its many species recovery and predator control activities, and acknowledge the dependence it has on voluntary groups all over the country and its relationship with tangata whenua.

The department has excellent policies and procedures governing its consultation and it was clear to us that when the department consults, it does so very well. Consultation with tangata whenua has sufficient priority to warrant special coverage in the CGP. We commend this.

However, consultation on its own does not amount to partnership. And when it comes to partnership,

DOC's policies are somewhat less whole-hearted. We have already explained our concerns about the CGP. We acknowledge that this policy provides for the *possibility* of partnership, but it should do more. Though the *Kete* identifies a range of innovative partnership mechanisms and approaches, its status remains uncertain. It is, at most, a guidance document; one that may be considered, not one that must be implemented.

In summary, though we commend DOC for its consultation with tangata whenua, we also agree with the claimants that DOC's policies read down the principle of partnership to consultation in most cases, and as a result, the department in doing so falls well short of the commitment to Treaty principles reflected in section 4 of the Conservation Act.

(c) THE KĀHUI KURA TAIAO NETWORK

Benjamin Hippolite, a Ngāti Koata kaumatua, gave evidence before us in 1999 and 2006. He was in a unique position to assess the DOC–Ngāti Koata relationship because he had been the Kaupapa Atawhai Manager in the Nelson–Marlborough area for much of the 1990s. In fact, his mediation skills took him the length and breadth of the country:

There were times when I would say to DOC if you walk down this pathway we're going to have trouble with iwi Māori. The Crown would back off and look for another way. I would meet with the iwi and see if we could find another way. All the years that I was with DOC it was walking that thin line to try and find a scenario where both parties would be very happy. We had some good experiences where this happened.

My area was supposed to be the Nelson–Marlborough area, but because of the amount of success I was having with iwi, I got invitations to go to other areas. I took it upon myself to find out local iwi issues and go back to DOC to find some other way of helping these people. I was often able to help iwi in other places.²⁰⁹

What we saw convinces us that that the Kaupapa Atawhai unit and the Pou Kura Taiao network are highly effective advisers within DOC. They are committed, highly respected, and add considerable value within their job

description. They are skilled in bringing iwi into conservation programmes run by the department and in facilitating consultation with iwi in respect of DOC activities and intentions. This means that through the goodwill and endeavours of both parties, real partnerships have sometimes been achieved between hapū, iwi, and the department at the conservancy level within the terms of the policy instruments developed in Wellington.

Some special agreements have been achieved in part or wholly through Pou Kura Taiao efforts. The examples of successful collaboration over customary use, such as of the kiekie at Morere (described in section 4.3.1), demonstrate the network's success.

But the role of Pou Kura Taiao is limited by the parameters within which they work. They are an effective operational arm of the department, but they seem to have little involvement in conservancy policy. And it seems equally possible for a conservancy to be run in ways that neither reach for nor achieve partnership, and for this to be seen as acceptable practice.

The Pou Kura Taiao have reached to the legislative limits available to them with great skill and perseverance, but they cannot (and do not pretend) to replace the Treaty partnership. Too often we saw expectations dashed because either Māori or DOC expected Pou Kura Taiao to be a proxy for that partnership. The recommendations we make in this section will provide an opportunity for the network to take its role to a higher level.

(d) THE IMPACT OF THE CROWN-MĀORI RELATIONSHIP INSTRUMENTS GUIDELINES

We are of the view that the CMRI guidelines have placed significant constraints on DOC's ability to implement section 4 of the Conservation Act. The three specific impediments are: the dictates about the definition of Treaty principles; the ban on admission of Treaty breach; and the dampening of innovation in DOC's relationships with Māori. We discuss our concerns with the last two issues here; we have already discussed Treaty principles in section 4.4.

The CMRI guidelines include a model for use between a Māori collective and a government agency in developing an agreement.²¹⁰ We see the development of the CMRI policies to standardise procedures as understandable,

and in some ways, commendable. But we are left with the impression that risk-averse lawyers and officials have come to dominate the practitioners in the field who better understand the importance of partnership and power sharing. This is reflected not only in the guidelines' narrow interpretation of Treaty principles, but also in their insistence that CMRI be non-binding, in the requirement that any variation be approved by Cabinet, and in a cumbersome and legalistic approval process that requires vetting by an officials committee before DOC and iwi can reach agreement.

We are concerned, too, that the CMRI guidelines provide for a general ban on including any admission of Treaty breach unless there has been a previous independent admission of the same breach in the Treaty settlement process. While we can certainly understand the need for caution in acknowledging Crown wrongdoings, to adopt a policy of effectively denying agencies the discretion to do so in appropriate circumstances goes too far. In DOC's case, officials should feel able to refer to the historical mana whenua of iwi and the need to restore lost relationships with land no longer in Māori ownership without running foul of this ban on acknowledgement of past breach.

DOC is the government agency which has more to gain than perhaps any other by staying in touch and on-side with the Māori communities it works with and amongst. Its legislation requires it to give effect to Treaty relationships, and its conservation mandate is served by building such relationships with iwi and others in the community. It is difficult to see how the department or its conservancies can make creative use of Treaty relationships (such as those envisaged in the *Kete* and the models provided in some Treaty settlements) under the constraints imposed by the CMRI guidelines. The dampening effect of these guidelines looks counter-productive to the trust-building with Māori in which DOC has invested so much.

Further, the guidelines do not address the special legal status that the Treaty has in DOC's legislation. Section 4 puts DOC in a different category from other Crown agencies; it requires DOC to be much more responsive to tangata whenua than these guidelines allow.

In sum, then, we have no doubt that these guidelines have influenced DOC's relationships with iwi, and not in a

positive way. They stand between the department and the partnership approach it should be seeking.

(e) NGĀ WHENUA RĀHUI AND MĀTAURANGA KURA
TAIAO FUNDS

The claimants argued that Ngā Whenua Rāhui was not an adequate protection of their kaitiaki relationship with land and taonga species, both because it was a contestable fund, and because it operates only on Māori-owned land. We accept their point, but also acknowledge that where Ngā Whenua Rāhui covenants are in place, they are an excellent model of Crown support of the kaitiaki relationship on Māori-owned land.

Taken together, the Ngā Whenua Rāhui and Mātauranga Kura Taiao funds provide avenues for Māori control over biodiversity projects and retention of mātauranga in relation to taonga species and places. These initiatives are genuine partnerships that benefit both mātauranga and conservation. Through the projects supported by Mātauranga Kura Taiao, the Crown has shown a willingness to engage with tangata whenua in ways that fully recognise both mana whenua and mātauranga Māori on DOC-held land. This is section 4 of the Conservation Act in action, and it shows that what has almost routinely been consigned to the too-hard basket is in fact entirely possible.

We have one suggestion to make. Those steeped in mātauranga who gave evidence during our inquiry were kaumātua and kuia of their iwi. Invariably, they were elderly. It is a sad truth that since they spoke to us, many of these venerable people have died, and in some cases their knowledge has died with them. This lends some urgency to the work of the Mātauranga Kura Taiao Fund in providing support for mātauranga Māori in this way. We would like to see the fund and its support systems increased for a time to the level where no more knowledge is lost for want of an opportunity to see it safeguarded.²¹¹

(2) Conclusion

DOC has excellent policies and structures in place for consultation and engagement with the community, including Māori communities. As we have said, it is rare among government agencies in the extent to which it involves the community in decisions about conservation strategy

and in active conservation management. This reflects the importance of community involvement to the department's conservation mission. We also acknowledge the relationships that have been built at conservancy level between the department and individual iwi or hapū. Clearly, tremendous progress has been made since the department was formed in 1987.

But the claimants are seeking something more than a right to be informed and consulted. Their wish is to fully exercise kaitiakitanga, in accordance with tikanga and mātauranga developed over many centuries. They accept that in most cases DOC is best placed to carry out day-to-day management of conservation land, but seek involvement in decision-making about taonga in their rohe.

The Crown's structures and policies for conservation management fall short of what is required by the Treaty principles referred to above. Both structures and policies need to be revised, with the principle of partnership at the forefront of that revision. What is needed are new structures that allow the Crown and Māori to engage effectively to the benefit of both conservation and mātauranga Māori, at both national and local levels. These structures should work with the NZCA and conservation boards to determine, case by case, the appropriate level of kaitiaki control, partnership, or influence for tangata whenua over individual taonga (such as species, places, and landscape features), and develop new models for the management of those taonga.

We therefore recommend the establishment of a national Kura Taiao Council and conservancy-based Kura Taiao boards to sit alongside the existing Conservation Authority and conservation boards (which would retain their existing membership). These new structures should have responsibility for setting Kura Taiao strategies and plans at national and regional levels; the strategies should form part of the relevant conservation management strategies, and the plans should form part of any relevant conservation management plan or national park plan. Any inconsistencies would have to be worked through jointly between the relevant boards. The Kura Taiao Council and boards should have power to advise the Minister and the Director-General as appropriate, just as their equivalent non-Māori partnership structures do.

These structures are necessary, in part, because there

are so many points of intersection between the places and species controlled by DOC and the world of te ao Māori. This proposal implements the principles of the Treaty because it puts Māori above the status of a mere stakeholder group among many. Māori should not have to constantly compete against a multitude of assertive voices to be heard.

We are aware that there are already direct relationships between DOC and iwi at head office and especially at conservancy levels. It is not our wish that the new structures interpose themselves between iwi and DOC as some sort of Kura Taiao middleman. We have no doubt that would be both inefficient and unacceptable to iwi. Nor do we apprehend that these structures and existing iwi organisations will compete any more than, for example, the Royal Forest and Bird Protection Society representative on the NZCA competes with the organisation that nominated him or her. The aim must be to enhance iwi influence in areas of DOC jurisdiction and so enhance iwi control of mātauranga Māori through this structure, not dilute it.

The creation of these purpose-built Māori relationship structures will bring advantages in addition to Treaty compliance. With their own place in our conservation structures, Māori will be able to play a more constructive role. With a Māori equivalent to the Conservation Authority and the conservation boards, the context will be right for Māori involvement in setting the agenda rather than reacting to somebody else's. A greater investment from the Māori community in DOC's work can only produce better conservation outcomes. If nothing else, it will have the positive effect of feeding mātauranga Māori values and approaches directly into conservation management. The evidence we heard from DOC witnesses themselves confirmed that even the limited Māori involvement in conservation management to date had produced beneficial results for DOC and the taonga it manages. It is difficult to see a downside to a change that would see that role strengthened.

We acknowledge, here, DOC's view that it has gone almost as far as it can towards partnerships and power-sharing under the current legislation. Neither the department nor the claimants identified the specific provisions that constrain such partnerships (except in the context of customary use, which we deal with in section 4.6),

and in the absence of submissions we will not attempt to draw detailed conclusions. Certainly, there are provisions that reserve decision-making powers for the Minister or Director-General or statutory boards, and likewise, there are provisions limiting transfer of ownership. It is also the case that DOC is legally accountable for delivering publicly-funded conservation outcomes and would therefore be understandably reluctant to transfer powers that are essential to those outcomes. We cannot know whether such obstacles are insurmountable without legislative reform, or, rather, are challenging but can be overcome with goodwill and a more generous interpretation of Treaty principle in DOC and Crown policies. We can only hope that, in either case, the parties will identify the constraints and work them through. The Kura Taiao Council we recommend may be able to help, as might the legislative review we propose in section 4.9.

Finally, in terms of policy, we have already advocated revision of the CGP and General Policy for National Parks to incorporate the full range of relevant Treaty principles (in particular, the principle of partnership). The CMRI guidelines also need revision, again to incorporate the full range of Treaty principles but also to promote a more open and innovative approach to Crown-Māori relations across government, and to acknowledge that Executive guidelines cannot override DOC's statutory responsibilities. We will have more to say about the Crown's overall approach to Treaty relationships in section 4.10.

In line with the structural and policy changes we are recommending, what is needed is a commitment on the part of DOC to incorporate the principle of partnership into all of its work. The department must consistently develop models that combine the need to care for the landscapes, species, and resources under its stewardship with the need to enable Māori to maintain their culture. This will mean seeking out and acting on the guidance of Māori in protection, first and foremost, of taonga species and places and, secondly, of the culture and identity that Māori derive from them. These approaches must be reflected in all of DOC's policies and practices applying to engagement with Māori. While recent Treaty settlements have shown the way, iwi should not have to rely on the settlement process to achieve partnerships,



Harvesting kina (sea eggs). Kina are an important traditional food source for Māori. Harvesting was traditionally carried out in spring and, as with all customary harvest, was subject to rules designed to ensure that stocks remained abundant. Kina are now managed under fisheries legislation, except in DOC-managed marine reserves, where taking is banned.

exercise kaitiakitanga, and express mātauranga; these things are protected by the principles of the Treaty and DOC legislation.

We emphasise once again that, in drawing these conclusions, we are not arguing that kaitiaki interests should be placed above those of the environment or other stakeholders. The environment must be protected first, because without it there can be no kaitiaki relationship to protect. And the relative weight given to kaitiaki and other interests will of course vary from one taonga to the next. But the overall approach to conservation and the methods used should, to the greatest extent practicable, give life to the kaitiaki relationships and the expression of mātauranga. We reiterate what we said in chapter 3, that kaitiaki cared for taonga in the environment for many centuries before European settlement, and now should be able to use their knowledge, skills, and efforts to achieve positive outcomes for conservation and mātauranga Māori alike.

4.6 CUSTOMARY USE

In the previous section, we made findings and recommendations for Māori involvement in conservation

decision-making. We now turn to consider DOC policy and practice in relation to customary use – that is, the traditional practice of taking natural resources, mostly native birds, fish, and plants, but also other traditional materials, including bone and stone. This is the area in which powers of decision-making are most strongly contested. It goes to the heart of claimants' concerns about the Crown's exclusive control of conservation taonga, and to the divergent world views that underpin attitudes to environmental management.

The CGP and the General Policy for National Parks define customary use as the '[g]athering and use of natural resources by tangata whenua according to tikanga.'²¹² It is usually practised within an iwi's rohe and can involve expression of fundamental and spiritually significant practices, including rongoā (our focus in chapter 7). Customary use is one of the most significant activities by which mātauranga Māori is retained and transmitted.

We have already related its importance to the claimants. In section 1.2, for example, we heard how weaver Erenora Puketapu-Hetet explained the whanaungatanga relationship between Māori and harakeke. And in section 4.3.2 we outlined the frustration felt by Ngāti Porou and Ngāti Koata over requirements to get permission from



Kererū (also known as kūkupa) sitting in harakeke.

DOC for customary harvest of harakeke and kiekie – a bureaucratic process that elders find demeaning and say reflects a lack of trust in centuries-old kaitiaki practices. Other claimants expressed similar concerns in relation to the gathering of leaves for rongoā. We also explained the claimants' concerns about the Wildlife Act, which vests ownership of materials from protected wildlife in the Crown – meaning that even if iwi can get feathers to make a kākahu, those feathers never belong to them.

As we have said, kaitiakitanga involves a responsibility to nurture the mauri of plants, wildlife, and other features of the environment to whom kaitiaki are related; this relationship may include use of plants or wildlife, so long as

that use preserves the mauri of the species. In Western conservation terms, this might be seen as maintaining nature in balance, and contrasts with the approach that has developed in te ao Pākehā of parcelling up the environment into areas for use and development (controlled under the RMA) and areas for preservation (under conservation and wildlife legislation). In the case of the conservation estate, there is a strong lobby for absolute preservation without any extractive use. In terms of effects on the environment, the difference between the kaitiaki and preservationist approaches might be small, since both approaches place overriding value on nature; but in terms of who has the ability to make decisions – the Crown or tangata whenua – there is a gulf between them.

