

**BEFORE THE WAITANGI TRIBUNAL
WELLINGTON**

Wai 262

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of a claim to flora and fauna me o
ratou taonga katoa

AND

IN THE MATTER of a claim to the Waitangi Tribunal
by Saana Murray of Ngati Kuri,
Hema Nui a Tawhaki Witana of Te
Rarawa, Te Witi McMath (deceased)
of Ngatiwai, John Hippolite
(deceased) of Ngati Koata, Tama
Poata (deceased) of Whanau a Rua
and Ngati Porou and Apera George
Clark (deceased) and Ngahiwi
Tomoana of Ngati Kahungunu

**CLOSING SUBMISSIONS
FOR NGATI KURI, NGATIWAI AND TE RARAWA
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Contents

Contents	3
Karakia	8
PART A: OVERVIEW OF SUBMISSIONS	9
Essence of the Claim	9
Structure and Summary of the Submissions	10
Summary of Te Tai Tokerau Claims	12
The Tai Tokerau Statements of Claim	12
Origins of the Claim	12
Inclusivity Not Exclusivity	13
Te Ao Mauri	16
Taonga Katoa	16
Indigenous Flora and Fauna	17
Matauranga and Intellectual Property Rights	17
Genetic Engineering	19
Partnership and Co-Management	19
The Interface	20
International Issues	22
Summary of the Claim for Ngati Kuri	23
Tino Rangatiratanga	23
Taonga Species	24
Raranga	26
Loss of Matauranga	26
Summary of the Claim for Te Rarawa	28
Whare Wananga and Matauranga	28
Te Ao Mauri	29
Whakairo	31
Indigenous Flora and Fauna	31
Conservation Management	32
Summary of the Claim for Ngatiwai	32
Taonga	33
Partnership and Co-Management	34
Claims to Offshore Islands	36
Taonga Species of Ngatiwai	38
Waterways within Ngatiwai Rohe	40
Rongoa Maori	41
Customary Harvest	43
Whare Wananga and Matauranga	44
Whakairo and Matauranga	45
Marine Reserves	46
Crown Statement of Response (CSOR)	47
Cabinet Direction 25 June 2002 – “Wai 262 Crown Guiding Principles”	47
<i>Forward-Looking Focus on Government Iwi Initiatives</i>	48
<i>Obligation to Act in Good Faith</i>	48
<i>Rights of Other Claimants to Raise Wai 262 Related Issues</i>	50

<i>Integrity of Settlement Process</i>	50
<i>Protecting Existing Policy Initiatives Being Pursued by the Crown</i>	51
<i>Relevance of International Obligations in IP, and Resource/Conservation Management</i>	52
Status of Existing Claims of Tai Tokerau Claimants.....	52
<i>Te Rarawa</i>	52
<i>Ngatiwai</i>	53
<i>Ngati Kuri</i>	53
Findings Sought From the Tribunal.....	54
<i>Mandate of Tai Tokerau Claimants</i>	54
<i>Relationship of Wai 262 Claims to “Generic” Claims</i>	54
<i>Implications of Wai 262 for all Maori</i>	55
<i>Relevance of Wai 740 Claim</i>	55
The Treaty and Treaty Principles.....	56
Tino Rangatiratanga ... Me o Ratou Taonga Katoa	56
<i>Specific Object and Specific Subject of the Rights Must be Identified</i>	56
<i>Treaty Does Not Protect Rights in Property or Resources Unknown in 1840</i>	58
<i>Treaty Does Not Protect Rights and Interests Unknown to the English Law in 1840</i>	58
<i>Development Rights</i>	59
Relationship Between Tino Rangatiratanga and Indigenous Rights.....	60
The “Fourth Article” of the Treaty	62
Acknowledging the Positive in the Crown 1975-2007	62
PART B: CLAIMANT VALUES, TREATY PRINCIPLES	68
Nga Pou Uara - Values and Principles of the Claimants	68
Whakapapa	69
Tapu and Tikanga	73
Tino Rangatiratanga and Mana.....	75
Kaitiakitanga.....	80
Manaakitanga.....	81
Whanaungatanga.....	82
Mauri.....	82
Taonga Katoa.....	84
<i>Matauranga/Reo</i>	85
<i>The Natural Environment – Nga Tini a Ranginui Raua Ko Papatuanuku</i>	86
<i>Tikanga</i>	86
Principles of te Tiriti o Waitangi/the Treaty of Waitangi	86
Principle of Autonomy/Tino Rangatiratanga.....	87
Principle of Partnership	88
<i>Hierarchy of Interests in Relation to Maori Resources</i>	89
<i>The Interface</i>	90
Principle of Active Protection of Taonga	93
<i>The Meaning of ‘Taonga’</i>	93
The “Fourth Article” and Related Promises	95
Principle of Development/Options	97
Principle of Redress.....	98

<i>Ability of Parties to Negotiate a Solution – Towards an “Ethical Framework for Resolution”</i>	99
<i>Consultation Not a Principle in Itself</i>	100
Emphasis on the Maori Text of Te Tiriti	102
PART C: INTELLECTUAL PROPERTY ASPECTS OF TAONGA WORKS	105
First Component Issues – Crown Obligations.....	105
Second Component Issues – Existing Law.....	114
Copyright – New Zealand Law.....	114
Copyright – International Agreements.....	118
Trademarks, Name Registration Systems, Passing Off and Registered Designs.....	124
Trademarks, Name Registration Systems, Passing Off and Registered Designs – International Agreements.....	128
Third Component Issues – Potential Remedies.....	129
PART D: BIOLOGICAL AND GENETIC RESOURCES OF INDIGENOUS AND/OR TAONGA SPECIES.....	130
First Component Issues – Crown Obligations.....	130
<i>Resource Management Act 1991</i>	137
Department of Conservation.....	137
Second Component Issues – Existing Law.....	140
Patents – New Zealand Law	140
Patents – International Agreements	143
Plant Variety Rights – New Zealand Law	144
Plant Variety Rights – International Agreements	145
Third Component Issues – Potential Remedies.....	145
PART E: TIKANGA MAORI, MATAURANGA MAORI	150
First Component Issues – Crown Obligations.....	150
Definition	150
Are Tikanga and Matauranga Taonga?.....	153
What Does the Status of Taonga Mean for Matauranga?	155
Crown Obligations.....	156
Matauranga Maori as Different From Western Knowledge	158
World Views – The Interface.....	160
Conservation Approaches – Sustainable Use Versus Preservation	161
Research Funding and Matauranga.....	163
Matauranga Maori and the Education Curriculum	165
Second Component Issues – Existing Law.....	170
Moveable Cultural Property.....	171
<i>Protected Objects Act 1975</i>	171
<i>Museum Policy and Legislation</i>	175
<i>National Library and National Archives</i>	175
Protection from Inconsistent Use.....	176
Development, Regulation and Control of Matauranga/Tikanga	177
Preservation and Transmission of Matauranga/Tikanga.....	180
Third Component Issues – Potential Remedies.....	181
PART E(2): TE REO MAORI	182

<i>Distinctiveness</i>	182
First Component Issues – Crown Obligations	183
Second Component Issues – Existing Law	183
<i>Use of Te Reo Maori</i>	183
Third Component Issues – Potential Remedies	186
PART F: RELATIONSHIP OF KAITIAKI WITH THE ENVIRONMENT	187
First Component Issues – Crown Obligations	188
Essence of Claimants’ Case in Relation to Conservation Estate	188
<i>Definition</i>	189
<i>Assumption of Crown Regulation of the Environment</i>	190
<i>Matauranga and the Environment</i>	191
<i>Reclaiming the Mauri of the Environment</i>	192
“Spectrum of Responsibilities” – An Approach to Crown Obligations	194
Second Component Issues – Existing Law	195
<i>Crown Evidence from Department of Conservation</i>	195
<i>Co-Management</i>	198
<i>Resource Management Act 1991</i>	212
<i>Conservation Act 1987</i>	222
<i>Reserves Act 1977</i>	228
<i>Local Government Act 2002</i>	230
<i>Biosecurity Act 1993</i>	232
<i>Hazardous Substances and New Organisms Act 1996</i>	243
<i>Crown Minerals Act 1991</i>	245
<i>Marine Mammals Protection Act 1978</i>	247
<i>Marine Reserves Act 1971</i>	248
<i>Environment Act 1986</i>	250
<i>Overall Effect of Statutory Protections</i>	250
Third Component Issues – Potential Remedies	251
PART F(2): TAONGA SPECIES	252
First Component Issues – Crown Obligations	252
Second Component Issues – Existing Law	258
Ngati Kuri	259
Te Rarawa.....	261
<i>Kumara</i>	261
Ngatiwai.....	267
Third Component Issues – Potential Remedies	268
PART F(3): RONGOA	269
Definition	269
First Component Issues – Crown Obligations	270
Mauri – Wellbeing	272
Second Component Issues – Existing Law	280
Knowledge Systems.....	280
Practices Associated With Plants and Other Material	284
Delivery of Health Services	286
Third Component Issues – Potential Remedies	288

PART G: MISCELLANEOUS	290
Historical v. Contemporary Issues	290
PART H: REMEDIES TO RESTORE THE TREATY RELATIONSHIP AND TE AO MAURI.....	291
General Findings.....	291
Indigenous Flora and Fauna and the Environment	292
<i>Biological and Genetic Resources.....</i>	292
<i>Kiore and Kumara.....</i>	292
Matauranga / Customary Laws and Practices / Taonga Works / Rongoa.....	294
International.....	295
Taonga Specific Recommendations.....	295
<i>Ngati Kuri.....</i>	296
<i>Te Rarawa.....</i>	297
<i>Ngatiwai.....</i>	297
General Recommendations – Towards An Ethical Framework for Resolution.....	299
Indigenous Flora and Fauna.....	299
Matauranga	301
International.....	304
Urgent and Interim Findings.....	306
Ethical Framework for Resolution.....	308
<i>Stage One – Kanohi Ora Strategy (Communication and Consultation amongst Maori).....</i>	308
<i>Stage Two – Process of Engagement between Taumata and the Crown.....</i>	311
Policy Considerations	314
<i>Policy Objectives.....</i>	314
<i>Policy Principles.....</i>	315
<i>Process Principles.....</i>	316
<i>Policy Options.....</i>	317
Preservation Measures	318
Protection Measures.....	318
Promotion Measures	324
Legislative Amendments	325
Codes of Ethics	325
Appendices.....	326
Volume of Documents	
Volume of Extracts of Evidence	

Karakia

Karakia whakatuwhera

Maiea te tipua
Maiea te tawhito
Maiea te kāhui o ngā ariki
Maiea tāwhiwhi ki ngā atua.

Oi ka takina te mauri
Ko te mauri i ahua noa ki runga i te taiao i runga i te ao nui
I runga i a Ranginui!
I runga i a Papatūānuku!

I kake a Tāwhaki i te pakiaka
Ki te toi o ngā rangi
Ka riro mai ai ngā kete o te wānanga
Ko te kete tuauri
Ko te kete tuatea
Ko te kete aronui

Ka tiritiria ka poupoua
Ki Papatūānuku
Ka puta te ira tangata ki te wheiao ki te ao mārama!

Kia rongō i te hā o te whenua
Kia ora i te tai o te ao.
Tihē mauriora!

PART A: OVERVIEW OF SUBMISSIONS

Chapter Summary
Essence of the Wai 262 claim <ul style="list-style-type: none">▪ Whakapapa as the unifying theme of the claimants’ world view▪ Under Te Tiriti o Waitangi, the claimants seek the recognition of their tino rangatiratanga in the Maori-Crown relationship▪ This will ensure the mauri (well-being) of tangata whenua, their culture, knowledge and identity, the well-being of indigenous flora and fauna, and the well-being of the peoples of Aotearoa.
Structure and Summary of the Submissions
Summary of Te Tai Tokerau Claims <ul style="list-style-type: none">▪ Origins of the Wai 262 Claim▪ The Tai Tokerau Statements of Claim▪ Ngati Kuri▪ Te Rarawa▪ Ngatiwai

Essence of the Claim

1. Whakapapa and tino rangatiratanga are at the heart of the Wai 262 claim. Whakapapa is what connects the claimants to their taonga and tino rangatiratanga (in all its dimensions of rights and obligations), it is what enables them to give full expression to their relationships with these taonga. They are essential to the claimants’ culture and identity.
2. The importance of whakapapa to this claim featured prominently throughout claimant evidence. Mrs Hema-Nui-a-Tawhaki Wihongi (Mrs Del Wihongi) for Te Rarawa, opened her evidence to the Waitangi Tribunal in 1997 with this statement which captured the essence of the claim which is bound together by whakapapa:

“In my korero I wish to explain the holistic relationship between the cosmos of the universe, the Gods, plants, animals and Maori. This relationship describes the rights and responsibilities Maori have to the

other partners within this relationship. This relationship is particularly important to our customary practices and norms”.¹

3. From whakapapa comes the rights and responsibilities of being *tangata whenua* – *people of the land*.² Those rights and responsibilities are encompassed in a world view, a way of existing according to tikanga, customs and laws, which include the following key concepts: kaitiakitanga, tapu, manaakitanga, mana, aroha, whanaungatanga, wairua and mauri.
4. The authority to live according to that world view is tino rangatiratanga, which was guaranteed under Te Tiriti o Waitangi/Treaty of Waitangi 1840. Te Tiriti was a constitutional guarantee that tangata whenua would be able to live in accordance with their world view for as long as they wished to do so, and that the Crown would actively protect those rights and responsibilities.
5. This guarantee in Te Tiriti o Waitangi is central to the mauri (the life essence, survival, growth and well-being) of the culture, reo, matauranga and identity of whanau, hapu and iwi. Enhancing the well-being and mauri of tangata whenua has significant consequences for the well-being of all of the peoples of Aotearoa. Enhancing the well-being and mauri of tangata whenua has significant consequences for the mauri of all species of indigenous flora and fauna. The Wai 262 claim is about restoring and enhancing *Te Ao Mauri*.

Structure and Summary of the Submissions

6. This section explains the way in which these submissions are structured and provides a summary of the submissions made under each heading. Each section is prefaced with a chapter Summary Box to assist with following the structure.
7. Part A is the Overview of the Submissions, and includes a summary of the essence of the claim, the structure of the submissions, and sets out the nature

¹ Evidence of Hema-nui-a-tawhaki Witana, first hearing of Wai 262 at Tamatea Marae, Motuti, 15 September 1997 (tape 2 (of 11), p 2).

² Evidence of Haami Piripi, #P3, paras 8-10, 13-17, 18-19, 23-27.

of the Tai Tokerau claims, with reference to the Statements of Claim and key extracts from the evidence of the claimants themselves.

8. Part B is in four sections, each dealing with the four ‘corners of the house’ around which this claim is built:
 - 8.1 The key Principles of the claim;
 - 8.2 The key Taonga of the claim;
 - 8.3 The key Breaches of the Treaty relationship which require Waitangi Tribunal inquiry, including an assessment of the issues most relevant to where the Maori-Crown relationship failed to adhere to the guarantees of Te Tiriti; and
 - 8.4 The key aspects of Remedies which might restore and enhance Te Ao Mauri.
9. Parts C-F deal with Parts 1-4 of the Statement of Issues, and each Part is structured by addressing in detail the First Component Issues (the nature of the Crown obligations), and the Second Component Issues (an assessment of Crown policy and legislation). The Third Component Issues (what the future Treaty relationship might look like) are traversed briefly, but are primarily dealt with in the final Remedies section.
10. Part G addresses miscellaneous matters which have been of relevance to the Wai 262 claim over the years.
11. Part H is the Remedies section, which addresses in more detail the Third Component Issues and seeks findings from the Tribunal, and also seeks recommendations relating to interim and final relief.
12. The submissions are supported by a **Volume of Documents** referred to in these submissions. .

Summary of Te Tai Tokerau Claims

13. This section provides an overview of the Tai Tokerau claims, including reference to their willingness to work in partnership with their Treaty partners and other stakeholders for the betterment of all. The submissions recall the origins of the Wai 262 claim, address the relevance of the three Tai Tokerau Statements of Claim, and then traverse in detail the nature of the distinct claims for Ngati Kuri, Te Rarawa and Ngatiwai.

The Tai Tokerau Statements of Claim

14. The Wai 262 Statement of Claim filed in 1991 was filed on behalf of all of the six claimant iwi. Urgency was sought in 1994 and granted in 1995. Hearings commenced in 1997. At the start of the hearing for the Tai Tokerau claimants at Tamatea Marae, Motuti on 15 September 1997, the First Amended Statement of Claim was filed. This version superseded the original claim, and was made specific to the three Tai Tokerau claimants with particular reference to their particular ‘taonga species’.
15. On 28 September 2001, a Second Amended Statement of Claim was filed on behalf of Te Tai Tokerau. This statement of claim was explicitly referred to as supplementing the First Amended Statement of Claim and not superseding the particulars therein. It was designed to simplify the nature of the claims into broad categories, and to focus on Remedies which might be of value to the claimants and the Crown to resolve the broad issues being raised.

Origins of the Claim

16. The long journey of the Wai 262 claim began with the heke by four kaumatua from Aotearoa to Japan to bring back a collection of traditional kumara cultivars that had been held by a Japanese research institute since 1969. Hema-Nui-a-Tawhaki Witana (Mrs Del Wihongi) was among those elders who travelled to Japan. Concern over whakapapa was one reason for the journey. In the words of Mrs Wihongi:

“We knew the genealogy of those kumara and where they had come from. Their genealogy in our customary tradition surrounding these kumara prompted the going of our elders to lift the mauri of the kumara from a people in Japan before bringing them back to Aotearoa”.³

17. Thus, the matauranga or traditional knowledge associated with those taonga is as important to the claimants as the taonga themselves. The two are inextricably bound together which is one of the reasons why this Wairua claim does not easily fit within the strictures of a legal system which creates a separation between resources and the knowledge and values underlying those resources.
18. Following the successful return of the kumara varieties, Mrs Wihongi together with Mrs Saana Murray from Ngati Kuri, Mr John Hippolite of Ngati Koata, Mr Tama Poata of Te Whanau Arua (Ngati Porou), Mr Witi McMath (Ngatiwai) and Kataraina Rimene of Ngati Kahungunu, prepared and filed the Wai 262 claim in the Tribunal in 1991.

Inclusivity Not Exclusivity

19. In discussing the struggle by Maori to retain their tikanga since 1840, the Law Commission has noted:

“The claims made through the Waitangi Tribunal demonstrate that Maori seek to re-establish a relationship with their lands and other resources. Fundamentally, Maori seek to reclaim their culture and identity.”⁴

20. The “re-claiming” and enhancement of *Te Ao Mauri* will benefit both tangata whenua and the other peoples of Aotearoa who are embraced by Te Tiriti o Waitangi. The “fear factor” that many non-Maori New Zealanders feel towards things Maori and a growing Maori influence, are more imagined than real, driven as they are by political posturing over Treaty and race-based issues, and biased reporting by mainstream media. However, it is clear from the evidence from many claimants, interested persons, Crown Research Institutes (“CRIs”) and some Crown witnesses, that this “fear

³ Evidence of Hema-nui-a-tawhaki Witana, first hearing of Wai 262 at Tamatea Marae, Motuti, 15 September 1997 (tape 2 (of 11), p 2).

⁴ Law Commission *Maori Custom and Values in New Zealand Law* (Study Paper 9, Wellington, March 2001) p 87.

factor” is largely based on an uncertainty over what the future may hold if Maori are given more control, but there also exists an equal willingness to sit down and proactively engage with the Maori to find solutions that will be beneficial to all. For example, many of the CRI and Department of Conservation (“DOC”) witnesses indicated that if Maori were to have their tino rangatiratanga recognised in respect to flora and fauna, they would be more than willing to work with Maori as Treaty partners, in the same way they currently work with the Crown and other institutions as ‘assumed owners’ of these taonga.

21. For their part, the claimant’s evidence is clear that Maori are prepared and willing to engage, and are in fact engaging across a broad spectrum of activities and with a broad number of institutions including the Crown, CRIs, academic institutions, the private sector and internationally, and will continue to do so into the future. Maori are not a static or ‘Luddite’ people. They are innovators, creative thinkers, hardworking and are recognised as one of the most entrepreneurial peoples in the world.⁵ But, what differentiates Maori from many western style cultures is that Maori regard their culture and identity as an integral part of their future. They want to take their tikanga, values and identity with them into that modern future.
22. The considerable body of evidence presented in this claim stretching over 10 years, establishes beyond any reasonable doubt the myriad of ways in which the Crown has and continues to, breach the guarantees of tino rangatiratanga o nga iwi Maori over their taonga.
23. These submissions will draw together the threads and issues of the claim - both those claims within the respective rohe of the claimant and the more generic issues - and identify the ways in which the Crown’s actions and omissions have prejudicially affected the claimants. The submissions will also analyse the Crown’s policies as revealed through the evidence and existing legislation, and suggest practical ways in which these policies and laws may be improved to provide better protection for the claimants.

⁵ Media Release, “The Global Entrepreneurship Monitor Aotearoa New Zealand 2005” www.twm.co.nz/maorientr2.html (last accessed 16 April 2007.)

24. While acknowledging that the Crown has taken steps in recent years to acknowledge the importance of matauranga Maori and cultural and intellectual property rights within its various Ministries, the evidence shows that these initiatives have taken place without the active involvement of its Treaty partners and in most, if not all, cases these steps fall far short of adequate recognition or protection in Treaty terms. In short, the claimants and Maori generally remain on the periphery of these Crown initiatives, and in many cases are prejudiced by them (or the lack of any policies) and lack any effective control and decision making in processes that fundamentally impact upon their taonga.

Tino Rangatiratanga

25. The concept of tino rangatiratanga is inextricably linked with kaitiakitanga. As Mrs Saana Murray has said in her evidence, tino rangatiratanga for her and Ngati Kuri means “*Maori control over things Maori.*” The extent to which the control will be exercised will depend on the nature of the taonga concerned, the Iwi, the parties involved and a host of other factors. These factors will not necessarily be predetermined from the outset but are matters of ongoing discussion, negotiation and elaboration.
26. Tino rangatiratanga embraces a wide spectrum of rights and responsibilities. This is analogous to the “*bundle of rights and responsibilities*” discussed by Dr Darrell Posey in his evidence on Traditional Resource Rights⁶ and also to the concept of a “rung” of relationships in co-management of conservation lands, as will be discussed later in these submissions.⁷
27. At the upper end of the Rangatiratanga spectrum would be ownership and control over taonga (similar to the control that Rakiura Maori exercise over the Titi Islands). The mid-range of that spectrum could involve co-ownership and co-management of resources (for example, both Te Rarawa and Ngatiwai have been seeking effective partnerships and co-management regimes with DOC in relation to the extensive lands owned and managed by DOC within their tribal rohe). At the lower end of the spectrum would be

⁶ Evidence of Darrell Posey, #B2 and #F1(b).

⁷ See Part F Relationship with the Environment.

the right of the claimants to be consulted by the Crown on a range of matters.

28. As revealed in the evidence of both claimant and Crown witnesses, the engagement with Maori is overwhelmingly at the lower end of that spectrum, namely consultation, or as Doris Johnston for DOC terms it, “*participatory rights*”. And even then, consultation is often inadequate.
29. The guarantee of the “unqualified exercise of Chieftainship” over their taonga, as Sir Hugh Kawharu has defined tino rangatiratanga, requires significantly more than *mere consultation*. There is thus a very large gap between claimant’s expectations arising from tino Rangatiratanga, and the recognition by the Crown in relation to indigenous flora and fauna me o ratou taonga katoa.
30. These submissions, as the claimants themselves have acknowledged in evidence, acknowledge the good work that some Crown agencies and individuals have been doing in working with Maori, but simply say that these initiatives are few and far between and do not go far enough. A substantial shift in the Crown’s *attitude* in their dealings with Maori is required if even some of the aspirations of the claimants are to be achieved.

Te Ao Mauri

31. This claim concerns the restoring of the *mauri* or life-essence of nga taonga katoa, including human beings. The claimants contend that this claim has as its ultimate objective the **wellbeing** of tangata whenua and the wellbeing of ‘tangata tiriti’. While the claim seeks recognition of the Treaty guarantee of tino rangatiratanga, this is a *process* by which Maori can reach a state of wellness. That state of wellness will in turn lead to better outcomes for society generally.

Taonga Katoa

32. The claim has consistently been based on the phrase from Article II of te Tiriti o Waitangi, *te tino rangatiratangao o ratou taonga katoa*. As lead

claimant Mrs Saana Murray describes the ambit of the taonga embraced by the claim:

“As claimant for Ngati Kuri, we place a blanket claim over all our Taonga. This is our Tino Rangatiratanga in the Treaty.”⁸

Indigenous Flora and Fauna

33. In relation to flora and fauna, the Tai Tokerau claimants assert that the Treaty guaranteed to them their tino rangatiratanga including rights and responsibilities of kaitiakitanga, protection, ownership, control, regulation, use and development of the biological and genetic resources of the flora and fauna of Aotearoa/New Zealand. These claims include all species of flora and fauna considered to be taonga by the claimants as at 1840 that are located within their tribal boundaries. This would include species of kumara introduced to New Zealand by Europeans prior to 1840 if considered to be a taonga by Maori, as was acknowledged by Dr Gould for the Crown in cross-examination.⁹

Matauranga and Intellectual Property Rights

34. The Tai Tokerau claimants assert that their matauranga (traditional, customary and contemporary knowledge) is recognised and protected in Article II as a taonga. The claimants further assert that the Crown had a duty to actively protect matauranga and the systems necessary for the survival and transmission of matauranga, but have repeatedly breached that duty since 1840. These knowledge systems are vital to the survival and maintenance of Maori culture and identity into the future. The Tai Tokerau claimants are seeking greater protection and control over the use of their matauranga and in particular the ongoing misuse and misappropriation of matauranga.
35. The Intellectual Property Rights (“IPRs”) system, whilst providing a very limited form of protection for matauranga does not reflect or protect the underlying *values* of traditional and customary knowledge systems. For

⁸ Brief of Evidence of Saana Murray, #D6(a), para 25.

⁹ Transcript of Cross-Examination of Dr Gould (31 January-1 February 2007) pp 133-134.

example IPRs are private, monopolistic rights that provide economic protection for the holders of those rights and are for a limited duration in time. Whereas, matakārangā Māori (as with indigenous knowledge systems worldwide) are collective by nature, intergenerational and are integral to the ongoing maintenance and survival of Māori culture and identity. The numerous examples given by claimant witnesses throughout the hearings amply demonstrate the ease with which matakārangā is being misappropriated over the internet, without the prior informed consent or any consent of the kaitiaki of that knowledge.

36. That is not to say that the IPR system does not provide some form of protection for Māori. There have been many examples given in evidence where Māori have used trademarks and copyright to protect the commercial aspects of their works. The key issue for the claimants is that the IPR system is limited to the protection of *economic and commercial* rights. It was not designed to protect the *cultural values and identity* associated with matakārangā Māori. The signing up of New Zealand to the General Agreement on Tariffs and Trade (“GATT”) and Agreement on Trade Related Aspects of Intellectual Property (“TRIP”) which ‘lock in’ this IPR system internationally without making provision for protecting Māori knowledge systems, is a reason that the claimants assert that the Crown was in breach of the Treaty.
37. While there are efforts being made at the international level, such as the World Intellectual Property Organisation (“WIPO”), to develop policies and guidelines for protection of traditional knowledge, this is occurring within, and thus subject to, the existing IPR system. New Zealand has a unique opportunity to develop a new and innovative system that draws from both the tikanga Māori and the tikanga Pākehā systems to create a new and innovative system of protection. Such a system and the process, framework, and policy necessary to make it work are discussed in these submissions under the Remedies section (Part H). Such a framework would have tikanga Māori as a starting point and would provide more protection for Māori whilst providing greater certainty for non-Māori who wish to access

matauranga or work collaboratively with Maori in research and development of indigenous flora and fauna.

Genetic Engineering

38. Evidence was given on behalf of the Tai Tokerau claimants about the potential adverse impacts of genetic engineering of plants and animals. The evidence clearly reveals that the cultural and spiritual concerns of Maori are regarded as inferior to scientific knowledge held by Crown entities such as ERMA. The claimants are seeking greater input into the decisionmaking processes around the introduction of genetically modified organisms. Furthermore, they seek the development of guidelines and codes of ethics that adequately reflect and take into account the tikanga of the tangata whenua in relation to issues of genetic modification. Refer the discussion of the Hazardous Substances and New Organisms Act (Part F).

Partnership and Co-Management

39. Key witnesses for Ngati Kuri, Te Rarawa and Ngatiwai have all clearly expressed in evidence to the Tribunal their desire to have a fully functional and effective Treaty partnership with the Crown. Not a one-sided relationship where the Crown merely consults and then does what it wants, but one where control and decision making is shared between the Treaty partners. As will be discussed later in these submissions, the scope for this type of collaborative partnership already successfully exists in a number of limited situations in New Zealand between hapu/iwi and the Crown. There is no legal impediment to those partnerships expanding; the only impediment is the lack of political will to do so.
40. In questions to claimant witnesses over the years, Crown counsel have been at pains to portray the claimants as wishing to *exclude* non-Maori from access to flora and fauna, and to their traditional knowledge. However, this does not accord with the evidence that successive claimant witnesses have given, namely that they are willing to share their resources and their knowledge *provided* there is a tangible acknowledgement of their tino rangatiratanga in respect of these taonga. The concept of manaakitanga

imposes an obligation to share what one has. Unfortunately for Maori, manaaki has largely been unreciprocated since 1840.

The Interface

41. In the context of the reform of the law of succession, Pat Hohepa describes the movement towards alternative dispute resolution processes incorporating marae based justice. For Hohepa:

“... the deep issue is the substantive law; merely changing the rules of dispute resolution *to take account of Maori processes* doesn't deal with that deeper issue. **The central issue is for an autonomous Maori succession law with tikanga as its core.**”¹⁰

42. The same principle applies across the spectrum of engagement between tikanga Maori and Western legislation and policy. It is insufficient to merely ‘take account of’ Maori processes and tikanga when the legislation and policy continues to be based in Western legal traditions.

43. Thus, David Williams, in his own part of that working paper which built on the principles laid down by Pat Hohepa, discusses the ‘interface’ between tikanga Maori and the general law. In advocating for a forum and a process of consultation, Williams states:

“An important part of the consultation process for this Project ought to be, therefore, a consideration of the extent that tikanga Maori may be allowed to act on its own terms within its own frameworks and without being imposed upon by the general law. When, on the other hand, is it appropriate for Maori to be able to opt to pursue remedies in ordinary courts over matters which are intrinsically Maori? Should Maori have a choice of law/tikanga on such matters? If so, what choice of law or conflict of laws rules might emerge or might be developed? When, if at all, is it appropriate that the general law should impose constraints for the operation of tikanga Maori?”¹¹

44. These issues remain extremely pertinent to the matters before this Waitangi Tribunal. They are not questions which can be addressed in a substantive or prescriptive sense by recommendations which address the ‘incorporation’ of

¹⁰ P Hohepa and D Williams *The Taking Into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (Working Paper for the Law Commission, July 1996) p 37 (emphasis added). This paper is quoted mindful of the author's disclaimer that they are raising issues rather than seeking to settle them (p 6).

¹¹ *Ibid*, p 45.

tikanga Maori within statute. They go to the deeper issue of the substantive law itself, which is underpinned by a completely different set of values.

45. Such notions as the enduring relevance of tikanga Maori in the context of interface with general law, have been explored in detail in a recent paper by Ani Mikaere where she argues from the context of the signing of the Treaty itself:

“Both the clear words used in Te Tiriti o Waitangi and the context in which it was signed, therefore, reveal a clear Māori intention to create space for the Crown to regulate the conduct of its own subjects, subject to the overriding authority of the rangatira. This reaffirmation of Māori authority meant that the highly developed and successful system of tikanga that had prevailed within iwi and hapū here in Aotearoa for a thousand years would retain its status as first law in Aotearoa: the development of Crown law, as contemplated by the granting of kāwanatanga to the Crown, was to remain firmly subject to tikanga Māori.”¹²

46. Mikaere likens the subjugation of tikanga to the law of the coloniser, as akin to the suffocation of the Maori language in the Twentieth Century, and like the revival of te reo Maori, she exhorts Maori to reclaim their tikanga in order that it may regain its rightful place according to the intentions of the Treaty pact:

“As we all know, the Crown perception of the legal position in Aotearoa is rather different: the Crown insists that the law emanating from Parliament is supreme law and that tikanga exists at the whim of that law. This assertion of the supremacy of the coloniser’s law has become so dominant, so all-encompassing, that it is easy to fall into the psychological trap of accepting it as unchallengeable or, at very least, as somehow inevitable. Yet clearly this is not the case. While our experience of colonisation has been devastating, its impact should not blind us to the fact that it has occupied a mere moment in time on the continuum of our history. When viewed in this way, it is apparent that while tikanga operated as an effective system of law for our ancestors (both here in Aotearoa and before that) for thousands of years, the imposition of Crown law represents no more than a temporary aberration¹³ from that state of affairs.”¹⁴

¹² Ibid, pp 3-4.

¹³ This term is borrowed from Whatarangi Winiata, who has used it to describe the process of colonisation in Aotearoa.

¹⁴ Ani Mikaere “How will future generations judge us? Some thoughts on the relationship between Crown law and tikanga Maori”, paper presented to the hui on *Waka Umanga: A Proposed Law for Maori Governance Entities* (2006), p 7.

47. Similarly, Dr Williams in this claim raised the issue of the ‘qualification on Crown rule’ by virtue of the status of tikanga law:

“The Tribunal in many reports has sought to elucidate the relationship between the kainga tanga [sic] or governance power and the tino rangatiratanga guarantee. And the view that’s often been put forward by the Crown in the past is that there is a sovereign power that is a monopoly right of Parliament to make laws for this land and for all its citizens and so on, and numerous Tribunal reports have said, Well there are those rights, I mean I’m not sure that all the claimants in this case would agree that there are, but I’m talking about what the Tribunal has said. But even accepting that it is subject to qualification. The qualification is that the tino rangatiratanga rights and duties are properly upheld and the Herangi hui in 1995 dealt with exactly those issues as well. It said that if the law-making rights of the Crown impact adversely on rangatiratanga then the sovereignty that the Crown claims is withdrawn. I think was the way in which it was put. In this particular claim there is also reference back to the Declaration of Independence in 1835 and other issues to put all of this discussion into a different constitutional framework. Now what I say here is that if the outcome of this claim is just that the Crown is happy to listen and then continue in its old ways of saying ‘right, we’re prepared to listen if people come and talk to us but at the end of the day only we can legislate to deal with these sorts of issues’ then, in my view, that would replicate the problems that we’ve been highlighting in this claim. So there is a reservation there, yes. The reservation is called tino rangatiratanga in Article 2 of the Treaty of Waitangi.”¹⁵

International Issues

48. With the advent of global markets and increasing international trade and their consequential and often adverse impacts on indigenous peoples including Maori, it is increasingly important that the Maori presence and voice be heard in international fora. Maori have been expressing to the Crown since the 1970s, their desire to be more actively engaged on international issues. The consequence of decisions being made on behalf of Maori by the Crown without consultation or consent of their Treaty partners, have had, and continue to have, prejudicial effects.
49. On issues affecting Maori at the international level, such as GATT and TRIP Agreements, the Convention on Biological Diversity (“CBD”), and Draft Declaration on the Rights of Indigenous Peoples (“dDRIP”), engagement with Maori has been either inadequate or totally absent. As

¹⁵ Transcript of Cross-Examination of Dr David Williams (Week 13) p 177.

revealed in questioning of Mr Gerard Van Bohemen for the Ministry of Foreign Affairs and Trade (“MFAT”), this Ministry (which is the lead agency for CBD and dDRIP discussions) has actively opposed New Zealand taking a “*positive approach*” on traditional knowledge issues despite a 2001 Cabinet Minute directing officials to “*be proactive in pursuing cultural and intellectual property rights for indigenous peoples internationally.*”¹⁶

50. The evidence establishes that the key lead department in New Zealand’s international negotiations, the Ministry of Foreign Affairs and Trade, has been ‘running interference’ and not acting to protect or enhance the capacity of Maori to protect matauranga and other related taonga. Other Crown agencies with responsibilities in this area, most notably the Ministry of Economic Development (“MED”) and to some extent Te Puni Kokiri (“TPK”), have been supportive of Maori involvement in international fora and the negotiation of international instruments. However, overall, the net result is that Maori remain significantly prejudiced by past and continuing actions and omissions of the Crown.
51. The claimants seek to have these grievances redressed and mechanisms and processes put in place to ensure that Maori are fully engaged with the Crown at both the domestic and international levels on matters affecting their well being. Further detailed analysis of these international issues is dealt with under relevant sections of these submissions and options for remedies are canvassed under the remedies section.

Summary of the Claim for Ngati Kuri

Tino Rangatiratanga

52. Ngati Kuri gave evidence to this Tribunal under the mantle of their kuia Saana Waitai Murray.¹⁷ The key theme of her korero was her assertion of

¹⁶ Transcript of Evidence of Gerard Van Bohemen, (22-26 January 2007)p 25-28. Briefing Paper to Minister of Maori Affairs re New Zealand Position on Traditional Knowledge Issues at International Meetings (7 February 2005). Further Attachments to the Evidence of Tipene Chrisp, Te Puni Kokiri, #R33(ooo).

¹⁷ Brief of Evidence of Haana Waitai Murray, #D6.

the continued right of Ngati Kuri to their tino rangatiratanga over all of their taonga katoa:

“Tino Rangatiratanga is our ancestors’ laws which enabled us to control our taonga, to preserve it for future generations. Our ancestors did not give these customary rights of Tino Rangatiratanga away.”¹⁸

53. And she further states: “*as claimant for Ngati Kuri, we place a blanket claim over all our Taonga. This is our Tino Rangatiratanga in the Treaty.*”¹⁹

54. Saana Murray still resides in her home of Te Hapua (which is properly named Te Hopua Wai). For her it is the hapu, whanau, and iwi of Ngati Kuri who are the kaitiaki of the taonga on their lands.²⁰

55. For Ngati Kuri, the importance of tino rangatiratanga is its ability to maintain control over an environment which can provide sustenance and wellbeing to its people:

“If the needs of all the inhabitants of Aotearoa are to be met and sustained into the indefinite future, Maori must regain control of their habitats. Maori needs we believe are human needs, we need a habitat that both sustains our physical lives and fulfils our spiritual needs. To take away our Maori land is to take away our reason to live.”²¹

Taonga Species

56. A central taonga which reflects the essence of Ngati Kuri’s “survival and sustenance” is the pupuharakeke (“*we owe our survival to this taonga.*”²²). Other species of flora and fauna that sustain the wellbeing of Ngati Kuri include the kuaka, the kukupa, all kaimoana including the toheroa, and species used for raranga including harakeke and pingao.

¹⁸ Ibid, para 20.

¹⁹ Ibid, para 25.

²⁰ Ibid, para 4.

²¹ Ibid. See also the Brief of Evidence of Mata Ra-Murray (#D5, para 7) on the connection between wellbeing and his own craft of weaving: “Weaving has given me that confidence and self-esteem as a person. There are a lot of Maori who don’t know enough about their heritage and this knocks them out as a person. For example, there was a generation gap where Maori lost their weaving skills. To regain this knowledge and keep it alive is the reclaiming of our rights as Maori.”

²² Brief of Evidence of Haana Waitai Murray, #D6, para 42.

57. Ngati Kuri regard as a breach of Tiriti o Waitangi, the alienation from lands within their rohe which would allow them to access these taonga. Their relationship with DOC therefore assumes fundamental significance for Ngati Kuri given the high proportion of DOC lands within their rohe. Legislation and policies which have created marine and conservation reserves have restricted access, control and decision making authority of kaitiaki to those areas, as well as imposing restrictions on customary harvest of kai such as the kuaka, the kukupa and the toheroa, are grievances which Ngati Kuri bring to this Tribunal for remedy. The evidence of Rapine Murray spoke of the cultural connection of his whanau to the kuaka:

“In our view it is kai rangatira. In my view, a law telling us not to harvest the kuaka is a bit like telling the Queen not to drink Earl Grey tea.”²³

58. Ngati Kuri seek a sustainable harvest programme which is developed in partnership with DOC for both the kuaka and the kukupa.²⁴

59. The evidence of Rapata Romana²⁵ deals with two main topics:

59.1 the importance of traditional kai (in particular kaimoana and kumara) and the impact that Crown legislation and policy has had on maintaining access to that kai; and

59.2 evidence relating to specific landscapes and wahi tapu (Te Ara Wairua) to which Ngati Kuri seek the return of control and management. Rapata Romana draws a link time and time again in his evidence, between the restrictions of access to lands now within the DOC estate and the resulting loss of matauranga associated with those places and the traditional food gathering customs.

²³ Brief of Evidence of Rapine Simon William Nicholas Robert Murray, #D4, para 23-24.

²⁴ Ibid, para 28-31 and 39.

²⁵ Brief of Evidence of Ropata Romana, #D2.

Raranga

60. Mata Ra-Murray²⁶ also explains a simple example of how the matauranga of raranga stays connected to the environment through the maintenance and survival of tikanga. Mata Ra-Murray recounts the tikanga associated with weaving where “*before I was taught to weave either harakeke or muka, I was taught to plant both these plants. This was so that the natural resources that we used when we moved were replaced.*”²⁷

Loss of Matauranga

61. Thus, in addition to expressing the wish to re-establish their connection to their flora and fauna, the Ngati Kuri evidence also addresses the loss of matauranga that flows from that process of alienation. Saana Murray’s brief of evidence focuses on the education system generally and with particular reference to the New Zealand Qualifications Authority (“NZQA”).²⁸ She talks of the historical Crown policies which prevented the use in schools of te reo Maori and Maori kai which she said contributed to a significant loss of matauranga.²⁹ She then addresses the more contemporary Crown policies establishing the NZQA and other mechanisms to teach te reo, raranga, and whakairo in some belated response to the significant loss of matauranga from those earlier historical policies. The curriculum and accreditation systems are regarded by Mrs Murray as a further disenfranchisement of the Ngati Kuri rangatiratanga over that matauranga.³⁰
62. This evidence is supported by that of Niki May Lawrence³¹ who focuses on her skill in raranga to illustrate a range of concerns she has with the relationship with the Crown. These include:
- 62.1 the education system, including NZQA, and the way in which traditional skills are now subsumed within a ‘tauiwi curriculum of the kaupapa of teaching’;³²

²⁶ Brief of Evidence of Mata Ra-Murray, #D5.

²⁷ Ibid, para 9

²⁸ Brief of Evidence of Haana Waitai Murray, #D6.

²⁹ Ibid, para 30-33 and 52-53.

³⁰ Ibid, para 83ff.

³¹ Brief of Evidence of Niki May Lawrence, #D3.

- 62.2 the matauranga associated with her raranga courses, including tikanga about to whom her knowledge should or can be passed, and how this traditional transmission of knowledge system is not maintained within the NZQA system;
- 62.3 the lack of appreciation for the depth of matauranga associated with korowai raranga, and the battles she has had to go through to seek recognition from the state system of her skills;³³
- 62.4 the inability to physically connect with the natural resources of her raranga, including criticisms of the DOC controlled Pataka Committee which allocates cultural materials:

“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.”³⁴

63. The same korero comes from Mereraina Uruamo,³⁵ a weaver herself who describes the loss of matauranga associated with raranga and its revival by the wahine of Ngati Kuri. Mereraina specifically refers to the ‘lack of access’ to the DOC estate as being a major contributor to that loss of matauranga.³⁶ She tackles the issue of the commercialisation of such matauranga in her evidence and concludes that “*we would need to wananga further on this to see if that development of commercialisation is acceptable within our traditions and on what terms.*”³⁷ But she is clear that there be maintained the cultural context should any commercialisation occur:

“I know there are demands to commercialise our fibres. To me we would have to retain the traditional rules and respect for that fibre if we wish to use it for things other than those traditional needs.”³⁸

³² Ibid, para 40-42.

³³ Ibid, para 54ff.

³⁴ Ibid, para 75.

³⁵ Brief of Evidence Mereraina Uruamo, #D7.

³⁶ Ibid, para 32-37.

³⁷ Ibid, para 42.

³⁸ Ibid., para 40.

64. In summary, the Ngati Kuri claims centre on the return to them of their tikanga rights and responsibilities as kaitiaki. The phrase used by Saana Murray under cross-examination has been repeatedly referred to by Crown counsel during the claim, and does encapsulate the Ngati Kuri claims: Wai 262 is about Maori control over things Maori.

Summary of the Claim for Te Rarawa

65. For Te Rarawa, as with the other Tai Tokerau claimants, the essence of their claim lies in the two categories of taonga - matauranga associated with whakapapa, whare wananga, and reo; and control, access and decisionmaking power over their natural environment. By virtue of whakapapa, Te Rarawa assert their tino rangatiratanga in relation to all species of flora and fauna, with specific examples given of “taonga species”.

Whare Wananga and Matauranga

66. Hema-Nui-a-Tawhaki Witana (Mrs Del Wihongi) in her brief of evidence³⁹ speaks of the critical importance of whare wananga as the vehicle by which this matauranga was transmitted from generation to generation:

“The repositories to this matauranga Maori were the tohunga who learnt it orally. The knowledge was passed down by reciting it to students in a darkened room. These places of learning are called whare wananga.

Matauranga are embedded in whakatauki, waiata, korero, and whakapapa was the means to explain the truths of the natural world of the Maori. Matauranga Maori was also used to categorise all plants and animals beginning from the land and to the sea.”⁴⁰

67. Mrs Wihongi speaks of the tikanga and customs associated with the use of matauranga Maori:

“To my knowledge, traditionally, there was a structure which governed the use or otherwise of matauranga Maori and tikanga. Matauranga and tikanga were governed by Ariki who sat in the sacred house known as the whare wananga. The whare wananga governed other different houses which were responsible for teaching specific skills and knowledge [para 134] ... The different houses included the whare

³⁹ Brief of Evidence of Hema-Nui-a-Tawhaki Witana, #A27(b).

⁴⁰ Ibid, para 132-133.

kaupo, the whare minenga, the whare kura, the whare tatai and other whare.”⁴¹

68. Mrs Wihongi spoke of the changes to whare wananga as knowledge was lost and in particular the risks that matauranga Maori became subjected to once the traditional structures were dismantled:

“Since my Uncle Joe passed away, I have been alone – with no one else to talk to about these things in the way and according to the tikanga of my people. It is this which is the greatest loss. You do not know who to trust with these things anymore since the old people passed away. You do not know if people will abuse this knowledge, so you tell no one and it dies. The knowledge is what is the heart of Maori people. It is what defines us and keeps us strong. It was never meant to be this way.”⁴²

Te Ao Mauri

69. This connection between the loss of matauranga and the tikanga associated with its transmission on the one hand, and the deleterious effect on wellbeing of tangata whenua on the other hand, is a key theme of the Te Rarawa case. Mrs Wihongi draws this connection:

“Maori people used to eat the natural things of life. They were very healthy, strong tall people. Now look at us. Human beings have the keys to matauranga to all these areas. If we look after those areas of te ao teretere in accordance with their matauranga, then they in turn look after us. But this is not happening now with this generation.”⁴³

70. It is for this reason that she refers to her people as the “Mauri” people, not the “Maori” people. And this connection between mauri and access to matauranga is born out in supporting evidence for the claimants, in particular that of Professor Mason Durie, Sir Hugh Kawharu and Mana Cracknell.⁴⁴

⁴¹ Ibid, para 136.

⁴² Ibid, para 6-7.

⁴³ Ibid para 185-186.

⁴⁴ It was also emphasised by the Te Rarawa claimant witness, Bruce Gregory in his korero in 1998 to the Tribunal (#B12). He discusses mauriora; the whakapapa of tangata Maori from nga atua; and “hence the way their lives are structured, i.e te Ao Maori.” Bruce Gregory then relates the tikanga associated with death and the tinana (body) generally: his particular concern for the appropriate respect to be paid to the tikanga associated with body parts, blood samples, tissue and organs is described at paras 34 – 40.

71. Therefore, a particular aspect of matauranga to which Te Rarawa gives special emphasis in their evidence is rongoa, which draws together their matauranga associated with the natural environment and their overall wellbeing.⁴⁵
72. The fundamental importance of whakapapa is also highlighted by Mrs Wihongi in the context of genetic modification, where she decries the fact that genetic manipulation “*carries on outside of our customary ways. Scientist who traditionally would never [of] had access to whakapapa can now freely take a DNA sample and also find out this knowledge. They can then use that DNA to create new whakapapa in isolation of our customs.*”⁴⁶
73. Thus the importance of the cultural context in which aspects of matauranga Maori are used is critical to the claimants’ perspective. As Mrs Wihongi summarises:

“If korero is not right or is used incorrectly, it has the potential to alter customary laws. That is not to say that Maori did not develop in their customary laws. However with the loose use of our korero today in isolation from our customs by advertisers and others, Maori are losing the meaning of many words, customs and traditional practices.”⁴⁷

74. In her refresher evidence in August 2006 given in the DVD presentation, Mrs Wihongi reiterated the whakatauki that she holds so dear, because it sums up the importance of the “right korero in the right context”, and it emphasises the origins of all korero from the sacred vowel sounds of te reo, AEIOU:

*“Ka AE tia te whenua
Ka IO tia te rangi
Ka U ki te u kaipo.*

People support the right korero. This will be blessed and will remain for all eternity.”⁴⁸

⁴⁵ See Brief of Evidence of Pa Henare Tate, #B13; Brief of Evidence of Bruce Gregory, #B12.

⁴⁶ Brief of Evidence of Hema-Nui-a-Tawhaki Witana, #A27(b), para 114.

⁴⁷ Ibid, para 131.

⁴⁸ #P55.

Whakairo

75. A particular example of the importance of the *cultural context* of matauranga is highlighted by Ross Gregory's evidence, a tohunga whakairo who gave evidence in Kaitaia in 1998. He speaks of the derivation of the koru design, inspired by the pitau or young shoot of a tree fern.⁴⁹ He discusses particular whakairo patterns including the pakati, raupunga and waka spirals such as the pitau or tete.

“To me, to the ancient Maori, the fern frond encapsulated in a carving pattern, was a picture of a chiefs life/mana.”⁵⁰

76. Ross Gregory emphasised this interconnectedness in this way:

“Our tupuna were close to nature and lived harmoniously with nature for their mere survival. A lot of their art work was derived from the environment around them. Contemporary Maori art still has its roots in the traditional art. It is my strong suggestions that we firstly as Maori and secondly as people of Aotearoa join together and hold steadfastly to ownership of our taonga to ensure a rich and understanding future.”⁵¹

Indigenous Flora and Fauna

77. In addition to matauranga, tikanga and reo, the claimants have provided evidence of their relationship with their natural environment – nga tini a Ranginui raua ko Papatuanuku. Del Wihongi's statement of evidence discussed some key “taonga species” for Te Rarawa under the heading of each atua who has the kaitiaki responsibilities for those species, and from whom the species can whakapapa. She refers to:

- 77.1 the trees, plants and insects within the area of Tane Mahuta who is the atua or caretaker of the forest (para 74) Particular species of importance included the puawananga (clematis) (para 80ff); harakeke (paras 82 – 90); pupuharakeke (para 91); and koromiko (para 92- 99);

⁴⁹ Ibid, , para 25.

⁵⁰ Ibid, para 23.

⁵¹ Ibid, para 27-30.

- 77.2 the Kumara, and also Mamaku and other ferns and brackens who are the descendents of Haumiatiketike (paras 100-107);
- 77.3 all fish, and sea creatures (including the tuatara) who descend from Tangaroa (paras 108-111).

Conservation Management

78. Mrs Wihongi summarises the claimants' perspective in relation to conservation management of all these species as follows:

“Maori played an important part. The kaitiakitanga was given to Maori to look after all these areas of te ao teretere. If you look at the whakapapa of all that has come before, beginning with Io and the whakapapa that goes with those, you will see that Maori people had a great understanding of what was before and what is now in terms of conservation, management, utilisation and the interconnectedness of all things on earth ...

When you speak about things such as knowledge Maori view the responsibilities of kaitiaki as including the ability to treat this knowledge as an integral part of themselves. This included ensuring these things are looked after in accordance with our customs and traditions.

It is then that we are able to exercise “manaakitanga” and “tapu” involving respecting the sacred things you guard”.⁵²

Summary of the Claim for Ngatiwai

79. The Ngatiwai claim was brought by Witi McMath on behalf of Ngatiwai Trust Board (NWTB). NWTB is the mandated authority for Te Iwi o Ngatiwai, and the Ngatiwai Resource Management Unit is responsible for developing Ngatiwai environmental policy, dealing with Crown and local authority environmental agencies, and exercising kaitiaki.⁵³
80. Ngatiwai exercise mana whenua and mana moana over the rohe from Tapeka Point in the Bay of Islands encompassing the eastern seaboard and all the offshore islands to Tokotu Point, South Omaha and including Aotea,

⁵² Ibid, para 79.

⁵³ Brief of Evidence of Hori Parata, #A33.

(Great Barrier Islands) in the Hauraki Gulf. A map of Ngatiwai rohe is attached as appendix (a) to Hori Parata's evidence.

Taonga

(First ASOC #1.1(a), 2.1 and 2.9)

81. For Witi McMath, "*genealogy, history and whakapapa are all taonga of our people*".⁵⁴ There were penalties for breaches of tapu and misuse of taonga such as whakairo, whakapapa and art forms:

"Things like preserved heads, greenstone meres, carvings, art forms should not be left overseas for display or to be sold. Our laws state – ko te tapu, ko te ihi, ko te mana, the state of mana, ihi and tapu of these things should not be treated in such a way and sold at auctions....This is a breach of our mana, our tino rangatiratanga and the Treaty."⁵⁵

82. Witi McMath's evidence speaks of the importance and sacredness of waiata that were passed on at meetings of the whare wananga:

"The waiata was a binding spiritually, physically and culturally. Ko te mana wairua, ka tukuna i te mana wairua – the taking of the mana wairua and bringing it back to normal sense."⁵⁶

83. For these reasons one had to be careful about how waiata were used and who performed them "*Waiata were a form by which we would record historical events such as [what happened in] wananga where the waiata was first sung.*" It was the elders who controlled the use of waiata.⁵⁷

84. For Ngatiwai, these sacred waiata could not simply be bought and sold and needed to be protected from use by others when finding their way into the public domain by means unknown to Ngatiwai.⁵⁸ Although there were arguments that the publication of waiata (such as *Nga Moteatea* by Sir Apirana Ngata) preserved many waiata, Mr McMath observes that "...if we had not lost our reo in the first place, then many of our own waiata would

⁵⁴ Brief of Evidence of Wiremu McMath, #B9, para 6.

⁵⁵ Ibid, para 11.

⁵⁶ Ibid, para 15.

⁵⁷ Ibid, para 21-23.

⁵⁸ Ibid, para 24.

have been preserved by our own people rather than relying on these printed books.”⁵⁹

85. Ngatiwai seek funding of their language and all the matauranga associated with reo such as nga tikanga; because with the loss of language goes the loss of other taonga: *“The losing of the reo meant the losing of all these things. One of the reasons I went teaching was to try to preserve our language, including in particular our waiata.”*⁶⁰

Partnership and Co-Management

(First ASOC#1.1(a), 2.1-2.11, 4.2(a)-(j))

*“You and us, and we should be, as a partnership we should be working together as one people not two divided people.”*⁶¹ *(Raukura Robinson, Kuia for Ngatiwai)*

86. Key witnesses for Ngatiwai have all stressed the importance of developing an effective Treaty partnership with the Crown, particularly in relation to co-management of the DOC estate, including the offshore islands. These claims are based on the ancient occupation rights of Ngatiwai as confirmed and guaranteed under Article II. As noted by the Chairperson of the Ngatiwai Trust Board, Mr Laly Haddon⁶²:

“On a wider more ancient level, Ngatiwai have takatupuna and takatikanga with all of this coastline through descent from Mania and his son Tahu-ki-te-rangi. Ngatiwai were also the Iwi who held the tikanga pertaining to the origins of the islands offshore and that is the korero about Maui-tiki-tiki-a-Taranga and his brother in relation to the Taranga and the Marotiri Islands.

Ngatiwai occupied all of the main islands off the entire coastline south to Mahurangi and held title to Te Hauturu o Toi, Pokohini and Motukino and Aotea.”

⁵⁹ Ibid, para 27

⁶⁰ Ibid, para 33.

⁶¹ Transcript of evidence for Mrs Robinson, Ngatiwai Trust Board (17 September 1997, Whangarei).

⁶² See Transcript of Evidence of Laly Haddon, Ngatiwai Trust Board (17 September 1997, Whangarei) tape 6 (of 11), paras 10 and 11.

87. For Ngatiwai one of the most important aspects of their claim is the recognition of their kaitiaki, in order to give effect to a genuine Treaty-based partnership⁶³ in relation to nga taonga o Ngatiwai.⁶⁴
88. Ngatiwai insist that decisions are made “with Ngatiwai and not for them” in their Treaty partnership with the Crown.⁶⁵
89. During cross-examination John Gardiner of DOC agreed that giving decision-making power to Ngatiwai in relation to Motukauri Islands was recognition of ‘strong co-management’, as against ‘weak or mild’ co-management where Maori are merely consulted:

MS “I’m just interested where they refer to they’ve got strong co-management is real decision making power is devolved, whereas mild co-management they say is where there’s more of a consultation process. Now talking about Motukauri as an example, where would you place in a spectrum from mild co-management to strong co-management, where would you place that? Would it be sort of a halfway house between strong and mild?”

JG I would have said stronger.

MS Stronger, okay. And what would your reasons for that be?

JG “Because the day-to-day decision-making is made by Maori.”⁶⁶

90. In Mr Gardiner’s opinion, the Crown should retain ownership of the land under the Reserves Act. However, Mr Gardiner submitted that there is no good reason, providing that the objectives of both partners are being met, that ownership of the whenua cannot be transferred to Ngatiwai as an acknowledgement of their tino rangatiratanga. The lands can remain designated for specific purposes to protect it for the future, and if necessary appropriate amendments made to the legislation.
91. At least ninety percent of Ngatiwai’s claims are for land and resources administered by the Department of Conservation within the Ngatiwai rohe.

⁶³ Ibid, p 9.

⁶⁴ See Submission by Laly Haddon (17 September 1997), #A30.

⁶⁵ Submission by Hori Parata (19 September 1997), #A33.

⁶⁶ Transcript of Evidence of John Gardiner, Department of Conservation (18-22 December 2006) p 63-64.

For this reason, Ngatiwai seek an equal and effective Treaty partnership with the Crown and its agencies, and in particular DOC. As noted in the evidence of Hori Parata:

“When issues arise relating to Ngatiwai’s flora and fauna or cultural heritage, a decision should be made with Ngatiwai, not for Ngatiwai. That is the partnership that the Treaty of Waitangi foresaw.”⁶⁷

92. In concluding his evidence Hori Parata outlined the struggles that Ngatiwai had faced over many years, to have their tino rangatiratanga recognised by the Crown:

“Ngatiwai have over the years been to the Courts, we have been to the Maori Land Court, to the District Court, to the High Court, to the Supreme Court, to the Court of Appeal, to the Government, to the Ministers, to Parliament, to the Governor-General, to the Queen, to the district councils, to regional councils, to county councils. We have pleaded, made submissions, argued, discussed, been consulted, objected, been objected to, all in keeping up our side of the promises that our tupuna made in the Treaty of Waitangi. Ngatiwai have shed tears for the Treaty of Waitangi. Ngatiwai have shed blood for the Treaty of Waitangi. We have shed tears for our tupuna. As a Treaty partner we have shed tears and as a Treaty partner we have shed blood. Ngatiwai ask when will this stop?”⁶⁸

Claims to Offshore Islands

*(First ASOC #1.1(a) – 2.1, 2.5(a), (b), (e), (f), 4.2(c), (d), 12.3(d), (e) and 20.1(b)
Second ASOC#1.1(g) 3.8)*

93. Ngatiwai seek the acknowledgement and restoration of the mana and kaitiaki status over the offshore islands including Hauturu-a-Toi, Pukehina, Motukino, Aotea, Motohina and Hauturu. In the words of Laly Haddon:

“I am reminded of our wahi tapu on Hauturu or as it is now called Little Barrier Island. Ngatiwai do not call it Little Barrier ... I do not understand why we have to go to the Department of Conservation to get a clearance to go and visit our tupuna. We are the kaitiaki of Hauturu.”⁶⁹

⁶⁷ Transcript of Evidence of Hori Parata, Ngatiwai Trust Board, (18 September 1997, Whangarei) tape 9 (of 11), p 1.

⁶⁸ Ibid, p 2.

⁶⁹ Ibid, p 22.

94. In 1894 the Crown passed the Little Barrier Island Purchase Act to compulsorily purchase Hauturu (Little Barrier Island) from Ngatiwai and to make a reserve for the preservation of native flora and fauna. Ngatiwai and their representative in Parliament protested that the Crown was acting in breach of the Treaty of Waitangi. The Crown ignored the protests then evicted by military force, the people of Ngatiwai who were still living on Hauturu.
95. The alienation of the people of Ngatiwai from Hauturu has denied them the exercise of te tino rangatiratanga in relation to that land. It has also denied them access to the tuatara and therefore the ability to exercise effective kaitiakitanga in relation to that species.⁷⁰
96. The Tribunal Commissioned historians, David Williams,⁷¹ Geoff Park,⁷² and Cathy Marr, Robin Hodge and Ben White⁷³ all refer to the circumstances in which Hauturu was compulsorily acquired by the Crown:
- 96.1 **Park:** “Soon after 1912, the animal protection legislation was amended to enable particular areas to be designated ‘sanctuaries’ for the protection of indigenous fauna. Early examples were the islands of Hauturu, or Little Barrier, and Kapiti, both of which had been significant sites in Maori terms. Hauturu’s iwi, Ngatiwai, were evicted by military force in the 1890s when the Crown acquired the island as ‘a Forest Reserve as a place of shelter for the indigenous birds of New Zealand’ free from the stoats and other introduced predators on the mainland”.⁷⁴
- 96.2 **Park:** “The author, James Muir, cites the Crown’s forcible eviction of Maori from Hauturu (Little Barrier Island) in the

⁷⁰ First Amended Statement of Claim, #1.1(a), para 12.3(d) and (e).

⁷¹ David Williams *Matauranga Maori and Taonga*, #K6.

⁷² Geoff Park *Effective Exclusion? An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912-1983*, #G2.

⁷³ Cathy Marr, Robin Hodge and Ben White *Crown Laws, Policies, and Practices in Relation to Flora and Fauna, 1840-1912*, #K5.

⁷⁴ Geoff Park *Effective Exclusion? An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912-1983*, #G2, p 653.

1890s as the best example of the ‘anti-Maori position of these protection measures’”.⁷⁵

96.3 **Marr, Hodge and White** – see pages 416-420.

96.4 **Williams**: The forcible removal of Ngatiwai from Hauturu is a topic which definitely requires detailed research and writing up, as it highlights the failure of Crown policy to respect tino rangatiratanga because of a fixed determination to totally exclude the tangata whenua from their ancestral lands in the interest of the preservation of indigenous flora and fauna. Even the recitals and sections of the Little Barrier Island Purchase Act 1894 on their face disclose a grave injustice against non-selling members of the hapu concerned and indicate a serious doubt as to the entire ‘purchase’ transaction”.⁷⁶

97. In order to restore their mana and kaitiaki status over these offshore islands, Ngatiwai are seeking restoration of ownership and the development of co-management of these islands with the Department of Conservation.

Taonga Species of Ngatiwai

(#1.1(a) – 2.1, 2.5, 2.8, 4.2(c), (f), 5.0, 10.0, 12.0, #2. 314 (SOI), 2.2.21-2.2.27)

98. Although Ngatiwai’s claim is to all indigenous flora and fauna within their rohe, tohora, tuatara, kiore and tipori are taonga species of particular importance to Ngatiwai.

99. In recent years the relationship between DOC and Ngatiwai regarding the management of whale strandings has improved considerably. Protocols for the management of whale strandings have been developed, although as at January 2007 the Crown has still not accepted changes that Ngatiwai had requested to be made to the whale stranding protocol. Mr Gardiner for DOC agreed that the relationship had improved over the years, but that any final decisions regarding the issuing of permits in relation to whale strandings rests with the Crown.

⁷⁵ Ibid, p 667.

⁷⁶ David Williams *Matauranga Maori and Taonga*, #K6, p 69.

100. The kiore is considered by Ngatiwai to be a “*taonga tino tapu o Ngatiwai*.”⁷⁷
101. As noted in the evidence of Hori Parata:
- “The kiore is a tipuna of Ngatiwai. Rangi and Papa had many children. Each of these Atua in turn gave rise to every living and non-living thing we see in the world around us today. The kiore is a descendent of the union of Ranginui and Papa who had Hinamoki who created the kiore ... all living and non-living beings contain their own supernatural life principle or mauri. In order to safeguard the mauri of all things we need to show respect for all members of our whanau including the kiore.”⁷⁸
102. Evidence was given about the importance of kiore as a source of food and an environmental indicator, and about how it was celebrated by Ngatiwai in waiata, whakatauki and whakairo.⁷⁹
103. Mr Parata gave evidence about how the tikanga and traditions around the kiore were gradually lost following the arrival of Europeans. Ngatiwai assert that the Crown is in breach of the Treaty for proceeding to exterminate the kiore from Hauturu without Ngatiwai’s consent.
104. Ngatiwai demonstrated an ability to “*manage or at least ameliorate the detrimental effects of kiore over population*” through culling methods. Rolien Elliot for DOC acknowledged that kiore had lived with other species of flora and fauna, including tuatara, on offshore islands for 1,000 years prior to arrival of Europeans. She then conceded that it was only in the last 100 years (in relation to Hauturu, the period it has been owned by the Crown) that kiore were considered to have become a pest. Ms Elliot also acknowledged that feral cats had also had a “devastating effect” on indigenous biota of Hauturu and other islands.⁸⁰
105. The Crown’s position is that kiore is not indigenous to Aotearoa because it was introduced by early Polynesian migrants. However, the evidence of Ngatiwai is that kiore is, and was a taonga and therefore falls within the

⁷⁷ See Brief of Evidence of Hori Parata, #A33, paras 15-37; Transcript of Evidence of Hori Parata (18 September 1997, Whangarei) tape 8, pp 14-16.

⁷⁸ Ibid, p 14.

⁷⁹ Ibid, p 16.

⁸⁰ Transcript of Evidence of Rolien Elliot Department of Conservation(22-26 January 2007) p 67-70.

protection of Article II. Ms Elliot for the Crown gave hearsay evidence that there were some in Ngatiwai who did not consider kiore to be a taonga, but there is no evidence on the record from Ngatiwai to support that opinion.

106. The tohora, tuatara and tipori also have special significance for Ngatiwai as taonga, as set out in the evidence of Hori Parata,⁸¹ Himiona Munroe⁸² and Laly Haddon,⁸³ and discussed in detail with DOC witnesses John Gardiner and Rolien Elliot.⁸⁴
107. Ngatiwai seek official acknowledgement of their kaitiaki status over these taonga species, and co-management and equal decision-making with the Crown and its agencies, such as the Department of Conservation.

Waterways within the Ngatiwai Rohe

(First ASOC #1.1(a) – 2.1, 4.2(c), Second ASOC#1.1(g) – 3.4.1, 3.8)

108. The name of Ngatiwai is derived from water. In the words of Hori Parata:

“Ngatiwai traces its own origins through its whakapapa to the land and to the sea. Ngatiwai’s name is derived from the water. Consequently, Ngatiwai are the kaitiaki of the waterways within its rohe. It is Ngatiwai’s vision that they be recognised by the Crown as the kaitiaki of the waterways within Ngatiwai’s rohe.”⁸⁵
109. In his evidence, Hori Parata also covered the origins and cycles of water, and Ngatiwai’s role as kaitiaki of the waterways.⁸⁶
110. Ngatiwai, through its resource management unit, has been one of the most proactive iwi, in terms of seeking to assert and protect their status as kaitiaki through local authority consent processes, including resource consent hearings and Environment and High Court action, over the past 15-20 years.
111. Ngatiwai continue to challenge local authorities and the Crown over the mismanagement of their resources and failure to provide for Ngatiwai

⁸¹ Submission of Hori Parata, #A33.

⁸² Submission of Himiona Munroe, #B11.

⁸³ Submission of Laly Haddon, #A30.

⁸⁴ Brief of Evidence of Michael J Gardiner and Rolien S Elliot, Department of Conservation (21 November 2006), #R12.

⁸⁵ Brief of Evidence of Hori Parata, #A33, para 47.

⁸⁶ *Ibid*, para 49-58.

kaitiakitanga, but find the processes of the Resource Management Act and costs of litigation to be inhibiting factors.

112. Ngatiwai have also shown a willingness to positively engage with the councils and the Crown over the development of policies for better environmental management practices.⁸⁷
113. Ngatiwai seek formal acknowledgement that they are the kaitiaki of the waterways within their rohe.⁸⁸
114. During questioning by Crown counsel, Mr Parata explains the nature of Ngatiwai's claim to water:

“Mr Brown So would I take it you exercise some kaitiakitanga but not sufficiently extensive as you would like?

Mr Hori Parata No, no, the privatisation of water at the moment is one that really bothers us.

Mr Brown So, just, so we're clear on that, would your answer be yes to some exercise but no to satisfactory exercise?

Mr Hori Parata Yes, some, very little.

Mr Brown And can I also take it from your statement that the issue of water is a matter that is within the scope of the Wai 262 claim for the Tribunal to consider?

Mr Hori Parata That's correct. It's habitat.”⁸⁹

115. Ngatiwai seek acknowledgement of their kaitiaki status over the waterways within their rohe and more effective participation in decision-making under the Resource Management Act 1991.

Rongoa Maori

(#1.1(a), 2.1 and 2.9)

116. Extensive evidence was given by Mrs Raukura Robinson (who has been a practitioner of rongoa for over 70 years) for Ngatiwai, on the use and

⁸⁷ Brief of Evidence of Hori Parata, #A33; Brief of Evidence of Laly Haddon, #A30 and #A30(a); Brief of Evidence of Wiremu McMath, #B9; Transcript of Evidence of John Gardiner and Rolien Elliot (18-22 December 2006), p 53.

⁸⁸ Transcript of Evidence of Hori Parata, Ngatiwai Trust Board (18 September 1997, Whangarei) tape 8 (of 11), p 22.