Altogether, the claimants listed dozens of plants and trees, fish, birds, and other species that had customary uses for purposes of rongoā, food, ceremonial purposes, weaving, carving, or other forms of expression. We have already referred to many of these in the introduction and section 4.3 of this chapter.

4.6.1 The example of kererū

For DOC, customary use has always been a challenge. Soon after it was formed in 1987, the department received requests for the customary harvest of kererū (or kūkupa as they are called in Northland). One was from the Ruatahuna Tribal Committee at a hui in 1988. The request was turned down on the basis that granting it would create a precedent and a flood of requests. At that time, the department had insufficient information to know what effect such harvest would have on kererū populations.

The tension between Māori and DOC continued over kererū taken illegally, often for the tradition of feeding a dying relative, as was the case against a harvester named Subritzky. There was support for his actions by elders from Te Rarawa, Te Aupōuri, and Ngāti Kahu, with the defendant being discharged without conviction, but with a statement from the judge that this was not a precedent. Similar cases against Māori have followed, their defence being that their actions were for spiritual and cultural purposes.²¹³

Those tensions also point to differing views among iwi, and to what they perceive as lack of control over their taonga. In Northland, kūkupa numbers have been

declining for a long time, reflecting the clearing of forests, predation by introduced pests, and loss of habitat caused by human activity. Te Rarawa have advocated for kūkupa harvesting, but also recognise the endangered status of these taonga and have sought to work with DOC to research kūkupa numbers and enhance the environment for their survival.²¹⁴

By contrast, Ngāpuhi assert that the harvest of kūkupa should be banned. Similarly, in 1994, DOC transferred to Ngāti Hine guardianship and management of the 350-hectare Motatau Forest, situated right in the heart of Ngāti Hine territory. The forest was renowned within the tribe as a rich source of kūkupa. Knowing this and the wider problem of decline, Ngāti Hine declared a rāhui (traditional ban) on the taking of kūkupa from Motatau. It is still in place. Ngāti Hine leader Kevin Prime declared that taking would resume only when the kūkupa had become a pest.

The example of the kūkupa illustrates two points. First, customary use is not merely a question of iwi wishing to have access to and use of a resource; rather, it is about the wish of iwi to express their kaitiakitanga through control of taonga. Secondly, there is a clear acceptance at iwi level that species decline is an important issue for customary harvesters.

DOC's Northland conservancy, for its part, has attempted to meet the needs of customary harvest by promoting the use of alternative birds, all legally scheduled for hunting:

Indigenous species of gamebird which may be hunted are parera/grey duck, kuruwheangi/shoveller duck, putangitangi/paradise shelduck, and pukeko. The flesh and feathers of these birds may be of value to Maori to assist, by substitution, with the conservation of protected native species.²¹⁵

4.6.2 Statutory provisions for Crown ownership and control

As it stands, the law requires either the Minister of Conservation or the Director-General to authorise access to plants or animals under DOC's jurisdiction. The only statutes that explicitly provide for customary use are the Conservation Act 1987 and the Reserves Act 1977. None of the other statutes within DOC's jurisdiction refer to



Pukeko. DOC has sought to accommodate cultural harvest by encouraging the hunting of game birds such as pukeko.

customary use of plants or wildlife. Rather, they contain general provisions for the taking or killing of flora and fauna, by consent of the Director-General or Minister.

Section 30(1) of the Conservation Act provides that no one may take plants from any conservation area unless authorised by and in accordance with a concession.²¹⁶ Section 30(2), however, provides that the 'Director-General may authorise any person to take from a conservation area any plant intended to be used for traditional Maori purposes.' The Act does not define the term 'traditional Maori purposes.' The detailed requirements for customary use are laid down in the CGP, which we will discuss in section 4.6.3 below.

Under section 46 of the Reserves Act, the Minister may grant to Māori 'the right to take or kill birds within any scenic reserve which immediately before the reservation or taking thereof was Maori land.'

Section 3 of the Wildlife Act 1953 provides that all wildlife is 'absolutely protected' unless it is specifically listed in one of the schedules to the Act (which cover partially protected wildlife, game, wildlife that is not protected, and wildlife that may be hunted subject to conditions imposed by the Minister).²¹⁷ The Act provides discretion for the Director-General to authorise killing or taking of protected wildlife. Otherwise, it is an offence to hunt, kill, buy or sell, or possess protected wildlife.²¹⁸

Table 4.2: Provisions in conservation legislation relating to customary use

Act	Provision
Conservation Act 1987	<p>'No person shall take any plant on or from a conservation area except with the authority of and in accordance with a concession under Part 38 of this Act'. Section 30(1)(a)</p> <p>'The Director-General may authorise any person to take on or from a conservation area any plant intended to be used for traditional Maori purposes'. Section 30(2)</p> <p>'Nothing in this Part of this Act shall affect any Maori fishing rights.' Section 26ZH</p>
Wildlife Act 1953	<p>Director-General may authorise the taking or killing of protected or partially protected wildlife for any purpose. Section 53</p> <p>Director-General may authorise 'the sale or other disposal of any such wildlife or game or eggs'. Section 53(5)(c)</p> <p>All wildlife except that specifically exempted (Schedule 5 of the Act) is vested in (owned by) the Crown. Section 57</p>
National Parks Act 1980	<p>'Written consent of the Minister is required to take any indigenous plant or animal from a National Park. Consent will not be given if the taking is not consistent with the management plan for the park.' Section 5</p>
Reserves Act 1977	<p>'Consent may be given by the Minister to cut or destroy native trees and bush on any historic, scenic, or nature reserve.' Section 42</p> <p>'An administering body may issue a permit allowing the cutting or destruction of trees or bush on any recreation, Government purpose, or local purpose reserve.' Section 42</p> <p>'The Minister may grant Maori, by notice in the <i>Gazette</i>, the right to take or kill birds within any scenic reserve which immediately before the reservation was Maori land and when the taking or killing is not in contravention of the Wildlife Act.' Section 46</p> <p>'The Minister may permit taking of flora and fauna specimens for scientific or education purposes from a reserve.' Section 49</p> <p>'The Minister may authorise the taking and killing of fauna from any scenic, historic, nature, or scientific reserve.' Section 50</p> <p>'An administering body may authorise the taking and killing of fauna from any recreation, Government purpose, or local purpose reserve. No permission can be granted to take fauna for commercial purposes unless it was a condition when the reserve was established. All such taking and killing of fauna must not contravene the Conservation Act 1987 and Wildlife Act 1953.' Section 50</p>
Marine Reserves Act 1971	<p>'No person can fish in a marine reserve unless authorised by the Minister via a notice in the <i>Gazette</i>.' Section 3</p>
Marine Mammals Protection Act 1978	<p>'No person shall take any mammal, alive or dead, without first obtaining a permit from the Minister or persons authorised on behalf of the Minister.' Section 4</p>

Other statutory provisions of relevance to customary use are set out in the table below.

Since the passage of section 57(3) of the Wildlife Act 1953, the Crown has owned all wildlife that is not specifically excluded by schedule 5 of that Act. The Crown also continues to own materials from wildlife that is absolutely protected, even after those materials have been used in the creation of products such as korowai, tukutuku panels, and other taonga works. While some native birds are not absolutely protected, and therefore may be owned if killed legally (such as pūkeko), the majority of native birds are absolutely protected and their carcasses cannot be owned even if killed legally (that is to say, by accident or by special exemption).²¹⁹

The Crown makes no claim to the ownership of fish, shellfish, or marine mammals.²²⁰ The fisheries legislation has extensive provisions allowing for management of customary use by tangata whenua and management of areas by them for that purpose. Also, the Conservation Act provides that 'Nothing in [the freshwater fisheries] Part of this Act shall affect any Maori fishing rights.'²²¹

In the Ngai Tahu Claims Settlement Act 1998, Ngāi Tahu obtained a partial exception allowing its members to 'lawfully have' and transfer among themselves (non-commercially only), cultural materials from dead wildlife, or the wildlife themselves.²²²

4.6.3 DOC policies and structures applying to customary use

In addition to the statutory provisions referred to above, a number of government policy statements assist with our understanding of how customary use is regarded by the Crown. These include the CGP and the General Policy for National Parks, DOC's customary use guidelines and whale stranding protocols, and the New Zealand Biodiversity Strategy. They are described below, followed by a description of pātaka komiti, made up of iwi and hapū representatives who advise DOC on customary use applications.

(1) CGP and General Policy for National Parks

We have already explained (section 4.4.2) the overarching status of the CGP and its application to DOC actions

in respect of all statutes the department administers. In relation to customary use, the CGP provides:

2(g) Customary use of traditional materials and indigenous species may be authorised on a case by case basis where:

- i. it is consistent with all relevant Acts and regulations (including fisheries legislation), conservation management strategies and plans;
- ii. it is consistent with the purposes for which the land is held;
- iii. there is an established tradition of such customary use at the place; and
- iv. the preservation of the indigenous species at the place is not affected.

The views of tangata whenua should be sought and had regard to.²²³

This provision is set out in the Treaty responsibilities section of the policy, and repeated in the Conservation of Natural Resources section. Both parts were amended in 2007, changing the words 'non-commercial customary use' to 'customary use.'²²⁴

As noted earlier, the policy's marine section also provides for tangata whenua to be immediately notified of, and involved in the management of, marine mammal strandings, and to be 'provided with access to the remains of dead marine protected species for customary use, including those incidentally caught in commercial fishing, consistent with relevant legislation and agreed protocols.'²²⁵

The General Policy for National Parks (which we introduced in section 4.4.3) is the primary policy document guiding DOC management of national parks. All other national park strategies and plans are subject to it. It contains similar provisions in relation to customary use:

2(g) Customary use of traditional materials and indigenous species may be allowed on a case-by-case basis where:

- i) there is an established tradition of such use;
- ii) it is consistent with all relevant Acts, regulations, and the national park management plan;
- iii) the preservation of the species involved is not adversely affected;



This cloak, worn by Guide Ellen at Rotorua in 1958, is made from kererū and kākā feathers.

- iv) the effects of use on national park values are not significant; and
- v) tangata whenua support the application.²²⁶

In addition, policy 4.4(f) provides:

Non-commercial customary and recreational fishing for indigenous species in national parks require a written

consent from the Minister and may be authorised on a case-by-case basis where:

- i) it is consistent with all relevant Acts and regulations and the purposes of national parks;
- ii) there is an established tradition of such fishing in those national park waters;
- iii) the preservation of the indigenous freshwater fisheries and maintenance of stocks within those waters are not adversely affected;
- iv) it is provided for in the national park management plan; and
- v) in the case of non-commercial customary fishing, the application is supported by tangata whenua.

As noted, the CGP and the General Policy for National Parks control all of DOC's day-to-day activities and override all other DOC policies.

(2) Customary use policy guidelines

In 2006, the department produced its 'final draft' on 'Customary Use of Indigenous Plants, Animals and Traditional Materials: Policy Guidelines.'²²⁷ The guidelines note:

The customary use by tangata whenua of New Zealand's indigenous plants, animals and traditional materials is essential to the maintenance of Maori cultural and traditional knowledge. Customary use sustains the kaitiaki relationship between the tangata whenua and indigenous biodiversity.

The Department of Conservation manages the areas and resources for which it is responsible on behalf of the people of New Zealand. Because of the extent of these responsibilities, the department has a major role to play in recognising customary use within the parameters of conservation legislation.

Conservation of natural resources, particularly rare or threatened species, is supported by both kaitiakitanga and conservation legislation.²²⁸

The guidelines set out the legislative basis for the exercise of customary use, noting that there are limits to what can be done within the law:

Current legislation establishes that access to many indigenous species is restrictive, and does not allow devolution of decision-making in relation to customary use of native birds, plants and other traditional materials. While tangata whenua determine the need for and the choices of materials for customary use at the local level, responsibility and accountability for decisions to enable use remains with the Director-General or the Minister of Conservation.²²⁹

They refer to the New Zealand Biodiversity Strategy (see section 4.6.3(3)), which talks of the importance of customary use to biodiversity. They also quote the relevant sections of the CGP and General Policy for National Parks (above), in setting out the circumstances in which customary use may be permitted and the requirement to seek and have regard to the views of tangata whenua.

While the guidelines note that providing for customary use while also ensuring conservation may be a challenge, they say this challenge is 'one that current experiences show can be achieved.'²³⁰

The guidelines provide tangata whenua with 'full opportunity for meaningful involvement in decision-making relating to customary use, to recognise the judgement of tangata whenua exercising their duty as kaitiaki'. The department will '[s]hare' information with Māori on cultural materials, consult with them at an early stage and 'identify' opportunities for them to 'exercise an effective

degree of participation and control in the protection, management and use of cultural materials.'²³¹

The guidelines also provide for the negotiation, 'in the context of kaitiakitanga', of 'partnership agreements' for the use of cultural materials. They discuss the need for amendment to either the Wildlife Act or the Conservation Act 'to allow tangata whenua to have lawful ownership of the Taonga, crafted from natural materials, that sustain culture and tradition.' Under the policy's sub-heading, '[o]wnership of crafted taonga, there is a blank space.'²³² Crown counsel advised in October 2009 that DOC was not producing further work on the customary use policy beyond that specified in the CGP and General Policy for National Parks.²³³

In summary, the guidelines envisage an open and permissive approach to customary use based on partnership, sharing of information, and meaningful involvement in decision-making. They acknowledge the importance to mātauranga Māori of customary use. They also suggest that DOC is supportive of iwi ownership of taonga crafted from materials such as feathers that, under current law, remain in Crown ownership. While the guidelines can be characterised as supportive of customary use, the same cannot be said for the CGP. Its focus, in general, is preservation. It contains no general assumption in favour of customary use, but instead merely provides that DOC 'may' provide case-by-case authorisation.

(3) *The Convention on Biological Diversity and the New Zealand Biodiversity Strategy*

We introduced the 1992 Convention on Biological Diversity and the New Zealand Biodiversity Strategy in section 4.5.4(2). The convention, as we said, stresses the vital role of traditional knowledge in conserving biodiversity. It also recognises a link between retention of that knowledge and customary use.

Article 10(c) states that each contracting party shall, 'as far as possible and as appropriate', 'Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements'.

The biodiversity strategy aims to provide government-wide guidance on management of biodiversity. As we said earlier, it emphasises the importance of '[u]nderstanding



A takahē chick
at Burwood Bush
Rearing Unit, Te Anau



Attempting to refloat a pod of pilot whales stranded at Pūponga/Farewell Spit in 1992. The Conservation General Policy provides for tangata whenua to be informed of strandings and to be involved in their management according to local protocols.

and valuing the Maori world-view' to biodiversity management.²³⁴ Objective 10 in the strategy recognises this intention when it states that it is government policy to 'Recognise and provide for the customary use of indigenous species by Maori, consistent with the conservation and sustainable management of biodiversity'. As an action point under this objective, the strategy says the Government will:

- b) Work with Maori to facilitate access to traditional materials, developing sources and harvesting techniques which minimise the potential adverse effects on indigenous biodiversity, and, where necessary, developing alternative materials.²³⁵

(4) Operational policy – whale stranding and whalebone protocols

Ngāti Wai, who (as we have said) revere whales and their relationship with them, led the country in developing a whale-stranding protocol with DOC through the 1990s. The protocol provides a means by which this iwi can exercise their rangatiratanga and revive their traditions in regard to harvesting of bone and teeth from beached whales once they have died. Informal protocols operate in other locations, for example in Hawke's Bay.

After our hearings closed, DOC issued a discussion paper on whale stranding and domestic trade in whalebone. The then Minister of Conservation said: 'I . . . believe that there is a profound relationship between Māori



A tohorā (whale) skull following a stranding. DOC policy provides for tangata whenua to have access to bone from dead whales for customary uses such as carving.

4.6.3(5)

and whales and that this deserves to be better recognised.²³⁶ The discussion paper contains two proposals: one to provide a regulatory regime to identify recovered whalebone; the other to provide statutory recognition of the role of tangata whenua in the management of whale strandings.²³⁷

The period for making submissions on this discussion paper closed on 1 March 2008. In 2009 we asked for an update on progress with these proposals. The Crown told us that:

DOC is recommending a regime that regulates the commercial sale of whale bone and whale bone products only. This represents the minimum intervention needed to verify that New Zealand's domestic trade in whale bone is not the result of illegal harvest or killing of whales, nor does it involve illegally imported whale bone.²³⁸

Crown counsel advised that, to achieve this, the Marine Mammals Protection Act may need to be amended. These amendments would, among other things, need to provide statutory recognition for the role of Māori in managing whale strandings; ensure that iwi or hapū are given the right to take and keep bone from stranded and buried whales within their rohe without a permit; remove existing permit requirements for private possession and sale of whale bone and whale bone carvings; and provide for regulations to manage domestic trade in whale bone and carvings with one-off permits needed by commercial carvers and retailers only.²³⁹

In 2011 the Marine and Coastal Area (Takutai Moana) Act (section 50(3)(b)) introduced a requirement for marine mammals officers who are managing marine mammal strandings in the marine and coastal area to have particular regard to the views of affected iwi, hapū, or whānau.

(5) *Pātaka komiti*

In 1993, the department commissioned a discussion paper and survey on customary use. It found that there was an increasing demand for materials in the North Island, as well as an increasing incidence of taking plants without permits. The survey found that there were no standard national policies regarding Māori access to and use

of plants on DOC land. Māori themselves said that they found the seeking of permits demeaning. They also opposed access by scientists without Māori permission.²⁴⁰

Among the suggestions resulting from the survey was a new national policy for all harvesting and a proposal that regional committees be set up to manage plant and other harvesting. 'The idea was that the "people with mana whenua" have the decision-making right over customary use and access to native flora and fauna.' One of the initiatives following this survey was a request to the NZCA to look into customary use of native species.²⁴¹

The Conservation Authority in 1997 produced an interim report (which we quoted in section 4.3.4). This report was alive to such fundamental concepts as mauri, mātauranga, rāhui, and the importance of local tikanga being expressed and taken account of in relevant departmental matters. It saw the potential for far greater Māori participation in DOC's work, from habitat restoration work and species and environmental monitoring, to research and education. It saw too the need to involve Māori in management and permitting, with a suggestion that the fish and game councils' independent model could be considered.²⁴²

To some extent, this suggestion has been reflected in DOC's establishment of pātaka komiti.²⁴³ These are committees generally made up of expert hapū representatives (such as carvers and weavers) who advise the department on how to exercise their statutory powers for the allocation of customary use rights. An example of their operation can be seen in the East Coast/Bay of Plenty conservancy, where protocols are in place requiring that applications for cultural materials be sent to the hapū with mana whenua. They provide feedback on applications, and DOC supports decisions made by hapū.²⁴⁴ The Northland committee (Te Pātaka o Te Tai Tokerau Komiti) is made up of iwi experts. From 1991 to 2006 it allocated cultural resources to 59 applicants for feathers (mainly for korowai), 12 for whalebone, and 11 for timber for waka and marae carving.²⁴⁵

4.6.4 Claimant and Crown arguments

We have already explained many of the claimant concerns in earlier sections of this report. In summary, the claimants wished to have control of the taonga species

that are the subject of customary use. Specifically, this means powers of decision-making about access to, use, and management of those taonga. The claimants saw three main obstacles to their exercise of kaitiakitanga in the context of customary use. First, under existing legislation, decision-making powers over access and use rest with DOC, not with kaitiaki. As one example, this affected them when they sought access to the DOC estate to gather plants for rongoā. Secondly, declining numbers among taonga species mean that many are no longer available for use. The claimants expressed resentment that various species were threatened because of the actions of others, and also at what was perceived as a lack of trust in their traditional methods of conservation and management. Thirdly, they were concerned that the Crown retains ownership not only of the wildlife subject to DOC's jurisdiction, but also the cultural materials that are derived from that wildlife. Examples include feathers used in korowai and bone used in carving.

The Crown, in response, rejected the claim that all indigenous flora and fauna in each claimant's rohe were taonga (see also chapter 2).²⁴⁶ It said that it recognised claimants' ownership interests in flora only in terms of contemporary legislation (that is to say, where claimants owned land, they owned the plants on it). It did not wish to see 'grievances about resource loss and cultural fragility' transformed into secured property rights. It considered that these concerns could be addressed through other avenues, such as historical Treaty settlements and contemporary policy development.²⁴⁷ However, counsel added that 'DOC works with tangata whenua on many initiatives and projects that support and enable iwi to maintain a relationship with, and enable the exercise of aspects of "kaitiakitanga" over, species they identify as taonga'.²⁴⁸

4.6.5 Analysis

We have already explained, in this chapter and others, how divergent world views have given rise to different approaches to conservation: kaitiakitanga, on the one hand, is based on human–environment relationships and enshrines deep responsibilities to care for flora and fauna, including careful use; the preservationist approach, on the other hand, seeks to protect the most precious landscapes and ecosystems from human contact. These

divergent views find their sharpest expression in relation to customary use. Many Pākehā conservationists simply do not believe that Māori can or would act in the interests of threatened species or vulnerable ecosystems. The fact that Māori might make any harvest at all from the conservation estate so offends the preservationist ethic that it raises the spectre of wholesale exploitation. This is, in essence, a matter of trust. In 1994, the Royal Forest and Bird Protection Society's then conservation director, Kevin Smith, put it like this: 'Conservationists feel uneasy when faced with the bald challenge: "You just don't trust Maori, do you". Yet the only honest response for many who have pondered this issue is that in many instances we don't'.²⁴⁹

We are convinced, however, that the claimants would not jeopardise the survival of the taonga species they wish to care for as kaitiaki. As Hori Parata and others noted in 1995, 'We are certain that no one, Maori or Pakeha, wants to harvest any species to extinction. The common aim is surely that there be an abundance of treasured species such as the kereru'.²⁵⁰

The survival of species is, for both kaitiaki and conservationists, a shared bottom line. The kaitiaki commitment to this goal can be seen in the common imposition of rāhui. We have already cited Ngāti Rakaipaaka's ban on kiekie gathering at Morere (see section 4.3.1), and Ngāti Hine's management of the precarious kūkupa population at Motatau (see section 4.6.1). We note also that a Ngāti Koata rāhui on the harvest of muttonbirds was in place when evidence was given in 2002.²⁵¹

Why, therefore, should there be such a lack of trust? The irony is that conservationists and kaitiaki have much more in common than either side realises. In the same 1994 discussion on Māori claims to the conservation estate from which we have quoted Kevin Smith, the Pākehā chair of both a regional Royal Forest and Bird Protection Society branch and the local conservation board took a different perspective. For him, Māori striving to protect kererū numbers so that they might one day be harvested sustainably 'bites around the edges but does not destroy Forest and Bird's core ecological concern for survival of the species. It also adds an additional argument in favour of Forest and Bird's concern for the survival of forest habitats.' He added that there was 'every reason to believe

that Maori, with their closer and more direct interest in things within their tribal boundaries than the Crown can ever have, can be more diligent in managing the natural environment.²⁵²

We are drawn to three conclusions. The first, as we have already said, is that the survival and recovery of species is the overwhelming priority. Again, we note the Court of Appeal's finding that DOC is bound by its legislation to put the needs of the species first. Secondly, we perceive no sound basis for the lack of trust in Māori conservation management. Given the endangered status of many native species, conservationists and kaitiaki want the same outcomes. The third is that there must be provision for kaitiakitanga because customary use is critical to the survival of mana Māori and Māoritanga itself. There can today be no going back to the 'wilderness' philosophy that sought to exclude traces of human culture from 'natural' environments.²⁵³ The simple point is that Māori culture – and kaitiakitanga as a fundamental aspect of that culture – lives and is practised in the bush and the water where it was born. We heard from claimants that to separate kaitiakitanga from its place is to destroy it.

The department's evidence suggests that there is no problem of willingness within DOC to share and perhaps even devolve power; the problem is with DOC's inability to do so within the law. It follows that legislative steps are needed.

The success of pātaka komiti provides the basis for a workable model. In that system, as we said above, tangata whenua experts advise DOC on applications for the harvest of cultural materials. This arrangement should take the next logical step of moving to full statutory co-management of customary use by DOC, as the representative of the Crown's interest in conservation, and the pātaka komiti, as representatives of kaitiaki. Joint decisions should be made on the basis of, first, the survival and recovery of the species, and, secondly, the right of iwi to exercise kaitiakitanga and maintain their culture.

We recall the suggestion of Rapine Murray, that '[i]t is time the Department of Conservation got together with Maori as one and set limits on harvesting'.²⁵⁴ That is what co-management between DOC and the pātaka komiti should achieve. In many cases – particularly amongst certain flora – we suspect that managed harvesting can occur

now. In others, however – such as kererū in Northland (and probably elsewhere too)²⁵⁵ – we doubt that even limited harvesting will be compatible with kaitiakitanga for some time to come. Regardless, shared decision-making is an urgent and important part of the process of building effective partnerships and implementing section 4 of the Conservation Act. Enhanced authority for pātaka komiti dovetails with our other key reform recommendations (the pātaka komiti could even become subcommittees of the Kura Taiao boards we proposed earlier).²⁵⁶

For the pātaka komiti to fulfil the role we envisage, changes will be needed to both legislation and the general policies. These policies, as we have noted, make the provision of access and harvest rights a low-priority 'may' responsibility. They effectively treat every decision to grant access or harvest rights as an exception to a general 'no access' rule. We do not think this is the right starting point from which to address one of the most important Treaty issues in DOC operations. The evidence consistently before us was that successful models for provision of access and harvest rights involved broadly agreed protocols with tangata whenua and decision-making shared with or transferred to them on an ongoing basis. There is no hint of this in either policy. Both should be amended to make customary harvest and access a 'will' responsibility provided appropriate conditions are satisfied, with a presumption in favour of customary practices rather than mere case-by-case discretion.

We were also concerned at the way policy and legislation combine to restrict the locations at which customary use can take place. The CGP requires that customary use only take place if there is 'an established tradition of such customary use at the place'²⁵⁷ and the General Policy for National Parks allows customary use only when 'there is an established tradition of such use'.²⁵⁸ These policy provisions, combined with the restrictions imposed by statute on the taking of plants, wildlife, and other material from the conservation estate, enforce a standard for access to customary use which is the equivalent of an aboriginal rights standard. This is a very rigorous requirement.

In practice, iwi may have traditionally gathered materials from sites where those materials are no longer available – for example, because bushland has become cities or farms, or because waterways have been fouled by

human activity. Those iwi seek to harvest materials from the conservation estate within their rohe because that is where those materials are still available. The materials are substitutes for those that have been lost. The fact that environmental changes which iwi did not consent to have severely limited their access to customary materials cannot be used as a reason to prevent access to those materials in other parts of their rohe. Requiring a tradition of use at the place of harvest is wrong in principle. These policies should be amended.

We acknowledge that customary use is a challenging issue for DOC. Though a preservationist thread runs through the department's legislation and its general policies, the department – and the NZCA – have sought to understand kaitiaki perspectives. Further, in the department's customary use guidelines and its establishment of pātaka komiti it has shown an intention to share decision-making and administration to the extent allowed by law and guiding policy. As in the case of consultation and partnerships, significant progress has been made since DOC was established, and for that we commend the department.

There remains one other issue to address, which we introduced in section 4.3.2. This is the Crown's statutory ownership of both wildlife and animal materials used by Māori in the creation of taonga works (such as feathers in cloaks). The Crown explained that the ownership created by the Wildlife Act was in order to address the complexities of common law. But in solving this problem the Crown clearly created another by ignoring its obligations under the Treaty to safeguard any Māori rights to control or manage these species. From a kaitiaki perspective, wildlife is not 'owned' at all; rather, kaitiaki are bound by obligations towards these taonga. The Crown's approach has therefore created new grievances and complexities for itself. By adopting ownership as the means of taking control, it has invited those with pre-existing claims to respond in kind. It is control, and not ownership, that is the real issue. This should not be a winner-takes-all argument: agreements should be forged around how to share control of taonga species, not who should own them.

To that extent, the Wildlife Act should be amended so that no one 'owns' protected wildlife. Rather, the Act should make provision for shared management of all

wildlife species it protects. In the case of customary use, that shared management could be via the partnership between DOC and the pātaka komiti we have outlined. The Crown should certainly not retain ownership of materials used in taonga works, which is a form of cultural dispossession. The legislation should also be amended 'to allow tangata whenua to have lawful ownership of the Taonga, crafted from natural materials, that sustain culture and tradition'.²⁵⁹ The Minister approved this in 1999 following NZCA recommendations, and it is now time it was given legislative effect.²⁶⁰ Such a change will not lead to the endangerment of taonga species, because, as we have stressed, the shared management we recommend must retain species survival as its core objective. After all, a similar provision in the Ngāi Tahu Claims Settlement Act was uncontroversial; it is time that this precedent was extended to cover all kaitiaki.

4.7 COMMERCIAL ACTIVITY IN THE CONSERVATION ESTATE

As we related in section 4.3.2, DOC's concessions policy was a concern for a number of claimants. Some alleged that they were excluded from decisions about the awarding of concessions; and some said they were seldom awarded concessions themselves. In some cases, claimants argued, concessions provided income for contractors and DOC from places of significance to tangata whenua, while tangata whenua did not share in the benefits. Here, we set out the detail of DOC's concessions policy.

'Concessions' is a shorthand description for the licensing process by which private enterprise pays to carry out business on the conservation estate. They are issued under part 3B of the Conservation Act, and are permits to carry out an activity, or leases or licences to establish structures. The process is primarily designed for commercial operators, many of which are from the tourism industry. They range from long-running, high-profile operations, such as the ski fields on Mount Ruapehu and the guided tours on the Milford Track, to infrastructure such as hydro schemes with effects on DOC land, to one-off events such as the Coast-to-Coast multi-sport event and filming, to very small scale and low key uses such as grazing, retail, storage, aircraft landings, and telecommunications.



Tūroa Skifield, Mt Ruapehu. Skifields such as Tūroa are among the higher profile DOC-granted concessions.

As at June 2010 there were 4,754 concessions operating throughout New Zealand.²⁶¹

Concessions are purchased. The Crown's annual income in 2009/10 from concessions through DOC was \$13.9 million. This funding goes strictly to the Crown, and is a reasonably lucrative source of additional funds to the Crown to assist in funding conservation work (total DOC revenue in 2009/10 was \$312.9 million).²⁶²

Part 3B sets out processes for considering concession applications and criteria for making decisions. These criteria, in section 17U, are focused on the nature and environmental effects of the proposed activity, and on steps to mitigate those effects. There are also provisions for other

matters such as public safety. The part contains no specific provision for consideration of tangata whenua interests.

We explained in chapter 2 that section 12 of the CGP and section 11 of the General Policy for National Parks deal with access to biological material for commercial and non-commercial research and information needs.²⁶³ They contain a specific requirement to recognise 'Mātauranga Māori and tangata whenua interests in research and monitoring on public conservation lands and waters, species and resources'.²⁶⁴ Section 12(d) and section 11(d) respectively, deal with collection of material, and provide for applications to be considered on a case-by-case basis, according to criteria that include consistency with the department's Treaty responsibilities.

There is also another set of significant commercial activities on the conservation estate – those run by the department itself, when it contracts out operations such as pest control, research and investigations, and facilities construction. DOC also runs some 'commercial activities' itself, such as campgrounds. Department officials gave evidence of a number of contracts for pest control, and other activities which are let to iwi or iwi-related organisations or individuals.²⁶⁵

We deal with general claimant issues to do with concessions here. In chapter 2, we consider the concessions regime and general policies in the context of bioprospecting – that is, the search, extraction, and examination of biological material or its molecular, biochemical, or genetic content for the purpose of determining its potential to yield a commercial product.