⁸⁹ Transcript of Evidence of Hori Parata, Ngatiwai Trust Board (18 September 1997, Whangarei) tape 9 (of 11), p 17.

practices associated with rongoa Maori relating to practice of rongoa.⁹⁰ In particular her evidence centred on the responsibilities of practitioners,⁹¹ breaches of rongoa laws,⁹² relationship between Maori and flora and fauna,⁹³ and evidence on specific species used for rongoa,⁹⁴ including the pupharakeke, pupurangi (kauri snail), tuatara, kukupa(native pigeon), koromiko, karetu (flower), puawananga (native clematis), makomako (wine berry tree), puha, pohutakawa and kumara. Such was her commitment to observing the tapu of her evidence (which was given by video), that she fasted for two days.

117. Her evidence during the hearings also covered the use of species from the ocean for various cures, including kina, karengo and other seaweeds.
118. She was prevented from using her knowledge of rongoa because of what she describes as “the laws of the Pakeha”. Despite these prohibitions she managed to discretely but successfully heal a number of patients in the hospital where she worked using traditional medicines and remedies when conventional methods were failing.
119. Mrs Robinson’s evidence covers in detail the loss of the flora and fauna, and the associated loss of knowledge. Prejudice against Maori healing methods meant many practitioners, including Mrs Robinson, were forced to practice ‘underground’ for fear of prosecution.
120. She describes in detail the importance of wairua and tikanga in the practices of rongoa, and described herself as the conduit between the healing properties of the plant, the atua, and the person being healed. Karakia and selecting the right plants and the right time of day for taking them were vital. For these reasons she would not charge for her work, because this would diminish the curative properties of the healing process. However, she would accept koha, but this was determined by the giver, not herself.

⁹⁰ Brief of Evidence of Raukura Robinson, #A32 and #A32(a).

⁹¹ Second Brief of Raukura Robinson, #A32(a), paras 13-18.

⁹² Ibid, paras 19-31.

⁹³ Ibid, paras 32-37.

⁹⁴ Ibid para 41-99.

121. She also explained that one of the reasons for giving her evidence in video format was to avoid anyone trying to make the remedies and potions which, if mixed incorrectly, can be deadly.
122. Ngatiwai seek to have their rongoa practices and matauranga more fully recognised and protected, including greater decision-making around access to flora and fauna, establishment of whare wananga for transmission of knowledge, and the return of important areas of ngahere for future teaching of the practices of rongoa o Ngatiwai.

Customary Harvest

(#1.1(a) – 2.1, 2.2, 2.5(b))

123. Mr Whetu McGregor gave evidence on the customary gathering practices and tikanga associated with flora and fauna within the rohe of Ngatiwai.⁹⁵ These practices included manu oi, use of tuatara, fish, te korora (penguin).
124. Evidence was also given by Hori Parata and Himiona Munroe on the importance of customary gathering of Kiore which was described as “he kai Rangatira – the food of the chiefs.”
125. Evidence has also been given by Hori Parata on the protocols around the stranding of whales:

“However, Ngatiwai still takes issue with the Crown assuming ownership of the Tohora under the Marine Mammals Act and believe that the Tohora and other taonga of Ngatiwai should be returned to the guardianship and control of Ngatiwai.”⁹⁶

126. Ngatiwai seek to have their customary harvest and practices recognised and protected, and to do so in constructive dialogue with the Crown.

⁹⁵ Brief of Evidence by Whetu Marama McGregor, #A31.

⁹⁶ Updating Evidence of Hori Te Moanaroa Parata (18 August 2006) #P31.

Whare Wananga and Matauranga

(#1.1(a), 4.2(a)(i), 4.2(b), 5.1(2))

127. Himiona Munro's evidence tells of his childhood being brought up with tohunga of Ngatiwai, Te Ngaranoa.⁹⁷ As a result of the Tohunga Suppression Act, Te Ngaranoa and other tohunga like him were forced underground:

“There were tohunga who were afraid to carry on with their practices because of fear of the Crown dealing with them. Many ceased being tohunga and the ones who remain practising these ways were driven underground. But as has been explained to me by my parents and uncles and aunties the old fellow was not afraid of any of those Pakeha laws and he practiced what he practiced without much fear of those laws.

“I think he still paid a price for those laws. The tohunga of that time became closet tohunga who were looked down on. This made it almost impossible for people like Te Ngaranoa to find people or ways to preserve his knowledge. He and others like him sort of ended up in an underground movement.”⁹⁸

128. Similarly, Te Warihi Hetaraka, the great grandson of Te Kauwhata (who signed the Treaty of Waitangi on behalf of Ngatiwai) and a descendant of Te Warihi Kokowai, the last tohunga mataapuna, explained the role of the tohunga:

“Mataapuna was considered as the highest ranking tohunga throughout our rohe and I think throughout the rest of the motu as well, because of this rank Te Warihi's sacred duties covered all major aspects of social organisation, which range from the ancient practice of hahunga, the felling of trees for the building of waka, and whare whakairo, healing of the sick, to the placing and lifting of tapu both on sea and land, for the purpose of conserving resources throughout the rohe in which he lived and beyond.”⁹⁹ (#B10, para 6)

129. Te Warihi Hetaraka's evidence also covers matauranga and intellectual property (#B10, paras 10-18), the importance of matauranga (#B10, paras 19-28), breaches of matauranga and Maori law (#B10, paras 29-45), wahi tapu (#B10, paras 46-53).

⁹⁷ Brief of Evidence of Himiona Peter Munroe, #B11.

⁹⁸ Ibid, para 35-36.

⁹⁹ Brief of evidence of Te Warihi Hetaraka, #B10, para 75-76.

Whakairo and Matauranga

(First ASOC #1.1(a) – 2.1, 2.3, 2.5, Second ASOC #1.1(g) – 3.1, 6.1-6.3)

130. The advent of Christianity in the Tai Tokerau region had a devastating effect on the practice of whakairo. In the words of Te Warihi Hetaraka:

“Te Warihi [the Tohunga and Mataapuna of Ngatiwai] witnessed and experienced firsthand the initial impact of colonialism, from the second coming of Captain Cook to the wars against the British that he by then an old man, personally took part in after the signing of the Treaty. His mana diminished rapidly once the majority of our people in Tai Tokerau adopted Christianity, which then led to the abolishment of the erection of carved meeting houses throughout the entire northern region!”
(#B10, para 7)

131. Mr Hetaraka, himself a tohunga whakairo, discusses the sacredness of the carved designs and for this reason:

“He used to be never allowed to take photos of meeting houses because the whakairo was tapu. I think when photos came into being as representations of our ancestors that use of the carving began to fade. These days, you are now forbidden to take photos of ancestors which may be hanging inside wharenuī. However, some marae the tapu is so strong you can’t even take cameras in. This is all pointing towards the law that you do not copy the designs of the whakairo without the designer’s or tohunga whakairo’s permission.”

132. Further on in his testimony he states that:

“Carvings are more than just designs. They are stories in themselves. They are our form of writing and are therefore beyond just design. They are something a lot more in that they are the written form of our history.”¹⁰⁰

133. Mr Hetaraka is also concerned that NZQA is not adequately equipped to protect the teaching of whakairo within the education system. In particular, the knowledge is not being transmitted in its correct form and that NZQA, rather than Maori, own and control the unit standards for whakairo.¹⁰¹

¹⁰⁰ Ibid, para 84.

¹⁰¹ Ibid, para 37

134. In relation to potential remedies, Mr Hetaraka observes that:

“Maori should have control of their things. I even go as far as to recommend systems be put in place that enable us to have that real control over our environment and the use of it.”¹⁰²

“My complaint is that the Pakeha system has got to recognise Maori methods of educating and protecting. The systems have got to recognise our methods of teaching, our methods of healing, our methods of protection. It is as simple as that.”¹⁰³

Marine Reserves

135. Evidence has also been heard from Ngatiwai regarding the plethora of marine reserves within their rohe moana. This is adversely impacting upon their commercial and customary fishing rights. As explained by Mr Parata (P31): “*Ngatiwai is faced with an overwhelming number of marine reserves and applications for new marine reserves and protected areas within our rohe.*”¹⁰⁴ For example, the rohe of Ngatiwai contains four existing Marine Protection Areas:

135.1 The Leigh Marine Reserve – New Zealand’s first marine reserve.

135.2 The Poor Knights Marine Reserve – of international significance.

135.3 The Tawharanui Marine Park – a regional council park.

135.4 The Mimiwhangata Marine Park – a DoC park.

“Despite the length of the Board’s involvement with these issues, the number of Marine Protected Areas, the range of Marine Protection Area types and the supposed ‘treaty protection’ of Section 4 of the Conservation Act 1987 for Ngatiwai customary rights and responsibilities, at the present time there is no formal role for Ngatiwai in the administration and management of these areas. We believe that the establishment of these areas will result in the extinguishment of a range of Ngatiwai customary rights and in particular our customary fishing rights.”¹⁰⁵

¹⁰² Ibid, para 104.

¹⁰³ Ibid, para 10.

¹⁰⁴ Updating Evidence of Hori Te Moanaroa Parata (18 August 2006) #P31.

¹⁰⁵ Ibid, para 15.

136. Ngatiwai seek to have their customary fishing interests protected before further marine reserves are imposed within their rohe. More particularly, they seek to have an effective say in decisions around the imposition of any further marine reserves and the ongoing management of such reserves.

137. The approach to remedies for Ngatiwai are best summed up by Hori Parata;

“I have spent the better part of my life endeavouring to work with various Crown agencies and others with a view to finding workable solutions to difficult problems. I remain committed to that kaupapa. It is my belief that this claim is only as complex and difficult as the willingness of the parties to find solutions. The solutions are within our hands and Ngatiwai look to the tribunal to help steer us in the right direction.”¹⁰⁶

Crown Statement of Response¹⁰⁷

138. The following is the Tai Tokerau claimants’ response to the Crown Statement of Response (“CSOR”).

Cabinet Direction 25 June 2002 – “Wai 262 Crown Guiding Principles”

139. At paragraph 7 of the CSOR the Crown refers to a Cabinet direction relating to “how the Wai 262 claims can most usefully be addressed by the Crown (and, it is hoped, the Tribunal)”. The Cabinet direction sets out its rationalisation of its position on the Wai 262 claim by reference to “guiding principles” which are recorded in the CSOR:

“Those principles being the promotion of an approach to Wai 262 that:

- is forward-looking and focuses on government initiatives that have the potential to improve relationships between iwi and the Crown;
- is mindful of the Crown’s duty to act in good faith towards the Wai 262 claimants and other claimant groups;
- does not undermine the rights of other claimant groups to bring their own Treaty claims that may include claims or issues that are currently raised in Wai 262;

¹⁰⁶ Ibid, para 20.

¹⁰⁷ Crown Statement of Response, #2.256.

- does not undermine existing Treaty settlements by revisiting issues in claims that have already been settled;
- does not undermine the Crown’s policy framework and processes for negotiating and settling historical Treaty claims;
- does not revisit issues or claims that have been addressed through existing Crown policies and practices specifically developed in response to Treaty claims;
- recognises wider Crown policy initiatives that are relevant to the issues that can reasonably be addressed in Wai 262 and may ameliorate potential Treaty breaches; and,
- is mindful of New Zealand’s international obligations, particularly those relating to intellectual property and environmental, resource and conservation management.”¹⁰⁸

140. The claimants have assessed each of those guiding principles against their aspirations in this claim, and respond as follows.

Forward-Looking Focus on Government Iwi Initiatives

141. The Waitangi Tribunal has adopted a “forward looking” focus for this claim, focusing on current Crown legislation and policy. There are Crown initiatives which aim to improve Crown-iwi relationships, and these submissions acknowledge the positive developments where credit is due. At the same time, the Crown has a responsibility to focus itself on Crown initiatives which have simply failed to deliver results for Maori, and be open to engagement with its Treaty partner to find solutions, even if that means a departure from its accepted practice.

Obligation to Act in Good Faith

142. Good faith is a basic principle of the Treaty of Waitangi relationship, and stems from the guarantee of ‘protection’. In the context of the Crown’s approach to the claim, good faith would require a willingness to engage with Maori where such serious and wide-reaching grievances exist about the nature of the Treaty relationship. Good faith is not about a slavish adherence to existing policy. Yet Crown witnesses simply produced an

¹⁰⁸ #2.256, fn 1.

analysis of existing policy with no attempt to posit how the claimants' concerns about those policies might be addressed.¹⁰⁹ Indeed, the overall approach of the Crown seems to be summed up in Crown counsel's assertion to Dr David Williams that:

“And you know that I'm facing, you know, a claim that's brought against the Crown, so it's my duty to do the best I can to resist it. Do you agree with that?”¹¹⁰

143. Dr Williams did not agree, and said that it was Crown counsel's duty to assist the Tribunal wherever appropriate. Counsel then changed his wording from “resist” to “test” the claims being raised.
144. Good faith requires the Crown to be transparent in its approach to the claim. Crown counsel queries “*what are the nature and legal incidents of the rights being asserted?*” and that “*it's not for the Crown to build a regime to provide answers to questions that remain unanswered.*”¹¹¹ Yet evidence from the Ministry of Economic Development, and Te Puni Kokiri documentation provided after the Crown hearings, illustrates how comprehensively the Crown has considered the very issues raised in this claim since 1994. The Ministry of Foreign Affairs and Trade has actively participated in international fora such as the World Intellectual Property Organisation which is seeking to “build a regime” to answer these very issues.
145. Good faith also requires an approach to the Treaty of Waitangi which is in accord with its spirit. Instead, the Crown's Statement of Response contains a position of unprecedented narrowness when it denies that the Treaty guaranteed to Maori any interests of a kind which were “not capable of protection by English law as at 1840”.¹¹²

¹⁰⁹ See for example Transcript of Evidence of Doris Johnston (11-15 December 2006) pp 344-345.

¹¹⁰ Transcript of Cross-Examination of Dr David Williams (Claimant Week 13) tape 14, p 246.

¹¹¹ Crown Opening Submissions (13 December 2006) #R25.

¹¹² This statement is repeated throughout the CSOR, but generally at para 42.

Rights of Other Claimants to Raise Wai 262 Related Issues

146. Such a right is fundamental and accepted by the Wai 262 claimants. However, the Crown cannot have it both ways. It has responded to a range of claims which have national application without particular reference to each potential claimant group. The Crown has restricted rights of claimants to raise commercial fisheries issues, based on a pan-iwi settlement. It has responded to radio spectrum and petroleum claims by rejecting the findings of the Tribunal without reference to iwi at all. It responded to foreshore and seabed claims with legislation affecting all iwi.
147. In order to maximise the opportunity for non-Wai 262 claimant iwi to take advantage of the work undertaken by the claimants in this claim, the claimants have proposed a process in the Remedies section which would involve all iwi, hapu and whanau in developing solutions to the issues which have national application.

Integrity of Settlement Process

148. The claimants are just as concerned as the Crown to ensure that the integrity of Treaty settlements is upheld. The Crown's "guiding principles" seek an approach which:
- 148.1 Does not undermine existing settlements;
 - 148.2 Does not undermine the policy framework for settling historical grievances;
 - 148.3 Does not revisit policies which have been developed in response to Treaty claims.
149. The Wai 262 claim does not seek to revisit or re-litigate issues that have already been addressed through existing Treaty settlements. It would appear that the focus of the Tribunal on Crown legislation and policy since 1975 (admittedly after the Statement of Response was filed), will largely address concerns regarding the conflict with historical settlements.

150. In the case of Te Rarawa, and therefore presumably as applicable to other iwi in similar situations, the Minister in Charge of Treaty Negotiations has confirmed that¹¹³:

“Settling the historical elements of Wai 262 within Te Rarawa historical Treaty settlement would not preclude Te Rarawa’s participation in a settlement of the contemporary elements of Wai 262, should there be such a settlement.”

151. Nevertheless, the Tribunal has accepted that the “historical context” will be important to determine the nature and extent of findings and recommendations in Wai 262. It is not always possible to draw a clear distinction between historical and contemporary breaches and there will be times when these issues overlap. For example, whilst the Crown has argued that Wai 262 is not a land claim and that these matters should be dealt with by virtue of historical settlements. It is argued for the claimants that the recognition of their interests in their whenua (by way of the return of land or the acknowledgement of kaitiaki status by way of co-management or other mechanisms) is a valid basis of remedies to address contemporary breaches.

Protecting Existing Policy Initiatives Being Pursued by the Crown

152. This is a rather circular argument because it is the focus of this Tribunal to consider and assess current Crown policy against the principles of the Treaty. If, after that assessment, the Tribunal finds policies or legislation to be prejudicial to the claimants, then it is appropriate that the Treaty partners engage to address those deficiencies.

153. That said, certain Crown agencies have begun to address a number of policy deficiencies concerning issues first raised by the Wai 262 claim back in 1991. Those initiatives are acknowledged. However, as these submissions will highlight, these policy initiatives are largely being undertaken by the Crown “in-house” and without adequate or any consultation with either the claimants or Maori generally. The ANZTPA Bill is an example of a policy being developed in a vacuum without input from Maori. Only as a consequence of the issue being raised through the Wai 262 hearings process,

¹¹³ Crown Statement Of Response, # 2.256, p 25.

did the Crown finally agree to engage with the claimants. Maori should not have to go to the Tribunal in order to ensure that the Crown complies with its duty to consult and engage in good faith with its Treaty partner.

Relevance of International Obligations in IP, and Resource/Conservation Management

154. There is some irony to this being a guiding principle of the Crown, when the claimants have maintained throughout this claim that the international obligations on the Crown in intellectual property, and resource, environmental and conservation management are critically relevant, and must inform the Crown as to its approach. Yet the Crown resisted the application for a hearing of international experts in 1998 on these obligations on the basis that the international framework held no relevance.
155. These submissions address the international law context in some detail, and the claimants submit that the Crown's obligations under those instruments confirm the validity and relevance of the claimants' concerns.

Status of Existing Claims of Tai Tokerau Claimants

156. The CSOR refers to existing historical claims by Tai Tokerau claimants.¹¹⁴

Te Rarawa

157. Te Rarawa are currently in negotiations with the Crown to settle historical Treaty claims. The Crown has acknowledged that these negotiations are without prejudice to the Wai 262 claim.¹¹⁵ It is possible that by the time the Tribunal issues any findings or recommendations in the Wai 262 claim, Te Rarawa may have settled its historical claims. However, Te Rarawa supports the process of engagement and, in particular, the recommendations for co-management as outlined in these submissions.

¹¹⁴ Ibid, para 22-26.

¹¹⁵ Brief of Evidence of Haami Piripi (11 August 2006) #P3.

Ngatiwai

158. As noted in the updating evidence of Himiona Munroe,¹¹⁶ Ngatiwai's land-based claims extend across a number of different hearing districts, including Hokianga, Bay of Islands, Whangarei, Mahurangi and The Gulf Islands. Ngatiwai would be unduly prejudiced by having to wait several years for all of their land-based claims to be heard.

159. The Tribunal recognised the prejudice to Ngatiwai of a "disjointed" hearing process in its Kaipara Report where it noted:

"A division of the Ngatiwai rohe across several hearing districts makes it difficult for the Tribunal to see their land issues in their full context."¹¹⁷

160. Although the Kaipara Tribunal found that Ngatiwai were prejudiced by Crown actions in respect of the Mangawhai lands and the claim was well-founded, they declined to make any specific recommendations because only part of Ngatiwai's lands lay within the Kaipara Inquiry.¹¹⁸

161. As stated by Laly Haddon for Ngatiwai, the significant majority of Ngatiwai's claims relate to DOC estate lands. This point was acknowledged in cross-examination by John Gardiner and Rolien Elliott for DOC. Ngatiwai are seeking effective co-management in relation to all DOC lands within their rohe. It is submitted that the process of engagement sought by the claimants would ensure the establishment of a robust policy framework, guidelines and objectives that would enable the parties to negotiate such a settlement.

Ngati Kuri

162. Ngati Kuri are not in negotiations with the Crown in relation to their historical claims.

¹¹⁶ Brief of Evidence of Himiona Munroe (11 August 2006) #P7.

¹¹⁷ Waitangi Tribunal *The Kaipara Report: Wai 674* (Legislation Direct, Wellington, 2006) 131.

¹¹⁸ *Ibid*, p 139.

Findings Sought From the Tribunal

163. In its Statement of Response the Crown seeks certain findings from the Tribunal concerning the claimants and particular aspects of their claims.¹¹⁹ These have not been pursued in any formal application to the Tribunal by the Crown, but are addressed here in the event that the Crown intends to pursue the matter in its closing submissions. Some of the “findings” sought have been addressed in other sections of this response.¹²⁰

Mandate of Tai Tokerau Claimants

164. The Crown seeks findings on the mandate held by Saana Murray for Ngati Kuri, Del Wihongi for Te Rarawa and Te Witi McMath for Ngatiwai, and in particular the relationship to rohe specific historical claims of each of those iwi.¹²¹

165. In the sixteen years since this claim was filed, there has been no challenge to the mandate of the above-named claimants to prosecute the Wai 262 claim on behalf of their respective iwi. No evidence or submissions have been made to the Tribunal questioning their mandate. Indeed, the resolutions from the 1994 national hui and the many hui that have been held subsequently, have all endorsed and supported the actions of the Wai 262 claimants. In any event, section 6 of the Treaty of Waitangi Act 1975 permits any Maori or group of Maori to make a claim to the Tribunal. Issues of mandate properly arise in the context of negotiating and settlement of the claim.

Relationship of Wai 262 Claims to “Generic” Claims

166. The Crown mentions a number of generic claims that have already been the subject of prior settlement such as the Te Reo Maori claim (Wai 11), Maori

¹¹⁹ Crown Statement of Response, #2.256, para 36.

¹²⁰ For example *ibid*, para 36.8 Historical aspects of Te Tai Tokerau claims.

¹²¹ *Ibid*, para 36.7.

Tertiary Education (Wai 431) and Wananga Maori Education Funding (Wai 718) which relate to Wai 262.¹²²

167. The Tribunal is not prevented from inquiring into the policy and legislation giving effect to the settlement of these generic claims. For example, the Tribunal is able to make findings and recommendations on the extent to which the Crown has been acting in a manner consistent with the Maori Language Act 1987, or the extent to which the actions or omissions of the Crown in implementing that claim are in breach. These are matters which have been addressed in the evidence of the claimants and are addressed in the context of these submissions.
168. To the extent that Wai 262 touches upon prior generic claims or their implementing legislation, the Tribunal has a valuable opportunity to provide a “stock-take” of the Crown’s performance.

Implications of Wai 262 for all Maori

169. The implications of any findings by the Wai 262 Tribunal on matters of relevance to all Maori (especially those not represented in the Wai 262 claim),¹²³ will be the same as any other claim that is being brought by, or on behalf of, an iwi or Maori organisation that has had implications for all Maori, including those not represented within those particular claims. The Te Reo Maori claim (Wai 11) is a good example of this. The claimants propose a process of engagement in the remedies sought in this claim to address the importance of wider iwi involvement.

Relevance of Wai 740 Claim

170. The Crown seeks findings on the implications of any findings of the Wai 262 Tribunal in relation to the Wai 740 claim.¹²⁴ The Wai 740 claim was to be heard in conjunction with the Wai 262 claim, but was not pursued.

¹²² Ibid, para 36.10, referring to paras 29-30 of the CSOR.

¹²³ Ibid, para 36.11.

¹²⁴ Ibid, para 36.13.

Instead, the claimant Mr Fred Allen, chose to give evidence in support of the Wai 262 claim as an Interested Person.¹²⁵

The Treaty and Treaty Principles

171. These aspects of the CSOR¹²⁶ are responded to in these submissions under the heading “Principles of te Tiriti o Waitangi/the Treaty of Waitangi”.

Tino Rangatiratanga ... Me o Ratou Taonga Katoa

172. The substance of this section of the CSOR¹²⁷ is dealt with throughout the submissions. For the sake of completeness, certain key aspects of the Crown’s arguments are addressed here.

Specific Object and Specific Subject of the Rights Must be Identified

173. The Crown contends that rangatiratanga rights cannot be claimed generically, but must be both species specific and specific as to the individual, hapu or iwi asserting the rights.¹²⁸

174. The Maori version of Article II does not require any specificity beyond guaranteeing “te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa”. The English version of Article II provides a little more detail (lands, and estates, forests, fisheries and other properties) but falls far short of the sort of specifics sought by the Crown. The Treaty (both Maori and English versions) lend themselves to the interpretation that Maori were guaranteed the continued recognition and protection of their existing customary laws, interests and property rights. The Waitangi Tribunal has found as recently as April 2007 that:

“the principle of active protection applied to those things, tangible and intangible, over which Maori exercised tino rangatiratanga according to

¹²⁵ Brief of Evidence of Fred Allen (15 September 2006) #Q10.

¹²⁶ CSOR, #2.256, paras 37-39.

¹²⁷ CSOR, #2.256, paras 40-53.

¹²⁸ CSOR, #2.256, para 40.

their own law....There is no evidence that the guarantee of **customary property rights** was intended to be short-term in this way.”¹²⁹

175. The Tribunal need only satisfy itself that the thing being claimed is a taonga within the contemplation of Article II (Maori version) for the guarantee of protection to be triggered. However, it is submitted that the claimants have prima facie established that in accordance with their customs, values and laws, all indigenous flora and fauna were considered taonga prior to, as at, and after 1840. Included in this category are kumara and kiore, both of which were introduced by early Polynesian ancestors.

176. As to the Crown’s assertion that the rights must be specific to an individual hapu or iwi, assistance can again be found in the specific words of the Treaty itself. In Article II of the English version:

“Her Majesty the Queen of England confirms and guarantees to the chiefs and tribes of New Zealand and respective families and individuals thereof ...”

177. And in the Maori version of Article II:

“Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu, ki nga tangata katoa o Nu Tirani

[as translated by Sir Hugh Kawharu] the Queen of England agrees to protect the chiefs, the sub-tribes and all the people of New Zealand ...”

178. Clearly, the rights reserved under Article II were to all Maori individuals, hapu and iwi as at 1840, and their descendants thereafter. Moreover, Governor Hobson did not consider it necessary for all chiefs and tribes in New Zealand to sign the Treaty before proclaiming sovereignty.

179. In any event, it is submitted that the Tai Tokerau claimants have established the nature and extent of both their rights and responsibilities arising from the Treaty of Waitangi, and that those rights and responsibilities vest in the respective whanau, hapu and iwi of the respective claimants today.

¹²⁹ Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui* (Legislation Direct, Wellington, 2007), p 115-116 (emphasis added).

Treaty Does Not Protect Rights in Property or Resources Unknown in 1840

180. The Crown asserts that the Treaty cannot guarantee to Maori rights or interests in property or resources that were neither known to Western nor Maori science in 1840,¹³⁰ It gives as an example genetic materials.
181. The Tai Tokerau claimants presented evidence to the Tribunal showing that they did have knowledge and an understanding of genetic materials in terms of their own matakā and tikanga prior to 1840.¹³¹
182. Irrespective of whether or not properties or resources were known about by either Maori or the Crown as at 1840, the Treaty protects and guarantees to Maori rights and interests in relation to newly discovered resources. Particularly where those resources are *derivatives* of properties and resources that *were known* about and protected at 1840 (e.g. lands, forests and fisheries). Biological and genetical resources as defined under various international treaties, and the commercialisation of those resources and traditional knowledge associated with those resources, are all derived from taonga that existed prior to and after 1840.
183. The claimants assert a development right in such resources which supports this conclusion.

Treaty Does Not Protect Rights and Interests Unknown to the English Law in 1840

184. The Crown's assertion that the Treaty could not "*guarantee to Maori property and/or proprietary rights and/or interests of a kind that was not known to, recognised, or capable of protection by English law in 1840*",¹³² is plainly wrong. The Waitangi Tribunal in *Te Tau Ihu o Te Waka a Maui Report* has made definitive statements in this regard, finding that the Article II guarantee extended to all those things over which Maori exercised tino rangatiratanga according to their own law.

¹³⁰ Crown Statement Of Response, #2.256, para 41.

¹³¹ Brief of Evidence of Peter Rowland Wills (8 February 2002) #K15; Brief of Evidence of Mana Cracknell (6 February 2002) #K12; Submission by Dell Wihonga, #A27.

¹³² Crown Statement Of Response, #2.256, para 42.

185. It would be a violation of both the spirit and the letter of the Treaty if it was to be interpreted as only protecting taonga (their treasures all) as were recognised or known to the English law in 1840. Further, such an interpretation would result in the Treaty being fossilised as at 1840.
186. The Crown's contention also ignores the body of Treaty jurisprudence that has developed over the last 20 years, that views the Treaty as a "living document", "always speaking" and an "evolving compact".
187. The Crown asserts that allegations regarding breaches in relation to taonga must be determined on a case-by-case basis, or the Crown is unable to respond.¹³³ As noted above, a fair, large and liberal interpretation of the Treaty lends support to a wider, rather than a narrower, scope of protection. In any event, the claimants say that their claims for protection of their matauranga and associated taonga including flora and fauna, have been prima facie made out. The onus is upon the Crown to show that such rights and interests do not exist.

Development Rights

188. The Crown acknowledged that Maori are entitled to exercise tino rangatiratanga over their tangible and intangible property and resources "to the extent of their legal ownership or control of that property or those resources". That includes the right to develop those resources.¹³⁴
189. The Crown further accepts that Maori have a right to enjoy the benefits of new technologies and discoveries since 1840, and new forms of property rights, but says that such rights extend from Article III of the Treaty.¹³⁵
190. The claimants assert that their right of development arises from both Article II and Article III of the Treaty. The indigenous right of development is recognised in international documents such as the Rio Declaration, Agenda 21, Declaration on the Rights of Indigenous Peoples, and the Mataatua Declaration. The right of development is further recognised in the

¹³³ Ibid, para 44.

¹³⁴ Ibid, para 45.

¹³⁵ Ibid, para 46.

Muriwhenua Report,¹³⁶ and to a limited extent by the Court of Appeal in the *Whalewatch* case.¹³⁷

Relationship Between Tino Rangatiratanga and Indigenous Rights

191. The Crown contends that:¹³⁸

191.1 the notion of indigenous rights is a relatively recent development, as reflected in the Declaration on the Rights of Indigenous Peoples;

191.2 the Crown accepts that some of these rights are similar to rights conferred on Maori by the Treaty of Waitangi;

191.3 the Crown does not accept that rights of rangatiratanga should be determined by analogy to rights of indigenous peoples generally, and in particular the right of self-determination (dDRIP: Article 4) and a right to special measures in relation to human and other genetic resources (dDRIP: Article 29).

192. Professor Mason Durie gave expert evidence for the Tai Tokerau claimants, relying on his writings on self-determination,¹³⁹ and was cross-examined by the Crown on this very aspect. The transcript of the exchange with Crown counsel has been put to Crown witnesses for their comment on Durie's summary of what the claim is about.¹⁴⁰ He agreed that the claim's raising of issues of authority and control was why he had drawn on his self-determination work in his written evidence. The issue of self-determination was also relevant to his discussion of the way in which Maori should be focusing on their own dealings with other indigenous peoples internationally, and for those relationships to be formalised by Maori as opportunities for positive development.

¹³⁶ Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fisheries Claim: Wai 22* (Legislation Direct, Wellington, 1988).

¹³⁷ *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).

¹³⁸ Crown Statement Of Response, #2.256, para 48-50.

¹³⁹ Brief of Evidence of Mason Durie (31 January 2002) #K14.

¹⁴⁰ Transcript of Evidence of Mason Durie, Week 12, Tape 1, pp 26-28. Extract is document #R6(g). See also extract from his text Mason Durie *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination* (Oxford University Press, Oxford, 1998), #L9.

193. The principle of self-determination was first elaborated in the Charter of the United Nations 1945, and further elaborated in the International Covenant on Economic, Social and Cultural Rights 1966 and the International Covenant on Civil and Political Rights 1966. Indigenous peoples, including Maori, assert that as they are “peoples” they are guaranteed the right of self-determination. This issue has been the subject of considerable debate internationally and the New Zealand Government has actively opposed recognition of self-determination under the dDRIP.¹⁴¹
194. Contrary to the Crown’s contention, the concept of self-determination is not a recent one. It is now firmly entrenched as part of international human rights law.¹⁴²
195. The New Zealand Court of Appeal in the 1987 Lands case makes a direct link between the rights guaranteed under the Treaty and international human rights:
- “[The Treaty of Waitangi] ... is a document relating to fundamental rights: that it should be interpreted widely and effectively and as a living instrument taking account of **subsequent developments** of human rights norms.”¹⁴³
196. Similarly, the Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities has noted that:
- “To be effective, the protection of indigenous peoples’ heritage should be based broadly on the principle of self-determination, which includes the right and duty of indigenous peoples to develop their own cultures and knowledge systems, and forms of social organisation.”¹⁴⁴
197. Therefore, contrary to the Crown position, tino rangatiratanga can be informed by reference to self-determination principles.

¹⁴¹ Brief of Evidence of Catherine Davis, (11 August 2006) #P5; Brief of Evidence of Aroha Mead (18 August 2006) #P30(a); Updating Evidence of Tracey Whare and Claire Charters (11 August 2006) #P13.

¹⁴² See for example, Erica-Irene A Daes *Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations to the Commission on Human Rights* (E/CN.4/sub.2/1993/29).

¹⁴³ *New Zealand Maori Council v. Attorney-General* [1987] 2 NZLR 656.

¹⁴⁴ Report of the Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/sub.2/1994/26) Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples (Annex 1, 21 June 1995) [see also E/CN.4/sub.2/2000/26, 19 June 2000 which updates the 1995 version with some minor changes]

The “Fourth Article” of the Treaty

198. The Crown denies that there is any so-called “Fourth Article” of the Treaty in the development of the principles of the Treaty by the Courts or this Tribunal.¹⁴⁵ This is responded to in detail in Part B of these submissions. The contention is out of step with Treaty jurisprudence, as has been recently confirmed in the Tribunal’s *Te Tau Ihu o Te Waka a Maui Report*.¹⁴⁶

Acknowledging the Positive in the Crown 1975-2007

199. These submissions intend to remain positive about the potential for a “transformation” of the relationship between the Crown and Maori, and this is based on the fact that there has been a significant improvement in the recognition of, and provision for, certain Maori interests, from 1975 to the present day. The basis for positiveness also lies in the fact that certain key Crown witnesses, under questioning from counsel and the Tribunal, were genuinely open to the need for, and the potential benefits of, a process of engagement with Maori to address the key issue of power-sharing. That is to be commended.

200. That said, the claimants maintain that positive Crown initiatives are limited to a significant degree by the lack of substantive sharing of decision-making authority, which lies at the heart of the Treaty relationship. The assessment of the positive steps which have been taken, is necessarily against the background of that fundamental criticism.

201. Based on the historical material produced by the Tribunal-commissioned witnesses, it was clear that by 1975 tangata whenua had endured decades of prejudicial legislation and policy which had effectively excluded them from authority over their environment, access to their resources, or control over their intangible treasures such as matauranga and language.

202. In the period 1975-2007, which is particularly the purview of this Tribunal, it is acknowledged by the claimants that there have been improvements in

¹⁴⁵ Crown Statement Of Response, #2.256, para 53. See also Crown Counsel objection at Transcript of Evidence, Claimant Week 13, Tape 12, p 207.