4.7.1 DOC's concessions policy

When we asked for the policies on concessions we were provided with a document detailing the standard operating procedure for concessions applications processing.²⁶⁶ This document is intended to aid DOC employees in processing a concession application, but stresses that it does not replace the 'relationship management skills needed to process and manage concessions'.²⁶⁷ This was the only national documentation on concessions that we received. We note that the CGP does cover concessions, but the only mention of iwi in these sections relates to access to pounamu (owned by Te Rūnanga o Ngāi Tahu). The CGP also states that tangata whenua will be consulted during

development of statutory planning documents and specific proposals that involve places or resources of spiritual or historical and cultural significance to them. We took this to mean that this would involve consultation on concession applications also.²⁶⁸

Regarding the encouragement of concessions applications from Māori, we found that the department takes a largely passive view – that is, it processes the applications it receives, rather than actively seeking applications. As the DOC website says: ‘Sometimes concession opportunities are publicly offered (tendered) by DOC . . . [but] most concessions are initiated by an individual or firm approaching DOC and seeking permission to run a particular business.’²⁶⁹

Regarding consultation, the standard operating procedure required iwi to be involved in processing any applications where there were ‘high impacts’, as well as some applications that fell into the ‘low-impact’ category. Conservancies were encouraged to use their own guidelines and discretion to determine which applications in the latter category triggered their ‘local guidelines with Iwi’ and consequently required consultation.²⁷⁰ The procedure explained that, with such concessions, the information is often ‘at hand to enable a decision to be made.’ Moreover:

Most conservancies have now developed locally agreed triggers that guide when to consult with tangata whenua. The applicant, as part of their EIA [Environmental Impact Assessment] and where necessary, should have contacted tangata whenua directly.²⁷¹

We note that concessions policy was reviewed in 2009 and that some amendments were made in 2010, apparently with the aim of streamlining and speeding up the processing of concession applications. In relation to iwi, the review’s principal concern appeared to be the length of time that consultation can take. It noted that consultation practices vary, with some conservancies ‘imposing no time constraints’ on iwi consultation, while some had consultation processes and timeframes determined by Treaty settlements. While iwi relationships were important, the review said: ‘So too are relationships the Department needs to have, and does have, with

concessionaires. Concessionaires pay a fee for a service to professionally process an application. They should expect this to be undertaken in a timely manner.’²⁷²

As a result of the review, the department has defined time limits for the processing of concessions applications, but also provided for extensions of time for iwi consultation under some circumstances. Examples included when the application conflicted with the contents of an iwi management plan (that is, a plan developed by an iwi authority under the RMA to set out priorities for environmental management – see chapter 3), when a full cultural impact assessment was needed, and when there are timeframes imposed by Treaty settlements or agreements with iwi.

The policy also changes some of the terminology. High impact concessions become ‘notified’, and low impact ones become ‘non-notified’; it provides for iwi to be consulted on some non-notified applications, and says the department will work with iwi to establish ‘triggers for when an iwi would like to be consulted.’²⁷³

4.7.2 Claimant and Crown arguments

As we have explained, iwi expressed three concerns about concessions and commercial contracts. The first was that they were excluded from decisions about the awarding of concessions. The second was that they were seldom awarded concessions or contracts themselves. The third concerned iwi sharing in the benefits of concession activity.

Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa said that tangata whenua should have a share in the department’s profits from concessions within their rohe. Ngāti Kuri considered that ‘the decision-making authority for the concessions does not provide for the effective exercise of tino rangatiratanga.’ Te Rarawa considered that they had established involvement in concessions applications ‘only after working hard to establish a relationship with DOC.’²⁷⁴ Ngāti Kahungunu said that ‘absolutely no priority is given to Maori either to oppose third parties obtaining concessions or to apply for their own, notwithstanding the area over which a concession is sought may be of immense importance to that group.’²⁷⁵

DOC’s witnesses told us of frequent interactions with the claimants on concession applications and of efforts to

build relationships and processes for managing the number of applications sent to iwi.²⁷⁶

In closing, Crown counsel submitted that:

DOC's concession system is rigorous and effects-based. Treaty obligations are given effect to by decision-makers being informed of any tangata whenua values and concerns, through consultation, and factoring that into decision-making. . . . In all cases, the emphasis is on potential environmental effects. In that sense the Crown is protecting the environment itself. That is a likely favourable result from a kaitiaki perspective.²⁷⁷

4.7.3 Analysis

We have already said that partnership between DOC and iwi should be the default approach to conservation management, but within that overall partnership approach there will be times when kaitiaki are entitled to greater degrees of control over environmental taonga, and other times when consultation and iwi influence is sufficient. This approach applies to concessions as much as to any other area of DOC activity. To the extent that the claimants are seeking decision-making powers in relation to concessions, the approach we have outlined and the recommendations we made in sections 4.4 and 4.5 answer their concerns. To the extent that consultation is sufficient, we have said that DOC consults well. In the context of concessions, the evidence from DOC witnesses indicated that consultation practices were developed out of local relationships. In practice, this appears to be working, and we are inclined to leave well enough alone. But we would add a word of caution. The more localised arrangements are, the more they rely on the individuals who have built relationships. We have often seen in the past that these arrangements can end with the tenure of those individuals. We would like to see consultation processes, no matter how localised, formally documented so that they become part of the standard process over the long term.

The level of priority given to Māori applicants for concessions and contracts gave us more trouble. We heard of some iwi winning contracts and concessions, but these appear to reflect quality local relationships rather than broadly applicable policy. The standard operating procedure for concessions applications processing contains no

encouragement for tangata whenua to seek concessions or contracts. And, as the DOC website made clear, the department only sometimes initiates concession opportunities – mostly, it responds to applications from individuals or businesses.²⁷⁸ We were generally impressed throughout our hearings by the way in which DOC officials at conservancy level appeared to work hard at enhancing tangata whenua relationships with the DOC estate and DOC-controlled species, so it was a surprise that this attitude was not carried through into concessions and contracts policy.

Commercial activities on conservation land, whether private businesses or contracts let by DOC, would seem to us to be an excellent way of strengthening relationships between iwi, whenua, and taonga species. A 'reasonable degree of preference'²⁷⁹ for tangata whenua on concession applications that derive from taonga on the conservation estate would be consistent with section 4 (and the Court of Appeal's finding in the *Whales* case), and therefore not discriminatory. Organisations owned by or sponsored by tangata whenua should be actively encouraged to take up opportunities such as recreational or interpretative guiding, or working on the land in roles such as pest control, research, construction, track cutting, or heritage preservation. These are ways in which Māori can generate employment and income in remote areas, as part of the exercise and preservation of mātauranga and kaitiakitanga.

We do not intend to say here that Māori should always receive preference in every concession application. That is clearly not contemplated by Treaty principle and was not what the Court of Appeal said in the *Whales* case. But it is incumbent upon DOC to develop rational policies and procedures that address the issue, in particular to guide the development of tender documents, in situations where there are multiple applications, or where DOC itself sees opportunities for tangata whenua to work within the conservation estate. There will be instances where Māori preference arises because there is some opportunity for a Māori aspect to the concession – for example, historical or botanical tours. In other cases, the intensity of the tangata whenua relationship with a place ought logically to suggest a level of priority because the work will allow tangata whenua to maintain and transmit mātauranga in relation to those places and make a living doing so. This

is a benefit which will not exist in relation to any other tenderer or applicant, Māori or otherwise.

We would not wish to pre-empt any criteria for determining what the relevant considerations or circumstances might be. Our complaint is that there is no policy about this subject at all, or if there is, we did not see it. It is incongruous to proceed on the basis that Māori have a special place in the management and administration of the DOC estate except where there is money to be made. This gap should be addressed.

The final issue the claimants raised in relation to concessions concerned kaitiaki sharing in the benefits of commercial activity on the conservation estate. Crown revenue from concessions is returned to DOC for spending on conservation activities. This revenue makes up a relatively modest proportion of overall Crown spending on conservation, and it benefits the taonga towards which the kaitiaki have obligations. The real issue is not about kaitiaki sharing in the revenue, but the degree to which kaitiaki have a say in the management of taonga. That is the central issue of this chapter, and is addressed in our recommendations for reform.

4.8 NATIONAL PARKS

We deal here, finally, with national parks. We do so separately because national parks are regarded as the jewels of the conservation estate and, as such, they are the locations in which the ethos of preservationism is elevated to the highest plinth. This in part reflects the fact that they include the most ‘untouched’ areas of conservation land, such as inland alpine regions and major lake, river, and forest landscapes. Scenic reserves, by contrast, tend to be smaller areas of remnant bush in lowland and coastal zones.²⁸⁰

The concept of preserving large areas of ‘unspoiled’ natural beauty for citizens to enjoy originated in the United States, with the creation of Yellowstone National Park in 1872. New Zealand’s first national park was established in 1887, and in the following three decades several other locations in both the North and South Islands either followed suit or were set aside as scenic reserves which formed the core of national parks in later decades.²⁸¹ The preservationist ethic was articulated in the first legislation

to introduce uniform management of the national parks, the National Parks Act 1952. This defined national parks as ‘areas of New Zealand that contain scenery of such distinctive quality or natural features so beautiful or unique that their preservation is in the national interest’ (section 3(1)). The Act went on to explain that national parks should be ‘preserved as far as possible in their natural state’ and that ‘the native flora and fauna . . . shall as far as possible be preserved and the introduced flora and fauna shall as far as possible be exterminated’ (section 3(2)(a) and (b)). Section 54 set out the range of offences under the Act, which included the unauthorised removal of any part of any plant or interference with any animal.

The cause of maintaining such ‘primeval’ landscapes inevitably meant the exclusion of indigenous peoples from them, even where those people had lived on the land for generations. This was less of an issue in the first parks, particularly in the South Island, where the topography was predominantly inaccessible and mountainous. But it was much more of an issue with parks like Urewera, which was established in 1954 in the midst of Māori communities. The 1976 management plan for Urewera National Park espoused the preservationist ethos and the exclusion of Māori culture with its emphasis that ‘[p]reservation of the wilderness character and the protection of the ecology’ was the Crown’s ‘primary objective of management’.²⁸²

The irony of this approach, from a claimant viewpoint, is that the kaitiaki interest is likely to be most significant in relation to national parks. As we have already noted, the conservation estate contains many of the remaining taonga species of flora and fauna, and many of the landscapes and places in which kaitiaki have interests. Those interests are of a greater order of magnitude in relation to national parks, where the relative abundance of taonga species is likely to be higher and where the most iconic features such as mountains, lakes, and rivers are likely to be located. This means that the conflict between kaitiakitanga and the preservationist approach is likely to be at its sharpest in relation to national parks.

The current National Parks Act, which dates from 1980, retains much the same preservationist intentions as its predecessor. A General Policy for National Parks was adopted in 1983 to guide the department in its

interpretation of the Act (see section 4.4.3). However, in 2005 the NZCA adopted a new general policy (which we have already referred to). This by and large carried forward the content of the 1983 policy but, as the chair of the NZCA explained, an ‘important consideration’ in the revision was ‘to provide for more appropriate recognition of the interests of tangata whenua in national parks.’²⁸³ This greater responsiveness to Māori obviously stemmed from the requirements of the Conservation Act. Amongst other things it led, in the new policy, to: explicit provision for the preservation and even restoration of sites of Māori historical and cultural heritage; the requirement to establish working relationships with tangata whenua to support the parks; and the allowance for the possible exercise of customary use, on a case-by-case basis.²⁸⁴

Despite this, national parks have generally been unavailable for use in Treaty settlements. The position of the Crown in negotiating settlements has been that ‘conservation land is not generally available for use in settlements apart from individual sites with wāhi tapu or wāhi whakahirahira significance.’²⁸⁵ It stands to reason that national parks have been the least available of any conservation lands, although we are of course yet to see the final outcome of settlement negotiations involving the Whanganui, Taranaki (Egmont), Urewera, and Tongariro national parks. The indications from current deeds of settlement and AIPs in the northern South Island (Kurahaupō and Tainui Taranaki ki te Tonga) and Urewera district (Ngāti Manawa and Ngāti Whare), however, are that the Crown is maintaining its restriction on the use of national park lands in Treaty settlements.²⁸⁶ There have been no moves to return national park lands to Māori outside the settlement process.

DOC staff who gave evidence acknowledged that the return of land was a matter of great significance for iwi. Staff also acknowledged that DOC’s mission was the conservation of the natural environment and if this could be done without DOC actually owning the land, it may be possible for both the Māori desire and the DOC mission to be achieved.

Ms Johnston said that DOC’s primary interest – in terms of ownership, control, and management – was in achieving conservation outcomes:

our primary interest is first of all, are the conservation outcomes that we had committed to, going to be achieved and that’s why, in some circumstances, you know, that’s I suppose the approach that we go into discussions about control and management, is are we going to be able to achieve the conservation outcomes that we want, that are agreed or that we’ve got a responsibility to try and achieve...²⁸⁷

For species, she continued:

It’s about... will those species continue to be managed so that we can ensure their survival into the future... I suppose the thing that I’m trying to say, is that going into [a] new regime or new thinking about ways of controlling and managing, the place that the department would start from is, is this going to achieve conservation [outcomes]?²⁸⁸

A second consideration, she said, was public access. She accepted that examples of shared or full transfer of title from Treaty settlements showed that title was not always necessary to achieve those outcomes.

Peter Williamson, who was the East Coast/Hawke’s Bay conservator at the time of the hearings, added: ‘If you talk about the conservation work being done... I don’t think the land ownership is a crucial issue in that the crucial issue is people’s willingness to engage with the conservation or ecological issues.’²⁸⁹

More recently, however, the possible return of national park land has become a matter of controversy, with the Crown and claimants squaring off over whether national park land should be made available in Treaty settlements as a matter of general principle. We acknowledge that this is a genuine debate that must be had. However, it is important to place this debate in an international context first and then in a local Treaty context. These issues are not unique to New Zealand or to our particular Treaty settlement process.

In Australia – where, like New Zealand, the establishment of national parks was informed for a century by the ‘Yellowstone model’ of preserving wilderness areas devoid of human occupation²⁹⁰ – national parks have been returned to Aboriginal ownership on several occasions in the last three decades. The Australian Government came to this less of its own free will than the necessity,



Uluru, Australia. It is now 25 years since ownership of Uluru (Ayer's Rock) was restored to the Anangu people of central Australia. This powerful symbol of Australian nationhood is, to Anangu, an ancestor, as are other landforms, plants, and animals from their traditional lands.

in the 1970s, to recognise Aboriginal land rights in the Northern Territory. Negotiations thus took place between the Government and traditional owners over various national parks or conservation areas, with title returning to Aboriginal ownership in exchange (usually) for joint management of the park and long-term lease-back to the federal government. In 1981 Gurig National Park on the Cobourg Peninsula north-east of Darwin thus became Australia's first jointly-managed, Aboriginal-owned national park, with a 99-year lease to the Government. Similar arrangements followed later that decade at Uluru-Kata Tjuta (Ayers Rock and the Olgas), Nitmiluk (Katherine Gorge), and Kakadu national parks.²⁹¹ In 2008 there were negotiations planned or under way for co-management of 27 national parks and reserves in the Northern Territory.²⁹²

Following the lead of the federal government, all Australian states and territories have now adopted legislation providing for considerable Aboriginal input into conservation governance and management. There has been variability in the implementation across Australia, and from an Aboriginal perspective we doubt that the

arrangements are regarded as remotely perfect. But, in general terms, a guaranteed Aboriginal majority on the park's board, the recognition of Aboriginal residence and customary use within the park's boundaries, the commitment to the training of Aboriginal people to work as park staff, and the payment of a proportion of park revenues to the Aboriginal owners all appear to have become completely normalised features of national park management across the country.²⁹³

Title return and shared management in Australia, therefore, has occurred not because of an inherent government desire to recognise Aboriginal conservation practices but because of an obligation to recognise Aboriginal rights. Along the way, a positive model has developed that has been of benefit to both parties as well as to the environment. The message of a 2007 conference at the Australian National University on indigenous management of conservation areas was that collaboration was essential for the future of Australia's protected areas. As two experts on the subject have written:

Governments are recognising that they need partnerships with Indigenous peoples to manage properly protected areas even when legislative recognition of Indigenous interests is meagre; Indigenous groups are recognising that they can benefit from partnerships with government agencies and others, even when sole Indigenous authority has been regained through land claims or land purchases. The future, it seems, will be about how, rather than if, those partnerships are developed.²⁹⁴

There is an obvious reason why New Zealand has not followed the Australian example with national parks. There has simply been no lever like aboriginal title to force the Government to take such steps. As a result, we lag behind Australia in this area even though Ngā Whenua Rāhui, for example, preceded the Australian equivalent by the best part of a decade.²⁹⁵

The current round of Treaty negotiations, however, suggests that we are now entering the situation Australia found itself in with the land rights movement in the 1970s, where something will have to give. The national parks in the more mountainous areas of the South Island were not places where Māori communities lived or continue to live, but North Island parks like Urewera and Whanganui have a long and recent history of Māori occupation. Tūhoe communities, for example, live on lands contiguous to the Urewera National Park that Māori retained. Without wishing to cut across any Tribunal findings in district inquiries, we are of the view that our national parks should be available for return of title and shared management if the circumstances of alienation and the ongoing strength of kaitiakitanga warrant it. Australia shows us that there is nothing to fear.

We recognise that some may regard the Australian approach as not being directly applicable to New Zealand, viewing national parks there as vast and remote and thus more suited to return to local indigenous people. New Zealand national parks, some will say, are much smaller and closer to our towns and cities. That may be so, but if universal access is guaranteed, and the conservation of species remains paramount (as it clearly also does under the terms of Aboriginal customary use in Australian parks), then we fail to see this as any invalidation of title

return and co-management. Moreover, a number of the parks returned in the Northern Territory have both much higher visitor numbers than our own and singularly iconic status. If anything, we sense that that status – in Kakadu, Uluru-Kata Tjuta National Park, and elsewhere – has even been enhanced by Aboriginal ownership or co-management. We could do well to learn from that example.

4.9 KAITIAKI CONSERVATION

Throughout our hearings, we were impressed by the considerable common ground between the Crown and claimants in relation to taonga within the environment. There was no dispute about the state of the environment and taonga species in New Zealand. All parties understood that there are areas of great fragility and threat and wished to see that situation remedied, whether their particular preoccupation was the retention of tribal culture through the harvest of kūkupa or the preservation of New Zealand's biodiversity or both.

There was also no dispute about the significance to Māori of the conservation estate and the species managed for conservation. The Crown acknowledged this both when it drafted section 4 of the Conservation Act in 1987 and by the effort the department put into attending hearings and providing evidence. The claimants affirmed it by specific statements in evidence, and the very fact that conservation issues were so prominent in the statements of claim.

There was, furthermore, clear agreement that the Crown and iwi and hapū should work together to achieve outcomes that benefit both kaitiakitanga and the environment.

Differences emerged, however, over the obligations that arise from the Treaty and the extent to which those are already met by existing law, policy, and practice. The Crown argued that it does not have a Treaty obligation to protect kaitiaki relationships with the environment, at least not to the extent of kaitiaki control and partnership.²⁹⁶ We have disagreed. The Treaty obliges the Crown to actively protect the continuing obligations of kaitiaki towards taonga, as one of the key components of te ao

Māori, and also obliges the Crown to conduct its conservation activities in a manner that is consistent with the tino rangatiratanga of iwi and hapū to the greatest extent practicable.

These differences over control and decision-making in turn reflected different ways of relating to the environment, between the preservationist approach and that of kaitiaki. Robert McGowan, who gave evidence on behalf of Ngāti Kahungunu and works for the Ngā Whenua Rāhui programme, describes this as a ‘major paradigm difference between the “hands off” outlook of many in the conservation movement, and the continual interaction with the natural environment that is the way of Maori.’ He believed that Ngā Whenua Rāhui brought the best of Māori and conservation biology traditions together to work for the taonga species:

What the Nga Whenua Rahui experience illustrates is that when Maori land owners are given the opportunity to manage their lands and the biodiversity on those lands by drawing strongly on traditional management practices, as well as the resources of contemporary biodiversity management, the outcomes may be not only comparable, but in some cases well in excess of what is currently being achieved by current methodologies.²⁹⁷

We agree, therefore, with counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa that the Māori and preservationist approaches:

need not be so irreconcilable where respect is given to the common themes and imperatives of each, through a process of engagement. ‘Both use and preservation approaches demand the protection and enhancement of habitats and the restoration of some populations before they can be harvested sustainably . . . Kaitiakitanga and euro-centric conservation approaches therefore share many common themes and imperatives, and the outcomes are often mutually beneficial.’²⁹⁸

Throughout this chapter, we have set out recommendations for legislative, policy, and structural change. At the heart of these reforms is a recommendation for shared

decision-making about taonga in the environment, based on the Treaty principle of partnership. Those changes and the partnership approach they encompass have potential to provide for a new approach to conservation management – one that acknowledges the commonality between the preservationist approach and kaitiaki interests, and reconciles the differences, and that enhances conservation outcomes while protecting and supporting mātauranga Māori.

Such an approach would of course have the survival and regeneration of the environment as its primary concern, and it would harness both mātauranga Māori and te ao Pākehā’s conservation expertise to that end. In bringing mātauranga Māori into a genuine partnership, it would acknowledge the importance of human–environment relationships. The environment needs active protection; damaged ecosystems and vulnerable species will not recover and flourish without intervention. On this basis it would acknowledge, too, that both the preservationist philosophy and mātauranga Māori developed during times when the demands on the environment were very different. Neither is any longer a complete solution.

As a step towards this new approach, the partners should review the conservation legislation as a whole. At the core of this review will be the articulation and expression of what could be called ‘kaitiaki conservation’, an approach that synthesises the preservationist philosophy and mātauranga Māori, and that is based on genuine partnership between Crown and Māori involving the new models of decision-making and management that we set out earlier. To the extent that there are statutory constraints on the full exercise of kaitiakitanga, such a review could identify them and negotiate ways to remove them, so that DOC is left in no doubt that it can pursue creative approaches to fulfilling its section 4 obligations.

We recognise that this is not a trivial, nor a particularly easy shift for either party to make. But we are mindful that there has been no such fundamental debate since the Conservation Act was passed in 1987, and that many of the other Acts in this area are much, much older. Practice and attitudes amongst those who are active in this field have changed significantly in the time since the Conservation Act was passed; so has the environment itself. What we

heard from both sides convinced us that there is sufficient depth of thought and goodwill for this to succeed. Indeed, given DOC's reliance on community effort, and the potential to learn from mātauranga Māori, this approach can only benefit the taonga that are so precious to the department, the claimants, and indeed, all New Zealanders. As counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa put it:

the full involvement and expression of the perspective of Tangata Whenua in conservation management is vital to the well being and survival of the environment. It is now accepted conservation practice within the Department of Conservation itself that increased community involvement brings about increased conservation gains.²⁹⁹

In conclusion, then, we have found that the Crown is obliged by the Treaty of Waitangi to protect kaitiaki interests in taonga within the environment, and to carry out its functions in a manner that to the greatest extent practicable is consistent with the tino rangatiratanga of iwi and hapū.

Though we acknowledge the considerable effort that DOC has put into building relationships with tangata whenua, current conservation and wildlife legislation, and DOC policy and structures, fall short of what is required for Treaty compliance in several respects.

While we have recommended a number of remedies in this chapter, the central themes are the incorporation of mātauranga Māori into conservation management, and the development of partnership models to achieve that. The shared concern of kaitiaki and the rest of the community for the environment, along with the centrality of conservation taonga to Māori culture, convince us that this is the only way forward if the Crown is to fulfil its Treaty obligations.

In the time since DOC was established, the department and iwi have been moving – albeit tentatively – in this direction. For the most part, we are convinced that the partners are ready to go to the next stage, because the necessary changes for DOC are in structure, law, and policy rather than attitude. Our recommendations recognise that progress. They are aimed at moving things beyond the important principle that DOC should be

constantly talking to iwi about its work, toward the even more important principle of responsible power-sharing. Examples of the shift already exist locally in many parts of the country, but power-sharing is not yet part of the structure and culture of the entire organisation – especially not at head office in Wellington where iwi relationships are weakest and easily overshadowed by abstract fears about iwi intentions and capacity. That is why partnership structures should be established. The same goes for the changes we recommend for customary harvest and concessions. Together, all of these changes should encourage the partners to explore the new ground that will carry them forward.

Partnerships are not necessarily predicated on equal power. In this case, DOC will almost always be the more powerful partner, because it generally brings greater resources and a statutory mandate to the table. It is not equal power that is necessary for a successful partnership, but an equal investment in the ultimate success of the joint endeavour.

For the Crown, the joint endeavour in this instance is the mutual survival of mātauranga Māori, and land and species. For the department, stewardship of the DOC estate and protected species is about respecting the intrinsic value of that which remains to us, and offering New Zealanders – indeed the world – the opportunity to feel its wonder. For Māori, it is about those things and the survival of their own identity. Without the mātauranga Māori that lives in the DOC estate, kaitiakitanga is lost. Without kaitiakitanga, Māori are themselves lost. There may not be equal power, but there is certainly equal investment in the outcome. That is why, in our view, ultimately the partnership between DOC and Māori will prevail. In short, then, though the approaches we recommend may be challenging to some, they have the potential to deliver a win-win-win result for the Crown, iwi, and the environment.

4.9.1 Reforms

Throughout this chapter we have identified reforms that are needed in legislation, policy, and practice, based on Treaty principle. For convenience, our specific recommendations are set out here.



The ‘kaitiaki conservation’ approach we recommend requires the weaving together of two approaches to conservation – the preservationist approach and that of kaitiakitanga. This synthesis is reflected in the flight of the tūi, which is often likened to a stitching or weaving action.

Witness David Williams remarked on the unifying potential of the Wai 262 claim when recalling the tūi’s stitching action in this famous tauparapara:

*Whakarongo rā, Whakarongo ake au
Ki te tangi a te manu
E rere runga rawa e
Tui, tui, tui, tuia
Tuia i runga, Tuia i raro, Tuia i roto, Tuia i waho
Tui, tui, tuia*

I listen, I listen, where up high
A bird flies
Its cry rings out
Sew, stitch and bind it together
From above, from below, from within, from without
Sew and bind it together

(1) Partnership

In section 4.5.8, we said that partnership, as the guiding framework for all Treaty principles, must be seen in every aspect of DOC's work, and should be sought by the department at every opportunity. These partnerships can and should support the health of the environment *and* the tino rangatiratanga of iwi and hapū in the expression of their mātauranga and their kaitiaki relationships. This has implications for legislation, and for the department's policies and practices.

We recommend that partnerships be formalised through the establishment in statute of a national Kura Taiao Council and conservancy-based Kura Taiao boards. They should have responsibility for setting Kura Taiao strategies and plans at national and regional levels; the strategies should form part of the relevant conservation management strategies, and the plans should form part of any relevant conservation management plan or national park plan. Any inconsistencies would have to be worked through jointly between the relevant boards.

We also recommend a general review of conservation legislation, aimed at bringing together and reconciling the differing approaches to conservation represented by mātauranga Māori and te ao Pākehā. Such a review could identify and respond to any statutory barriers to genuine partnership and to the full exercise of kaitiakitanga.

We also recommend that the partnership principle be made a 'will' obligation in the CGP and General Policy for National Parks, as should the obligation to actively protect kaitiaki interests in taonga. Other DOC policies and practices should also encourage joint decision-making and management of taonga.

These recommendations provide an overall partnership framework in which decisions can be made about kaitiaki control, partnership, or influence in relation to individual taonga such as species, places, or landscape features. As we have said, there are many forms of partnership, and many interests at play in relation to each. In some cases the kaitiaki interest will be so significant as to justify outright control; in others, influence will be sufficient. For all, however, the starting point must be partnership.

The working principles for partnership in decision-making which we set out in section 6.8 in respect of protecting mātauranga Māori may assist DOC.

(2) Treaty principles

Though DOC has a statutory mandate to 'give effect to the principles of the Treaty, these principles are not adequately reflected in its key policies. Likewise, the CMRI guidelines, which apply to all government agencies, fail to reflect the full range of Treaty principles defined by courts and the Tribunal.

We recommend that the CGP and General Policy for National Parks be amended to reflect the full range of relevant Treaty principles as articulated by the Courts. While Treaty principles as articulated by the Waitangi Tribunal do not bind DOC as a matter of law, it would be unduly restrictive for the department to treat them as irrelevant to its work. They too must be given due consideration. We recommend that the policies be amended accordingly. In addition, as both the courts and the Tribunal have said Treaty principles are not set in stone: they can and must evolve to meet new circumstances. This too must be adequately reflected in general policies. Again, we recommend that the policies be amended accordingly.

The responsibilities set down in the CGP and other DOC policies should be amended to reflect this broader list of Treaty principles and to promote more open and creative approaches to Treaty relationships, in particular those based on the Treaty principle of partnership.

We further recommend that the CMRI guidelines be amended to allow statements of Treaty principle that reflect the full range of principles articulated by the courts and the Tribunal. We also recommend that the guidelines acknowledge that Crown policy instruments cannot override requirements that are set down by statute. (We acknowledge that the Executive has a role to play in providing guidance to government departments on the Treaty principles that are relevant to their functions, and will say more on this role in section 4.10.)

(3) Statutory co-management of customary use

We recommend that provision be made for full statutory co-management of customary use, by DOC as the Crown's representative and the pātaka komiti in each conservancy as representatives of kaitiaki. Joint decisions should be made on the basis of the following core principles: first, that survival of the species is paramount; and, secondly,

that iwi have a right to exercise kaitiakitanga and maintain their culture.

We recommend that the CGP and the General Policy for National Parks be amended to make customary harvest and access a 'will' responsibility provided appropriate conditions are satisfied, with a presumption in favour of customary practices, in contrast to the discretionary and preservationist approach that currently holds sway. We also recommend that these policies be amended to remove the requirement that there be 'an established tradition of such customary use at the place' before customary use may be permitted.

(4) Ownership of protected wildlife

In vesting ownership of protected wildlife in itself, the Crown ignored its obligations to safeguard kaitiaki interests in protected species. We recommend that the Wildlife Act be amended so that no one owns protected wildlife, and the Act should instead provide for shared management of protected wildlife species in line with the Treaty principle of partnership.

We also recommend that the Act be amended so that the Crown does not own taonga works derived from protected wildlife, but instead allows 'tangata whenua to have lawful ownership of the Taonga, crafted from natural materials, that sustain culture and tradition.'

(5) Commercial activity on the conservation estate

We recommend that DOC amend its policies and practices to give tangata whenua interests in taonga a 'reasonable degree of preference' when the department makes decisions about commercial activities in the conservation estate. As we explained, this is not a preference for all Māori, nor is it an overriding consideration; rather, what must be considered is the special relationship between tangata whenua and taonga within their rohe.

DOC should also formalise its policies for consultation of tangata whenua about concessions within their rohe.