¹⁴⁶ Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui* (Legislation Direct, Wellington, 2007) p 115.

the Crown's recognition of, and provision for, the Treaty relationship. Certain positive initiatives or spokespeople of the Crown stand out for comment, and it is appropriate to acknowledge those developments:

202.1 *The Treaty of Waitangi Act 1975, and the establishment of the Waitangi Tribunal.* This is a forum in which tangata whenua can raise their grievances in order to have them robustly considered in a manner which seeks to encompass a bi-cultural approach to both the practice of the Tribunal, and its development of Treaty jurisprudence. The Crown has engaged in this process, often robustly resisting claims, or making appropriate concessions, but engaging nonetheless. The settlement of claims which are found to be well-founded by the Tribunal, is itself a process of positive engagement.

202.2 *The inclusion of the principles of the Treaty of Waitangi in various statutes.* In particular the Conservation Act 1987 which is at the high end of Treaty references in statute¹⁴⁷ and would, if taken to its appropriate fulfilment of 'giving effect to the principles', lead to the sort of 'transformation' in the relationship, sought by the claimants. Ultimately, the operational interpretation of these statutory references to the Treaty are dependent on the goodwill and political will of Crown agents. Generally, when interpreting Treaty references in statutes, officials have applied a limited view of the Treaty's application, and to resist notions of proprietary interests held by tangata whenua in resources. Moreover, references to the Treaty principles have been predominantly 'weak' references.¹⁴⁸ However, the incorporation of the Treaty into legislation has assisted demonstrably with the process of 'carving out' Maori interests. Of concern in this context is the Crown's current support for the Private Member's

¹⁴⁷ Note also section 9 of the State Owned Enterprises (Treaty of Waitangi) Act.

¹⁴⁸ For example, Resource Management Act 1991.

Bill which would see a removal from legislation of references to the Treaty principles.¹⁴⁹

- 202.3 *The increased uptake by civil servants of training and development in te reo Maori me ona tikanga.* This signals a Crown acknowledgement of the importance of increasing the capacity of Crown officials to widen their perspective on how issues might be addressed, in order to encompass an understanding of the tangata whenua perspective. That is an important step forward. Such a focus on increasing internal capacity is only a means to an end however, and must be balanced by a focus on increasing the capacity of the Maori Treaty partner to engage, and from that platform, to reach for solutions which incorporate equitably both perspectives.
- 202.4 *Specific examples of where co-management options have been considered as viable and legitimate, or where control and decision-making authority over conservation land has been returned to tangata whenua.* These instances are very rare, and are mainly in the context of full and final settlements with iwi of their historical claims, but do include the return of control and decision making over Motukauri Island (5 hectares) to Ngatiwai where the Crown retains ownership under the Reserves Act as a scenic reserve.
- 202.5 *Specific examples of co-management options in relation to particular species.* In the case of Ngatiwai, the whale protocol has been established as a worthwhile model for the Treaty partners working together.
- 202.6 *Development work by MED on assessing sui generis models of protection for traditional knowledge, and MED's efforts to include Maori in the consultation on the Inter-Governmental*

¹⁴⁹ Principles of the Treaty of Waitangi Deletion Bill.

Committee meetings at the World Intellectual Property Organisation.

- 202.7 *Crown Research Institutes.* A general acceptance by the CRIs that they should be increasingly responsive to the Maori perspective, and to working in collaboration with Maori. Under questioning, the CRIs largely supported the development and application by their organisations of a Code of Ethics similar to that of the International Society of Ethnobotanists, as examples of international best practice (particularly in relation to prior informed consent).
- 202.8 *The Department of Education's new Secretary for Education, Dr Karen Sewell.* Dr Sewell was frank in her concessions about the deletion of the reference to the Treaty of Waitangi in the draft curriculum, and illustrated a willingness to be actively engaged in finding solutions. She was particularly open about a willingness to enter into a 'long conversation' with Maori about how the education curriculum and its delivery might best accommodate Maori aspirations for tino rangatiratanga. She had been involved in her role at the Education Review Office in useful models of assessment for kohanga reo and kura kaupapa, which sought to ensure that a methodology for assessment was based in tikanga Maori, and that ultimately authority for that assessment would return to the kaitiaki when there was appropriate capacity. Refreshingly, she did not seem fazed by the prospect of 'sharing decision-making authority', acknowledging that it would require negotiation with Maori.
- 202.9 *Creative New Zealand's Toi Iho Maori Made Mark.* While the claimants (and the artists involved in this initiative) acknowledge that the Toi Iho Mark was an interim measure to counter the inadequacy of the IP system to protect matauranga, the process of development of the Mark was inclusive and ensured the kaitiaki artists and tohunga had control of their own process. The Mark

had been intended to be returned to the ultimate control of Maori when there is appropriate capacity, but this has not yet occurred. Thus, while the process of consultation and involvement is a worthwhile model, there remain issues to be resolved.

202.10 *Te Papa Tongarewa's "Mana Taonga" policy.* Te Papa Tongarewa has been at the forefront of implementing a bi-cultural approach to its curatorial work, and in the context of historical wrongs over the collection of taonga, has moved to implement a strong policy which reflects that the mana of the taonga lies with the kaitiaki, and that decisions about the taonga will involve the kaitiaki first. At law, the Museum continues to have legal ownership over much of the taonga it cares for, contrary to the Treaty guarantee. However, within the inadequacy of the legislation and policy of the Crown, Te Papa Tongarewa has a code of ethics which recognises the importance of mana, kaitiakitanga, matauranga and tikanga.

202.11 *The New Zealand Qualifications Authority Maori Strategic Plan 2007-2012.* The Strategy is said to 'mark an important new beginning for the Qualifications Authority', and notes that there is an absence of a recognised national Maori validation process. Arawhetu Peretini agreed that this was an important issue to develop, but in the meantime the Authority had a challenge "to construct a system where Maori knowledge can be appropriately included in national curricula, and quality assurance processes that are consistent with Maori intellectual traditions can be applied in a fitting manner."¹⁵⁰

203. Given the lack of substantive power-sharing in the Maori-Crown relationship, these acknowledgements are more related to processes which have been undertaken or are contemplated, which tend to elevate the Maori

¹⁵⁰ New Zealand Qualifications Authority *Te Rautaki Maori a te Mana Tohu Matauranga – The Maori Strategic Plan for the New Zealand Qualifications Authority 2007-2012* (September 2006), p 16 – Brief of Evidence of Arawhetu Peretini, New Zealand Qualifications Authority (8 January 2007) #R30, Attachment B..

perspective beyond that of mere consultees. It is submitted that such processes, which grant the Maori voice equal status in the negotiation of the terms of engagement, are much more likely to lead to Treaty compliant outcomes, and ultimately increase the well-being of both Treaty partners.

PART B: CLAIMANT VALUES, TREATY PRINCIPLES

Chapter Summary
Nga Pou Uara – Values and Principles of the Claimants <ul style="list-style-type: none">▪ Whakapapa▪ Tino rangatiratanga▪ Kaitiakitanga▪ Manaakitanga▪ Tapu▪ Mauri▪ Taonga Katoa<ul style="list-style-type: none">➢ Matauranga / Reo➢ Nga tini a Ranginui raua ko Papatuanuku (flora and fauna)➢ Tikanga
Principles of Te Tiriti o Waitangi / The Treaty of Waitangi <ul style="list-style-type: none">▪ Autonomy / Tino Rangatiratanga▪ Partnership▪ Active Protection▪ Development / Options▪ Redress

Nga Pou Uara - Values and Principles of the Claimants

204. The purpose of this section is to articulate the framework and the core principles of the Wai 262 claim from the perspective of the Tai Tokerau claimants. These core principles are whakapapa, tapu, tino rangatiratanga, kaitiakitanga, manaakitanga, and whanaungatanga.
205. These core principles are fundamental to the articulation and understanding of the claim, and to the formulation of any remedies that this Tribunal may recommend for the future.
206. These core principles will inform the way in which the Statement of Issues (“SOI”) is addressed, so as to ensure the claimants values and tikanga are not subordinated within the predominantly legislative and intellectual property framework adopted in the SOI.
207. Ultimately, solutions to the wairua of the claim will be found in the weaving together of tikanga Maori, with the wairua of the tikanga Pakeha system of

laws and regulations. As was noted in Counsel's opening submissions in 1997.¹⁵¹

“Perhaps more than any other claim Wai 262 throws into sharp contrast the conceptual differences between the tikanga Pakeha system and the tikanga Maori system. This claim seeks to challenge the almost total domination of the one system over the other. The Treaty promised Maori something quite different. The Crown as the Treaty partner has not delivered on those promises, in particular the promise of tino rangatiratanga me o ratou taonga katoa has consistently been denied and actively suppressed.”

208. Any remedies recommended by this Tribunal must take into account *both* systems of values, principles and laws if justice is not to be denied to the claimants and Maori in general. As noted by Dr Williams in his closing remarks to the Tribunal in 1997:

“What this claim is about ... is the weaving of separate strands that are identifiably separate strands and weaving them together.”¹⁵²

209. Although five key principles, or “Pou”, have been identified in these submissions, it goes without saying that many of these principles overlap and flow from one into another. It also goes without saying that there are many fundamental core values such as wairua, mauri, tapu, utu and aroha, that are all of fundamental importance in the Maori world view. Although not expressly identified as principles, these core values are infused within those which are discussed throughout these submissions.

Whakapapa

210. At the commencement of her evidence to the Waitangi Tribunal at Tamatea Marae on 15 September 1997, Mrs Wihongi emphasised the importance of:

“The holistic relationship between the cosmos of the universe, the gods, plants, animals and Maori. This relationship describes the rights and responsibilities Maori have to the other partners within this relationship. This relationship is particularly important to our customary practices and norms.”¹⁵³

211. Mrs Wihongi further observed that:

¹⁵¹ #A26

¹⁵² Transcript of Evidence of David Williams (19 September 1997) tape 11 (of 11), p 10.

¹⁵³ Transcript of Evidence of Hemanui-a-tawhaki Wihongi (15 September 1997) tape 1 (of 11), p 12.

“Thus, the whole universe is inter-connected by whakapapa to Io and Ranginui who married Papatuanuku.”¹⁵⁴

212. Similarly, key witnesses for Ngati Kuri (Saana Murray) and Ngatiwai (Witi McMath) and Laly Haddon), and expert witnesses (Mason Durie, Mana Cracknell and Robert McGowan) have all emphasised the importance of whakapapa to this claim.
213. Whakapapa links the claimants to their atua, and through them to their taonga, in an unbroken and seamless continuum. It is at the core of Maori identity and culture and is comprised of layers of relationships, rights and responsibilities. It is the glue that binds the Maori world together.
214. It is the denial of the ability of the claimants to continue to exercise those rights and responsibilities in relation to their taonga, and thus the ability to nurture and sustain their culture and identity, that lies at the heart of the claimants’ grievances.
215. Whakapapa was also an important consideration in the development of policy responses, in the early days of the reform of New Zealand’s resource management laws in the 1980’s (“RMLR”). The late Reverend Maori Marsden was engaged in writing a number of these background working papers for the RMLR process, and he focussed much attention on the importance of whakapapa.¹⁵⁵ Reverend Marsden’s writings explain the role of whakapapa in the Maori relationship with natural resources and the *raison d’ete* for Maori control and decision-making in the management of those resources:

“Out of the Black Hole (Te Kowhao) Rangi and Papa emerged clinging to each other. Dim light alons filtered between them. Into this constricted space were born their seventy children, the lesser gods who, chafing at their incarceration, resolved to part their parents. Under the leadership of Tane their efforts were successful and they too emerged into the broad day, they became the departmental gods over natural

¹⁵⁴ Ibid, p 14.

¹⁵⁵ These RMLR Working Papers were requested as additional material from Mr Lindsay Gow from Ministry for the Environment, and are on the ROI as documents R19(u) - R19(cc).

resources. From them were descended the myth heroes and from those tupua came our tupuna.”¹⁵⁶

216. Reverend Maori Marsden explains further that:

“Man is both human and divine and an integral part both of the cosmic process and of the natural order.”¹⁵⁷

217. As explained by M Roberts, D Wihongi and others, of the children of Rangi and Papa, Tane-nui-a-Rangi was the most important:

“Personified as Tane Mahuta (God of the Standing Forest), he engaged in numerous procreation events with supernatural female deities. For example, from Hinewaoriki came the Kahikatea (Podocarpus Dacrydioids) and Mati (P. Taxifolia) Trees, and from Mumuhunga, the Totara (P. Totara) Tree; in all a total of eight wives produced nine species of large trees. With Punga he produced the insects and all other small creatures of the forest, while from Parauri came the Tui. Further co-habitations produced all the other birds indigenous to Aotearoa.

Tangaroa was god of the sea and all sea creatures. All fishes are descended from one of his grandchildren (Ikateru) and reptiles from another (Tutewehiwehi).

Tawhirimatea was god ancestor of the winds and all other meteorological aspects while Tumatauenga had authority over warfare, and human affairs. Rongomatane, god of agriculture, was responsible for all cultivated foods, especially the kumara (Ipomea batatas). To this function was added that of god of peace. Haumiaticetike was god of the uncultivated foods eg the bracken fern root, an important food source in Aotearoa.”¹⁵⁸

218. Tane in Maori cosmology, was also responsible for the creation of human beings, by fashioning a female form from the earth of Papatuanuku and breathing life into her nostrils.

219. Accordingly:

¹⁵⁶ Reverend M Marsden *The Natural World and Natural Resources: Maori Value Systems and Perspectives* (Ministry for the Environment, Resource Management Law Reform Core Group Working Paper, No. 29 Part A, 1988) pp 9-11 as quoted in David Williams, *Matauranga Maori 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* (Waitangi Tribunal Publication 2001) #K6, p 100.

¹⁵⁷ *Ibid*, pp 9-11.

¹⁵⁸ M Roberts, W Norman, N Minhinnick, D Wihongi, C Kirkwood, *Kaitiakitanga: Maori Perspectives on Conservation* (University of Auckland, Auckland, 1995) pp 3-5 as quoted in David Williams *Matauranga Maori and Taonga* (Waitangi Tribunal Publication 2001) #K6, p103.

“Everything in the universe, inanimate and animate, has its own whakapapa or genealogy, and all are ultimately linked via the gods Rangi and Papa. There is no distinction or break in this cosmogony, and hence in the whakapapa between supernatural and natural. Both are part of a unified whole. “The bond this creates between humans and the rest of the physical world is both immutable and unseverable”.”¹⁵⁹

220. Although Dr Williams notes that there is some academic scepticism about these cosmological events, he observes that:

“Yet the academic scepticism is not particularly relevant to the continuing significance of myth and legend in understanding the importance of kaitiakitanga principles for Iwi and hapu today.”¹⁶⁰

221. For Maori Marsden these myths and legends were part of the “*corpus of fundamental knowledge*” held by Maori and “*forms the central system on which their holistic view of the universe is based.*”¹⁶¹

222. Reverend Maori Marsden compares the Maori knowledge system to that of Western culture, whose major focus is on the natural universe, assuming it to be comprised of indestructible atoms of solid matter and conforming to strict mechanical laws in an absolutely predictable manner that can be understood and scientifically described.¹⁶² However, he notes that just because Maori may start from different assumptions about the universe than Western culture, they are no less valid:

“Their logic may be just as good or as bad as western cultures and the way they reason from assumption or hypothesis to conclusion may be very similar particularly in regard to the natural world but their basic assumptions may be very different.”¹⁶³

223. It is worth noting that the Working Papers prepared by Maori Marsden and others Maori commentators for Ministry for the Environment (“MFE”) were prepared for the resource management law reform process with the

¹⁵⁹ Ibid, pp 3-5.

¹⁶⁰ David Williams *Matauranga Maori and Taonga* (Waitangi Tribunal Publication 2001) #K6, p 105.

¹⁶¹ Ibid, p 106.

¹⁶² Reverend M Marsden *The Natural World and Natural Resources: Maori Value Systems and Perspectives* (Ministry for the Environment, Resource Management Law Reform Core Group Working Paper, No. 29 Part A, 1988) pp 9-11 as quoted in David Williams, *Matauranga Maori 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* (Waitangi Tribunal Publication 2001) #K6, p 100.

¹⁶³ Ibid.

expectation that Maori values, ethics and principles would be more fully understood and reflected in decisions made under the RMA. Sixteen years of experience with the RMA has led to little progress for Maori in this regard. As agreed by Lindsay Gow for MFE in questioning, much of this has a lot to do with attitude of local authorities. However, the Crown cannot simply wash its hands of the matter. If the RMA is not delivering to Maori, then steps need to be taken to ensure that it does.

224. It was concern over the whakapapa of the kumara that was a catalyst for Mrs Wihongi travelling to Japan, which in turn was the catalyst for this claim. As Mrs Wihongi observed in her evidence:

“We knew the genealogy of those kumara and where they had come from. Their genealogy and our customary traditions surrounding these kumara prompted the going of four elders to life the mauri of the kumara from a people in Japan before bringing them back to Aotearoa. Upon the return of the kumara to Aotearoa the elders were to return the mauri of those kumara to our people.”¹⁶⁴

225. Mrs Saana Murray talks of the whakapapa of the pupuharakeke, as a way of illustrating the depth of the connection her people have to the land of Muriwhenua, and the taonga that resided there:

*“E Mahana Tonu Ana
Te Motu Nei
Ka Takahia E Kupe
A Muriwhenua
Te Kainga o te Pupuharakeke
I Aotearoa*

The land was still warm when our Ancestor Kupe set foot on the Muriwhenua, the home of the pupuharakeke, in Aotearoa. It was the warmth, or virgin land and only the Flora and Fauna greeted, the greatest ocean navigator of all times Kupe our ancestor.”¹⁶⁵

Tapu and Tikanga

226. The concepts of tapu and tikanga are also key principles in understanding the Maori world view. Throughout their evidence, all the claimants speak passionately about the ‘tapu’ nature of various things. When giving

¹⁶⁴ Transcript of Evidence of Hemanui-a-tawhaki Wihongi (15 September 1997) tape 2 (of 11), p 2.

¹⁶⁵ Brief of Evidence of Saana Murray, #D6(a), para 34. See also paras 35-43.

evidence, Whetu McGregor talked extensively of the ancient relationship Ngatiwai have with the tuatara, and agreed with Tribunal member Mrs Keita Walker that, “*Ae, ae, he tapu tena taonga.*”¹⁶⁶

227. Laly Haddon for Ngatiwai describes the sands at Pakiri as a “tapu taonga”, and Saana Murray of Ngati Kuri talks of the ‘tapu’ associated with the pupuharakeke and the sands of Parengarenga that sustain the kuaka. There are also wahi tapu or sacred landscapes such as urupa, maunga, awa and whenua.
228. Tapu is the notion of being in the presence of one’s Atua. A thing or a person was made tapu by dedicatory and consecratory ritual. There are different forms of tapu, the temporary state, the permanent state and the seasonal state. An example of seasonal tapu was the practice of not leaving feathers or snared birds in the forest because other birds would sense danger and leave the area. Similarly, the cleansing of fish in the sea (or below the high water mark) constituted not only physical pollution but spiritual pollution.¹⁶⁷ In this manner, tapu conveyed obligations to observe appropriate ritual so as to respect and sustainably use the resources of the tribe. A tohunga in olden times were said to be in a permanent state of tapu from the day of birth until death.
229. Pa Henare Tate in giving evidence for Te Rarawa, eloquently explains the relationship between tangata, tapu, tikanga, whenua and mana:

“Then comes the word “tikanga,” right procedure, protocol, etiquette, based on the right way of doing things, proven by practice. Then maybe we’ll arrive at the last, “Whai tikanga,” which means to have meaning, purpose, reason and direction. So if I may now attempt a description if not a definition. Tika is the principle that determines the right relationship of tapu to tapu, of tangata ki te atua, of tangata ki te whenua, of tangata ki te tangata. Tika is the principle that determines the right relationship of tapu with tapu, of people with people, of people with atua, of atua with whenua, and of whenua with atua. In this case, tika explains the right order between atua and whenua, between atua and tangata, namely the right relationship between atua, whether they be with a small “a” signifying Tane etcetera or Atua with a capital “a” in the Christian understanding of the word, means that in that process the

¹⁶⁶ Transcript of Evidence of Whetu McGregor Ngatiwai Trust Board (17 September 1997) tape 7 (of 11),p 30.

¹⁶⁷ Resource Management Law Reform Working Paper No.8, p 31.

source of tapu, of being, of existence is acknowledged and the source of mana is acknowledged as being with Atua.

To that extent whenua then is in a right relationship with atua, a principle expressed by Maori in acknowledging Tane over the forest, Rongo over cultivations, Haumietiketike over cultivations, Tangaroa over the sea, Tawhirimatea that blows both sea and land, Tumatauenga. The right relationship between atua and tangata has the same implication, the order in acknowledging atua as the source of tapu and the source of mana for tangata. The right relationship between tangata and te whenua, because every hectare of land in Aotearoa had a tipuna who declared the boundary of the whenua which includes moana. They described every aspect of land and sea and therefore when a person was discussing the issue of mana over whenua then they had to produce the whakapapa, heketika, which is the direct line of descent from the tipuna to themselves acknowledging the rohe whenua or the territorial boundaries of the mana of the tipuna. As I mentioned earlier coupled with ahi kaa, constant occupation, there lay mana and therefore tikanga.”¹⁶⁸

230. This has been quoted in full because it ties together so well the many complex *relationships* that the claimants, and Maori generally, have with their taonga, and the fundamental place of ‘tapu’ and ‘tikanga’ in guiding and regulating those relationships. These customs need to be given appropriate recognition in any future framework of protection, if the kaitiaki is to perform their job in relation to the preservation, management, and control of their taonga.

Tino Rangatiratanga and Mana

231. At the core of the Wai 262 claim is the assertion by the claimants of their right to exercise their tino rangatiratanga in relation to flora and fauna, matauranga Maori, cultural and intellectual heritage rights and all other related taonga. For the Tai Tokerau claimants, the notion of tino rangatiratanga was best described by the words of Saana Murray, as “*Maori control over things Maori*”.¹⁶⁹

232. As was noted by the Tribunal in the *Motunui Waiatara Report*:

¹⁶⁸ Transcript of Evidence of Pa Henare Tate, Ngatiwai Trust Board(30 March – 3 April 1998) tape 1 (of 19), p 10.

¹⁶⁹ Transcript of Evidence of Saana Murray(Week 4) tape 4, p 90. Her comment has been put to a number of claimant and Crown witnesses during the course of the claim, by Crown counsel, based on the proposition that this was Mrs Murray’s summation of the claim. In fact, she was referring to the placards in front of Parliament during the 1972 Nga Tama Toa protest.

“ “Rangatiratanga” and “mana” are inextricably related words. “Rangatiratanga” denotes the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences.”¹⁷⁰

233. In order to fully understand the concept of tino rangatiratanga one must return to first principles and the origins of the term. Traditionally a rangatira was the chief of a particular tribe, and the word rangatiratanga referred to chieftainship, and the art and process of leadership.¹⁷¹ The position of chief was vested on an individual not only through their birth, but required the individual to prove they were worthy of the responsibilities. It is a complex concept, Peter Cleave draws out some of the central aspects:

“Rangatiratanga does not depend on kaha or strength alone. A man’s sense of spirituality, mauri, his capacity to put others in awe of him, wehi, and his ability to humble himself if need be, whakaiti, are all involved”.¹⁷²

234. As a result of this understanding, the term tino rangatiratanga as used in the Treaty of Waitangi is translated as “chieftainship”, or “unqualified chieftainship”. Inherent to this is the prestige and spirituality which are intricately linked with the traditional concept of chieftainship.¹⁷³ Rather than simply preserving a particular form of control or input, the guarantee of tino rangatiratanga refers to preservation of the much broader prestige and spiritual importance of Maori control over their resources, treasures and way of life.
235. The concept of tino rangatiratanga is analogous to the right of self-determination asserted by indigenous peoples internationally.
236. There has been much discussion about the guarantee of tino rangatiratanga. Indeed, there is often a great deal of scepticism about what tino rangatiratanga really means, and whether it is capable of contemporary application. As several Crown witnesses and Crown counsel have alluded

¹⁷⁰ Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui Waitara Claim: Wai 6* (Legislation Direct, Wellington, 1983).

¹⁷¹ Peter Cleave *The Maori State* (Campus Press, Palmerston North, 1998) 30. For a discussion of the debate surrounding this point see Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: Wai 8* (Legislation Direct, Wellington, 1987).

¹⁷² Peter Cleave *The Maori State* (Campus Press, Palmerston North, 1998) 17.

¹⁷³ Peter Cleave *The Maori State* (Campus Press, Palmerston North, 1998) 30.

to, there is always the question of whether the claimants simply deluding themselves and being unrealistic in their aspirations? These submissions will argue that rangatiratanga is both realistic and achievable, and there are many examples of Maori exercising their tino rangatiratanga throughout the country, in ways that enhance their own mana and provide benefits for the wider community. As noted by Treaty commentator, Patrick Snedden, rangatiratanga is not something to be feared by New Zealanders, but to be embraced:

“There is evidence that the original intent of the parties to the Treaty allowed for joint protection under the law but separate sovereignty over assets and taonga and therefore a separate and unique indigenous identity.”¹⁷⁴

237. What lies at the heart of many Pakeha New Zealander’s perceptions and understandings regarding the recognition of Treaty rights, is their fear that recognition of rangatiratanga will in some way undermine the sovereignty of the Crown, and therefore its authority to rule. However, although the Tai Tokerau claimants have been strong in asserting their belief in, and right to exercise, tino rangatiratanga, it has always been expressed in an inclusive rather than exclusive manner; in a way that demonstrates manaakitanga or generosity of spirit; in a way that is quintessentially Maori. A rangatira could not exercise authority without also demonstrating attributes of manaakitanga. Thus, there have been many references throughout claimant evidence of their willingness to share their resources and share their knowledge with others, providing that their tino rangatiratanga is first acknowledged.¹⁷⁵

238. Rangatiratanga is central to the claimants’ case, and to Maori customary law. As Paul McHugh has said:

“Rangatiratanga, the tribal basis of Maori society, arises from Maori customary law, indeed the two (tribalism and customary law) are

¹⁷⁴ Pat Snedden, *How Does Rangatiratanga Work?* www.anew.org.nz, last accessed 15 April 2007.

¹⁷⁵ Mrs Saana Murray, Raukura Robinson, Hori Parata, Pa Henare Tate. Co-Management is dealt with in detail in Part F.

inseparable. It is not a consequence of Pakeha permission or acquiescence, but an inherent attribute of Maori society.”¹⁷⁶

239. Therefore any discussion of tino rangatiratanga is couched, not in what the Crown can ‘reasonably’ or realistically concede, but rather in the inherent nature of tino rangatiratanga as understood in Maori custom.
240. In the Crown’s Statement of Response the Crown references the case of *New Zealand Maori Council v Attorney General*, where the Privy Council states that the Crown’s obligation of active protection is limited to “*such action as is reasonable in the prevailing circumstances.*”¹⁷⁷ The Crown uses this ruling to limit the obligations of the Crown and argues that many of the claims made by the claimants are unrealistic burdens on the Crown.
241. However, ‘reasonableness’ does not simply look from the point of view of the Crown or Pakeha majority, it also brings into the balance the importance of the interest to be protected. It is in light of this understanding of tino rangatiratanga that one must interpret what is ‘reasonable’.
242. Tino rangatiratanga does not necessarily imply a challenge to the sovereignty of the state. Rather, it can be framed in a constructive manner that works towards a more balanced relationship between Maori and the Crown. As Mason Durie has stated:

“Essentially Maori self-determination is about the advancement of Maori people, as Maori, and the protection of the environment for future generations.”¹⁷⁸

243. Tino rangatiratanga, or Maori self-determination, is about taking practical steps towards the advancement of the Maori generally and the claimants in particular. Too often the concept is shelved as too hard to deal with, or is simply given token recognition. The Tai Tokerau claimants of Te Rarawa, Ngatiwai and Ngati Kuri are seeking practical and real recognition of their tino rangatiratanga. It is not a concept that belongs in a glass case, but is

¹⁷⁶ P G McHugh “Constitutional Theory and Māori Claims” in I H Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 25.

¹⁷⁷ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517.

¹⁷⁸ Mason Durie *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) 4.

one with which the Crown and Maori must practically engage. The Tribunal has repeatedly accepted that “*the Crown is obliged to take positive steps to ensure that Maori interests are protected.*”¹⁷⁹ Tino rangatiratanga is the most important of all Maori interests, and recognition is fundamental to the protection of all things Maori.

244. Therefore, the focus of these submissions will be on providing the Waitangi Tribunal with practical examples of how tino rangatiratanga can be recognised in ways which are mana-enhancing to the claimants, and to the Crown. However, this will require serious re-evaluation of existing systems of law, and Crown policies and practises, and a dramatic shift towards real and meaningful engagement with Maori.
245. The practical application of tino rangatiratanga in any given situation will depend on the nature of the taonga at issue, the relationship between the relevant parties, and other relevant factors. However, depending on the nature and extent of those factors, a practical application of the principle might result in the hapu or iwi exercising a form of self-government or tribal autonomy in relation to that taonga (for example Rakiura Maori exercise of tino rangatiratanga in relation to the Titi Islands¹⁸⁰); or a form of partnership or co-management (for example analogous to the relationship that exists between Ngatiwai and DOC concerning management of whale strandings or co-management of DOC lands within claimant rohe); or in many other situations, a right to be adequately consulted. While some practical ways of recognising rangatiratanga by way of remedies will be identified, it is not the function of these submissions, or indeed the Tribunal, to come up with all the solutions, as this will take time to develop.
246. Most importantly, it will require time and goodwill on the part of both Maori and the Crown to work out, over time, where that relationship sits on

¹⁷⁹ Waitangi Tribunal *The Tarawera Forest Report: Wai 411* (Legislation Direct, Wellington, 2003) 22.

¹⁸⁰ Rakiihia Tau, the principal claimant for the Ngai Tahu Treaty claim noted in his evidence to the Waitangi Tribunal in explaining the close interrelationship between rangatiratanga and kaitiakitanga explained that “*our relationship, management and administration as Ngai Tahu whanui of the Muttonbird or Titi Islands is perhaps the nearest living example we have to the meaning of rangatiratanga to our natural resources or mahinga kai*” (referred to in Ngai Tahu document J10, para 25).

the Rangatiratanga-Kawanatanga relationship spectrum. In many cases it may be obvious where that relationship lies, but in many other cases this will be a matter for negotiation between the affected hapu and iwi, and the Crown (and potentially other stakeholders). There will also be a role for some kind of specialist mediator or Treaty of Waitangi commissioner who oversees this negotiation process to ensure a degree of fairness and objectivity. This is a recommendation proposed in this claim as part of the “Ethical Framework for Resolution” outlined in Section H.

Kaitiakitanga

247. All of the Iwi witnesses for the Tai Tokerau claimants have stressed the importance of kaitiakitanga. They have also given evidence on the myriad of ways in which the Crown has denied and continues to deny their status as kaitiaki.¹⁸¹

248. As stated by the main claimant for Te Rarawa:

“Kaitiakitanga is the term that is often used incorrectly. When we speak of “kai” we speak of eating and hence taking into oneself. The act of taking the thing into oneself indicates how these things were viewed such as is part of you. “Tiaki” means to guard. When you speak about the things such as knowledge, Maori view the responsibilities of kaitiaki as including the ability to treat this knowledge as an integral part of themselves. This includes ensuring that those things are looked after in accordance with our customs and traditions.”¹⁸²

249. Despite the acknowledged difficulties of translating holistic value systems into another language,¹⁸³ kaitiakitanga is generally understood today to convey trusteeship, guardianship and protection. Traditionally, kaitiaki were not in human form but rather took the form of taniwha, or other manifestations of indigenous flora and fauna and supernatural beings.

¹⁸¹ See for example, Transcript of Evidence of Hori Parata, Ngatiwai (18 September 1997) tape 9, p 13-17. Also *Haddon v Auckland Regional Authority* [1994] NZRMA 49 which involved Laly Haddon for Ngatiwai opposing a decision of the Auckland Regional Council to extract sand from the seabed 3-4kms off the coast of Pakiri Beach. The hapu argued that as tangata whenua they were the traditional kaitiaki over the resource. The Tribunal decided that the hapu has kaitiaki status over the sand resource and its future development but decided, in this instance, that the proposed extraction was within the principles of sustainable management which is the overarching purpose of the RMA. See Del Wihongi Transcript of Evidence, 15 September 1997, tape 1, p 21.

¹⁸² Transcript of Evidence of Hema-nui-a-tawhaki Wihongi (16 September 1997) tape 3, p 3.

¹⁸³ Margaret Mutu and Peter Rikys *Statutory Resource Management and Indigenous Property Rights: A Report Prepared for the Ministry for the Environment* (1993).

Today, it is most often applied to the obligation of whanau, hapu and iwi to protect the spiritual wellbeing of the natural resources within their rohe.¹⁸⁴

250. However, kaitiakitanga is equally about managing sets of relationships that transcend time and space; between the atua and ancestors on the one hand, and their living kaitiaki on the other.¹⁸⁵ As noted by Mereta Kawharu:

“Kaitiakitanga is, therefore, more than managing relations between environmental resources and humans; it also involves managing relationships between people in the past, present and future.”¹⁸⁶

251. Kaitiakitanga conveys more than just the ethic of guardianship or stewardship. It requires an acknowledgement of mana and rangatiratanga which provides the authority for the exercise of the stewardship or protection of the kaitiaki obligation.¹⁸⁷

252. Kaitiakitanga is also inextricably linked with tapu, which acknowledges the sacred character of all things, and hence the need to protect the spiritual wellbeing of those resources subject to tribal mana, or mauri, which recognises that all things have a life-force and personality of their own.¹⁸⁸

Manaakitanga

253. Manaakitanga is a deep-rooted concept within Maori culture and implies an obligation on tangata whenua as host, to share with and care for others. It is closely interlinked with kaitiakitanga, in that it incorporates responsibilities of guardianship over whenua, taonga, manuhiri and tangata.¹⁸⁹ In simple terms manaakitanga has been fulfilled when a guest or visitor leaves feeling that they have been well taken care of and better off than when they arrived.

¹⁸⁴ Waitangi Tribunal *The Whanganui River Report: Wai 167* (GP Publications, Wellington, 1999) 265-283.

¹⁸⁵ Mereta Kawharu “Kaitiakitanga: A Maori Anthropological Perspective of Maori Socio-Environmental Ethic of Resource Management” (2000) *Journal of Polynesian Society*, p 352.

¹⁸⁶ *Ibid*, p 352.

¹⁸⁷ Law Commission *Maori Custom and Values in New Zealand* (NZLC SP9, Wellington, 2001) p 40.

¹⁸⁸ *Ibid*, p 40.

¹⁸⁹ Transcript of Evidence of Pa Henare Tate(30 March 1998) tape 1, p 9. Transcript of Evidence of Sir Hugh Kawharu (Week 12) tape 12, p 332 (and page 336). See also Transcript of Evidence of David Williams (Week 1)(Week 1) tape 10, p 28.