4.9.2 A note on DOC's operating environment

Some of the reforms we outline above, such as the establishment of a Kura Taiao Council and boards, will involve commitment of resources. These recommendations are being made at a time when DOC's Crown funding is

declining and the department is reviewing its activities in order to meet the constraints imposed on it. In acknowledgement of the department's operating environment, the following points are relevant. First, our role in this context is to determine whether the department's operations are compliant with the Treaty and, by extension, with its own legislation. Where the department's operations are not Treaty compliant, we have made recommendations to remedy that. Our role is not to set departmental budgets.

Secondly, partnership need not be resource intensive. Though there are costs involved in establishing and maintaining partnerships, they may also harness external resources – such as volunteer time, expertise, finances, and land – to the benefit of conservation. Indeed, DOC is founded on the principle of community action precisely because the department cannot hope to fulfil its statutory mandate by acting alone. This principle is now being extended to the private sector, in the hope that businesses will take responsibility for conservation outcomes. Similarly, partnerships between DOC and iwi or hapū, which bring together mātauranga Māori and DOC science, Māori and DOC people, and resources such as land, skills, finance, and effort, can provide mutual benefit.

4.10 A FINAL WORD TO THE EXECUTIVE

There is one final strategic issue that should be considered which is essential to setting the framework for a transition to a New Zealand form of conservation. DOC told us that it was guided by the Executive's interpretation of the Treaty principles in interpreting section 4 and developing crucial documents such as the CGP. We acknowledge that they were acting under instruction; and we reject the validity of that instruction.

We have already described the failings of this approach. In order to remedy it, we consider that the Crown must look at the Treaty principles from a new angle. Rather than regarding the current list of principles as a menu from which to pick and choose, it is time to recognise that in the three or more decades that principles have been in development, they have taken on their own relative qualities. Some of them, like the Treaty itself, are always speaking; and, like the provisions of the Treaty, they must always be read together. As was originally suggested

would happen, they are changing with time. Some seem to have faded a little already; others burn brighter as the years pass.

It seems to us, at this time, that the principle of partnership provides the only context within which the principles of *kāwanatanga* and *rangatiratanga* can be understood. Their interdependence is clear. They will always qualify each other. It is hardly possible to conceive of any of these principles making sense in isolation, since each defines and balances the others. Many of the other principles – such as those concerning the duties to make informed decisions, to act reasonably, honourably, and in good faith, and the principles of reciprocity and mutual benefit – are the rules that govern the conduct of that partnership between *kāwanatanga* and *tino rangatiratanga*.

We invite the Crown to consider this approach. We can see nothing but good coming from some reflection on the operation of the principles at this time. And until this approach, or something like it is adopted, we cannot see how DOC, or indeed any government entity directed by Cabinet, can be empowered to act in a way that adequately implements the Treaty principles.

4.11 SUMMARY OF RECOMMENDATIONS

Most of the surviving examples of the natural environment in which *mātauranga Māori* evolved are under DOC control. The department's operations are thus of paramount importance to those wishing to exercise *kaitiakitanga* in relation to the environment, as provided for in the Treaty.

The Conservation Act 1987 contains one of the strongest legislative requirements for the Crown to give effect to its Treaty obligations. However, the principles of the Treaty, as they have been defined by the courts and by the Waitangi Tribunal, are not adequately reflected in DOC's guiding policies; and, as a result, they do not adequately infuse DOC's day-to-day work.

Given the importance of the environment under DOC control to the survival of the Māori culture, Treaty principle requires that partnership and shared decision-making between the department and *kaitiaki* must be the default

approach to conservation management. Within that overall partnership framework, decisions can be made case-by-case about management of individual *taonga*, taking into account the interests of *kaitiaki*, the interests of the *taonga* themselves, and other interests.

It is on this basis that we have formulated our recommendations for legislative, policy, and structural reform. Specifically:

1. *Partnership between DOC and iwi*: We recommend that partnership becomes a 'will' obligation under the CGP and the General Policy for National Parks; and that the principle that DOC's conservation mission should wherever practicable be achieved in a manner that is consistent with the *tino rangatiratanga* of *iwi* and *hapū* also becomes a 'will' obligation under these general policies. We recommend that partnership be formalised through the establishment in statute of a national Kura Taiao Council and conservancy-based Kura Taiao boards; and that these entities have responsibility for setting Kura Taiao strategies and plans at national and conservancy level, to form part of any relevant conservation management strategies or plans or national park plans. We further recommend that conservation legislation be reviewed with the aim of bringing together and reconciling the differing approaches to conservation management represented by *mātauranga Māori* and *te ao Pākehā*, and that such a review should identify and respond to any statutory barriers to *kaitiakitanga*.
2. *Treaty principles*: We recommend that the CGP and the General Policy for National Parks be amended to reflect the full range of Treaty principles that apply in law – that is, those articulated by the courts. While Treaty principles as articulated by the Tribunal do not bind the department as a matter of law, it would be unduly restrictive for the department to treat them as irrelevant to its work; accordingly, we recommend that they too be given due consideration. In addition, as both the courts and the Tribunal have said, Treaty principles are not set in stone. They can and must evolve to meet new circumstances. We

recommend that this, too, be adequately reflected in the general policies. We further recommend that the Crown–Māori Relationship Instruments guidelines also be amended to allow statements of Treaty principle that reflect the full range of principles defined by the courts and the Tribunal. We also recommend that the guidelines acknowledge that Crown policy instruments cannot override requirements that are set down by statute.

3. *Co-management of customary use:* We recommend that provision be made for full, statutory co-management of customary use by DOC and by pātaka komiti as representatives of kaitiaki. They should make joint decisions. We recommend that the CGP and the General Policy for National Parks both be amended to make customary harvest and access a ‘will’ responsibility provided appropriate conditions are satisfied, with a presumption in favour of customary practices rather than mere case-by-case discretion; and that those policies be amended to remove the requirement that there be ‘an established tradition of such customary use at the place’ before customary use may be permitted.
4. *Ownership of protected wildlife:* We recommend that the Wildlife Act be amended so that no one owns protected wildlife, and that the Act instead provides for shared management of protected wildlife species in line with the partnership principle. We also recommend that the Act be amended so that the Crown does not own taonga works derived from protected wildlife, but instead allows ‘tangata whenua to have lawful ownership of the Taonga, crafted from natural materials, that sustain culture and tradition.’
5. *Commercial activity on the conservation estate:* We recommend that DOC policies and practices be amended to give tangata whenua interests in taonga a ‘reasonable degree of preference’ when the department makes decisions about commercial activities in the conservation estate. We also recommend that DOC formalise its policies for consultation with tangata whenua about concessions within their rohe.

Text notes

1. Document κ2 (Robert McClean and Trecia Smith, ‘The Crown and Flora and Fauna: Legislation, Policies, and Practices, 1983–98’, report commissioned by the Waitangi Tribunal, 2001), p 728
2. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 554 (CA)
3. Section 16(1) provides ‘Notwithstanding anything in the State-Owned Enterprises Act 1986 but subject to the Public Works Act 1981, no conservation area or interest in a conservation area shall be disposed of except in accordance with this Act.’ Section 26 provides that the Minister may dispose of stewardship areas – that is, conservation areas that are not a marginal strip, a water-course area, conservation park, an ecological area, a sanctuary area, or a wilderness area – subject to public consultation. Other restrictions apply to the sale of land administered under other Acts, such as reserves.
4. Department of Conservation, *Annual Report for the Year Ended 30 June 2009* (Wellington: Department of Conservation, 2009), p 9
5. Document ρ8 (Doris Johnston, brief of evidence on behalf of Department of Conservation, 21 November 2006, appendix 9), pp 6–7
6. Department of Conservation, *Annual Report for the Year Ended 30 June 2009*, pp 10, 93
7. Department of Conservation, *Annual Report for the Year Ended 30 June 2007* (Wellington: Department of Conservation, 2007), p 128; doc ρ13 (Jonathan Maxwell, evidence on behalf of Department of Conservation, 21 November 2006), p 7; paper 2.513 (Crown counsel, memorandum providing further information), 1 October 2009, p 6
8. For examples of Tribunal-commissioned reports providing such detail in the Wai 262 inquiry, see doc κ3 (David Williams, ‘Crown Policy Affecting Maori Knowledge Systems and Cultural Practices’, report commissioned by the Waitangi Tribunal), pp 19–25, 245–388; doc κ5 (Cathy Marr, Robin Hodge, and Ben White, ‘Crown Laws, Policies and Practices in Relation to Flora and Fauna, 1840–1912’, report commissioned by the Waitangi Tribunal).
9. Document s3 (Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, closing submissions, 5 September 2007), pp 223–224
10. Document p3 (Haami Piripi, brief of evidence, 11 August 2006), pp 8–9
11. *Te Rūnanga o Te Rarawa and Her Majesty the Queen in Right of New Zealand: Agreement in Principle for the Settlement of the Historical Claims of Te Rarawa* ([Wellington: Office of Treaty Settlements], 2007), p 8

12. 'Land Gets Iwi Cloak,' *Northern News*, 13 May 2009, p 1, <http://www.stuff.co.nz/auckland/northland/local-news/northern-news/2402004/Land-gets-iwi-cloak> (accessed 29 July 2010)
13. Document R12(g) (Department of Conservation and Ngāti Wai Trust Board, 'Protocol for the Management of Whale Strandings in Ngatiwai rohe', 29 July 1998); doc R12(h) (Department of Conservation and Ngatiwai Trust Board, 'Protocol for the Management of Marine Mammal Strandings in Ngatiwai rohe', 2004)
14. Laly Haddon, oral evidence on behalf of Ngāti Wai, 1st hearing, 17 September 1997, tape 6, pp 9–10 (transcript 4.1.1, pp 111–112)
15. Document R8(u) (Department of Conservation, *Domestic Trade in Whale Bone from Whales Stranded in NZ and a Framework for the Role of Māori in the Management of Whale Strandings* (Wellington: Department of Conservation, 2007)), p 9
16. Brad Coombes, 'Postcolonial Conservation and Kiekie Harvests at Morere New Zealand – Abstracting Indigenous Knowledge from Indigenous Politics', *Geographical Research*, vol 45, no 2, June 2007, pp 186–193, pp 190–191; doc R14 (Peter Williamson, brief of evidence on behalf of the Department of Conservation, 21 November 2006), p 12
17. Document R14, p 13
18. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (Wellington: Legislation Direct, 2008), pp 1306–1307; Ross Galbreath and Derek Brown, 'The Tale of the Lighthouse-Keeper's Cat: Discovery and Extinction of the Stephens Island Wren (*Traversia lyalli*)', *Notornis*, vol 51, no 4, 2004, pp 193–200; D G Medway, 'The Land Bird Fauna of Stephens Island, New Zealand in the Early 1890s, and the Cause of its Demise', *Notornis*, vol 51, no 4, 2004, pp 201–211; Department of Conservation, 'Application for tours to Stephens Island/Takapourewa declined', Department of Conservation, <http://www.doc.govt.nz/about-doc/news/media-releases/2007/application-for-tours-to-stephens-island-takapourewa-declined/> (accessed 6 August 2010)
19. Document P38 (Benjamin Hippolite, brief of evidence, 14 August 2006), p 4
20. Document D6 (Haana Murray, brief of evidence), pp 7–8
21. Document R13, p 8
22. Ibid, pp 8–9
23. Document D6, pp 8, 10. Her contemporary concern related to access to the scientific reserve. She also expressed concern about past land alienation and past Crown policies that had led to destruction of pūpū harakeke habitats.
24. Document P6 (Nellie Norman, brief of evidence, 11 August 2006), p 2
25. Document I20 (Abel [Apera] George Clark, brief of evidence, undated), p 20
26. Document P28 (Connie Pewhairangi, brief of evidence, 16 August 2006), p 4
27. Document H11 (Benjamin Hippolite, brief of evidence on behalf of Ngāti Koata, undated), pp 4–5; doc H10 (Puhanga Tupaea, brief of evidence on behalf of Ngāti Koata, undated), p 19
28. Crown counsel contended that the Crown asserts ownership over wildlife so it can manage and protect the species and address the 'inherent complexity of common law norms relating to property in undomesticated animals' (doc T1 (Crown counsel, closing submissions, 21 May 2007)), p 64. For example, under common law, the landowner owned baby wild animals, but only until they could fly or run away. After that no one owned them, unless they captured them on their own land (doc K5, pp 62–63, 83, 405), thus making it impossible for anyone to protect or manage them in the wild. See also doc T2 (Crown counsel, closing submissions, 21 May 2007), pp 106–110.
29. Document D3 (Niki Lawrence, brief of evidence), p 11
30. Document H14 (Kathleen Hemi, brief of evidence, for hearing 6–10 November 1999), p 12
31. Ibid, pp 12–13
32. Brad Coombes, 'Postcolonial Conservation', p 191
33. Phil Aspinall, oral evidence on behalf of Ngāti Porou, 5th hearing, 13 August 1998 (transcript 4.1.5, p 372)
34. Document D4 (Rapine Murray, brief of evidence on behalf of Ngāti Kuri, undated), p 9
35. Rapine Murray, oral evidence on behalf of Ngāti Kuri, under questioning by Keita Walker, 4th hearing, 23 June 1998 (transcript 4.1.4, p 236)
36. Document H15 (Ruruku Hippolite, brief of evidence, for hearing 6–10 November 1999), p 11
37. Document H16 (James Elkington, brief of evidence, for hearing 6–10 November 1999), pp 8–9
38. Document I20, p 20
39. Document H10, p 16
40. Document S3, p 228
41. Jared M Diamond, 'Distributions of New Zealand Birds on Real and Virtual Islands', *New Zealand Journal of Ecology*, vol 7 (1984), p 49
42. Roy Pilott, 'Mammal Mafia Waging War on Native Birdlife', *Waikato Times*, 5 December 2009. For further information see John Innes, Dave Kelly, Jacob McC Overton, and Craig Gillies, 'Predation and Other Factors Currently Limiting New Zealand Forest Birds', *New Zealand Journal of Ecology*, vol 34, no 1 (2010), pp 86–114.
43. Department of Conservation, 'New Zealand Native Pests and Threats: Pacific Rat Facts', Department of Conservation, <http://>

- www.doc.govt.nz/conservation/threats-and-impacts/animal-pests/animal-pests-a-z/rats/facts/pacific-rat/ (accessed 30 June 2009).
44. Te Tiaki Mahinga Kai, 'Toheroa', Te Tiaki Mahinga Kai, <http://www.mahingakai.org.nz/mahinga-kai-species/toheroa> (accessed 30 June 2009)
 45. Document R8, pp 28–29
 46. Document R8(d) (Wren Green and Bruce Clarkson, *Turning the Tide? A Review of the First Five Years of the New Zealand Biodiversity Strategy: the Synthesis Report*, report submitted to the Biodiversity Chief Executives, 2005), pp 18–19. The authors go on to note that '77% of the acutely or chronically threatened species still lack targeted recovery work and are most likely in decline. The inability to deal with these "priority" species appears to be due to a lack of resources.'
 47. Document R8, p 29
 48. Miskelly et al, 'Conservation Status of New Zealand Birds', p 123
 49. Document R8(c) (Department of Conservation and Ministry for the Environment, *New Zealand Biodiversity Strategy* (Wellington: Department of Conservation and Ministry for the Environment, 2000)), p 2
 50. Miskelly et al, 'Conservation Status of New Zealand Birds', p 123
 51. Te Tiaki Mahinga Kai, 'Toheroa', Te Tiaki Mahinga Kai, <http://www.mahingakai.org.nz/mahinga-kai-species/toheroa> (accessed 19 May 2009)
 52. Document D2 (Rapata Romana, brief of evidence), pp 3–4
 53. Royal Forest and Bird Protection Society, 'Groups Join Forces to Save the Longfin Eel', media release, Royal Forest and Bird Protection Society, 25 November 2009, <http://www.forestandbird.co.nz/what-we-do/publications/media-releases/groups-join-forces-save-the-longfin-eel> (accessed 24 June 2010)
 54. Document P3, p 7
 55. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA)
 56. Document I17 (Wero Karena, brief of evidence, undated), pp 11–12
 57. Document K5, pp 306–313
 58. Document K4, pp 246, 317. See also Feldman on generations of tension over customary harvest; Feldman notes that 'Today's conflict over management of the kereru and other native birds has deep roots. Many of the issues currently contentious first arose over a hundred years ago': doc K7 (James Feldman, 'Treaty Rights and Pigeon Poaching: Alienation of Maori Access to Kereru, 1864–1960', report commissioned by the Waitangi Tribunal, 2001), p 1.
 59. Document S3, p 161
 60. Ibid, p 276. Hema Nui a Tawhaki Witana's confidential evidence is quoted in the closing submissions of counsel for the Te Tai Tokerau claimants.
 61. Document A20 (New Zealand Conservation Authority, 'Maori Customary Use of Native Birds, Plants and other Traditional Materials', interim report and discussion paper, 1997), p 12. We introduce the NZCA below.
 62. David Young, *Our Islands, Our Selves: A History of Conservation in New Zealand* (Dunedin: Otago University Press, 2004), p 216
 63. *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 656 (CA)
 64. Document T2, p 77
 65. Document R8(a) (Department of Conservation, *Conservation General Policy* (Wellington: Department of Conservation, 2005)), pp 8–9
 66. Ibid, pp 5–6
 67. Ibid, pp 3, 65–68
 68. Ibid, p 12
 69. Ibid, pp 3–4
 70. Ibid, p 14
 71. Ibid, pp 16–17
 72. Ibid, p 27. We note that 'participate in' can be construed either as genuine involvement in decision-making, or as mere consultation.
 73. Ibid, p 46
 74. Ibid, pp 26, 49
 75. Ibid, pp 24–25
 76. Ibid, p 15; Alan Ward, *National Overview*, 3 vols, Rangahaua Whanui Series (Wellington: GP Publications, 1997), vol 2, pp 493–494
 77. Document R8(a), p 60
 78. Document R8, pp 7–8, 12–13
 79. New Zealand Conservation Authority, *General Policy for National Parks* (Wellington: New Zealand Conservation Authority, 2005), pp 15–16. There are minor editorial differences, and different wording to reflect the scope of each policy. For example, in the CGP, policy 2(a) reads 'Relationships with tangata whenua will be sought and maintained to enhance conservation', whereas in the General Policy for National Parks, policy 2(a) reads 'Relationships with tangata whenua will be sought and maintained to maintain and support national parks.' Also, the CGP says that DOC will 'participate in and implement' Treaty settlements whereas the national parks policy says only that DOC will 'implement' settlements.

80. New Zealand Conservation Authority, *General Policy for National Parks*, pp 29, 32, 35, 56–57
81. Document R8(m) (Te Puni Kōkiri and Ministry of Justice, *Crown–Māori Relationship Instruments: Guidelines and Advice for Government and State Sector Agencies* (Wellington: Te Puni Kōkiri, 2006), pp 2, 5
82. *Ibid*, p 2
83. *Ibid*, p 4
84. *Ibid*, p 23
85. *Ibid*, p 36
86. *Ibid*, pp 36–37
87. Document S3, p 224
88. Document S1 (Counsel for Ngāti Kahungunu, closing submissions, 16 April 2007), p 59; doc S3, pp 137–138; doc S6 (Counsel for Ngāti Porou, closing submissions, 23 April 2007), p 67
89. Document S4 (Counsel for Ngāti Koata, closing submissions, 18 April 2007), pp 79–80
90. Document R8(a), p 60. The *Conservation General Policy* definition, as we said earlier, is ‘as identified from time to time by the Government of New Zealand.’
91. Document S2 (Counsel for Ngāti Kahungunu, closing submissions, 16 April 2007), p 94
92. *Ibid*, pp 94–95; doc S3, p 138
93. Document T2, p 78
94. *Ibid*, p 71
95. *Ibid*, p 72
96. *Ibid*, p 70
97. *Ibid*, pp 72–73
98. Te Puni Kōkiri, *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Wellington: Te Puni Kōkiri, 2001), p 16
99. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 642, 656 (CA)
100. *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 656 (CA)
101. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 550 (CA)
102. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 562 (CA)
103. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 561 (CA)
104. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 558 (CA). The Court of Appeal addressed section 4 again in the *McRitchie* case, but only very briefly in the majority judgment, which is essentially silent on the implications of section 4 in respect of any potential reconciliation between the rights and obligations contained in articles 1 and 2 of the Treaty. See *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 (CA).
105. Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), p 58
106. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Brooker & Friend Ltd, 1991), p 232
107. Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), p 60
108. Alan Ward, *National Overview*, 3 vols, Rangahaua Whanui Series (Wellington: GP Publications, 1997), vol 2, pp 475–494. The *Manukau* and *Te Reo Maori* reports referred to active protection (p 484). The *Manukau* report referred to good faith (p 484) and this was reinforced in the *Ngai Tahu Sea Fisheries Report 1992* which recognised the Treaty as a partnership in which both parties act towards each other ‘reasonably and with the utmost good faith’ (pp 486–487). The principle of active protection has been developed in several reports, including the *Te Reo Maori*, *Ngai Tahu Sea Fisheries*, and *Ngawha Geothermal Resources* reports (p 488).
109. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 558 (CA)
110. Matthew Palmer, *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Wellington: Victoria University Press, 2008), pp 85–88
111. Both documents refer to partnerships, but not as a Treaty principle. The CGP, in explanatory notes in chapter 2, refers to ‘[e]ffective partnerships with tangata whenua’ (p 15), while part 2(b) encourages ‘[p]artnerships to enhance conservation and to recognise mana’ (p 16). The CMRI is distinctly lukewarm about partnerships, noting that ‘Māori may see the partnership inherent in the Treaty of Waitangi as the basis for the agreement’ (p 11), but warning that “‘Partnership” in particular can mean many different things and should generally be avoided in CMRI, if it is used it should be defined very carefully’ (p 15): doc R8(a), pp 15, 16; doc R8(m), pp 11, 15.
112. Doris Johnston, under cross-examination by counsel for Ngāti Kahungunu, 19th hearing, 15 December 2006 (transcript 4.1.19, p 307)

113. Doris Johnston, under cross-examination by counsel for Ngāti Kahungunu, 19th hearing, 14 December 2006 (transcript 4.1.19, pp 311–312)
114. Conservation Act 1987, s 6D
115. Department of Conservation, ‘Kaupapa Atawhai role’, Department of Conservation, <http://www.doc.govt.nz/about-doc/role/maori/kaupapa-atawhai-role/> (accessed 26 April 2011).
116. Ibid. Pou Kura Taiao were originally known as Kaupapa Atawhai Managers. The name was changed after a kaumatua objected to the mixture of English and Māori in that title.
117. Ibid.
118. Document R8, p 5
119. Document P38, p 3
120. Document R14, p 9
121. Document R8(g) (Director-General of Conservation, ‘Kaupapa Atawhai Strategic Direction: Outcomes for DOC Work with Tangata Whenua’ (Wellington: Department of Conservation, 2006))
122. Document R8, pp i–xviii
123. Ibid, pp 27, iii
124. Document R8, pp 26–27
125. In 2009, DOC confirmed ‘that there has been no material change to the content or status of the document since the Crown brought this document to the Tribunal’: paper 2.513, p 7
126. Document R8, p 27
127. Ibid, p iv
128. Section 53(2)(i) of the Conservation Act authorises the Director-General to enter into contracts or agreements that are needed to enable the department to fulfil its functions (which include the requirement to administer legislation to give effect to Treaty principles).
129. Document R8, pp xi–xx
130. Ibid, pp iii–iv, x–xvii
131. Document R8(i) (Department of Conservation, ‘Consultation Policy’, undated), p 2
132. Ibid, p 3
133. Ibid, p 7; doc R8(j) (Department of Conservation, ‘Consultation Guidelines’, undated), p 4
134. Document R8(j), p 4
135. Ibid, p 16. The rights and responsibilities also cover matters such as consultation timeframes, content, information, and methods of input such as submissions and hui.
136. Ibid, pp 21–23 (Refers to the second set of pages marked pp 17–19 in the document.)
137. Document R8(m), p 24
138. Document R8(m), p 24
139. Ibid, p 17. CMRI can be legally binding when ‘circumstances require’; the only circumstance anticipated in the guidelines is a contract for service, and even here the advice is to have a separate contract and a non-binding CMRI.
140. Ibid, p 24. The committee comprises officials from the Ministry of Justice and Te Puni Kōkiri.
141. Ibid, p 25
142. Document R8, pp iii, ix, xviii
143. United Nations/United Nations Environment Programme, Convention on Biological Diversity, ‘List of Parties’, <http://www.cbd.int/information/parties.shtml> (accessed 10 September 2009)
144. United Nations/United Nations Environment Programme, *Report of the Workshop on Traditional Knowledge and Biological Diversity* (UNEP/CBD/TKBD/1/3) (New York: United Nations, 1997), p 3
145. United Nations, Article 8 of the Convention on Biological Diversity, United Nations, <http://www.cbd.int/convention/convention.shtml> (accessed 26 August 2010)
146. Article 6 of the convention states:

Each Contracting Party shall, in accordance with its particular conditions and capabilities:

(a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and

(b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.
147. Document K2, p 704; Minister of Conservation, ‘Biodiversity Funding Aims to Prevent Extinction and Promote Restoration of Endangered Species’ (media release, Wellington, 8 June 2000)
148. Document R8(c) (Department of Conservation and Ministry for the Environment, *New Zealand Biodiversity Strategy* (Wellington: Ministry for the Environment, 2000)), pp 2, 10

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149. Document R8(c), p 5
150. Ibid, p 7
151. Ibid, pp 93, 95
152. Department of Conservation, 'Briefing to the Incoming Minister of Conservation 2008', Department of Conservation, <http://www.doc.govt.nz/publications/about-doc/archive/briefings-to-new-ministers/briefing-to-the-new-minister-of-conservation-2008/> (accessed 19 August 2010), p 29
153. Document K2, p 200; Department of Conservation, 'Matauranga Kura Taiao Fund: Nga Whenua Rahui', Department of Conservation, <http://www.doc.govt.nz/getting-involved/volunteer-join-or-start-a-project/start-or-fund-a-project/funding/for-landowners/nga-whenua-rahui/matauranga-kura-taiao-fund/> (accessed 13 January 2010)
154. Paper 2.513, pp 2–3
155. Te Puni Kōkiri, *Annual Report for Year Ended 30 June 2009* (Wellington: Te Puni Kōkiri, 2009), p 26
156. The Nature Heritage Fund was established by DOC in 1990 to protect indigenous forest ecosystems; its scope was subsequently widened to include non-forest ecosystems: Department of Conservation, 'Nature Heritage Fund', Department of Conservation, <http://www.doc.govt.nz/getting-involved/volunteer-join-or-start-a-project/start-or-fund-a-project/funding/for-landowners/nature-heritage-fund/> (accessed 19 August 2010).
157. Department of Conservation, 'Nga Whenua Rahui Fund', Department of Conservation, <http://www.doc.govt.nz/getting-involved/volunteer-join-or-start-a-project/start-or-fund-a-project/funding/for-landowners/nga-whenua-rahui/nga-whenua-rahui-fund/> (accessed 30 June 2010)
158. Document R8, p 22
159. Document R8(e) (Ngā Whenua Rāhui Komiti, *Whatungarongaro he Tangata, Toitu he Whenua: 'Man Disappears, the Land Endures'* (Wellington: Ngā Whenua Rāhui Komiti, undated)), pp 6–7
160. Ibid
161. Department of Conservation, *Annual Report for the Year Ended 30 June 2009*, p 124
162. Ministry for the Environment, *Legally Protected Conservation Land in New Zealand: Environmental Snapshot, April 2010* (Wellington: Ministry for the Environment, 2010), p 2
163. Queen Elizabeth II National Trust, *Annual Report 2009* (Wellington: Queen Elizabeth II National Trust, 2009), pp 1, 3, 12
164. The fund is part of the New Zealand Biodiversity Strategy which, according to DOC, 'gives recognition to tangata whenua and matauranga Maori in biodiversity management'. Any iwi or hapū representative organisation may apply to the fund for assistance with biodiversity projects that foster the retention and transmission of traditional knowledge: Department of Conservation, 'Matauranga Kura Taiao Fund', Department of Conservation, <http://www.doc.govt.nz/getting-involved/volunteer-join-or-start-a-project/start-or-fund-a-project/funding/for-landowners/nga-whenua-rahui/matauranga-kura-taiao-fund/> (accessed 23 December 2009).
165. Document R8(e), p 8
166. Ibid
167. Department of Conservation, 'Matauranga Kura Taiao Fund', Department of Conservation, <http://www.doc.govt.nz/getting-involved/volunteer-join-or-start-a-project/start-or-fund-a-project/funding/for-landowners/nga-whenua-rahui/matauranga-kura-taiao-fund/> (accessed 23 December 2009)
168. Paper 2.513, p 4
169. Document R8(e), p 31. DOC witnesses from Te Tai Tokerau and Auckland, and East Coast/Hawkes Bay and Wellington conservancies also appended details of projects funded by the Mātauranga Kura Taiao Fund in their respective areas: doc R12 (Michael Gardiner and Rolien Elliot, joint brief of evidence on behalf of Department of Conservation, 21 November 2006), pp vii–ix; doc R14, pp 33–36.
170. Paper 2.513, p 4
171. Department of Conservation, 'Ngāti Awa Deed of Settlement', Department of Conservation, <http://www.doc.govt.nz/about-doc/role/maori/settlements/ngati-awa/> (accessed 1 July 2010); Ngāti Porou and Te Runanganui o Ngāti Porou Trustee Limited as Trustee of Te Runanganui o Ngāti Porou and the Crown, *Deed of Settlement of Historical Claims* ([Wellington: Office of Treaty Settlements], 2010), p 49. The Ngāti Porou Claims Settlement Bill was introduced to Parliament on 15 February 2011.
172. *Ngāti Pahauwera and the Crown: Agreement in Principle for the Settlement of Historical Claims and Foreshore and Seabed Claims of Ngāti Pahauwera* ([Wellington: Office of Treaty Settlements], 2008), p 10; *Ngāti Toa Rangitira Letter of Agreement* ([Wellington: Office of Treaty Settlements], 2009), p 9
173. Ngāti Porou and Te Runanganui o Ngāti Porou Trustee Limited as Trustee of Te Runanganui o Ngāti Porou and the Crown, *Deed of Settlement of Historical Claims* ([Wellington: Office of Treaty Settlements], 2010), pp 51–52; *Ngāti Whare and the Sovereign in Right of New Zealand: Deed of Settlement of Historical Claims* ([Wellington: Office of Treaty Settlements], 2009), p 23
174. *Tainui Taranaki ki te Tonga Letter of Agreement* ([Wellington: Office of Treaty Settlements], 2009), pp 11–12
175. Ibid; *Ngāti Toa Rangitira Letter of Agreement* ([Wellington: Office of Treaty Settlements], 2009), pp 9–10
176. For example, see Te Uri o Hau Claims Settlement Act 2002, ss 39–45.