Whanaungatanga

254. Whanaungatanga is a fundamentally important value of tikanga Maori. In the Maori way of thinking, relationships are everything – between people, between people in the physical world, and between people and the atua.¹⁹⁰ As quoted in the Law Commission’s report into Maori customary law:
- “The glue that holds the Maori world together is whakapapa or genealogy identifying the nature of relationships between all things.”¹⁹¹
255. In traditional Maori society an individual’s identity was defined through that individual’s relationship with others. This remains the case today. Tikanga Maori emphasises the responsibilities owed by the individual to the collective, and in return this was reciprocated through the community accepting responsibility for its members. Thus, the principle of “utu” was important in maintaining reciprocity and balance within, and between, the various and often complex relationships that comprised Maori society.
256. Whanaungatanga, today, remains a key ingredient within the fabric of Maori society.
257. In the context of the Wai 262 claim, the principles of whanaungatanga acknowledge the obligations that Maori have to one another, to the wider community, and to society as a whole.

Mauri

258. Mauri is the life essence of a taonga, whether the taonga is tangible or intangible. It embodies the concept of “well-being” in its very fullest sense, and goes well beyond ‘physical health’, that of the ‘tinana’, and embraces the four bases of the Maori worldview – taha wairua, taha hinengaro, taha tinana and taha whanau.
259. The claimants contend that this claim has as its ultimate objective the **wellbeing** of tangata whenua, and the wellbeing of ‘tangata tiriti’. While

¹⁹⁰ Law Commission *Maori Custom and Values in New Zealand* (NZLC SP9, Wellington, 2001) p 30.

¹⁹¹ Joseph Williams, *He Aha Te Tikanga Maori* (an unpublished paper for the Law Commission, 1998) 9: as quoted in *ibid*.

the claim seeks recognition of the Treaty guarantee of tino rangatiratanga, this is a *process* by which Maori can reach a state of wellness. That state of wellness will in turn lead to better outcomes for the society generally.

260. Professor Mason Durie provided evidence to this Tribunal on behalf of the claimants. His evidence included an explanation of the longitudinal study being undertaken by Massey University that established that Maori health was improved if there was a clear connection of Maori individuals to te ao Maori. That included a connection to their whenua, marae, reo, tikanga and to their natural resources.
261. The Ministry of Health's Chief Maori Advisor agreed that the Ministry was influenced by the writings of Professor Mason Durie, and that the connection drawn between access to te ao Maori and wellbeing was accepted.¹⁹²
262. In summarising his longitudinal study for the tribunal in 2002, Professor Durie stated this:

“The point of access to Te Ao Maori and the control of Te Ao Maori and the management of it. And by Te Ao Maori I'm talking about Maori resources, intellectual resources, cultural resources, physical resources, the range of Maori resources. Now many resources, the kaitiaki, the carers for them, the trustees are iwi or hapu. I suspect whanau more than many others are in fact the custodians of intellectual resources and many cultural resources. Yet there's not always a very clear arrangement for controlling those resources. The situation is even more nebulous when it comes to those resources that belong to all Maori people and which are not the prerogative of a single hapu or a single whanau but are common to all Maori. And when it comes to decision making in that case, the control mechanisms are even more uncertain. So there is a great deal of uncertainty about how Maori resources are cared for, sometimes at a local level, frequently at a much more national level. And in this submission, one of the options to look at that, that's explored, is the possibility of some national organisation, national group, not so much to control the resource as to direct the control of the resource in the right direction. The more important point though, and I referred to it in this

¹⁹² Professor Durie *Mauri Ora – the Dynamics of Maori Health* (Oxford University Press, Oxford, 2001) p 257 - concluded that there are three broad strategies that contribute to positive health gains for Maori:

- The recognition of Maori perspectives on health;
 - Maori leadership in the health sector; and
 - And dedicated Maori health services, usually delivered by Maori for Maori.
- Wi Keelan agreed under questioning that these broad strategies continued to be relevant for the Ministry in its work.

submission, the more important point is that Maori resources should be under Maori jurisdiction, however that jurisdiction is to be configured. The truth of the matter is that Maori have not really discussed at any great extent how those mechanisms should be put in place and that needs to happen. And in fact, I agree entirely with the claimants who say that it is Maori people who need to develop systems of control and care and development of the Maori resources because those systems and those mechanisms have not yet been developed.”¹⁹³

263. “*Maori resources should be under Maori jurisdiction*” is a theme which will be emphasised again and again throughout these submissions. It is the claimants’ contention that while wellbeing might be the ‘end game’, it cannot be achieved unless full provision is made for Maori to exercise their tino rangatiratanga over their taonga (be those taonga within the broad categories of matauranga, or aspects of the natural environment).

Taonga Katoa

264. Having discussed in the previous section the key principles of the claim, this section of the submissions addresses the three categories of taonga which are so important to Te Tai Tokerau claimants. Together, these key principles and key taonga provide the overlay to the way in which the Statement of Issues can be addressed. The three taonga categories regarded as fundamental to this claim for the Te Tai Tokerau claimants are:

264.1 matauranga and reo;

264.2 nga tini a Ranginui raua ko Papatuanuku (those species of flora and fauna and parts of the natural environment which are derived by whakapapa from the deities of the Maori world);¹⁹⁴ and

264.3 tikanga – the laws and customs by which tino rangatiratanga over these taonga is exercised.

265. While categorisation of this nature can at times be less than helpful, in this instance the categorisation of taonga is intended to aid understanding of the

¹⁹³ Transcript of Evidence of Professor Mason Durie (6 May 2002) tape 1 (of 16), p 11.

¹⁹⁴ Refer Transcript of Evidence of Saana Murray (22-24 June 1998) tape 3, p 55-65. Flora and fauna cannot be considered separately from the whenua upon which they are found. This point was made strongly by Mrs Murray in response to questioning from Crown counsel.

claimants' approach to the breadth of the claim. Nor is this to minimise the inter-connectedness of matakura (and its constituent parts, tikanga and reo) and the natural environment.

266. From its inception, the Wai 262 claim has been colloquially referred to as a claim to 'indigenous flora and fauna *me o ratou taonga katoa*.' The latter italicised phrase comes directly from the Maori version of Te Tiriti o Waitangi, and generally encapsulates the notion that the guarantees of Te Tiriti apply not to just land, fisheries and forests (those properties specifically referred to in the English version of the Treaty), but to *all things* held special and treasured to tangata Maori. The sheer breadth of the phrase 'taonga katoa' have led to frustration over the years amongst Crown counsel and Crown officials who have struggled at times with understanding, appreciating or even dealing with the wide scope of the claim. The claims breadth has also led to claimant witnesses describing it variously as 'Maori control over things Maori' and 'te ao Maori claim'. Te Tai Tokerau claimants maintain as strongly today as they did when the claim was first lodged, that they seek to regain and retain their Tino Rangatiratanga in relation to their 'taonga katoa'.
267. Within that breadth, the claimants say that the three categories of taonga identified above encapsulate with more particularity the fundamental basis of the claim.

Matakura/Reo

268. When turning to the Statement of Issues later in the submissions, it is clear that issues of matakura (including reo and tikanga) are as applicable to Part 1 [taonga works], as they are to Part 2 [biological and genetic resources of taonga species], Part 3 [tikanga, matakura and reo] and Part 4 [the relationship of kaitiaki with their environment]. The submissions will refer to expressions such as the 'Maori world view' or the Maori 'cultural perspective' as an indication of how fundamental matters relating to matakura, tikanga and reo are to the understanding of the Treaty partnership.

The Natural Environment – Nga Tini a Ranginui Raua Ko Papatuanuku

269. Just as importantly in the eyes of the claimants is their natural world: te ao turoa. All aspects of the natural world are derived from the gods by whakapapa, and this intricate web of relationships applies to the biological and genetic resources of a species, to the species themselves and to all aspects of the natural environment. While the claimants have identified within each of their respective claimant rohe, certain specific taonga species - either flora and or fauna which are of high significance to the claimants - nevertheless the claimants have consistently maintained that those specific examples are not exclusive, and are not to be so elevated as to dilute the importance of their respective relationships with their 'taonga katoa'.

Tikanga

270. Tikanga is Maori law and customary practices. It is the 'mechanics' of the exercise of tino rangatiratanga in relation to nga taonga katoa. It is an aspect of matauranga Maori. It is the right to make and enforce laws in relation to taonga over which Maori exercise their rangatiratanga. It has existed for generations, and has never been relinquished.¹⁹⁵.

Principles of te Tiriti o Waitangi/the Treaty of Waitangi

271. This section of the submissions addresses those Treaty of Waitangi principles which are of most relevance to the subject matter of this claim. It is submitted that the following principles are relevant:

271.1 Autonomy / Tino Rangatiratanga

271.2 Partnership

271.3 Active Protection of Taonga

271.4 Development/Options

271.5 Redress

¹⁹⁵ Brief of Evidence of Saana Murray, #D6(a), para 21. See also Brief of Evidence of Haami Piripi, #P3, para 22.

Principle of Autonomy¹⁹⁶/Tino Rangatiratanga

272. Article II of the Treaty guarantees to Maori their rangatiratanga over all they possess for as long as they wish to retain it.¹⁹⁷ The *Report on the Muriwhenua Fishing Claim*,¹⁹⁸ cited with approval in the *Wananga Capital Establishment Report*, explained the phrase “te tino rangatiratanga o o ratou taonga” in this way:

“Te tino rangatiratanga o o ratou taonga’ tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and yet to be born. There are three main elements embodied in the guarantee of rangatiratanga.

The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually.

The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations.

Thirdly, the exercise of authority was not only over property, but [over] persons within the kinship group and their access to tribal resources.”

273. The claimants rely on that exposition, and its emphasis on the following key aspects of this claim:

- 273.1 The crucial element of *authority or control* over tribal taonga;
- 273.2 The *tapu* or spiritual nature of authority must be recognised, being the cultural context in which tino rangatiratanga is exercised;
- 273.3 Stewardship or *kaitiakitanga*; and
- 273.4 The authority over *access* to tribal resources.

¹⁹⁶ Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui Preliminary Report* (Legislation Direct, Wellington, 2007), p 5: “Inherent in maori autonomy and tino rangatiratanga is their own customary law and institutions, and the right to determine their own decision-makers and land entitlements.”

¹⁹⁷ *Ibid*, p 138. Waitangi Tribunal *Wananga Capital Establishment Report* (Legislation Direct, Wellington, 1999) section 5.5.

¹⁹⁸ Waitangi Tribunal *Report on the Muriwhenua Fishing Claim* (Legislation Direct, Wellington, 1989) section 10.3.2.

Principle of Partnership

274. The Treaty of Waitangi created a reciprocal relationship between Maori and the Crown, in the nature of a partnership, with the partners required to act towards each other reasonably and with the utmost good faith.¹⁹⁹
275. The Crown was granted both the right to govern and the valuable right of pre-emption to Maori land interests should they chose to dispose of them. Under Article II of the Treaty, Maori were guaranteed their exercise of tino rangatiratanga to their resources and property, and received the promise of Her Majesty's protection. In addition, under Article III, Maori were given the all the rights and obligations of British subjects.²⁰⁰
276. In seeking to apply the partnership principle to the issues of radio spectrum management, the Tribunal in the *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* of 1990, said that:
- “The key principle in the management of the spectrum is partnership. In essence the Treaty signifies a partnership requiring each partner to act reasonably and with the utmost good faith towards the other partner, and that in turn involves an obligation to consult.”²⁰¹
277. In the interim decision of the *Radio Spectrum* Tribunal, the majority finding endorsed the *Radio Frequencies* Tribunal analysis of the principle of partnership that:

“The ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources. Neither Treaty partner can have monopoly rights in terms of the resource.”²⁰²

¹⁹⁹ *New Zealand Maori Council v Attorney-General* [1987] NZLR 641 (CA). In the *Broadcasting Assets* case (*New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)) the Privy Council stated that the Treaty relationship should be founded on reasonableness, mutual cooperation and trust. Other references include the *Waitangi Tribunal Report on the Muriwhenua Fishing Claim* (section 10.5.2); the *Motunui-Waitara Claim*, section 10.2(b); and *Te Whanau o Waipareira Report*, section 1.5.5(1). Adopted by the Tribunal in the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Legislation Direct, Wellington, 1993) p 33.

²⁰⁰ Waitangi Tribunal *Wananga Capital Establishment Report* (Legislation Direct, Wellington, 1999) section 5.3.

²⁰¹ Waitangi Tribunal *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies: Wai 26 and 150* (Legislation Direct, Wellington, 1990) p 42.

²⁰² Waitangi Tribunal *Report on Radio Spectrum Management* (Wellington, 1999)..

278. The Waitangi Tribunal in the *Te Reo Maori* report summarised the partnership principle, by observing that “*in its widest sense the Treaty promotes a partnership and the development of a country and a sharing of all resources.*”²⁰³
279. The claimants concur with the Crown’s Statement of Response, where it says that the resolution of the Wai 262 claim will be found through working together reasonably and in good faith.²⁰⁴ However, the claimants require the Crown to move beyond just the “spirit” of partnership, and give practical and effective application to it. Suggestions on how this can be done are outlined in these submissions, and in particular in the Remedies section.

Hierarchy of Interests in Relation to Maori Resources

280. It has been accepted by the Waitangi Tribunal²⁰⁵ that there is a “hierarchy of interests” in natural resources. The clearest statement on this hierarchy was made in the report on the allocation of Radio Frequencies:

“There is a hierarchy of interests in natural resources based on the twin concepts of *kawanatanga* and *tino rangatiratanga*. First in the hierarchy comes the Crown’s obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Secondly comes the tribal interest in the resource. Then follows those who have commercial or recreational interests in the resource ...

Tribal *rangatiratanga* gives Maori a greater right of access to the newly discovered spectrum. In any scheme of spectrum management it has rights greater than the general public, and especially when it is being used for the protection of the *taonga* of the language and the culture.”²⁰⁶

281. There are also other examples where it is clear that the Waitangi Tribunal considers that the Treaty grants to Maori a priority over non-Maori in terms

²⁰³ Waitangi Tribunal *Report of the Waitangi Tribunal of the Te Reo Maori Claim: Wai 11* (Legislation Direct, Wellington, 1986) para 7.2.5.

²⁰⁴ Crown Statement of Response, #2.256, para 38.3.

²⁰⁵ Waitangi Tribunal *Radio Spectrum Management and Development Final Report* (Legislation Direct, Wellington, 1999) pp 38-39. The hierarchy concept is well developed in Canadian and North American case law: *R v Sparrow* (1990) 70 D.L.R. (4th) 414. This doctrine was followed by *R v Gladstone* (1996) 137 DLR (4th) 676 and *R v Van der Peet* (1996) 137 DLR (4th) 289.

²⁰⁶ Waitangi Tribunal *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies: Wai 26 and 150* (Legislation Direct, Wellington, 1990) pp 42-3.

of natural resources.²⁰⁷ In the *Ngai Tahu Fisheries Report*, the Tribunal said the following about priority:

“Subject to some limited or partial exceptions the sea fishery statutes reflected the Crown’s assumption that non-Maori had equal rights with Maori in the whole of the sea fisheries, notwithstanding that Article 2 of the Treaty guaranteed Maori rangatiratanga over their fisheries. This assumption was in breach of the treaty principle requiring the Crown actively to protect Maori rangatiratanga.”²⁰⁸

The Interface

282. Dr David Williams described the crux of his report, *Matauranga Maori and Taonga* in this way:

“This report challenges some of the usual assumptions adopted by the Crown, especially the assumption that English law is what automatically applies and English law presumptions and doctrines are what automatically apply unless Maori come along and prove the contrary. That’s the usual perception. I draw a comparison between the orthodox legal theory that Maori customary law is considered to be Crown land subject to native aboriginal title unless that title has been lawfully extinguished by the Crown.

...

The assumption is that the Crown title is the starting point and then Maori rights come along afterwards. This Wai 262 claim puts it the other way round Madam Chair. It puts the Maori claim first and then suggests, I believe correctly, that the Crown will then have to come along and show what its rights are if it does claim to have rights of intellectual property. So that the assumption for example that Maori will only have intellectual property rights if they’re able to demonstrate human intervention or individual innovation, value added, is something that I believe is inconsistent with the way in which this claim has been presented. And I say that these assumptions are at odds with the concept of tino rangatiratanga which would suggest that the radical title to all taonga including intellectual property if we must use that word, but the radical title to all taonga lies with the hapu, those hapu that I named at the beginning because they are the ones that brought this claim, but no doubt other hapu as well from around the whole country. And so that the Crown would then have the burden of proof if you want to use a legal

²⁰⁷ Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fisheries Claim: Wai 22* (Legislation Direct, Wellington, 1988) p 239.

²⁰⁸ Waitangi Tribunal *Ngai Tahu Sea Fisheries Report: Wai 27* (Legislation Direct, Wellington, 1992) 305.

term to establish its rights to those taonga only after showing that they have properly extinguished in a consensual way the indigenous title.”²⁰⁹

283. This quotation on the ‘interface’ between the two worldviews highlights immediately the depth to which the question of the interface must go. It is not simply at the level of the interface between ‘intellectual property laws’ and ‘matauranga Maori’, or ‘conservation law’ with ‘matauranga Maori’ (although it naturally includes these relationships). Rather, the interface commences at the deeper and more fundamental level of a constitutional relationship between the two worldviews. One aspect of that constitutional relationship is identified by Dr Williams as being the ‘usual assumption’ that English law will apply unless Maori prove to the contrary.

284. He continued in his summary of his report in these terms:

“If the Crown’s assumption is that it has the monopoly right to legislate and that Maori only have use rights once they’ve established a value added input then this report would suggest that the Crown actions are liable to be impeached as breaches of the Treaty. It seems that some of these assumptions have been carried through into the realm of international trade agreements and other international law obligations which feature in my report, particularly.

...

The Wai 262 claimants therefore are inviting the Tribunal, para 1.1.3 to advise the Crown on an appropriate *constitutional priority* of respect for matauranga Maori concerning indigenous flora and fauna of lands, fisheries, forestry’s and indeed all ecosystems with respect to moveable cultural property objects and visible taonga as well.”²¹⁰

285. Thus the analysis of the interface necessarily first involves a reappraisal of the underpinnings of the assumptions that we make about the ‘constitutional priority’ which is given to one worldview over another.

286. Is such a task beyond the jurisdiction of the Waitangi Tribunal, given that it itself is a creature of statute? The claimants say “No”: they submit that the Waitangi Tribunal is well within its jurisdiction under section 5 of the

²⁰⁹ Transcript of Evidence of David Williams (Hearing 1) tape 10, pp 5-6.

²¹⁰ Ibid, p 7.

Treaty of Waitangi Act 1975, where, in inquiring into and making recommendations upon any claim submitted to it, the Tribunal:

“... shall have regard to the 2 texts of the Treaty set out in Schedule 1 and, for the purposes of this Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them.”²¹¹

287. The fact that such a task might lead the Tribunal to make recommendations which challenge the constitutional framework within which it, and the legal system operates, does not take the inquiry out of the Tribunal’s jurisdiction. This can be contrasted with the line of authority illustrated by the *Berkett v Tauranga District Council* case,²¹² where courts have refused to countenance argument from tangata whenua that the specific laws (including laws relating to unlawful taking of a tractor, drink driving, cannabis prohibition and electoral laws) do not apply because such arguments constitute a challenge to the existing constitutional framework.²¹³ The jurisdiction of the Waitangi Tribunal is concerned directly with an analysis and interpretation of that constitutional framework, based as it must be on the Treaty of Waitangi.
288. Nor is an analysis of the “*constitutional priority*” as Dr Williams categorises it, a matter which is beyond the contemplation of current Crown officials. The Secretary for Education, Dr Karen Sewell, acknowledged under questioning that her department would be willing to engage constructively on a long conversation which would deal with the structural issues of engagement as between the Maori worldview of mātāuranga, and the education system currently in place. She noted that if one was fearful of the discussion taking place, then one would not get anywhere.²¹⁴ She acknowledged the Minister of Education’s own comment in the Parliamentary debates on 15 November 2006, that a worthwhile goal for the

²¹¹ Treaty of Waitangi Act 1975, s 6(a).

²¹² *Berkett v Tauranga District Council* [1992] 3 NZLR 206.

²¹⁴ See also Transcript of Evidence of Karen Sewell, ((January 2007) p 405, lines 16-20.

education system was education “*by Maori, of Maori, for Maori*” (with the addition of good leadership, good resources, and effective teaching).²¹⁵

289. And ‘transformation’ is what this claim is all about; a transforming of the way in which two world views interact with each other, for the betterment and advancement of both worldviews.

Principle of Active Protection of Taonga

290. It is accepted by the Crown that it has a duty of active protection in relation to those treasures, tangible and intangible, which are taonga of Maori.
291. The Crown refers in its Statement of Response to the active protection principle as being subject to the “reasonable dictates of sovereignty.”²¹⁶ The Crown argues that its duty of active protection does not impose absolute obligations and refers to an observation by the Privy Council that obligations to protect taonga must be reasonable in the circumstances.²¹⁷
292. In the circumstances of this claim, it is not unreasonable for the claimants to expect the Crown to proactively engage with them in designing processes, options and mechanisms for protecting Maori cultural and intellectual heritage rights. Successive witnesses for the Crown and for the claimants have given support for such a process of engagement to occur.

The Meaning of ‘Taonga’

293. The Treaty guarantees to Maori their “te tino rangatiratanga o o ratou taonga katoa”.
294. The phrase “o ratou taonga katoa” was considered by Professor Mead in his submission before both the *Radio Frequencies* and *Te Reo Maori* Waitangi Tribunals. In the *Te Reo Report*, the Tribunal found:

“[Professor Hirini Mead]...produced for us a carefully prepared submission...The general thrust of his view...is that the phrase “O ratou taonga katoa” covers both tangible and intangible things and can best be

²¹⁵ Ibid, p 396.

²¹⁶ Crown Statement of Response, #2.256, para 38.4.

²¹⁷ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517.

translated by the expression “all their valued customs and possessions.” This is in accordance with the conclusion we have already reached in the Kaituna River Finding (para. 4.7) where we accepted the phrase to mean “all things highly prized”, and the Motunui Finding to the same effect.”²¹⁸

295. The *Report of the Waitangi Tribunal on the Manukau Claim* concluded that taonga meant more than objects of tangible value. Importantly in the context of this claim, the ‘mauri’ or ‘life-force’ of a river was deemed a taonga.²¹⁹
296. Another reference to ‘taonga’ in the reports of the Tribunal is in the *Report of the Waitangi Tribunal on the Orakei Claim*, which talks of “taonga works” and finds that taonga ‘*may even include thoughts*’.²²⁰
297. As is discussed in more detail under the heading “Matauranga” in these submissions, the Tribunal in the *Wananga Capital Establishment Report* has found that matauranga Maori is a taonga of high and irreplaceable value to Maori. That Tribunal relied on the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993* to establish the link between the taonga status and the Crown’s obligations of active protection:

“Article 2 of the Treaty requires the Crown actively to protect the claimants’ respective interests in both the benefit and enjoyment of their taonga and the mana or authority to exercise control over them. Failure to afford such protection constitutes a breach of Treaty principles.

The degree of protection given to the claimants’ taonga will depend on the nature and value of the resource. The value to be attached to their taonga is essentially a matter for the claimants to determine. Such value is not confined to, or restricted by, traditional uses of the taonga. It will include present day usage and such potential usage as may be though appropriate by those having rangatiratanga over the taonga. In the case of a highly valued, rare and irreplaceable taonga of great spiritual and physical importance ... the Crown is under an obligation to ensure its

²¹⁸ Waitangi Tribunal *Report of the Waitangi Tribunal on the Te Reo Maori Claim: Wai 11* (Legislation Direct, Wellington, 1986)

²¹⁹ Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim: Wai 8*(Legislation Direct, Wellington, 1985) para 8.3.3.

²²⁰ Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: Wai 9* (Legislation Direct, Wellington, 1987) para 11.5.20.

protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected.”²²¹

The “Fourth Article” and Related Promises

298. The Second Amended Statement of Claim for Ngati Kuri, Ngatiwai and Te Rarawa claims that:

“4.4 Governor Hobson further promised at Waitangi in 1840 that:

“The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Maori custom, shall be alike protected by him”.

4.5 Willoughby Shortland conveyed to Maori gathered in Kaitia to sign the Treaty, on behalf of the Governor his explicit message that:

“The Queen will not interfere with your native laws or customs”.

4.6 This guarantee, sometimes referred to as the “fourth article” of Te Tiriti, clearly envisaged and required a dual system of governance for Aotearoa/New Zealand, including the full recognition and authority of the claimants’ laws, customs and values, which has never been honoured by the Crown.”²²²

299. The Crown’s Statement of Response explicitly rejects these propositions, and denies that the Fourth Article has been developed as part of the Treaty principles by the Courts or the Tribunal. It also takes the position that there is no jurisdiction under the Treaty of Waitangi Act 1975 to consider the Fourth Article because it is not contained in the Schedules to the Act.²²³

300. However the importance of the Fourth Article and related promises at the time of the signing of the Treaty have recently been confirmed in the Tribunal’s *Te Tau Ihu o Te Waka a Maui Report*.

“The historical evidence of Dr Williams addressed the latter point. He noted the so-called fourth article read out at Waitangi and Hobson’s promise to protect Maori custom (ritenga). Other oral and written promises were made to the effect that the Government would recognise Maori customary rights.

²²¹ Waitangi Tribunal *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993: Wai 153* (Legislation Direct, Wellington, 1993) p 49.

²²² Second Amended Statement of Claim for Ngati Kuri, Ngatiwai and Te Rarawa, #1.1(g), paras 4.4-4.6.

²²³ Crown Statement of Response, #2.256, para 53. See also Crown Counsel objection at Transcript of Evidence(Claimant Week 13) tape 12, p 207.

In Williams’ view, therefore, the recorded promises in the Treaty debates clarified the meaning of article 2, and the Crown’s intention to recognise Maori property rights [something it wanted to obtain] as defined and regulated by Maori law. We agree, and consider the evidence very clear that the principle of active protection applied to those things, tangible and intangible, over which Maori etangible and intangible, over which Maori exercised tino rangatiratanga according to their own law.”²²⁴ (emphasis added)

301. In a 1996 Otago Law Review article, Chief Judge Durie (as he then was), in discussing Shortland’s assurance that “the Queen will not interfere with your native laws or customs”, observed that:

“American precedent is undoubtedly correct in asserting that in treaties with indigenous peoples of oral tradition, verbal promises are as much a part of the Treaty as that subscribed to in the documentation. It cannot be said, as a matter of fact, that the Treaty introduced the law of England if the corollary is that Maori laws then cease to be applicable. The Treaty is rather authority for the proposition that the law of the country would have its source in two streams.”²²⁵

302. This was endorsed by the Law Commission in its detailed discussion of the Fourth Article in *Maori Custom and Values in New Zealand Law*:

“Chief Judge Durie, in extra-judicial remarks, in the Waitangi Tribunal in a 1997 report, has now clearly come down in favour of the view that the Crown representations in 1840 on respect for Maori custom are indeed important to Treaty jurisprudence.”²²⁶

303. Support for Justice Durie’s views can be found in the evidence of David Williams for the Tai Tokerau claimants,²²⁷ and the work of Professor Allan Ward.²²⁸

304. The Law Commission concludes:

“As a consequence of reviewing all of the above matters and of splicing elements of trust, equity, public/private law, administrative law and

²²⁴ Waitangi Tribunal, report *Te Tau Ihu o Te Waka a Maui: Report on the Customary Rights in the Northern South Island: Wai 785* (Legislation Direct, Wellington, 2007) p 115. See also Waitangi Tribunal *Radio Spectrum Management and Development Final Report: Wai 776* (Legislation Direct, Wellington, 1999), p 47.

²²⁵ E T Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8:4 *Otago University Law Review*.

²²⁶ Law Commission *Maori Custom and Values in New Zealand Law* (Study Paper 9, Wellington, March 2001) pp 73-75.

²²⁷ Brief of Evidence of David Williams, #K9.

²²⁸ Allan Ward *A Show of Justice: Racial Amalgamation in 19th Century New Zealand* (2nd ed, Auckland University Press, Auckland, 1995), p 45.

custom law, it may be that an indigenous form of public law is developed which draws on the best of English legal traditions and Maori values. Ultimately the purpose of this law will be to provide a set of values of principles to guide the exercise of powers both by and within Maori socio-political kin groups.”²²⁹

305. There is thus both a historical and evidential basis for the claimants’ contention that the guarantee of tino rangatiratanga includes the right of kaitiaki to make and enforce laws and customs in relation to their taonga.²³⁰

Principle of Development/Options

306. The Waitangi Tribunal has consistently acknowledged a Maori right of development of resources as a Treaty right arising from Article II.²³¹

307. The right of development is also recognised under International Law. For example, the United Nations Declaration on the Right to Development was adopted by the General Assembly on 4 December 1986 (resolution 41/128), and was supported by New Zealand:

“Article 1 (1) The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

Article 3(1) States have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development.

Article 10 Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.”²³²

308. It is submitted that Maori have a right to develop their culture in both customary and modern ways. Their rights cannot be fossilised as at 1840

²²⁹ Law Commission *Maori Custom and Values in New Zealand Law* (Study Paper 9, Wellington, March 2001) p 401.

²³⁰ See also Transcript of Evidence of David Williams (Claimant Week 13) tape 12, pp 207-208.

²³¹ Waitangi Tribunal *Ngai Tahu Sea Fisheries Report: Wai 27* (Legislation Direct, Wellington, 1992) chap 10; Waitangi Tribunal *Ika Whenua Rivers Report: Wai 212* (Legislation Direct, Wellington 1998) p 120; Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fisheries Claim: Wai 22* (Legislation Direct, Wellington, 1988) 10.2.1.

²³² United Nations Declaration on the Right to Development (4 December 1986) Res 41/128.

and limited only to resources known or used back then. To do so would unfairly constrain Maori social, cultural and economic development as a people.

Principle of Redress

309. In the *New Zealand Maori Council* case (the Lands case), Justice Casey addressed the question of redress for past breaches and saw it as obligation on the Crown. President of the Court, Cooke P (as he then was) noted that it would only be in “special circumstances” that the Crown could justify the withholding of redress:

“A duty to remedy past breaches was spoken of. I would accept that suggestion, in the sense that if the Waitangi Tribunal finds merit in the claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would only be in very special circumstances, if ever. As mentioned earlier, I prefer to keep open the question whether the Crown ought ordinarily to grant any precise form of redress that may be indicated by the Tribunal.”²³³

310. In the Wai 262 claim the Tribunal has before it extensive historical material from Tribunal commissioned witnesses indicating prejudice to tangata whenua in relation to their relationship with their environment, and loss of matauranga. In these circumstances, there is a general evidential background upon which the Tribunal is now considering current legislation and policy. The Treaty of Waitangi Act 1975 requires claimants to establish “prejudice” from acts or omissions of the Crown. It is submitted that there is sufficient evidence for the Tribunal to make general findings on prejudice based on historical Crown action or inaction in relation to the environment and matauranga, so as to trigger the general principle that redress should follow. The nature of that redress is dealt with in a separate section of these submissions.

²³³ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664.

Ability of Parties to Negotiate a Solution – Towards an “Ethical Framework for Resolution”

311. The claimants seek the Tribunal’s endorsement of their proposed “Ethical Framework for Resolution” which is detailed in Section H.

312. There is a well established process and principles relating to how the Crown must conduct itself in relation to a Maori Treaty claim. Inherent in the principle of active protection and the principle of redress (both accepted by the government as principles of the Treaty) is the notion of a process whereby Treaty rights can be resolved between the parties themselves. In 1989 Cooke P (as he then was) said that even Tribunal inquiries were not as constructive to the resolution of Treaty issues as resolution between the Treaty partners:

“Preferably – and I am confident that the Waitangi Tribunal would agree with this- the Treaty partners should work out their own agreement. The principles of the Treaty require that they make a genuine effort to do so. For this case that means Tainui and the Crown.

In the end no doubt only the Courts can finally rule on whether or not a particular solution accords with the Treaty principles. But in this kind of issue judicial resolution should be very much a last resort. In the *New Zealand Maori Council* case [lands case] and the forests case the Treaty partners have achieved solutions.”²³⁴

313. A very helpful exposition of what due process might mean in practice can be found in *New Zealand Maori Council v Attorney-General*.²³⁵ That case concerned the transfer of radio and television assets from the Crown to the Radio New Zealand Limited and Television New Zealand Limited, under section 23 State Owned Enterprises Act 1986. The Maori plaintiffs argued that the proposed transfer made no provision for the protection of te reo Maori and Maori culture, and sought a declaration that the transfer of the assets without inquiry as to the extent of the Treaty obligation and without establishing a protective process to ensure that the transfer was not inconsistent with the Treaty was unlawful. McGechan J discusses the issue

²³⁴ *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, 529 as per Cooke P.

²³⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 as per McGechan J.

of “[o]n the facts of this case, are proposed asset transfers to RNZ and TVNZ inconsistent with Treaty principles?”²³⁶ He says:

“I approach this crucial issue by inquiring into sufficiency of required prior Treaty processes, identified as:

- Good faith;
- Self-instruction and consultation;
- Planning and safeguards;
- Discussion and negotiation towards agreement.

Second, I examine the consistency with Treaty principles of results arising.

This method of analysis must not, however, be allowed to drown the ultimate aim. The question at end to be answered is one of overall principles – at heart, very much a matter of spirit.”²³⁷

314. What is immediately apparent is that the Crown obligation to be “properly informed” is not sufficient for a fulfilment of Treaty principles in relation to making an ultimate decision on a Treaty issue. McGechan J states that “*having properly informed itself, the Crown was required to devise satisfactory Treaty safeguards.*”²³⁸ He continues, stating, “*having informed itself, and devised its BC safeguards, the correct Treaty process was for the Crown in good faith to disclose proposals to Maori, and seek negotiated agreement.*”²³⁹

Consultation Not a Principle in Itself

315. The Crown’s view that it need only be ‘properly informed’, derives from the Lands case, where Richardson J (as he then was) stated that an “*absolute open ended and formless duty to consult is incapable of practical fulfilment*

²³⁶ Ibid, p 66 and following.

²³⁷ Ibid.

²³⁸ Ibid, p 71.

²³⁹ Ibid, p 78.

and cannot be regarded as implicit in the Treaty.”²⁴⁰ His Honour went on to say that:

“I think the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably toward the other puts the onus on a partner, here the crown, **when acting within its sphere to make an informed decision**, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say that it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith.”²⁴¹ (emphasis added)

316. What has appeared to have happened since that judgement, is that the Crown has interpreted its obligations in a blanket way, requiring only that it be ‘properly informed’ as to the facts and the law of each case. The requirement noted by Justice Richardson, for “*extensive consultation and co-operation*” in some cases, appears to have received limited application by the Crown.
317. Moreover, in the Wai 262 claim especially, the claimants assert that often in making decisions, Crown or Crown agencies (or even local authorities having had decision-making authority devolved to them by the Crown), are not ‘acting within [their] sphere to make an informed decision.’ Rather, the ‘sphere of decision-making’ is a joint one involving the Maori and Crown perspective.
318. There is also a need to ensure that during the process of negotiating solutions to the Wai 262 issues, the Maori position must be actively protected in the interim. There continues to be prejudice to tangata whenua from existing Crown legislation and policy on a daily basis, including (but not limited to):
- 318.1 Loss of Matauranga and Reo;
 - 318.2 Degradation of indigenous flora and fauna;
 - 318.3 Continued loss of access to kai and rongoa resources, along with resources for whakairo, raranga etc;

²⁴⁰ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 684 as per Richardson J.

²⁴¹ *Ibid.*

318.4 Information containing matauranga entering the public domain;
and

318.5 Commercial (and monopolistic) use of plants and biological
material.

319. As McGechan J noted in the transfer of broadcasting assets case:

“Such a transfer will not be inconsistent [with Treaty principles] if reasonable safeguards to procure Treaty compliance are put in place. The position of Maori should not be worsened, and the Crown in association with such transfer should not act unreasonably. The transactions in question need not be approached requiring all the ruthless self-interest appropriate to a purely commercial transaction. The parties are to continue to act in, and are entitled to expect, good faith. The Crown is expected to act in relation to Maori in accordance with the concept of honour of the Crown.

Whether particular safeguards are reasonable, and conduct consistent, in the end are very much questions of fact, with elements by way of value judgment.”²⁴²

320. It is submitted that the Process of Engagement proposed by the claimants is supported by the findings of the Waitangi Tribunal in the *Radio Spectrum Management and Development Final Report*, which regarded consultation as a process of partnership:

“Consultation between Treaty partners acting reasonably and with the utmost good faith to one another required, in our view, fully fledged discussion, preferably in an atmosphere that respected Maori tikanga, with every attempt to find an agreed position that was in accord with Treaty principles.”²⁴³

Emphasis on the Maori Text of Te Tiriti

321. As noted by Ms Pamela Ringwood for the Tribunal, the principle of *contra proferentum* is directly applicable to the issues of cross cultural communication that arise in the context of the interpretation of the English text and the Maori text of the Treaty of Waitangi. An established principle

²⁴² *New Zealand Maori Council v Attorney-General* (29 July 1991) HC WN CP 942/88 as per McGechan J.

²⁴³ Waitangi Tribunal *Radio Spectrum Management and Development Final Report: Wai 776* (Legislation Direct, Wellington, 1999), p 39.

of the interpretation of treaties with indigenous peoples internationally,²⁴⁴ which has been endorsed by the Waitangi Tribunal, *contra proferentum* provides that the indigenous language text should prevail where ambiguities in interpretation arise.²⁴⁵ In the context of the signing of the Treaty of Waitangi, it was the Maori version which was put to the Chiefs and to which they overwhelmingly signed. It contained the phrases which they would interpret according to their cultural constructs.

322. That issue of cross-cultural communication has a long linguistic history. The principles, cultural practices and values of Tangata Whenua, which have developed in Aotearoa for upwards of 1000 years, have their origins in a much older culture, as described by Professor Pat Hohepa in his working paper for the Law Commission:

“The principles and cultural practices and beliefs have developed in Aotearoa for over 1000 years, and its origins were from an Oceanic cultural life style which existed in the Pacific for over 10,000 years which originated in South-East Asia at least 20,000 years before that. Linguistically Maori belongs to the Austronesian or Malayo-Polynesian family of languages ... neither Maori, nor its related family of languages cultures, have language or culture origins links with the Indo-European family. Aotearoa was the last of the larger inhabited land masses to be reached by European voyagers and the last to be colonised. The errors, misinformation and difficulties in comparing, translating or codifying Maori into English are due partly to that lack of common origin linguistically, culturally and historically.”²⁴⁶

323. This applies not only to the interpretation of the wording of the two language versions of the Treaty, but to an understanding of the two systems of law. Tikanga Maori is not a relic of the past, but has authority in the present. While early colonial administrators saw and interpreted tikanga in a westernised legal terms, and while that interpretation provided some understanding, the reality of tikanga was distorted. Hohepa maintains that tikanga, or Maori lore, has to be placed in its own cultural context.²⁴⁷ Hohepa continues and states that the western law became known as ‘ture’,

²⁴⁴ *Jones v Meehan* (1899) 175 US 1.

²⁴⁵ Waitangi Tribunal *Ngai Tahu Report: Wai 27* (Legislation Direct, Wellington, 1991), p 223; *The Mohaka River Report: Wai 119* (Legislation Direct, Wellington, 1992), p 34; *Radio Spectrum Development and Management Final Report: Wai 776* (Legislation Direct, Wellington, 1999), p 37.

²⁴⁶ Pat Hohepa and David Williams “The taking into account Te Ao Maori in relation to reform of the law of succession” (Law Commission Working Paper, 1996) pp 11-12.

²⁴⁷ *Ibid*, p 16.

being the introduced law which came with the church, colonial Government and the institutionalised Maori land law:

“Ture has been in operation for 190 years now. That ture has either replaced, impeded, codified or ignored tikanga Maori in a manner which subverted its power and efficacy for Maori.”²⁴⁸

“Like grammatical laws, deep cultural principles have the greatest resistance to change because they are the underpinnings of cultural strength and continuity. While changes and more surface things such as land tenure, social and political structures or religion happens, they did so without sacrificing the deeper principles outlined above. That is why tikanga Maori has persisted.”²⁴⁹

324. Ngati Kuri, Te Rarawa and Ngatiwai are in no doubt that their tikanga has persisted. The application of their tikanga must be cognisant of the issues of cross-cultural communication to avoid a ‘linguistic colonisation’.

²⁴⁸ Ibid, p16

²⁴⁹ Ibid, p17. It should be noted that references to the Hohepa/Williams paper carry with it the disclaimer included in the author's own introduction: the authors wish to emphasise that this is a working paper. It is intended to provide a basis for going forward to consultations with iwi and with relevant pan-Maori organizations. It is mainly devoted to raising issues rather than seeking to settle them. It is not to be used or quoted except in that context.

PART C: INTELLECTUAL PROPERTY ASPECTS OF TAONGA WORKS²⁵⁰

Chapter Summary

- Intellectual Property Laws are inadequate for protecting holistic knowledge systems of Maori and merely “tinkering” with these laws will not address what are fundamental problems with the system, e.g. the concept of the “public domain.”
- The GATT:TRIPS Agreements entrenched the western IP system and failed to provide protection of Maori cultural and intellectual heritage consistent with the duty of active protection.
- The Trade Marks Act 2002 provides a limited form of ‘protection’ in relation to marks that may be “offensive” to Maori.
- A major review of the IP laws needs to be undertaken as part of an ‘Ethical Framework of Resolution’ involving Maori and the Crown
- Crown witnesses agree that the IP laws by themselves are inadequate for protecting taonga works and a “suite of options” including customary laws and non-IP based mechanisms such as codes of ethics need to be considered.
- Crown says that any *sui generis* system of protection would have to be TRIPS compliant to be acceptable to New Zealand’s trading partners.
- The Crown can do much more to advocate for protection of ‘taonga works’ at the international level.

First Component Issues – Crown Obligations

“Intellectual property rights cannot adequately protect the knowledge and resources of indigenous peoples, nor are they a panacea for the lack of self-determination of indigenous peoples and the inequalities of wealth and power between local communities on one hand and governments and corporations on the other. Furthermore, not only do IPR have to be acquired by a process that can be difficult, time-consuming, and expensive, but they also have to be defended. Acquiring and defending IPR protection requires access to information, good legal advice, and financial resources, all of which may be beyond the reach of many indigenous peoples.”²⁵¹

325. While it is appreciated that the coining of the term “*taonga works*” is for the purpose of the Wai 262 Statement of Issues and not intended to be an

²⁵⁰ Statement of Issues, # 2.314, Part 1.

²⁵¹ Darrell A Posey and Graham Dutfield *Beyond Intellectual Property: Towards Traditional Resources Rights for Indigenous Peoples and Local Communities* (International Development Research Centre, Ottawa, 1996) p 75.

exhaustive summary of the concepts of matauranga concerned,²⁵² the term nevertheless conveys a ‘compartmentalising’ of matauranga Maori in order to accommodate it within the IPR system of copyright, trademarks and patents. However, as the evidence has demonstrated, the IPR system as it now stands is the wrong ‘size and fit’ for adequately protecting indigenous systems of knowledge.²⁵³

326. It is the claimants’ contention that merely tinkering with the existing copyright laws will not adequately address their concerns, but what is required is a commensurate substantive review of the system itself.

327. The Treaty of Waitangi promised a partnership in which both partners’ cultures and customs would be preserved and maintained. The Western system, and more particularly in the context of the Wai 262 claim, the IPR system, has predominated to the point where Maori customary law has been relegated to the backwaters of the marae, and only token recognition is given to such customs in mainstream New Zealand law. Unless and until mainstream law and policy is able to reflect and protect the values underlining Maori culture and custom law, Maori will always have “*one foot in the ditch*”. In the words of the late Bishop Manuhua Bennett:

“You know there was a professor who typically was very absent minded and one time he was overworked and when he left his office he had to walk home about a quarter of a mile and as he walked he didn’t realise that he had one foot in the drain and the other on the footpath. So when he got home he rung his doctor and said “look doctor, I’ve got something terribly wrong with one leg shorter than the other”. And the doctor said, “well if you put both feet on the footpath you will be able to walk alright”. So [*the moral is*], if we are two parties to the one treaty, and one is in the ditch and one on the footpath, put the other one on the footpath and we’ll walk along together.”²⁵⁴

328. The claimants accept that there are aspects of the IPR system,²⁵⁵ such as its economic incentives, which may be useful in designing an overall system of protection. However, to provide the kind of protection that is necessary will require starting from tikanga values and principles and designing a system

²⁵² Statement of Issues, # 2.314, p 4.

²⁵³ Brief of Evidence of Darryl Posey #D9.

²⁵⁴ Bishop Manuhua Bennett, Tamatea Marae, Motuti (18 September 1997) tape 9, p 24.

²⁵⁵ See for example, Part H: Remedies – “Framework for Legal and Policy Mechanisms”

that incorporates both tikanga Maori and tikanga Pakeha concepts as appropriate.

329. Critics will say that this is “*unrealistic and unachievable*” because the system cannot be changed without major disruption. For example, Mr Van Bohemen for MFAT while indicating that the TRIPS agreement enabled development of sui generis mechanisms under Article 27(3), added that any such mechanisms had to be consistent with the philosophy of the TRIPS agreement. To do otherwise, would require amendment of the TRIPS agreement, which would not be in New Zealand’s international trade interests.²⁵⁶
330. In effect, Maori appear to be stuck with a system that does not recognise or protect their cultural taonga from commercial exploitation. This is the key reason why the Wai 262 claimants had complained in 1994 that the GATT:TRIPS Agreements were in breach of the Crown’s duty of active protection of Maori cultural and intellectual heritage. As a result of the concerns raised by the claimants and other Maori, they were given assurances by Ministers of the Crown in 1994/1995 that their Treaty interests would not be affected or prejudiced.²⁵⁷ They were also advised by Crown officials and MPs during the progress of the GATT Bill through Parliament that their concerns with the GATT:TRIPS agreements were misplaced and would be addressed in the following proposed reform of New Zealand’s intellectual property laws.
331. However, it was for good reason that Maori had sought a Treaty clause to be inserted into the GATT Bill in 1994 (which implemented the GATT: TRIPS in New Zealand. There was support and empathy for Maori concerns in Parliament as the proposed amendment to insert a Treaty clause into the Bill was narrowly defeated in Parliamentary by a vote of 42:40 votes.²⁵⁸

²⁵⁶ Gerard Van Bohemen #R34.

²⁵⁷ Refer to documents put to Mark Steel during MS cross-examination re GATT: TRIPS agreement et al.

²⁵⁸ Transcript of Cross Examination of Mark Steel by Maui Solomon (18-22 December 2006); #R16(ddd); R16 (eee); R16(fff).

332. In response to a question from counsel for Ngati Porou, Ms Rudland, regarding what protections TRIPs and copyright law could offer in the context of protecting transmission of whakapapa and other ceremonial knowledge, Mark Steel for the Crown responded that:

“Yes it could be done. Before we did it we’d have to answer a couple of questions which are firstly, in so doing, would we in some way, instead of just adding to the basic requirements of Trips, derogate or alter in some way. Secondly if we were to use copyright law as the instrument for doing that, would we in some way undermine the basic bargain in relation to copyright law that I talked about before. In other words, the state agrees to protect your rights. In return the term of protection is finite and the material enters the public domain at the end of that protection. Now what a government in the future may wish to do, is say, the copyright law as it stands is very effective in serving certain purposes. We don’t want to distort, undermine or in other compromise those purposes. It may be clearer and simpler to actually develop new instruments for other purposes, so there’s a judgment to made about what instrument do you use for what purpose.”²⁵⁹

333. Here, Mr Steel acknowledges the potential difficulties of complying with TRIPs and the “bargain in relation to copyright” and the public domain imperatives. Importantly, he also acknowledges that “new instruments” may be required to provide the level of protection sought by the claimants.

334. Notwithstanding the repeated Crown assurances and “undertakings”, as recorded in the Hansard Debates, that Maori would not be prejudiced and would be actively engaged on the issues, it is clear from the evidence that Maori have been prejudicially affected by the TRIPs agreement.. The only tangible legal mechanism that has been developed in New Zealand since 1994, as conceded by Mr Steel in counsel questioning of him, is the 2002 amendment to the Trademarks Act to establish a Maori advisory committee.²⁶⁰ The Act also creates a new ground for rejecting a trademark application, namely on the basis that the mark “*is or is likely to be offensive to a significant section of the community, including Maori*”.

335. However, Mr Steel also agreed with counsel that the Trade Marks Act provided protection only in circumstances in which third parties applied for

²⁵⁹ Transcript of Cross-Examination of Mark Steel by Gina Rudland, (18-22 December 2006).

²⁶⁰ Transcript of Cross-Examination of Mark Steel by Maui Solomon (18-22 December 2006); #R16; Trademarks Amendment Act 2002, s 17.

registration of a mark and that in a significant majority of cases misappropriation of matauranga was occurring outside of this framework.²⁶¹

336. While there are international instruments such as Article 8(j) of the Convention on Bio-Diversity (“CBD”), the policies and objectives being developed by the World Intellectual Property Organisation (“WIPO”) for traditional knowledge, genetic resources and intellectual property rights, UNESCO provisions on culture and heritage, and the draft Declaration on the Rights of Indigenous Peoples (dDRIP), these various mechanisms are either at an early stage of development, being actively opposed by the New Zealand Government (in the case of the dDRIP), or not binding. However, these various instruments demonstrate the high level of international debate and importance attached to the proper recognition and provision being made for the rights of indigenous peoples regarding their culture, identity and cultural heritage rights and responsibilities.
337. The claimants, and Maori generally, are now faced with a situation of having to operate within a legislative framework that does not fit their needs. Only through a process of robust engagement, collaborative dialogue and good faith intentions on all sides, may it be possible for solutions to be found which, although not meeting all the needs of the claimants, may go a substantial way down that road, providing there is a political will on the part of the Crown to do so.
338. It is not proposed in these submissions to undertake a lengthy analysis of New Zealand’s intellectual property laws or international IP agreements such as the Berne Convention, the Universal Copyright Convention, as they do not provide recognition and protection of kaitiaki in relation to their taonga and were not designed to do so. Commentary will, however, be provided under the relevant headings of the Statement of Issues (“SOI”) where it is thought that such a contribution is relevant or helpful. Indications will also be given where these submissions agree with or endorse the submissions of other counsel in relation to the first and second component issues.

²⁶¹ Ibid.

339. Throughout the various subheadings of the SOI, there will be cross-references to other sections and paragraphs in order to avoid repetition.

1.3.1(a) *Must the Crown protect taonga works from use by persons other than the kaitiaki or in a manner inconsistent with the customs and values of those kaitiaki?*

340. 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. Numerous other examples have been given by witnesses such as Moana Maniapoto.²⁶² This lack of protection is in breach of Article II.

(b) *If so, in what circumstances does New Zealand law and policy provide such protection?*

341. Only in very limited circumstances. The Trademarks Amendment Act 2002 is the only law in New Zealand that provides limited recognition and protection for matauranga. However, this protection only applies where a user is seeking to register a trademark application and is proposing to use a mark that is or is likely to be offensive to a significant section of the community, including Maori. Although this is a step in the right direction, the submissions made by the Wai 262 claimants to the Select Committee concerning the amendments were largely ignored. As noted by the Chair of the Maori Advisory Committee for Trademarks, Mrs Karen Waaka, the Committee is advisory only (the Commissioner of Patents makes the final decisions) and the Committee can only recommend rejection of applications that are “offensive”, but not where they may be “inappropriate.”²⁶³

²⁶² Moana Maniapoto (doc P4) and documentary “*Guarding the Family Silver*” (doc P68) as given in updating evidence for Tai Tokerau claimants.

²⁶³ Refer to Karen Waaka’s presentation to the Inter-Governmental Committee (“IGC”) of WIPO: WIPO Report – Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Eighth session, Geneva 6-10 Jun 05, 22 Dec 06, #R16(III) p 7. In her statement to the IGC Ms Waaka noted that “*Maori generally questioned the ability of the legislation*

342. In the significant majority of cases, unauthorised users of matauranga Maori, such as the LEGO bionicle toys and the other examples referred to in the evidence of Moana Maniapoto, are not seeking IP rights such as a trademark. Therefore there is no trigger point to invoke even this limited form of protection. In such circumstances, the use of moko to promote restaurant chains in Denmark,²⁶⁴ the use of atua names on Austrian Fischer skis, and Maori motifs and traditions in PlayStation games by Sony, matauranga remains unprotected. Even in the situation where Moana Maniapoto (a well-known New Zealand Maori singer and artist) had her name “Moana” trademarked in Germany and as a result could be prevented from using her own name on her CD album because of the trademark. She was threatened with prosecution and a fine if she continued to use her own name and was forced to change the album name to avoid such consequences.
343. Neither New Zealand law nor international law provides adequate protection for misappropriation of matauranga Maori (by the public domain) or in circumstances where overseas entities are seeking to apply for IP rights over that matauranga. As illustrated by the trademarking of the name “Moana” by a German based company.
344. The Crown’s bland statement that it is unable to provide protection in foreign countries without renegotiating international treaties is too simplistic and unhelpful. There are fact a range of measures the Crown could take to ensure greater protection for misappropriation of matauranga Maori by domestic and foreign users. Such measures could include:
- 344.1 greater advocacy for protection measures within WIPO;
 - 344.2 support for the dDRIP which, under article 29, provides for indigenous people to have control and decision-making over their own cultural and intellectual property rights;

and regulations under IP to protect our TK and TCEs and came to the realisation that IP law on its own was NOT sufficient to protect the IP concerns we had”(p 8).

²⁶⁴ Brief of Evidence of Moana Maniapoto, #P4.

- 344.3 resourcing Maori to ensure their effective participation within international fora including WIPO, CBD and the dDRIP;
 - 344.4 supporting the development of codes of ethics, conduct and guidelines to raise awareness of and encourage compliance with appropriate processes and procedures for accessing matauranga;
 - 344.5 development of sui generis based systems for recognising and protecting matauranga Maori;
 - 344.6 ensuring that countries such as the United States and European Union are aware of New Zealand's obligations to protect matauranga Maori as a taonga under the Treaty of Waitangi (e.g. through international fora, through bilateral trade agreements, through regional fora and through a range of other as yet undefined processes); and
 - 344.7 ensuring proactive engagement with Maori prior to international meetings to agree positions and strategies that impact upon matauranga Maori and associated IP.
345. If the Crown's attitude is that it cannot do anything to prevent misappropriation, then it will not do anything. However, if the attitude is more positive and proactive, and there is a preparedness to work in close collaboration with Maori, solutions can and will be found. As noted by Moana Maniapoto, many overseas companies are unaware that they may be causing offense to Maori by using their words and images, as they are taken from the public domain. Moana, in response to questions from Crown counsel, favoured the development of some kind of mechanism, agency or process that could monitor issues around misappropriation by foreign entities, and which could act as a contact point or "*clearing-house*":

“Maori aren't saying that we don't want our Matauranga Maori floating around out there in the world, or to be used in the commercial market,

we are just saying that we require there to be authorised use and appropriate use, and engagement”²⁶⁵.

346. Although matauranga Maori has found its way into the public domain, there are still obligations upon both Maori (in terms of kaitiaki responsibilities) and obligations on the Crown to actively protect that knowledge. A practical measure for ensuring matauranga in the public domain is protected would be the establishment of some kind of mechanism or process which vetted the use of such matauranga to determine whether such use was appropriate, inappropriate or ‘misappropriate’. Depending on the nature of the matauranga, the appropriate agency to deal with it could be at a national, regional or local marae level. It would also potentially consider other issues such as benefit sharing and collaborative partnerships between the kaitiaki and the proposed commercial user.

1.3.2(a) Must the Crown provide for the regulation, control, use and development by kaitiaki of their taonga works?

347. Yes, the Crown, in cooperation with its Treaty partners is required to design a process and mechanism to enable kaitiaki to control, use, regulate and develop their taonga works. Suggestion for how this can be done are set out in the ‘Ethical Framework for Engagement’ in Part H of these submissions.

1.3.2(b) If so, in what circumstances does New Zealand law and policy ensure this activity?

348. As set out under the analysis of the **Second Component Issues** below, New Zealand law and policy has not and does not provide for protection in this regard.

1.3.3(a) Must the Crown ensure the preservation of intellectual property aspects of taonga works in the hands of kaitiaki and the transmission of those works from generation to generation among kaitiaki?

349. Yes. However, the Crown’s duty extends further than preserving the “*intellectual property aspects*” of taonga works, and extends to protecting the holistic values that underpin those taonga works, as it is these which are

²⁶⁵ Transcript of Evidence of Moana Maniapoto (Week 4, Day 1, Interested Persons), p 41.

vital for the preservation of the cultural identity of the claimants and Maori generally.

(b) If so, in what circumstances, does New Zealand law and policy provide for such preservation and transmission?

350. There is no New Zealand law and policy currently directed at the preservation of IP aspects of taonga works in the hands of kaitiaki or aimed at intergenerational transmission of those IP aspects. This point was admitted by Mr Steel in questioning by counsel for Ngati Porou, Ms Rudland.²⁶⁶ For example, as identified by Moana Maniapoto, there is no law or policy that would prevent her award winning song “*Moko*”, or a traditional waiata, from being “*slapped up against a Fiat ad or a fast food chain product*” once the period of copyright has expired.²⁶⁷ The concern of the Wai 262 claimants, as echoed by Moana, is the ongoing responsibility of the kaitiaki to preserve and maintain the integrity of the “*very strong spiritual content*”²⁶⁸ of those waiata.

351. There are certainly laws and policies, such as the Maori Language Act 1987 and policies developed by the Te Tarua Whiri i Te Reo Maori aimed at fostering the growth of Maori language as the official language of New Zealand. However, there are no mechanisms at the interface between Te Reo Maori and the IP system that prevent or regulate the misappropriation of kupu Maori for commercial products such as rugby boots, skis, PlayStation games, watches, restaurants, and a whole host of other examples.²⁶⁹

Second Component Issues – Existing Law

Copyright – New Zealand Law

352. Copyright can be used to protect certain IP aspects of taonga works, but not the underlying ideas, content or values associated with that matauranga.

²⁶⁶ Transcript of Cross-Examination of Mark Steel by Gina Rudland, (18-22 December 2006).

²⁶⁷ Transcript of Evidence of Moana Maniapoto (Week 4, Day 1) p 31.

²⁶⁸ Transcript of Evidence of Moana Maniapoto (Week 4, Day 1) p 31..

²⁶⁹ See updating evidence TV documentary “*Protecting the Family Silver*”, #P68 (Tawera Productions Ltd) presented as part of Tai Tokerau updating evidence August 2006.

Because of the finite period of protection, copyright protection in terms of the Copyright Act is only likely to be available for contemporary “*traditional cultural expressions of matakauranga*”. For example:

- 352.1 performance or recordings of performances (sound or visual) of waiata or haka through “*performer’s rights*”;
- 352.2 musical composition or lyrics of contemporary waiata as “*musical works*” with separate protection for “*sound recordings*”;
- 352.3 newly documented oral history – korero tuku iho – as “*literary works*” or “*films*”; and carvings, paintings, weaving, textiles, photographs, architecture as “*artistic*” works.²⁷⁰

1.4.1 <i>Has and does the copyright law of New Zealand provide adequate protection for taonga works?</i>

353. No. Copyright provides a form of commercial protection and unauthorised use of another’s works during the period of the copyright, but does not protect the values of integrity of the matakauranga associated with those taonga works.

354. The general attitude of the Tai Tokerau claimants to copyright was best summed up in the words of Moana Maniapoto when responding to a question from Crown counsel as to whether or not she supported the notion of copyright:

“In terms of copyright there is a distinction between myself as an artist who is controlling the release of my song into the commercial marketplace, and therefore, can enjoy some legal tools now available to me. I think there is a clear distinction between that and matakauranga Maori that is made available through the public domain. I mean, in one instance I am participating in a commercial marketplace, I am putting my songs out there, I want people to buy them, I can enjoy a copyright, or you know that is associated with those songs, my songs though, some songs such as like the song “Moko”, which talks about cultural values

²⁷⁰ See #R16 (jj) report on *Economic Significance of Maori Traditional Knowledge*, a report prepared by LEGC Ltd for Ministry of Economic Development, July 2006, p 43 . Although this report gives support for the commercialisation of traditional knowledge by both local and foreign enterprises it notes that “*economic considerations need to be considered in light of concerns such as whether the use of MTK (Maori traditional knowledge) is culturally appropriate*” (p 48). It notes further that such concerns are outside the scope of the current report.

and tikanga related to moko, I have an issue that in 50 years' time anyone can grab that song and they may want to slap it on a toilet paper ad or something, so for me, there are still cultural implications that go beyond what is able to serve me now as a musician and artist. There is other issues that come into play."²⁷¹

355. Further on she states:

“While I think that in terms of Maori waiata and waiata that has a very strong Maori identity to it, it might have reo content, or it might have, it goes to our spiritual and cultural kind of identity, it contains values that underpin us as a culture, and I don't know how you can – I don't necessarily understand how the current intellectual property system can acknowledge those other dimensions, of what I would term to be matauranga Maori.”²⁷²

1.4.1(a) Does the law of copyright in New Zealand allow for the recognition of kaitiakitanga?

356. No.

(b) Does the concept of authorship as defined in section 5 of the Copyright Act 1994 prevent copyright protection from applying to certain taonga works? If yes, why and what are those works?

357. Yes, because the definition of “authorship” as defined in the Copyright Act requires the author to be identified, which, in the case of a large body of traditional knowledge is simply not possible because the original authors cannot always be identified.

358. Australia is currently considering a draft amendment to their Copyright Act (Amendment (ICMR) Bill 2003) that will have the effect of recognising Indigenous communal moral rights of integrity, attribution and false attribution in original copyright works.²⁷³ This is partly a response to the ‘rip-off’ of aboriginal art forms that having been occurring over recent years as highlighted in a series of high profile legal cases.

359. However, as noted by a leading Aboriginal legal practitioner and writer in the field, Ms Terri Janke, who is involved in reviewing the legislation:

²⁷¹ Transcript of Evidence of Moana Maniapoto(Week 4, Day 1, Interested Persons) pp 37-38.

²⁷² Ibid, p 38.

²⁷³ Terri Janke *Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006* (Paper for the Aboriginal and Torres Strait Arts Board Australia Council, 10 May 2006) p 13.

“One foundational principle underlies the development of Indigenous culture and arts. That is, the need for Indigenous peoples to control their intellectual and cultural property and to manage it in appropriate ways.”²⁷⁴

(c) Do the categorisations of works required for copyright protection in section 14 of the Copyright Act 1994 make it difficult for some aspects of the said taonga works to obtain copyright?

360. Adopt Ngati Kahungunu submission on this point.

(d) Does the originality requirement in section 14 of the Copyright Act 1994 prevent copyright law protecting taonga works?

361. Adopt Ngati Kahungunu submission on this point.

(e) Does the fixation requirement in section 15 of the Copyright Act 1994 prevent copyright law protecting the taonga works?

362. Adopt Ngati Kahungunu submission on this point.

(f) Does the duration of copyright limited to life of the author plus 50 years (and in some situations 50 years mean that elements of taonga works inappropriately) fall into the public domain?

363. Yes. Refer to evidence of Moana Maniapoto on this point as set out in s 1.4.1 above.

(g) Does the right to assert authorship of (sections 94-97) provide appropriate protection for the rights of kaitiaki to claim authorship of taonga works?

364. Adopt Ngati Kahungunu submission on this point.

(h) Does the right to object to derogatory treatment (sections 98-101) provide adequate protection for customary uses and authorisation of customary uses of taonga works?

365. Adopt Ngati Kahungunu submission on this point

(i) Do the rights against false attribution of a work (sections 102-104) provide adequate protection for kaitiaki against false attribution of taonga works?

²⁷⁴ Ibid, p 10.

366. Adopt Ngati Kahungunu submission on this point.

(j) Do the protection of performers' rights in Part IX of the Copyright Act provide adequate protection for performers of taonga works?

367. Adopt Ngati Kahungunu submission on this point.

1.4.2 If the answer to one or more of the above parts of question 1 is "no" does that mean that copyright is not applicable to aspects of traditional knowledge in taonga works and is this a breach of the principles of the Treaty?

368. Yes. For the reasons set out above, the Copyright Act does not provide protection for kaitiaki of their taonga works and is therefore in breach of the principles of the Treaty of Waitangi.

1.4.3 Does the provision of copyright protection to third parties ever wrongly prevent the control, use, regulation, development, transmission and/or preservation of taonga works by the kaitiaki?

369. Yes.

370. There are many examples as set out in claimant evidence where taonga works, such as carvings and meeting houses have been photographed and used in commercial publications, postcards or on souvenirs. The photographer can claim copyright in the photographic image of the taonga work in a manner that is in contravention of the cultural protocols, control and use of the subject matter of the photographic image.

Copyright – International Agreements

1.4.9 Do the TRIPS Agreement, Berne Convention, UCC and FTAs, or any part of them, adversely affect the ability of New Zealand law and policy to:

(a) protect taonga works from use by persons other than the kaitiaki or in a manner inconsistent with the customs and values of those kaitiaki?

(b) provide for control, use, regulation and/or development by kaitiaki of their taonga works?

(c) ensure the preservation of taonga works in the hands of kaitiaki and the transmission of those works from generation to generation among kaitiaki?

TRIPs

371. Under the current international regime, arguably any sui generis system of protection would have to be consistent with TRIPS. Because TRIPS provides for *minimum* standards of protection, the absence of any mention of protection for traditional knowledge would not in theory prevent New Zealand from enacting legislation to protect such knowledge. Although during questioning Mr Steel for MED refers to the potential difficulties of any regime that was not TRIPS compliant. In addition, other WTO members are not required to recognise rights in other countries that go beyond the minimum standards established by TRIPS.²⁷⁵
372. So, if the New Zealand Government was to enact legislation to protect matauranga Maori in the public domain this could technically breach the spirit, if not the letter of TRIPS Agreement and overseas countries would not be obliged to observe such restrictions. Nevertheless, matauranga Maori is a taonga and the Crown has a duty to protect it notwithstanding if it is in the public domain. Because the Crown has entered into the TRIPS agreement without consent or consultation with its Treaty partners, it is a weak argument to suggest that the Crown's hands are now tied. The Crown's primary obligation is to ensure adequate protection of taonga prior to making or entrenching international commitments that potentially expose that taonga to further exploitation or misappropriation.
373. The suggestion by Mr Steel that TRIPS does not add to what was already there, overlooks the claimants' argument that TRIPS is an entrenchment of the Western system of IP and potentially forecloses protection of other equally valid systems of knowledge such as matauranga.

Berne Convention

374. The Berne Convention for the Protection of Literary and Artistic Works is a framework for the basis of New Zealand's Copyright Act 1994. It does not provide any recognition or protection of traditional knowledge.

Universal Copyright Convention

²⁷⁵ Graham Dutfield *Intellectual Property Rights, Trade and Biodiversity* (Aldershot, Ashgate, 2003) p 19.

375. The UCC was enacted in 1952 as an alternative to the Berne Convention. The UCC does not provide any protection or preservation of taonga works. Any protection, transmission or preservation of control of taonga works in the hands of kaitiaki.

Free Trade Agreements (FTAs)

376. Both the New Zealand and Thailand Close Economic Partnership 2005 and the New Zealand and Singapore Close Economic Partnership 2001 contain exception clauses that purport to preserve the Crown's obligations to Maori under the Treaty of Waitangi.

377. Whilst the Trans-Pacific Strategic Economic Partnership (Trans-Pacific SEP) Agreement among Brunei, Darussalan, Chile, New Zealand and Singapore does not contain a Treaty of Waitangi provision, nevertheless it contains a general exception enabling any party to adopt measures "*necessary to protect national works or specific sites of historical or archaeological value, or to support creative arts of national value*".²⁷⁶ "*Creative arts*" include indigenous traditional practice and contemporary cultural expression.

378. The difficulty with these FTAs is that they reaffirm the parties' commitments to the WTO and the philosophy of trade liberalisation and framework of IP rights. The New Zealand Government has shown a willingness to include Treaty of Waitangi preservation clauses in separate FTAs with partners in the Asia-Pacific region. This action is to be commended. However, it remains to be seen how an exemption of this nature would work in practice to afford greater protection to taonga works in the hands of Maori, bearing in mind that in both the Thailand and Singapore FTAs these countries would have the right to invoke a dispute mechanism if they felt these rights were "*inconsistent*" with any rights granted to it under the FTA.

379. The insertion of FTA Treaty of Waitangi reservation clauses, and the acceptance of them by Thailand and Singapore, indicate that some of New

²⁷⁶ Article 19.1: General Exceptions.

Zealand's trading partners are prepared to acknowledge the Crown's obligations to its indigenous people. This may not, however, be the case for each of our trading partners with whom we seek to enter free trade agreements.

380. Submitted that the Crown has a responsibility to develop with Maori as part of any resolution of this claim, adequate protection mechanisms for including in bilateral and multilateral trade agreements. If the Crown was to be more positive in recognising its responsibilities for protecting kaitiaki's ability to regulate and control taonga works, New Zealand's trading partners are more likely to acknowledge the merits of doing so in any future trade agreements.

381. The claimants consider the Treaty of Waitangi to be a valid international treaty which should be acknowledged as such by the New Zealand Government and our trading partners.

1.4.10 *Alternatively, if the answer to 1.4.9 (a), (b), or (c) is "not necessarily", do the TRIPS Agreement, Berne Convention, UCC and FTAs, or any part of them, enhance the protection, preservation, control, use, development, regulation and/or transmission of taonga works?*

382. Refer to discussion in previous section.

1.4.11 *Do any other international treaties, conventions or agreements, or any part of them, including but not limited to the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, detract or enhance the protection, preservation, control, use, development, regulation and/or transmission of taonga works?*

383. There are a number of international agreements, declarations, conventions and codes of ethics that call for greater recognition and protection of the rights of indigenous peoples in relation to their taonga. These include:

383.1 *Declaration on the Rights of Indigenous Peoples* – – the Declaration was adopted by the Human Rights Council (HRC) in 2006 – see in particular Articles 3, 4, 5, 13 and 31:

Article 31

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

In conjunction with indigenous peoples, states shall take effective measures to recognise and protect the exercise of these rights”

- 383.2 *Covenant on Intellectual, Cultural, and Scientific Property: A Basic Code of Ethics and Conduct of Equitable Partnerships Between Responsible Corporations, Scientists or Institutions and Indigenous Groups* – this Covenant proposes to build upon existing IPR concepts utilising *inter alia*, customary law and traditional practices, human rights laws and agreements, environmental conventions and law, cultural property and heritage and economic and social agreements;
- 383.3 *Principles and Guidelines for the Protection of the Heritage of Indigenous People*²⁷⁷ – this report contains a set of Principles and Guidelines for the protection of the heritage of indigenous peoples. The report recognises the importance of the principle of self-determination to the protection of indigenous peoples’ heritage. It also recognises heritage is defined to include past and future objects, knowledge and literary or artistic works that are based upon heritage;
- 383.4 *The International Society of Ethnobiology Code of Ethics* – this Code, finalised in November 2006, embodies established principles and practices of international law and customary practice including acknowledgement of prior rights, self-determination, prior informed consent and in the case of third-party publications, the principle of acknowledgement and due credit. The ISE Code of Ethics was acknowledged by Dr Hay

²⁷⁷ E/CN.4/sub.2/1996/26

(ESR) and Dr Parker (Landcare) during counsel questioning as an example of developing standards of international best practice in this area.²⁷⁸

383.5 *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples 1993* – this is the first declaration by indigenous peoples on intellectual property rights containing a number of clauses and recommendations including, in the context of copyright:

“Recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge” (Article 2.1)

383.6 *Universal Declaration of Human Rights (1948)* –Article A27;

383.7 *International Covenant on Economic, Social and Cultural Rights 1966* – Article 15;

383.8 *Convention on Biological Diversity* – Article 8(j) and related provisions;

383.9 *Convention for the Safeguarding of Intangible Cultural Property 2003* – which include under the purposes to safeguard intangible cultural heritage, ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned and to raise international awareness of these issues (see also Article 2 – definitions of “*intangible cultural heritage*”).