177. Conservation Act 1987, s17B; Office of the Minister for the Environment, *Progress of Phase Two of the Resource Management Reforms*, Cabinet paper, 2009; Department of Conservation, 'Department of Conservation's Statutory Planning Process – why would DOC submit on my resource consent application?', <http://www.doc.govt.nz/publications/about-doc/role/policies-and-plans/docs-statutory-planning-processes/what-doc-doesnt-do/why-would-doc-submit-on-my-resource-consent-application/> (accessed 10 November 2010)
178. *Tainui Taranaki ki te Tonga Letter of Agreement* ([Wellington: Office of Treaty Settlements], 2009), pp 11–12, 19; *Crown Settlement Offer to Ngāti Porou* ([Wellington: Office of Treaty Settlements], 2009), pp 2, 5–7; Ngāa Rauru Kaitiaki Claims Settlement Act 2005, sch 3
179. Customary taking of tūi in other areas is by DOC permit only (doc R8, p xxvii). To further extend the cultural management of the area, mataitai reserves were approved by the Ministry of Fisheries in July 2010 for the waters around three of the islands. Mataitai reserves allow tangata whenua to manage the fisheries in those areas: 'Mataitai being Assessed', *Otago Daily Times*, 12 July 2010.
180. *Kurahaupō ki Te Waipounamu Letter of Agreement* ([Wellington: Office of Treaty Settlements], 2009), p 30
181. *Te Rūnanga o Te Rarawa and Her Majesty the Queen in right of New Zealand: Agreement in Principle for the Settlement of the Historical Claims of Te Rarawa* ([Wellington: Office of Treaty Settlements], 2007), p 8; *Crown Settlement Offer to Ngāti Porou* (Wellington: Office of Treaty Settlement], 2009), p 3
182. Ngai Tahu Claims Settlement Act 1998, s 293
183. Document s1, p 72
184. Document s1, pp 72, 91–92
185. Document s3, p 40
186. *Ibid*, p 250
187. Document H7 (Counsel for Ngāti Koata, opening submissions for hearing 6–10 December 1999), p 3
188. Document T2, p 70
189. Doris Johnston, oral evidence on behalf of DOC, under cross-examination by claimant counsel, 19th hearing, 15 December 2006 (transcript 4.1.19, p 382)
190. Document s2, p 98
191. Document s3, p 225
192. Document s6(a) (Counsel for Ngāti Porou, closing submissions, answers to statement of issues), p 35
193. Paper 2.513, p 5
194. Document T2, p 76
195. Document s1, p 62
196. Document s4, p 81
197. Document s6, p 68
198. Document s1, p 59
199. Document T2, p 70
200. Document s2, pp 100, 103–104
201. Document s3, pp 227–228
202. Document s6(a), p 35
203. Document s3, p 258
204. Document T2, pp 74, 75
205. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA)
206. Doris Johnston, oral evidence on behalf of DOC, under cross-examination by claimant counsel, 19th hearing, 15 December 2006 (transcript 4.1.19, pp 375, 392)
207. Document R13, pp 9–14. As an example of this, DOC told us that the movement of toilets and a carpark away from the spiritual pathway at Te Rerenga Wairua, and the planting of 50,000 trees to restore the area, had been partly dependent on 'Ngāti Kuri supplying the land for the nursery, the people power and the buy in and drive to get the mahi done'.
208. Document s3, p 200
209. Document P38, p 3
210. Document R8(m), p 39
211. Document R8(d), p 38. We note that the review of the New Zealand Biodiversity Strategy reached the same conclusion in 2005.
212. Document R8(a), p 55; paper 2.479 (Crown counsel, memorandum updating information provided by Government departments, 14 March 2008), p 2
213. Document K2, pp 407–408
214. Document R12(f) (Department of Conservation, *Conservation Management Strategy: Northland Conservancy, 1999–2009* (Wellington: Department of Conservation, 1999)), pp 170–173, p 3; doc K2, p 472
215. *Ibid*, p 4
216. Conservation Act 1987, s 170
217. Wildlife Act 1953, sch 1–5
218. Wildlife Act 1953, ss 53, 63
219. Wildlife Act 1953, s 57
220. Document R4 (Terence Lynch, brief of evidence on behalf of the Ministry of Fisheries, 21 November 2006), p 5
221. Conservation Act 1987, s 26ZH

222. Ngai Tahu Claims Settlement Act 1998, s 296
223. Department of Conservation, *Conservation General Policy*, amended ed (Wellington: Department of Conservation, 2007), p 16
224. Department of Conservation, *Conservation General Policy*, amended ed (Wellington: Department of Conservation, 2007), pp 16, 21–22. Both parts were amended in 2007, changing the words ‘Non-commercial customary use’ to ‘Customary use’. The Minister of Conservation made this change after the NZCA had made the same change in the General Policy for National Parks.
225. Department of Conservation, *Conservation General Policy* (2007), p 25
226. New Zealand Conservation Authority, *General Policy for National Parks*, pp 15–16 (amendment published 2007). In an explanatory note, the policy says that customary use may be authorised either by the Minister of Conservation as a consent under section 5 of the National Parks Act or as a concession under section 49. The NZCA amended the policy in 2007, changing the words ‘non-commercial customary use’ to ‘customary use’, following representations from Ngāi Tahu: paper 2.479, p 2. Crown counsel also advised that to the: ‘Introductory text to Policy 2(g), under the heading Treaty of Waitangi Responsibilities, has been added: “Customary use of traditional materials and indigenous species may be authorised under a variety of different statutory provisions, such as section 17Q and section 30 of the Conservation Act 1987, depending on the nature of the use. Other consents may be required.”’ Also see New Zealand Conservation Authority, *General Policy for National Parks* (Wellington: New Zealand Conservation Authority, 2005).
227. Document R8(n) (Department of Conservation, *Customary Use of Indigenous Plants, Animals and Traditional Materials: Policy Guidelines* (Wellington: Department of Conservation, 2006)). In October 2009 the Crown advised that no further work was planned on this document or on customary use policy (paper 2.513, p 9). Note that material from marine mammals is not addressed in the policy guidelines document.
228. Document R8(n), p 1
229. Ibid, p 2
230. Ibid, p 1
231. Ibid, pp 1, 2, 3
232. Ibid, pp 3, 7
233. Paper 2.513, p 9
234. Document R8(c), pp 2, 10
235. Ibid, p 98
236. Document R8(u) (Department of Conservation, *Domestic Trade in Whale Bone from Whales Stranded in New Zealand and a Framework for the role of Māori in the Management of Whale*
- Strandings: Public Discussion Paper* (Wellington: Department of Conservation, 2007)), p 3
237. Ibid
238. Paper 2.513, p 8
239. Ibid, p 9
240. Document K2, p 463
241. Ibid, pp 463–464
242. Document A20, pp 83–99, 145–148. See also doc K2, pp 464–465; doc R8(n), pp 4, 6. The customary use discussion document attracted 380 submissions.
243. Document A20, pp 31–35. The NZCA report on customary use provides a useful summary of the forms of committees and other systems used in 1996 and 1997.
244. Ibid, p 32. Note that the NZCA report dates from 1997. We have no reason to believe that the regime has changed in the period since then, although we note that the East Coast conservancy boundaries have changed, with East Coast being decoupled from Hawke’s Bay and joined to Bay of Plenty. Hawke’s Bay has been joined to Wellington.
245. Document R12, pp 19–20
246. Document T2, p 101
247. Document T1, p 12; doc T2, p 48
248. Document T2, p 103
249. Document A15(d), pp 1343–1344 (Kevin Smith, ‘There Has to be a Better Way’, *Forest & Bird*, no 271 (February 1994), p 15)
250. Document A15(e), p 2049–2052 (Shane D Wright, Graham Nugent, and Hori G Parata, ‘Customary Management of Indigenous Species: A Maori Perspective’, *New Zealand Journal of Ecology*, vol 19, no 1 (1995), p 85). See also Ngāti Wai Trust Board, Resource Management Unit, *Te Iwi o Ngatiwai: Ngatiwai Environmental Policy Document* (Whangarei: Ngāti Wai Trust Board, 2007), pp 39, 43. This policy stipulates all native trees over three metres in height are to be protected. Objectives for fauna include ‘the maintenance and restoration of natural species’ and ‘the enhancement of endemic and endangered indigenous animals.’
251. Document K8 (James Elkington, brief of evidence, 5 February 2002), p 12. Muttonbirds are a migratory species and are in decline due to the deterioration of habitats in overseas jurisdictions.
252. Document A15(d), p 1344
253. Another irony is that, in the fisheries area, the hands-off approach has never prevailed, regardless of the existence of marine reserves. Management has always been designed around use of the fishery in some way. Māori, for their part, have never applied such a distinction.

254. Document D4, p 9
255. Research by DOC, Landcare Research, universities, and other groups has found that kererū are in danger of becoming extinct in Northland through the combined effects of predation, competition, and continued hunting: Department of Conservation, 'Threats to New Zealand Pigeon', Department of Conservation, <http://www.doc.govt.nz/conservation/native-animals/birds/land-birds/NZ-pigeon-kereru/threats/> (accessed 24 April 2009).
256. Customary use has also been considered by other Waitangi Tribunal inquiries, with similar conclusions. The Te Tau Ihu Tribunal concluded that the Crown and claimants should negotiate arrangements for the exercise of customary rights in the conservation estate, and that 'The goal of such negotiations would be a true partnership between the kawanatanga authority of the Crown and the tino rangatiratanga of the Te Tau Ihu tribes. Compromise would be necessary on both sides. DOC is already willing to accept some sustainable use of plant and animal resources on Crown land . . . What it must also do is share decision-making about it. Iwi, on the other hand, have to accept – as the Rekohu Tribunal found – that the conservation of species for the future has priority over customary takes. Given the many tangata whenua witnesses who stressed their support for the conservation of resources for future generations and the need for customary use to be truly sustainable, we think that there is enough common ground to make joint decision-making work.' Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui: Report on the Northern South Island Claims* (Wellington: Legislation Direct, 2008), p 1205.
257. Document R8(a), p 16
258. New Zealand Conservation Authority, *General Policy for National Parks*, pp 15–16 (amendment published 2007). In an explanatory note, the policy says that customary use may be authorised either by the Minister of Conservation as a consent under section 5 of the National Parks Act or as a concession under section 49.
259. Document R8(n), p 7
260. Document R8(n), pp 7–8
261. Department of Conservation, *Annual Report 2009/10* (Wellington: Department of Conservation, 2010), pp 49–50. Specifically, there were: 504 active one-off recreation concessions; 1,049 active longer-term recreation concessions; 178 active one-off other resource use concessions; and 3,023 active longer-term other resource use concessions.
262. Ibid, pp 101, 105
263. Document R8(a), p 46. Such material includes 'indigenous species (or parts thereof), fossilised plant or animal material, soils, rocks, and any other geological material'.
264. Ibid
265. Document R12, p 15; doc R13, pp 7, 17, 20
266. Document R8(l) (Department of Conservation, 'Concession Application Processing, Standard Operating Procedure Version 4', 2006)
267. Ibid, p 6
268. Document R8(a), pp 16, 44–45
269. Department of Conservation, 'What Is a Concession?', Department of Conservation, <http://www.doc.govt.nz/about-doc/concessions-and-permits/concessions/about-concessions/what-is-a-concession/> (accessed 5 September 2010)
270. Document R8(l), pp 47, 53, 61
271. Ibid, p 62
272. Department of Conservation, *Concessions Processing Review: Final Report – April 2010* (Wellington: Department of Conservation, 2010), p 35
273. Department of Conservation, *Concessions Processing Review*, p 36
274. Document S3, p 228
275. Document S2, pp 100–101
276. Document R12, pp 3–4
277. Document T2, p 78
278. Department of Conservation, 'What Is a Concession?', Department of Conservation, <http://www.doc.govt.nz/about-doc/concessions-and-permits/concessions/about-concessions/what-is-a-concession/> (accessed 5 September 2010)
279. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 562 (CA)
280. Document K4, p 329
281. Ibid, pp 337–338
282. Quoted in ibid, p 337
283. New Zealand Conservation Authority, *General Policy for National Parks*, p 3
284. Ibid, pp 8, 16–17, 29–30
285. Office of Treaty Settlements, *Ka tika ā muri, ka tika ā mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* ([Wellington: Office of Treaty Settlements], 2002), p 127
286. In recent AIPs and deeds of settlement, Ngāti Manawa, Ngāti Whare, Kurahaupō ki te Waipounamu, and Tainui Taranaki ki te Tonga have secured vest-and-gift-back arrangements, overlay classifications, deeds of recognition, and statutory acknowledgements but not, it seems, return of title to any national park lands.

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287. Doris Johnston, oral evidence on behalf of the Department of Conservation, 19th hearing, 15 December 2006 (transcript 4.1.19, p 392–393)
288. Ibid
289. Peter Williamson, oral evidence on behalf of the Department of Conservation, 19th hearing, 15 December 2006 (transcript 4.1.19, p 426)
290. Dermot Smyth and Graeme K Ward, 'Introduction', *Protecting Country: Indigenous Governance and Management of Protected Areas*, ed Smyth and Ward (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2008), p 1
291. Kakadu had in fact been returned to Aboriginal ownership in 1978, but joint management arrangements were put in place in 1989: Director of National Parks and Kakadu Board of Management, *Kakadu National Park Management Plan 2007–2014* (Darwin: Director of National Parks, 2007), p 6.
292. Dermot Smyth, 'Joint Management of National Parks in Australia', *Working on Country: Contemporary Indigenous Management of Australia's Lands and Coastal Areas*, ed R Baker, J Davies, and E Young (Oxford: Oxford University Press, 2001), pp 75–78; Dermot Smyth and Graeme K Ward, 'Introduction', pp 2–4; Donna Craig, 'Recognising Indigenous Rights through Co-management Regimes: Canadian and Australian Experiences', *New Zealand Journal of Environmental Law*, vol 6 (2002), pp 240–246
293. Smyth, 'Joint Management', pp 75–78; Craig, 'Recognising Indigenous Rights', pp 240–241
294. Smyth and Ward, 'Introduction', p 6
295. These are Indigenous Protected Areas, the first of which was proclaimed in 1998: Smyth, 'Joint Management', pp 12–14, 75, 86–88.
296. Document T2, p 71
297. Document P14 (Robert McGowan, updated brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006), p 12
298. Document S3, pp 162–163, quoting doc R12(j) (Todd Taiepa, Philip Lyver, Peter Horsley, Jane Davis, Margaret Brag, and Henrik Moller, 'Co-management of New Zealand's Conservation Estate by Maori and Pakeha; A Review', *Environmental Conservation*, vol 24, no 3 (1997), p 240), p 5)

299. Document S3, p 192

Table notes

Table 4.1: 'Threat classification for taonga species'. Source: Department of Conservation, 'Facts about flax snail', Department of Conservation, <http://www.doc.govt.nz/conservation/native-animals/invertebrates/flax-snail/facts/> (accessed 10 August 2010); C M Miskelly, J E Dowding, G P Elliott, R A Hitchmough, R G Powlesland, H A Robertson, P M Sagar, R P Scofield, and G A Taylor, 'Conservation Status of New Zealand Birds', *Notornis: Ornithology of the Southern Pacific*, vol 55, no 3 (2008), pp 117–135, 131; Department of Conservation, 'Threats to New Zealand Pigeon', Department of Conservation, <http://www.doc.govt.nz/conservation/native-animals/birds/land-birds/nz-pigeon-kereru/threats> (accessed 10 August 2010). Miskelly et al also indicate that kūaka are secure overseas (p 132). All assessments drawn from Department of Conservation, 'Species Identified as Taonga by Claimants: Threat and Protection Status', except for toheroa, kiore, kūaka, and kererū: doc R8, pp xxxiv–xxxviii.

Table 4.2: 'Provisions in conservation legislation relating to customary use'. Source: Document K2, pp 461–462.

Whakataukī notes

Page 294: Theodore Roosevelt, address to the Deep Waterway Convention, Memphis, Tennessee, 4 October 1907

Page 294: Hirini Moko Mead and Neil Grove, *Ngā Pēpeha a ngā Tipuna* (Wellington: Victoria University Press, 2001), p 425