384. Although these various international instruments are not binding on the New Zealand Government, they nevertheless carry considerable moral weight and in the case of the dDRIP, ISE Code of Ethics and Mataatua Declaration have developed over a long period of time and incorporate the rights and aspirations of not only Maori, but indigenous peoples worldwide.

385. New Zealand’s lack of support for the dDRIP on the basis that it is a threat to New Zealand’s “territorial integrity” is somewhat of a red herring. In

²⁷⁸ Transcript of Cross-Examination of Dr Hay and Dr Parker (11-15 December 2006).

response to a prior claim that Maori might seek to secede from the nation state of New Zealand if they gained their self-determination, Moana Jackson wryly observed: “where would we secede too?”. As many commentators have observed, the notion of self-determination in Maori terms, is closely aligned to tino Rangatiratanga.²⁷⁹ The Crown’s lack of support for self-determination mirrors its stance in relation to recognising tino rangatiratanga. Both failures are a breach of Article II of the Treaty of Waitangi.

Trademarks, Name Registration Systems, Passing Off and Registered Designs

1.4.12 <i>Has and does the trademark law of New Zealand provide adequate protection for taonga works?</i>
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386. No.

387. Until the amendment to the Trademarks Act in 2002, there was no mechanism to provide any protection for taonga works. Although these amendments are a step in the right direction, they fall short of the protections sought by the claimants. A Maori Advisory Committee can recommend to the Commissioner of Trademarks whether an application for a mark is likely to offend a significant section of the community, including Maori.²⁸⁰ Of the 451 applications as at 9 October 2006,²⁸¹ 351 contained Maori text and/or imagery, 303 were submitted to the Advisory Committee and of those, only 5 were considered likely to be offensive or further information requested.²⁸²

388. 148 applications in 2006 (220 in 2005) were not submitted to the Advisory Committee because they contained text or imagery of koru devices, kiwi or geographical locations.

²⁷⁹ Mason Durie *Te Mana Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998).

²⁸⁰ Trademarks Act 2002, s 17 .

²⁸¹ #R16(kk).

²⁸² #R16(kk).

389. Each of these three categories which are not referred to the Maori Advisory Committee are considered to be taonga by the claimants²⁸³ and this point was conceded by Mr Steel for the Crown during counsel questioning.²⁸⁴
390. As mentioned elsewhere in these submissions, the Trademarks Act provides very limited protection, and only in circumstances where a person is applying to register a mark. The significant majority of situations involve the use of Maori text and imagery where proprietary rights are not being sought.

(a) Does the law of trademarks in New Zealand allow for the recognition of kaitiakitanga?

391. No.
392. Examples were given by witnesses for Ngati Koata (Ka Mate Haka) and Ngati Kahungunu (longest place name) of the inability of kaitiaki to obtain trademark protection.
393. On the positive side, the trademarks law has been used by Maori artists in the case of the Toi Iho: Maori Made Mark, to create a mark of authenticity and quality for art produced by or co-produced with, registered Maori artists. A key contributing factor to the successful development and use of the Toi Iho mark is that the process was developed in close collaboration between Maori artists and Creative New Zealand: Te Waka Toi from beginning to end. This point was acknowledged by both Mr Steel for the Crown²⁸⁵ and Moana Maniapoto.²⁸⁶
394. In addition, it was conceded in cross-examination by Mr Steel that the Toi Iho process was considered as an interim step pending the development of more robust mechanisms of protection (possibly arising out of Wai 262) and

²⁸³ See evidence of Hema-nui-a-tawhaki Wihongi for Te Rarawa, Laly Haddon for Ngatiwai and Saana Murray for Ngati Kuri.

²⁸⁴ Transcript of Evidence of Mark Steel (18-22 December 2006).

²⁸⁵ Transcript of Evidence of Mark Steel (18-22 December 2006).

²⁸⁶ Brief of Evidence of Moana Maniapoto, #P4.

that ownership of the mark would eventually be transferred to a Maori owned and controlled body.²⁸⁷

395. The process adopted for developing the Toi Iho brand is a model for engagement with Maori at the interface between IP law and achieving certain cultural objectives. Notwithstanding the success of the Toi Iho brand, it does not prevent or prevent the production and sale of cheap and often offensive Maori artworks imported from overseas.

(b) Does the requirement of distinctiveness for trademark registration prevent taonga works (particularly symbols and designs) from being registered by kaitiaki?

396. Adopt Ngati Kahungunu submission on this point.

(c) Do the requirements of proprietorship for trademark registration prevent taonga works (particularly symbols and designs) from being registered by kaitiaki?

397. Yes.
398. Kaitiaki should not be required to apply for proprietary rights over their own taonga or taonga works in order to prevent others from misusing or misappropriating them.
399. Questions may arise as to who is the kaitiaki or ‘owner’ of the taonga works? Usually, but not always, this will be a collective of the whanau, hapu or iwi. In some cases, the taonga works may be owned by an individual artist who has sought and obtained authority from the collective to use a particular style, design or imagery. However, there may be situations where individuals within the collective apply for proprietary rights around a trademark. Currently there is no mechanism available that could deal adequately with this issue.
400. Even if there were no issues around identifying kaitiaki and all their taonga works could be registered, the cost, time and burden of having to register all these taonga works and then to apply for future renewal would place an unreasonable burden on the kaitiaki. .

²⁸⁷ Transcript of Evidence of Mark Steel (18-22 December 2006).

(d) Are there any other requirements of the trademark registration system that prevents its use by kaitiaki?

401. Refer previous comments that trademarks are an inappropriate mechanism for kaitiaki to protect their taonga.

(e) Is the use of the trademark registration system by third parties in relation to taonga works (particularly design and symbols) a breach of the treaty?

402. As previously discussed, the Maori Advisory Committee and new offensiveness criteria provide enhanced protection against registration by third parties. However, it does not provide protection for ‘inappropriate’ use of Maori designs and symbols, as acknowledged by the chair of the Advisory Committee. Applications for trademarks incorporating the word ‘kiwi’ or a ‘koru’ design or a Maori geographical place name are automatically excluded from the category of ‘offensiveness’ and will not be referred to the Maori Advisory Committee unless the Commissioner is satisfied that there is some additional basis for doing so.²⁸⁸ In questioning by counsel, Mr Steel acknowledged that both the ‘koru’ and ‘kiwi’ were taonga of the claimants.²⁸⁹

403. Although the mechanism in the Trademarks Act 2002 is a step in the right direction, it does not go far enough. Ultimately, the final decision on whether or not an application by a third party is offensive or not rests with the Commissioner of Trade Marks rather than the Maori Advisory Committee. In the claimants’ opinion, Maori as the kaitiaki of their taonga works should have the final say on whether or not a breach of their tikanga has occurred.

404. In respect of the issues addressed in the SOI 1.4.13 to 1.4.20, it is submitted that the laws relating to name registration, passing off and registered designs were not intended to and do not provide protection for taonga, or appropriate recognition and protection of rangatiratanga or kaitiakitanga and

²⁸⁸ ‘Practice Guidelines’ Maori Trade Marks Advisory Committee (16 September 2003) #R16(j) p 13.

²⁸⁹ Transcript of Evidence of Mark Steel (18-22 December 2006).

would need to be substantially reviewed as part of the “Ethical Framework for Resolution” as proposed in these submissions.

Trademarks, Name Registration Systems, Passing Off and Registered Designs – International Agreements

- 1.4.13** *Do the name registration systems, such as domain names and company names, provide adequate protection for taonga works? Specifically:*
- (a)** *Do the laws and regulations relating to name registration systems in New Zealand allow for the recognition of kaitiakitanga?*
- (b)** *Do the requirements of proprietorship for name registration systems prevent taonga works from being registered by kaitiaki?*
- (c)** *Do any other requirements of the name registration systems prevent taonga works from being registered by kaitiaki?*
- (d)** *Is the use of the name registration system by third parties in relation to taonga works a breach of the Treaty of Waitangi or its principles?*
- 1.4.14(a)** *Does the law of passing off provide protection for taonga works?*
- (b)** *Does the law of passing off in any way hinder the protection of taonga works?*
- 1.4.15(a)** *Does the law of registered designs in New Zealand allow for the recognition of forms of kaitiakitanga of intellectual property rights?*
- (b)** *Do the requirements for design registration prevent taonga works from being registered by kaitiaki?*
- 1.4.18** *Do the TRIPS Agreement, Paris Convention and FTAs, or any part of them, adversely affect the ability of New Zealand law and policy to:*
- (a)** *protect taonga works from use by persons other than the kaitiaki or in a manner inconsistent with the customs and values of those kaitiaki?*

405. The Free Trade Agreements that New Zealand has entered into with Singapore and Thailand, both of which contain Treaty of Waitangi exception clauses, provides for the possibility of protection of traditional knowledge but the effectiveness of these clauses have yet to be tested.

406. In the case of the Trans-Pacific Strategic Economic Partnership (Trans-Pacific SEP), the Treaty exception provision is somewhat more restrictive and it is by no means certain how the development of any future law and

policy by the Crown to protect taonga Maori would be reacted to by the partner countries.

407. However, any protections that were negotiated are likely to be limited by the FTAs commitment to the WTO and TRIPS which are adverse to recognition and protection of taonga works in accordance with tikanga Maori.

(b)	<i>provide for protection, preservation, control, use, development and/or regulation by kaitiaki of their taonga works?</i>
(c)	<i>ensure the preservation of taonga works in the hands of kaitiaki and the transmission of those works from generation to generation among kaitiaki?</i>
1.4.19	<i>Alternatively, if the answer to 1.4.18(a), (b) and (c) is “not necessarily” do the TRIPS agreement, Paris Convention and FTAs, or any part of them, enhance the control, use, development, transmission and/or preservation of taonga works?</i>
1.4.20	<i>Do any other international treaties, conventions or agreements, or any part of them, including but not limited to the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, detract or enhance the control, use, preservation, development and/or transmission of taonga works?</i>

Third Component Issues – Potential Remedies

408. Refer to Part H on the Remedies section.
409. It would be necessary to design an overall framework of protection before specific legislative amendments could be recommended.

PART D: BIOLOGICAL AND GENETIC RESOURCES OF INDIGENOUS AND/OR TAONGA SPECIES

Chapter Summary

- The guarantee of tino rangatiratanga over indigenous flora and fauna in the respective rohe of Ngati Kuri, Te Rarawa and Ngatiwai included and includes the taonga of associated biological and genetic resources of indigenous flora and fauna on the basis that:
 - Biological and genetic resources are not new resources but are derivatives of the indigenous flora and fauna connected by whakapapa;
 - Biological and genetic resources are highly valued components of indigenous flora and fauna to Ngati Kuri, Te Rarawa and Ngatiwai and in relation to which Ngati Kuri, Te Rarawa and Ngatiwai had traditional knowledge; and/or
 - Ngati Kuri, Te Rarawa and Ngatiwai have a right of development to their taonga including indigenous flora and fauna, which attaches to biological and genetic resources when technology develops which enables those resources to be identified and applied.
- The claimants have not had their interests, rights and responsibilities in the biological and genetic resources of indigenous flora and fauna protected under the Resource Management Act or the Conservation Act.
- The law of patents and plant variety rights within the existing Intellectual Property Rights system does not protect the claimants' rights, interests and responsibilities in relation to their traditional knowledge associated with biodiversity.

First Component Issues – Crown Obligations

410. The Tai Tokerau claimants see the biological and genetic resources of taonga species holistically. This is consistent with the key unifying principle of whakapapa as set out in section B.
411. Through the principle of whakapapa, the Tai Tokerau claimants and Maori generally assert their claims over biological and genetic resources; not in an extrinsic way, but through a direct genealogical connection.
412. The global spread of the Intellectual Property regime and the influence of multilateral trade agreements such as GATT and the establishment of the WTO, have increasingly brought into focus the importance of the biological

and genetic resources of the world to the future survival and development of humankind. They have also brought into sharper focus what one commentator describes as proprietarianism:

“A creed which says that the possessor should take all, but ownership privileges should trump community interests and that the world and its contents are open to ownership.”²⁹⁰

413. The creation of the Convention on Biological Diversity 1992, was the first time that nation states began to assert sovereignty over biological and genetic resources, once thought to belong to the common heritage of mankind.
414. The spread of global trade and CBD processes have fuelled the concern of Maori and other indigenous peoples that their prior resource rights which are so essential to their heritage and identities will face even greater threats in the drive towards a more homogenous and uniform world order. The Rio Declaration and Agenda 21, gave international prominence to the recognition of the inextricable link between biological and cultural diversity.²⁹¹
415. Moreover, the WTO and TRIPs agendas were cemented at a time when indigenous peoples were actively negotiating the terms and provisions of the Draft Declaration on the Rights of Indigenous Peoples. This Declaration establishes an alternative world view to that represented by the WTO and TRIPs, reflecting the philosophy, customary laws, aims and aspirations of indigenous peoples and local communities the world over. In particular, Article 3 of the dDRIP contains the all important provision acknowledging that indigenous peoples have the right to self-determination, a phrase which has a meaning similar to tino rangatiratanga.
416. As discussed above, it was the concern expressed by Mrs Del Wihongi and Mrs Saana Murray at a hui in 1988 over the storage of native varieties of

²⁹⁰ P Dreyhoss *A Philosophy of Intellectual Property* (Aldershot & Brookfield, Dartmouth, 1996).

²⁹¹ See, for example, Articles 1, 21, 22 and 25, Rio Declaration on Environment and Development, June 1992, Wai 262, # R34(m). Also see Preamble, Articles 23 and 26 United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 – 14 Jun 92, Agenda 21, # R34(n).

kumara in a Japanese laboratory, that was the impetus for the Wai 262 claim.

417. As Mrs Wihongi expressed in her evidence to the Tribunal, she was concerned about the whakapapa of these plants and their importance within the Maori cultural paradigm. Her concerns were not with the commercialisation of kumara but with protecting and respecting the mauri (life force) of this important taonga.
418. Her evidence further demonstrates that she was concerned that the proper cultural protocols were carried out (Dr Gould confirmed the DSIR, and the Japanese Government were concerned to ensure proper protocols were followed) and that upon return to Aotearoa, Maori would again exercise their rangatiratanga over these native varieties of kumara.²⁹² But the exercise of rangatiratanga is not exclusive of other parties' interests. Once the rights of rangatiratanga and responsibilities of kaitiakitanga are recognised, the obligation of manaakitanga means that those rights are shared. In relation to the kumara return from Japan, this was illustrated in the collaborative research agreements entered into by Mrs Wihongi (via Pu Hao Rangi Trust) and various Crown agencies and academic institutions, sharing these returned cultivars among whanau and hapu and thus reaffirming bonds of whanaungatanga.
419. The above example of the return of the kumara illustrates the way in which one of the lead claimants, Mrs Wihongi, has applied in practice the key principles associated with the Wai 262 claim. Most importantly, it serves to highlight that the claimants, and Maori generally, have a holistic relationship between biological and genetic resources and themselves. Economic interests are part of that spectrum, but are by no means the most predominant. This is to be compared and contrasted with the Western construct which appears to place property rights and economic interests above all else.

2.3.1 *Is the relationship between Māori and biological and genetic resources in indigenous*

²⁹² Brief of Evidence of Hemi Nui a Tawhaki Witana (15 September 1997) # A27, para 67-73.

and/or taonga species such that it gives rise to:

- (a) legal rights to biological and genetic resources of indigenous and/or taonga species?**
- (b) customary rights in biological and genetic resources of indigenous and/or taonga species?; and/ or**
- (c) rights in biological and genetic resources of indigenous and/or taonga species as a matter of treaty principle?**

420. As illustrated throughout these submissions, the Tai Tokerau claimants have an ancient relationship with the indigenous flora and fauna of Aotearoa through whakapapa. This relationship has been maintained over the centuries by matauranga that has been transmitted down through the generations to the present day claimants. These rights have their origin in ancient custom and law and were reaffirmed and guaranteed under Article II of the Treaty of Waitangi. Specifically, the guarantee of tino rangatiratanga o ratou whenua me ratou taonga katoa. Translated means “*the unqualified exercise of their chieftainship over their lands, over their villages and over their treasures all*”.²⁹³ As Sir Hugh Kawharu further notes, “*treasures*” refers to taonga, and that “*taonga*” in turn “*refer to all dimensions of a tribal group’s estate, material and non-material – heirlooms and wahi tapu, ancestral lore and whakapapa, etc*”.²⁹⁴

421. It is submitted that once the Tribunal makes a finding that indigenous flora and fauna and/or taonga species are taonga under Article II, then the onus shifts to the Crown to establish that the claimants’ pre-existing customary and Treaty rights do not exist. Alternatively, that they have been extinguished with the consent of Māori. This approach is consistent with the approach put forward by the courts in the context of native or aboriginal title. In *Ngati Apa v Attorney-General*, following the High Court of Australia in *Mabo v Queensland*²⁹⁵ and the Supreme Court of Canada in *R v Sparrow*,²⁹⁶ the New Zealand Court of Appeal held that once the existence

²⁹³ Sir Hugh Kawharu *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) p 319.

²⁹⁴ Kawharu, *ibid*, notes to footnote 8 of the Appendix.

²⁹⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

²⁹⁶ *R v Sparrow* [1990] 1 SCR 1075.

of native title has been proved, the onus is on the Crown to show extinguishment.²⁹⁷

422. Furthermore, it is entirely consistent with the practise of the Tribunal in the past. For example in *Te Ika Whenua Rivers Report* the Tribunal clearly places the burden on the Crown to prove any extinguishment of the tino rangatiratanga of the claimants.²⁹⁸
423. The Crown contends in its Statement of Response that interests or rights not known about or recognised under Western law cannot be sustained. However, the Treaty of Waitangi was declaratory of pre-existing customary and aboriginal title rights of Maori to their resources and not just those which were known to the Western mind.²⁹⁹
424. Similarly, the Crown's contention that matters not known to Western science as at 1840, such as DNA, genes, and human or animal tissue, cannot be the subject of a legitimate claim under the Treaty of Waitangi, cannot be sustained.³⁰⁰ As the claimants' evidence amply demonstrates, Maori had a sophisticated understanding of the complexities of their natural and meta-physical universe. Millennia prior to the 10-year Human Genome Research Project, Maori understood that they shared the same whakapapa (in modern scientific terms, gene sequencing or DNA structures) as plants and animals.³⁰¹
425. In many key respects, Western science is only now appreciating what has been known to indigenous peoples mai rano. Namely, that the Earth is a living and functioning organism of which humans are only a small part. This is the basis of the Gaia hypothesis and underpins the philosophy behind Agenda 21 and the concept of biological diversity. The Gaia hypothesis was formulated in the 1960's by James Lovelock, and was based on the revelation that Earth is self-regulating: maintaining its relatively constant

²⁹⁷ *Ngati Apa v Attorney-General* [2003] 3 NZLR 643, para 148 Elias CJ.

²⁹⁸ Waitangi Tribunal *Te Ika Whenua Rivers Report: Wai 212* (Legislation Direct, Wellington, 1998) p 90-95.

²⁹⁹ Crown Statement of Response, Wai 262, Doc # 2.256, para 41.

³⁰⁰ Crown Statement of Response, Wai 262, Doc # 2.256, para 41.

³⁰¹ See in particular evidence of Mana Cracknell on whakapapa and genetics and evidence of Peter Wills.

environmental composition in light of the changing circumstances, and as a result the hypothesis was raised that Earth is in fact a living organism. It is this idea of constant interaction between living creatures, including the Earth itself as a living and changing organism, that lead to concepts of biological diversity and interdependent ecosystems which underpin international agreements such as the Rio Declaration, Agenda 21 and the CBD.³⁰²

426. When Raukura Robinson gave evidence for Ngatiwai on rongoa, she explained to the Tribunal the intrinsic importance of understanding the spiritual relationship between plants and animals. When talking about the importance of getting trees from your rohe Raukura Robinson stated that “*Those trees know YOU and you know the trees*” and “*Trees are people*”.³⁰³ It is evidence of the long-standing comprehension by Maori that everything is connected and one will only succeed if the spiritual relationship between the earth and humans is appreciated and understood.
427. The historical failure of New Zealand’s legal system to acknowledge customary and Treaty rights to biological and genetic resources does not invalidate the nature and scope of those rights. Further the reservation of tino rangatiratanga amounts to a constitutional guarantee that Maori rights in relation to themselves, their taonga and their customs and laws would be protected post-1840.
428. The New Zealand Law Commission has referred to what has been termed the “fourth article”, or protocol of the Treaty of Waitangi. This refers to an oral statement on Hobson’s behalf that promised to respect all forms of distinctiveness, including specifically religion and custom:

“The Governor says that the several faiths (beliefs) of England, of the Wesleyans, of Rome, and also Māori custom shall alike be protected by him.”³⁰⁴

³⁰² Evidence of Robert McGowan, traversed in detail in the Rongoa section of these submissions.

³⁰³ Brief of Evidence of Raukura Robinson, # 32, p 13.

³⁰⁴ New Zealand Law Commission *Māori Custom and Values in New Zealand* (NZLC SP9, Wellington, 2001) 72-3.

2.3.2(a) Must the Crown protect biological and genetic resources of indigenous and/or taonga species from use by persons other than the kaitiaki or from use in a manner inconsistent with the customs and values of those kaitiaki?

429. Yes, to the extent necessary to recognise and protect the kaitiaki's role in the control, use and management of those biological and genetic resources.

430. This has been recognised by the New Zealand courts in the well-known passage of the *Lands case*:

“...the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties ... the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.”³⁰⁵

431. The Waitangi Tribunal has made similar statements, such as in the report on the *Manukau Claim*:

“The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests but actively to protect them.”³⁰⁶

432. Chapter 26 of Agenda 21 (developed during the Rio Earth Summit in 1992) also calls upon governments “*in full partnership with indigenous peoples and their communities*”, to strengthen the active participation of indigenous people in the national formulation of policies, laws and programmes relating to resource management and conservation and other development programmes affecting them.³⁰⁷ Agenda 21 also calls for the adoption or strengthening of policies and laws that “*will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices*”.³⁰⁸

(b) If so, in what circumstances does New Zealand law and policy provide such protection?

³⁰⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 654.

³⁰⁶ Waitangi Tribunal *Report on the Manukau Claim: Wai 8* (Legislation Direct, Wellington, 1985) p 70.

³⁰⁷ Agenda 21, Chapter 26, *Recognising and Strengthening the Role of Indigenous People and Their Communities*, (UN Department of Economic and Social Affairs, Division for Sustainable Development).

³⁰⁸ Agenda 21, Chapter 26.4(b).

Resource Management Act 1991

433. The Resource Management Act 1991 (“RMA”) promised much, but has delivered very little to Maori generally and the Tai Tokerau claimants in particular. As evidenced from the Resource Management Law Reform Working Papers on Maori issues, there were high expectations among Maori that the reform of New Zealand’s town and country planning, and environmental laws, would provide a greater recognition of their rangatiratanga, including fuller participation in management, decision-making and control over taonga. However, Maori have been bitterly disappointed. This outcome was signalled in 1993 when the Tribunal in the *Nga Wha Geothermal Report*, found that the RMA was “*fatally flawed because of the weak Treaty references*”. Ngatiwai in particular has been very active in endeavouring to have their rights recognised and upheld in front of local authorities, the Environment Court and the higher courts. These efforts, at considerable cost to the iwi, have had limited results. Ngatiwai continued to look towards the courts for recognition of their rangatiratanga and kaitiakitanga status, but inevitably their concerns are outweighed by other concerns decision-makers are required to take into account under the RMA.³⁰⁹ These points were conceded by Mr Gow for the Ministry for the Environment in questioning from counsel.³¹⁰
434. Maori were informed by the Crown that whilst the RMA would not deal with their ownership claims, they would have greater input into management and decision-making processes. 15 years later, the Crown has still failed to deliver on acknowledging and restoring rangatiratanga rights to the Tai Tokerau claimants. They continue to fail to deliver active management and decision-making to kaitiaki.

Department of Conservation

435. Despite the strong words in section 4 of the Conservation Act 1987 requiring decision-makers to give effect to the principles of the Treaty of Waitangi, DOC have adopted a minimalist approach to the interpretation of

³⁰⁹ *Haddon v Auckland Regional Authority* [1994] NZRMA 49.

³¹⁰ Transcript of Evidence of Lindsay Gow (18-22 December 2006).

this section. The Assistant General Manager of Policy, Ms Doris Johnson, after considerable prevarication in response to questioning from counsel Mr Powell, finally conceded that the only Treaty principles DOC applied were those chosen by the Government from time to time. Notably, the five principles for Crown action announced by the Labour Government in 1989.³¹¹

436. If senior management within DOC are unable to clearly articulate their understanding of their obligations to Maori under the Treaty of Waitangi, and section 4 in particular, it is unlikely that those lower down the management chain and in the DOC conservancies will have a clear understanding of how those obligations are to be fulfilled.
437. Although the evidence from Area Conservancy Managers within DOC indicated they had a better understanding of Treaty issues and the expectations of the Tai Tokerau claimants, in particular around tino rangatiratanga and kaitiakitanga,³¹² their evidence also clearly demonstrated that they consider their main obligation to Maori under section 4 to be one of consultation.
438. Ms Johnston for DOC conceded that the legislative framework even precluded further engagement:

“TC I suppose the potential outcome of what you’re expressing not found in the words is that nothing is excluded from the Department’s consideration ultimately as mechanisms to ensure first consultation but beyond consultation, control and even potentially exercise of rights of ownership by tangata whenua?”

DJ Well the thing that currently constrains us is the legislative framework which I’ve explained so therefore we have to work within that framework.”³¹³

439. Yet as these submissions show, on the rangatiratanga spectrum consultation is towards the bottom.

³¹¹ Transcript of Evidence of Doris Johnson (12-15 December 2006).

³¹² Brief of Evidence of John Gardiner and Rolien Elliot , #R12.

³¹³ Transcript of Evidence of Doris Johnston (18-22 December 2006).

440. While there is evidence of some developments towards high-level partnerships between DOC officials at the local level and Tai Tokerau iwi, such as development of whale stranding protocols with Ngatiwai and consideration of returning Motu Kauri Island in the Hauraki Gulf to Ngatiwai under a co-management agreement, these instances are rare and fragmented. Even in these examples, the DOC witnesses Gardiner and Elliot acknowledged that DOC will have the final say in decision-making if agreement cannot be reached.

441. In relation to the eradication of kiore from Hauturu (Little Barrier) Island, responses from counsel questioning of Ms Elliot revealed that the customs and values of the Ngatiwai claimants in relation to kaitiakitanga of kiore had either not been fully appreciated or had been ignored by DOC in their decision to proceed with the eradication programme:

“As part of the resource consent, I mean you must appreciate from 1997 since I was area manager through to 2002/2003 we had worked for some five, six years with the Trust Board to no avail in regards to the issues regarding kiore. We had a new conservator who was quite clear that he wanted to move forward, we had more and more information suggesting that the species were being put at risk on Houtere [sic] and a decision was made to proceed with the resource consent application and during the consultation for that consent application we met with other members of Ngatiwai, Ngati Rehua and Ngati Manuhiri and it became apparent that they did not support the presence of kiore on the island.”³¹⁴

442. Furthermore, in relation to kuaka, John Gardiner clearly illustrated DOC’s lack of understanding for the concern that Ngati Kuri have continuing access to their traditional kai:

“LW Given the decline of the koaka [sic] as you say is it of concern to you that the kaitiaki of those koaka [sic] for hundreds of years are the ones now who are restricted from taking it for kai in the name of conservation.

JM In the name of conservation.”³¹⁵

443. Whilst the Crown is required to balance the interests of the general public with those of Maori in relation to protection of biological and genetic

³¹⁴ Transcript of Cross-Examination of Rolien Elliot by Maui Solomon, (18-22 December 2006) p 73-74.

³¹⁵ Transcript of Cross-Examination of John Gardiner by Leo Watson (18-22 December 2006) p 9, line 30.

resources, the reality for the Tai Tokerau claimants is that the interests of conservation and conservationists inevitably predominate over the interests of the claimants as kaitiaki of these resources. Nor are the customs and values of these kaitiaki given proper weight in terms of active protection or rangatiratanga.

2.3.3(a) Must the Crown provide for the protection, control, use, development, regulation and/or transmission by kaitiaki of biological and genetic resources of indigenous and/or taonga species?

444. Yes. Refer to answers in 2.3.2(a).

(b) If so, in what circumstances does New Zealand law and policy ensure such protection, control, use, development, regulation and/or transmission?

445. Refer to answers in 2.3.2(b).

2.3.4(a) Must the Crown ensure the preservation of biological and genetic resources of indigenous and/or taonga species in the hands of kaitiaki and the transmission of those resources from generation to generation among kaitiaki?

446. Yes. Refer to answers in 2.3.2(a).

(b) If so, in what circumstances, does New Zealand law and policy provide for such preservation and transmission?

447. Refer to answers in 2.3.2(b).

448. Both the CBD (Article 8(j)) and Agenda 21 (Chapter 26), require the Crown to be proactive in respecting and preserving the traditional knowledge of the claimants and “*in full partnership*” “*strengthen*” and “*empower*” the claimants in relation to the preservation, use and control of biological diversity of taonga species.

Second Component Issues – Existing Law

Patents – New Zealand Law

449. Patents derived from traditional knowledge of plants and medicines, generate tens of billions of dollars in revenue from major international

pharmaceutical and agri-chemical companies such as Monsanto, and GlaxoSmithKline. In 1990, it was estimated that USD\$45 billion was generated from pharmaceutical products derived directly from traditional knowledge.³¹⁶

450. In other words, traditional knowledge of plants and medicines gathered directly from local communities, databases of information and obtained from the public domain, is big business internationally.
451. It is acknowledged that the extent to which matauranga Maori has led to the obtaining of patents in relation to isolated bio-active compounds from indigenous flora in New Zealand is relatively small. While the Tai Tokerau claimants are not opposed in principle to the concept of patents, they do not consider that it is an appropriate mechanism for protecting their matauranga in relation to biological and genetic resources of taonga species. While the evidence of the CRIs (Crop & Food and Landcare) suggests that there are Maori who are engaged in the process of obtaining patents, this has not been done with a view to protecting either matauranga or biological and genetic resources, but for the purpose of deriving economic returns.
452. What the international literature shows, particularly that from an indigenous perspective, is that patents are an inadequate mechanism for recognising and protecting the traditional knowledge and biological resources of indigenous peoples.³¹⁷
453. Moreover, patents, by their nature, are monopolistic, exclude others from use, are for limited duration and are expensive to obtain. These very principles are contrary to Maori concepts of kaitiakitanga, manaakitanga and rangatiratanga. The fact that some Maori may choose to use patents in the course of commercial endeavours or research does not mean that the patent system is a tool that can be used to protect biological and genetic resources in taonga species.

³¹⁶ Brief of Evidence of Darrell Addison Posey (23-27 November 1998) Wai 262, Doc # F1(b), para 8.

³¹⁷ Brief of Evidence of Darrell Posey, #F1(b); Darrell Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*.

454. It is submitted that a new and innovative system which incorporates the central pou of this claim and which draws on aspects of the IP system, will be better able to protect Treaty interests.

2.4.1 *Has and does the patent law of New Zealand provide adequate protection for biological and genetic resources of indigenous and/or taonga species? (The following questions relate to the current Patent Act 1953). Specifically:*

(a) *Do the requirements of invention and patentable invention (including novelty, obviousness, anticipation, prior publication and utility) prevent copyright patent protection from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki? If yes, why and what are those resources?*

455. Yes.

456. Patents can be used by anybody, including Maori, for the purposes for which they have been developed. This does not make them an adequate tool for protecting taonga species of kaitiaki.

(b) *Do the requirements for applications for patents prevent patent protection from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki? If yes, what aspects of patent law and in relation to which resources?*

457. Yes, for the reasons stated in the previous paragraph.

458. This would apply to all biological and genetic resources of indigenous and/or taonga species, including human and animal tissues.

(c) *Does the 20-year duration of patent prevent patent protection from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki?*

459. Yes, as above.

(d) *Do the requirements of disclosure of patented information conflict with the customary uses of biological and genetic resources of indigenous and/or taonga species? If yes, in what way?*

460. Yes. See above answers.

461. Any information submitted with a patent application is released into the public domain after the patent period expires. If this information included

sensitive matauranga, that would not be consistent with the rights and obligations of kaitiaki.

2.4.2 *If the answer to one or more of the above parts of question is “yes” does that mean that the Crown has failed to meet its obligations and is in breach of any rights, guarantees or expectations under the Treaty?*

462. Yes.

463. The Tai Tokerau claimants have a legitimate expectation that their tino rangatiratanga in relation to all of their taonga, including matauranga and taonga species, would be provided adequate recognition and protection under New Zealand law. The fact that this has not happened, is a direct breach of the Treaty of Waitangi.

2.4.3 *Does the granting of patents to third parties ever wrongly prevent the control, use, transmission and/or preservation of biological and genetic resources of indigenous and/or taonga species by the kaitiaki?*

464. Potentially, yes.

465. If a patent was obtained by a third party on the basis of knowledge gleaned from matauranga in the public domain relating to traditional uses of plants or animals, in the absence of the prior informed consent of the kaitiaki, the granting of a patent would be in breach of the Treaty.

466. A considerable body of traditional knowledge has found its way into the public domain in circumstances either beyond the control or knowledge of the kaitiaki of that knowledge.

Patents – International Agreements

467. The responses under this section are essentially the same as the responses under the section dealing with *Copyright – International Agreements*, so will not be repeated here.

2.4.6 *Do the TRIPS Agreement, Paris Convention, PCT and FTAs, or any part of them, adversely affect the ability of New Zealand law and policy to protect biological and genetic resources of indigenous and/or taonga species from use by persons other*

than the kaitiaki or in a manner inconsistent with the customs and values of those kaitiaki?

2.4.7 *Do the TRIPS Agreement, Paris Convention, PCT and FTAs, or any part of them, adversely affect the ability of the Crown provide for the use, protection, control, regulation and development by kaitiaki of their biological and genetic resources of indigenous and/or taonga species?*

2.4.8 *Do the TRIPS Agreement, Paris Convention, PCT and FTAs, or any part of them, adversely affect the ability of the Crown to ensure the preservation of biological and genetic resource in the hands of kaitiaki and the transmission of those works from generation to generation among kaitiaki?*

2.4.9 *Has New Zealand fully utilised the TRIPS agreement, the Rio Convention on the Preservation of Biological Diversity (and any other international agreements) to provide for the protection, control, use, regulation, development and transmission of biological and genetic resources of indigenous and/or taonga species as required under and analysis of the first component?*

468. Essentially none of the international agreements dealing with patents (TRIPS, the Paris Convention, the Patent Cooperation Treaty, or FTAs) providing a mechanism for enhancing protection of biological and genetic resources of taonga species in the hands of kaitiaki.

469. The Crown has not fully utilised the provisions in the CBD (Article 8(j) and related provisions), Bonn Guidelines (including provisions on prior informed consent) and other relevant instruments to provide for protection, control and use of biological and genetic resources of taonga species.

Plant Variety Rights – New Zealand Law

2.4.10 *Has and does the Plant Variety Rights Act 1987 of New Zealand provide adequate protection for biological and genetic resources of indigenous and/or taonga species?*

470. The Plant Varieties Act 1987 (“PVR Act”) does not provide any protection for biological and genetic resources of taonga species in the hands of kaitiaki. It would enable Maori to apply for plant variety rights, but the claimants contend that they should have a say in any decision-making around varieties developed from taonga species such as koromiko, pohutukawa, puawananga etc. There are no mechanisms in the PVR Act that requires consultation or prior informed consent of the kaitiaki.

(a) Do the definitions of 'plant' and 'variety' prevent plant variety protection from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki? If yes, why and what are those resources?

471. Adopt submissions of Ngati Kahungunu on this point.

(b) Do the requirements for applications for plant variety rights (including that the variety be new, distinct, homogenous and stable) prevent plant variety protection from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki? If yes, what requirements and in relation to which resources?

472. Adopt submissions of Ngati Kahungunu on this point.

(c) Does the duration of plant variety rights prevent such rights from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki?

473. Adopt submissions of Ngati Kahungunu on this point.

(d) Do the requirements disclosure of plant variety information conflict with the customary uses of biological and genetic resources of indigenous and/or taonga species? If "yes", in what way?

474. Adopt submissions of Ngati Kahungunu on this point.

Plant Variety Rights – International Agreements

475. The responses to the questions raised in paras 2.4.15, 2.4.16 and 2.4.17 of the SOI relating to TRIPs, UPOV, Rio Convention (that should be the CBD) and FTAs, are substantially the same as the answers given in relation to 2.4.6 to 2.4.9 (Patents – International Agreements).

Third Component Issues – Potential Remedies

2.5.1 If New Zealand patent and plant variety rights laws are in whole, or in part, inconsistent with the Treaty, can they be made treaty consistent by amendment in particular areas? Issues include:

(a) Should the definition of invention and requirements of patentable invention be amended to include biological and genetic resources of indigenous and/or taonga species otherwise excluded from the definitions?

(b) Should the definition of invention and requirements of patentable invention be amended to have express exclusions of biological and genetic resources of

indigenous and/or taonga species?

- (c) *Should the requirements of registerable plant varieties be amended to have express exclusions of the biological and genetic resources of indigenous and/or taonga species?*
- (d) *Should the duration of patents be amended to make biological and genetic resources of indigenous and/or taonga species protectable where it otherwise excludes biological and genetic resources of indigenous and/or taonga species?*
- (e) *Should the duration of plant variety rights be amended to make biological and genetic resources of indigenous and/or taonga species protectable where it otherwise excludes biological and genetic resources of indigenous and/or taonga species?*
- 2.5.2** *If the answer to any of the parts of 1 above is “yes” what should the amendments include?*

476. Amendment to existing legislation should occur as part of a holistic review of all legislation impacting upon biological and genetic resources of indigenous and/or taonga species. The claimants propose that this should occur as part of the process of developing and implementing the Ethical framework of protection and the process for a longer conversation between the Crown and Maori (Refer Section H).

2.5.3 *If New Zealand patent and plant variety rights laws are in whole, or in part, inconsistent with the Treaty, can they be made treaty consistent through a discrete (sui generis) form of protection (including mechanisms both legal and non-legal and custom law) for biological and genetic resources of indigenous and/or taonga species?*

2.5.4 *If the answer to 2.5.3 is “yes” what protection should be developed?*

477. See answer in previous paragraph.

478. The evidence is clear that MFAT, while claiming under cross examination to seek guidance from TPK and other agencies (such as MED) on engagement with Maori on matters such as consultation and participation in international meetings, have often ignored advice to be more proactive in involving Maori as revealed in this briefing paper to the Minister of Maori Affairs in February 2005:

“MFAT: Uncomfortable with the positive approach that New Zealand has been taking on traditional knowledge issues and do not think it is in accordance with Ministers views on the matter. The position that MFAT

supports is a conservative approach and they recommend that the delegation ‘sit and listen’.”³¹⁸

479. This attitude is in direct contravention of the 2001 Cabinet directive and specific advice given to Officials to be proactive at the international level. Both Mr Van Bohemen for MFAT and Mr Steele for MED concurred under cross examination that the Cabinet Directive remained binding as at 2007. This unhelpful and obstructive attitude on the part of MFAT as lead agency, and is in breach of the Crown’s duty to actively protect Mātauranga Māori as a taonga. If MFAT officials see fit to ignore advice from TPK (upon whom they claimed in evidence to be guided on matters related to Māori) and specific directions from the highest Executive Office in the land to proactively pursue Māori interests at the international level, then it serves to highlight to this Tribunal the uphill battle that the claimants and Māori generally face in developing constructive and Treaty consistent relationships with this influential government department.

480. As the a number of witnesses for the Tai Tokerau claimants,³¹⁹ have made very plain over a 10 year period, this claim has considerable significance for Māori both domestically and internationally. For these reasons it is critical that Māori have full and effective representation and participation at all international fora where their rights and interests are being debated and determined. So as to ensure their voice and concerns are clearly heard and not diluted by ‘unfriendly’ Crown officials, it is important that the claimants and Māori in general are represented separately from the Crown, in addition to ensuring suitably qualified Māori are part of official government delegations. Support for this stance is echoed in reports from TPK to MFAT in 2003:

“We are supportive of the participation of Māori in international meetings, both in terms of their attendance inside and outside official New Zealand delegations...Māori participation in this area has not been

³¹⁸ Briefing Paper to Minister of Māori Affairs (7 February 2005) Vol 1, Tab 36 of additional material provided by Te Puni Kōkiri to Tribunal, March 2007.

³¹⁹ Catherine Davis, #P5; Darrell Posey, #F1(b); Alejandro Argumedo, #F4(b); David Stephenson JR, #F3(b); Stephan Schnierer, #F6(c).

sufficient and we have concerns that Maori are not engaging in issues that directly or indirectly affect them.”³²⁰

481. On the issue of funding Maori participation TPK states:

“Te Puni Kokiri agrees that the financial support of government for NGOs is very important. Maori have indicated the need for a national ‘voluntary fund’ to provide assistance for their participation in international meetings....therefore we suggest placing some form of obligation on departments to ensure that money which is given to to assist NGOs, including Maori, participation be only used for this purpose”³²¹

482. On the breadth of participation in international fora, TPK observes:

“Maori have interests in many international activities including human rights, trade and the environment. Additionally, there are important meetings including WTO, APEC and IPEG which are extremely relevant to Maori economic development”.³²²

483. In spite of these strongly worded suggestions and recommendations from Te Puni Kokiri to MFAT in 2003, Mr Van Bohemen for MFAT confirmed in cross examination in February 2007, that:

483.1 MFAT opposed Maori (and other indigenous peoples) fuller and effective participation in the CBD Working Group on Access and Benefit Sharing;

483.2 that there was no funding from MFAT to assist the claimants or Maori generally to attend meetings of the CBD;

483.3 that MFAT opposed Maori receiving assistance from any voluntary fund established by the CBD to assist indigenous peoples attend CBD meetings;

³²⁰ Letter from Te Puni Kokiri responding to a Ministry of Foreign Affairs and Trade draft submission on ‘Non-Official Representatives on Official Delegations’, 7 March 2003, requested Bundle of Further documents of TPK, March 2007, Volume 1, Tab 7..para 4.

³²¹ Letter from Te Puni Kokiri responding to a Ministry of Foreign Affairs and Trade draft submission on ‘Non-Official Representatives on Official Delegations’, 7 March 2003, requested Bundle of Further documents of TPK, March 2007, Volume 1, Tab 7, at paragraphs 15-16.

³²² Letter from Te Puni Kokiri responding to a Ministry of Foreign Affairs and Trade draft submission on ‘Non-Official Representatives on Official Delegations’, 7 March 2003, requested Bundle of Further documents of TPK, March 2007, Volume 1, Tab 7. at para 14.

483.4 that, although he *assumed* consultation with Maori had been adequate, because neither he nor anyone else currently employed by MFAT had any idea. TPK in March 2003 advised MFAT that “consultation undertaken by MFAT...with Maori was inadequate and therefore it is not appropriate to note that interested iwi/Maori have been consulted.”³²³

484. It is also clear from counsel questioning of both Tipene Crisp from TPK and Mr Van Bohemen from MFAT (both of whom were unable to give clear answers due to a lack of any direct knowledge or any retained institutional knowledge regarding the international engagement strategy with Maori) and additional documents provided by TPK, that MFAT has consistently ignored the advice provided to it by TPK regarding implementation of MFAT's engagement strategy with Maori. This is contrary to Mr Van Bohemen's testimony that they relied on guidance from TPK for implementing the strategy.

³²³ Refer to Letter from Te Puni Kokiri responding to a Ministry of Foreign Affairs and Trade draft submission on ‘Non-Official Representatives on Official Delegations’, 7 March 2003, requested Bundle of Further documents of TPK, March 2007, Volume 1, Tab 7, para 19 and to M Solomon cross examination of Gerard Van Bohemen, Crown Hearings,, 22-26 January 2007.

PART E: TIKANGA MAORI, MATAURANGA MAORI

Chapter Summary

- The customary systems of knowledge or matauranga (including tikanga and reo) of each of the respective iwi of Ngatiwai, Te Rarawa and Ngati Kuri are taonga guaranteed protection under Article 2 of the Treaty of Waitangi, (which includes rongoa and the taonga works derived from matauranga, dealt with in other sections of the submissions)
- That Te Tiriti o Waitangi, including the promises and undertakings made by the Crown at the time of the signing of Te Tiriti o Waitangi (including the so-called “Fourth Article”), guaranteed to Ngati Kuri, Te Rarawa and Ngatiwai, the continued exercise of their customary laws and practices in relation to their taonga (including indigenous flora and fauna, rongoa, and taonga works);
- The Crown has failed to recognise, actively protect and give effect to those customary systems of knowledge or matauranga and those customary laws and practices by implementing legislation, regulation and policy from 1975-2007, including (but not limited to) the areas of intellectual property rights, health services, education, science research and technology, and moveable cultural property.
- The Crown has failed to protect te reo Maori from misappropriation and abuse, and has not adequately promoted the dialectical uniqueness of nga mita o nga reo o Ngati Kuri, Ngatiwai and Te Rarawa.
- The Crown has not actively facilitated the involvement and participation of Maori in international fora where issues of matauranga and traditional knowledge are being considered.

First Component Issues – Crown Obligations

Definition

485. Matauranga Maori is defined in the Statement of issues as meaning:

“... the Maori knowledge of kaitiaki together with the systems for the organisation, transmission, dissemination and protection of such knowledge and further includes te reo Maori, tikanga Maori and taonga works.”

486. The definition therefore includes the concepts of tikanga Maori and reo, both of which are more particularly defined in the Statement of Issues, as well as “taonga works” dealt with in Part C. Of particular relevance is the

definition of tikanga Maori meaning: “the customs, laws, practices, traditions and values of kaitiaki that comprise, underpin and inform Maori culture and its many distinctive tribal cultures.” Thus, for the purposes of these submissions, unless otherwise expressly stated, the term ‘mātauranga Maori’ is intended to embrace tikanga and te reo.

487. The definition of mātauranga Maori in the Statement of Issues in this Waitangi Tribunal claim has been put to key witnesses speaking on behalf of the Crown, who concurred that it generally encompassed the broad range of subject matter understood by those who talk of ‘mātauranga Maori’.³²⁴

- 3A.3.1(a) Must the Crown protect tikanga Maori and mātauranga Maori from use by persons other than kaitiaki or in a manner inconsistent with the values, and prescriptions underpinning tikanga Maori and mātauranga Maori? And**
- (b) If so, in what circumstances has New Zealand law and policy provided such protection?**
- 3A.3.2(a) Must the Crown provide for the control, use, development and regulation of tikanga Maori and mātauranga Maori by their kaitiaki?**
- (b) If so, in what circumstances has New Zealand law and policy ensured such control?**
- 3A.3.3(a) Must the Crown ensure the preservation of tikanga Maori and mātauranga Maori in the hands of their kaitiaki and transmission of tikanga Maori and mātauranga Maori from generation to generation among kaitiaki?**
- (b) If so, in what circumstances does New Zealand law and policy provide for such preservation and transmission?**

488. In summary, the claimants answer “Yes” to the three questions concerning the nature of the Crown obligations in relation to mātauranga and tikanga.

489. Mātauranga Maori (including tikanga and reo) is a taonga. It is that status as taonga which triggers the Crown’s obligations under Te Tiriti o Waitangi. These submissions seek to define the scope of those obligations, and then assess those obligations against Crown policy and legislation in this area.

³²⁴ Refer to cross-examination of Karen Sewell (MED), Tipene Chrisp (TPK), Larry Ferguson (MAF), Helen Andersen (MORST), Wi Keelan (Health), Mark Steel (MED),. Mātauranga Maori is defined in a very general way, in the international context in particular, as ‘traditional knowledge’.

490. Professor Mason Durie refers to the ownership of “cultural properties”:³²⁵

“Under the Treaty of Waitangi, the Crown has an obligation to guarantee to Maori the continuing ownership of physical and cultural properties until they have been lawfully alienated. Article two of both the English and Maori versions expressly recognises Maori property rights.”

491. He went on to categorise the Crown obligation under the Treaty as that of a ‘protector of Maori people and Maori property rights’. This notion of protection is clear from the Preamble to the Treaty.³²⁶ Dr Williams summarised the Preamble, in response to claimant counsel questioning, in this way.³²⁷

Solomon “Do you think that, for the majority, or the majority of chiefs, who signed the Maori version of Te Tiriti, that they would have regarded the reservation and guarantee of tino rangatiratanga as a protection of their customs, laws, and values, that the very fact that tino rangatiratanga was expressly mentioned in Article 2 of Te Tiriti – that they would have considered that their customs, laws, and values would have been protected?”

Dr Williams “Yes. I mean, the way you asked the question puts the emphasis on the signing, and the way in which Crown Counsel intervened, puts emphasis on the written documents. I have been influenced by the views of McKenzie, who wrote a book about the oral nature of Maori society and the importance of what was spoken, not just what was written and what was signed. And all of the records of what was spoken reflects much more the preamble to Te Tiriti, which is the protective role of the Crown. What the missionaries and the officials that Hobson sent out, what they constantly emphasised is that “we are coming in a protective capacity”, which, in more recent years, has been talked about in fiduciary terms. But the words that were used in 1840 were “protective”. So, they say that they’re coming in a protective role and they give specific assurances about continuation of Maori customs. It seems to me to be tied together.”

³²⁵ M Durie “Matauranga Maori: iwi and the Crown: a discussion paper” (Paper prepared for a Hui to discuss Matauranga Maori, James Henare Maori Research Centre, University of Auckland, 26 September 1996) #A15(b), pp181-189.

³²⁶ See also Waitangi Tribunal *Wananga Capital Establishment Report* (Legislation Direct, Wellington, 1999) section 5.2: “It is in the preamble that we receive our understanding of the spirit in which the chiefs who signed the Treaty entered the agreement.”

³²⁷ Transcript of Evidence of David Williams (Claimant Week 13) tape 12, p 208.

492. Mrs Pamela Ringwood, Tribunal Member, put it to Dr Williams that the Preamble was intended to influence the interpretation of the whole of the Treaty document. He agreed.³²⁸ Tribunal Member Mrs Keita Walker also asked Sir Hugh Kawharu for his expert opinion on whether the Preamble gave any enlightenment to the interpretation of the Treaty articles. He responded that it conveyed “here we will come and we will protect you.”³²⁹

Are Tikanga and Mātauranga Taonga?

493. It is not automatically clear as to whether the status of mātauranga Māori as a taonga is a question that is at issue between the claimants and the Crown in this Waitangi Tribunal claim. On the one hand, the Crown Statement of Response filed in 2002 clearly indicates that the Crown does not accept that ‘English law’ in 1840 recognised private property or proprietary rights in folklore, oral history and oral traditions, information per se, or language per se.³³⁰
494. The argument by the Crown that the Treaty guaranteed only such rights or interests that were recognised or capable of protection by English law as at 1840 has been discounted in these submissions, as being contrary to the Treaty and without legal precedent in Treaty jurisprudence.
495. The general principle espoused by the Crown is completely an anathema to the spirit of the Treaty relationship, and contrary to a fair reading of the words of the Treaty itself. In particular, the Preamble to the English text has the Queen regarding with “*her royal favour the native chiefs and tribes of New Zealand*” and “*anxious to protect **their just Rights and Property***”. The use of the pronoun ‘their’ clearly relates to the rights and property of the native chiefs and tribes of New Zealand. There is no justification whatsoever for allowing those rights and property to be restricted to only such rights and property as was recognised or capable of protection by English law.

³²⁸ Transcript of Evidence of David Williams (Week 13) tape 15, p 274.

³²⁹ Transcript of Evidence of Sir Hugh Kawharu (Week 12) tape 13, p 368.

³³⁰ Crown Statement of Response, document 2.256, para 43.2.

496. In any case, to infer such a restriction on the wording of the Treaty to protection of only those interests capable of protection at English law, would be to render Article III of the Treaty pointless as it would simply be restating the rights given in Article II, given that that Article specifically imparts to the ‘natives of New Zealand’ all the rights and privileges of British subjects.
497. Why would there be any need to explicitly impart to the Maori signatories the rights and privileges of British subjects (and therefore British law) if rangatiratanga simply meant those rights and property which were capable of protection at English law? No, rangatiratanga must mean those rights and property as held by the signatories in their own right, and prior to the signing of the Treaty of Waitangi. Thus Article 2 was a ‘guarantee’ of a status already existing, rather than the creation of a status as under English law.
498. Furthermore, the Crown position in its Statement of Response is inconsistent with Waitangi Tribunal findings that language (te reo Maori), and knowledge (mātauranga Maori), are taonga which are the subject of the Treaty guarantee. Is there a category of taonga which are nevertheless not guaranteed by the Treaty of Waitangi? The Crown in the Radio Spectrum claim agreed that “Maori culture” was a taonga and the Tribunal so found.³³¹ Yet rights to “culture” were not recognised at English Law as at 1840.
499. In the *Wananga Capital Establishment Report* the Waitangi Tribunal was in no doubt that mātauranga Maori was a taonga of the claimants:

“There can be no doubt that te reo Maori and mātauranga 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.”³³²

³³¹ Waitangi Tribunal *Radio Spectrum Management and Development Final Report: Wai 776* (Legislation Direct, Wellington, 1999) p 47.

³³² Waitangi Tribunal *Wananga Capital Establishment Report: Wai 718* (Legislation Direct, Wellington, 1999) section 5.7.

500. In addition, Crown witnesses raised no objection to the categorisation of matauranga Maori as a taonga, and indeed key Crown witnesses explicitly endorsed that status under cross examination.
501. International obligations on the Crown support the recognition of traditional languages and traditional knowledge as warranting protection and preservation.
502. For the avoidance of doubt, the Te Tai Tokerau claimants specifically seek a finding from this Waitangi Tribunal that matauranga Maori, as defined in the Statement of Issues as including tikanga Maori and te reo Maori, was a taonga as at 1840, was a taonga subject to Treaty guarantees from 1840 onwards, and it remains a taonga of Maori today.

What Does the Status of Taonga Mean for Matauranga?

503. In the claimants' submission, the recognition by this tribunal that matauranga Maori is a taonga, carries with it the explicit endorsement of the fact that matauranga was within the contemplation of the signatories to Te Tiriti o Waitangi, and in particular the guarantee in Article II that Maori would be able to exercise their te tino rangatiratanga in relation to such taonga. Where the terms of the Treaty have referred to 'nga Rangatira ki nga hapu, ki nga tangata katoa o Nu Tirani', as being the recipients of the guarantee of te tino rangatiratanga, the Statement of Issues in this claim has conveniently described those recipients as being 'kaitiaki'. Given the definition of kaitiaki and kaitiakitanga in the Statement of Issues, this categorisation is acceptable to the Te Tai Tokerau claimants. From their point of view, the status of matauranga Maori (including tikanga and te reo) as taonga under Te Tiriti o Waitangi, carries with it the fact that the kaitiaki of that matauranga, tikanga and reo must be able to exercise their tino rangatiratanga in relation to such taonga.
504. This in turn creates obligations on the Kawana or Crown who is obliged to govern in a manner which ensures that the Article II guarantees are fulfilled. As fiduciary, stemming from the obligation of 'protection' on the Crown,

the Crown has obligations to ensure that the relationship of the kaitiaki and their taonga can be maintained, enhanced and fulfilled.

505. The Statement of Issues has categorised this relationship of the kaitiaki with their taonga in the context of matauranga, and tikanga as involving the following:

505.1 the protection of tikanga and matauranga from use by persons other than kaitiaki;

505.2 the protection of tikanga and matauranga from use by persons in a matter inconsistent with the values and prescriptions underpinning tikanga and matauranga

505.3 the control, use, development and regulation of tikanga and matauranga by their kaitiaki; and

505.4 the preservation of tikanga and matauranga in the hands of kaitiaki and the transmission of tikanga and matauranga from generation to generation among kaitiaki.

506. It is the claimants' submission that all of these are 'incidents' of the guarantee of the 'full, exclusive and undisturbed possession' by kaitiaki of their matauranga Maori. Thus, where the First Component Issues in the Statement of Issues asks whether the Crown has such obligations, the claimants would say that these are all integral aspects of the exercise by kaitiaki of their te tino rangatiratanga.

Crown Obligations

507. The Crown asserts that any Treaty breaches resulting from the introduction of political and constitutional structures that prejudicially affected matauranga Maori, were a "necessary incident of colonisation".³³³

508. The destruction of Maori knowledge systems and customary laws that were guaranteed protection under the Treaty, cannot be said to be a "necessary

³³³ Crown Statement of Response, #2.256, para 120.

incident of colonisation”. Such a result would make a mockery of the bargain that was entered into in 1840; to say that the signatories to the Treaty (including the ancestors of the Tai Tokerau claimants) would permit the establishment of English legal and political institutions in their country if they thought the result would be the destruction of their own knowledge systems and loss of rangatiratanga is inconceivable.

509. The findings of the majority of the Waitangi Tribunal in the *Radio Spectrum Management and Development Final Report* on the effects of colonisation are very relevant:

“Fiduciary duty: the Crown has an additional fiduciary duty, running right through the Treaty, to protect Maori ‘just Rights and Property’ and, **in the event of Maori being adversely affected by the process of colonisation, to correct that imbalance by affirmative action.**

Mutual Benefit: Maori expected, and the Crown was obliged to ensure, that they and the colonists would gain mutual benefits from colonisation and contact with the rest of the world, including the benefits of new technologies.”³³⁴

The Treaty specifically guaranteed the Crown will fulfil its obligation of active protection to the chiefs and tribes of these taonga. The Crown has been in consistent breach of those guarantees since 1840.

510. The Tribunal and the Courts have variously described this duty of protection as being a Treaty principle, or an incident of a common law fiduciary duty the Crown owes to its Treaty partner.
511. For Professor Mason Durie:

“This fiduciary duty does not require an assumption of ownership, in loco parentis as it were, but rather a responsibility to ensure that ownership is rightfully assumed. A failure to do so will lead to unnecessary injustices similar to those experienced in relation to Maori leased lands.”³³⁵

³³⁴ Waitangi Tribunal *Radio Spectrum Management and Development Final Report* (Legislation Direct, Wellington, 1999), pp 51-52.

³³⁵ Mason Durie “Matauranga Maori: iwi and the Crown: a discussion paper” (Paper prepared for a Hui to discuss Matauranga Maori, James Henare Maori Research Centre, University of Auckland, 26 September 1996) #A15(b), pp 181-189.

512. This approach is explicitly adopted by David Williams in his commissioned report for the Wai 262 claim, *Matauranga Maori* (A15).
513. However, such an approach to the Crown role under the Treaty has not been borne out in the evidence of the Crown as to how matauranga Maori is viewed. Increasingly, matauranga Maori is used and incorporated into Crown protocols and policies. Education curricula, science and research and environmental policies all make liberal use of matauranga Maori, and do so in a manner which runs the risk of distorting both context and content.³³⁶ The claimants argue that regardless of whether a context is commercial or non-commercial, those who use matauranga Maori must be either the kaitiaki of the knowledge, or have been authorised by the kaitiaki, so that the knowledge is used in a manner consistent with its underlying values and prescriptions.
514. The Crown obligation extends beyond a fiduciary protection against inappropriate use. Mason Durie makes important reference to the advancement of matauranga Maori, through its retention, protection and promotion. It is noted that these are all different issues and require different approaches. However ‘the main point in this discussion paper is that matauranga Maori should be under Maori control.’ Professor Durie notes that the role of the Crown as a protector includes the allocation of funding for the retention, transmission and development of traditional Maori knowledge:

“It is not appropriate that funding opportunities should be bundled together into a science research fund, since matauranga Maori is not a science nor is it built on scientific philosophies or principles.”

Matauranga Maori as Different From Western Knowledge

515. The process of definition must be approached with particular care when terminology from one cultural context is brought into another. In particular, caution must be applied in describing matauranga Maori in precise terms, lest it be ‘subjected to misinterpretation or re-conceptualisation according to

³³⁶ Ibid, p 5.

the tenets of other systems of knowledge such as science'.³³⁷ This has been a particular issue in the context of research and technology, and is discussed in more detail in this section.

516. One of the key differences in the approach of western knowledge and matauranga Maori is to the ownership of knowledge. Western law has developed conventions relating to the copyright, patents, inventions and authorship. These conventions have tended to emphasise the individual proprietary nature of knowledge, as opposed to its collective ownership.

517. In his paper entitled "Matauranga Maori: Iwi and the Crown",³³⁸ Professor Mason Durie noted that:

"Matauranga Maori is not owned equally by all Maori. While some traditional knowledge is common to Maori people generally, much traditional knowledge is of tribal origin and ownership correspondingly lies with the tribes, sometimes iwi, sometimes hapu."

518. Western law conventions have also been derived primarily from commercial imperatives, whereas concepts of 'ownership' of matauranga Maori extend far wider than the commercial context. **Refer to submissions at Part C for detailed analysis of these differences.**

519. During questioning of Mason Durie by Crown counsel during the hearing of claimant expert evidence at Awataha Marae, Auckland, Professor Durie expanded on his categorisation of the three 'levels' of knowledge. The first being a level of highly sacred or tapu knowledge, to which notions of commercialisation and general use were anathema. The second category was a wider body of knowledge which was of importance to the collective Maori owner, because of the subject matter, but might, in certain circumstances which involved the authority and permission of the owner of the knowledge, be used in a commercial context. The third broad category of knowledge related to matters generally to which Maori had an interest, an interest which was common to those of other New Zealanders. In those

³³⁷ Ibid.

³³⁸ Ibid.

circumstances, issues of commercialisation could be addressed in a similar way to how such issues were dealt with under western law.³³⁹

520. Although describing matauranga in three levels, Professor Durie emphasised that underlying all of these levels is the clear evidence of the Wai 262 claimants that the ownership of knowledge rests with the kaitiaki, whoever that may be.

World Views – The Interface

521. In the discussion of matauranga Maori, and in particular its interface with the western knowledge systems, Dr Mere Roberts has given particular thought to the similarities and differences between these two ‘world views’. In her paper ‘Teaching Indigenous Knowledge and Western Science’,³⁴⁰ she equates the particular world view of a ‘cultural perspective’ as tending to be influenced by an individual’s physical and mental attributes, experiences, attitudes, beliefs and education. This then is the ‘world view’ within which the ‘local knowledge’ is embedded.
522. An example used in the Roberts paper is the radically different ‘cultural perspectives’ or ‘world views’ held by Maori and non-Maori concerning the same object – a species of rat (*Rattus exulans*) - with reference to the historical and cultural differences which have given rise to these two perspectives.³⁴¹
523. The divergent views expressed in those papers continue to resonate in a very practical sense for claimant group Ngatiwai. Conservation policies in relation to the eradication of kiore from Ngatiwai’s offshore islands have conflicted fundamentally with the view held by Ngatiwai that kiore is a taonga. The key point in assessing the Treaty obligations of the Crown in relation to the protection of matauranga Maori is that however much

³³⁹ Transcript of Evidence of Professor Mason Durie (Week 12, 6 May 2002) tape 2. The topic is dealt with by Professor Durie in numerous parts of his oral testimony, including at pages 41, 44, 58, 65.

³⁴⁰ Dr Mere Roberts “Teaching Indigenous Knowledge in Western Science” (Centre for Pacific Studies, University of Auckland, 1996) #A15(a), pp 125-141]

³⁴¹ Detailed more particularly in B Haami “The Kiore Rat in Aotearoa: a Maori perspective” (Science of the Pacific Island Peoples Conference, Institute of Pacific Studies, University of the South Pacific, Suva, Fiji, 1994) pp 65-76.; M Roberts “A Pakeha view of the Kiore Rat in New Zealand”(1994) IV Science of the Pacific Island Peoples, pp 125-142.

conversation policies might be exhorted to take into account tikanga Maori and matauranga Maori, when a conflict arises (and one which is seemingly irreconcilable), the western ‘world view’ of how the kiore should be dealt with, dominates. This is because of where the authority for decisions ultimately lies.

524. It is for that reason, that this claim looks not just to the Crown for the promotion and retention of matauranga Maori, but more fundamentally to a shift in power that will ensure that Maori, as kaitiaki of the matauranga Maori, are the ultimate decision makers as to how that matauranga is to be given effect to in relation to policies which affect their taonga.
525. Moana Jackson has categorised an incident of colonisation as the requirement that Maori no longer source the right to do anything in the rules of their own law, instead relying on Pakeha law for the definition of those rights. Colonisation requires that Maori “*seek permission from an alien word to do those things which [our] philosophy [has] permitted for centuries.*”³⁴²

Conservation Approaches – Sustainable Use Versus Preservation

526. Another clear example of the conflict between the knowledge systems leading to different approaches to the environment, is the notion of ‘the preservation’ and the ‘setting aside of land’ in the form of National Parks or reserves. Significant evidence has been given in this Claim concerning the ‘YellowStone National Park approach’,³⁴³ which has said to derive primarily from the traditional western concept of a dichotomy between ‘man’ and ‘nature’. The approach which alienates humans from those environments for the purpose of preservation for those environments, only serves to alienate the kaitiaki from their land and their own kaitiaki responsibilities.

³⁴² Moana Jackson “The Treaty and the Word: The Colonisation of Maori Philosophy” in Graham Oddie and Roy Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992)p 6.

³⁴³ Geoff Park *Effective Exclusion? An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912-1983* (Waitangi Tribunal Publication, Wellington, 2001) 330; Transcript of Evidence of Dr Geoff Park (Week 14) tape 3, pp 63-64.

Dr David Williams on the significance of the forced removal of Ngatiwai from their island Hauturu.³⁴⁴

Dr Williams “The relevance of that land transaction to the Wai 262 claim is the discussion that I put in this report about what other people call “a yellow stone model of National Parks” which is that human beings should be excluded from special National Park treasures, and that Hoturu [sic] is an example of a situation where Crown policy had destroyed the indigenous flora and fauna in almost the whole of the country and is suddenly discovering late in the date in the 1890s, ‘oh dear we’ve got very little left, let’s find some rare pieces of land where the habitat is less badly damaged by our intrusions’, ‘oh dear, there are some Maori people there let’s get rid of them’. That’s the context that I talk about it as relevant to this claim. It’s the National Park idea, it’s the bias fear of people idea as opposed to the eco-system people idea. But on Hoturu, given a different scenario, the Ngatiwai people who have lived there for many hundreds of years would be the ideal persons to look after that eco-system. But the Crown chose to move them off in the way that I described there briefly.”

527. Where the western world view regards preservation as paramount (notably a fairly recent phenomenon in the context of western ‘environmentalism’), the approach of traditional knowledge is to view the environment as able to be sustainably harvest, and be better protected through the close whakapapa bonds between the kaitiaki and the taonga and the land.³⁴⁵
528. And yet these 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

³⁴⁴ Transcript of Evidence of David Williams (Week 13) tape 9, pp 174-175. The return of Hauturu to Ngatiwai ownership is subject to a separate land claim, but as acknowledged by Himiona Munroe, Ngatiwai continue to pursue recognition of their kaitiakitanga status to Hauturu and the kiore population, especially given the logistical difficulties facing Ngatiwai in their historical claims to the Tribunal. This has been canvassed in these submissions in Part A “Crown Statement of Response”. Return of ownership of the land itself is an appropriate remedy given the historical circumstances of raupatu and the unique relationship Ngatiwai have with their taonga, the kiore.

³⁴⁵ Mere Roberts, Waerete Norman, Nganeko Minhinnick, Del Wihongi, Carmen Kirkwood, “Kaitiakitanga; Maori perspectives on Conservation” (University of Auckland) #A15 Document Bank, B3.6.

conservation approaches therefore share many common themes and imperatives, and the outcomes are often mutually beneficial”³⁴⁶.

Research Funding and Maturanga

529. A specific issue in relation to the interface between maturaunga Maori and western knowledge is in the context of science and research funding. In a paper approved for general release by the Chief Executive of the Ministry of Research Science and Technology in June 1995,³⁴⁷ a series of generalised recommendations were included to ensure that maturaunga Maori achieved a parity of funding by the Government in order ‘to emphasise its intention to underpin the maintenance of the traditional Maori knowledge ‘taonga’’.³⁴⁸ The recommendations included:

529.1 That ‘maturaunga Maori’ be accepted as a legitimate research topic under the Research Science and Technology framework;

529.2 That ‘maturaunga Maori’ be accepted as a knowledge paradigm of nature different from Western Science.

530. In relation to the funding of maturaunga Maori, it was recommended that a specific fund be established with the main emphasis being on:

530.1 Research into exploring the interface between traditional knowledge and modern applications (for example the interface between traditional medicines and pharmacology);

530.2 Research which would underpin Maori development, and does not otherwise fit into the Public Good Science Fund; especially research which builds research capability within the Maori community.

531. The MORST paper recommended that ‘to deal with the intellectual property problems’ it might be possible that ownership of intellectual property could

³⁴⁶ Taiepa et al “Co-Management of New Zealand’s conservation estate by Maori and Pakeha: a review” (1997) 24(3) Environmental Conservation, 236, 240.

³⁴⁷ Ministry of Research, Science and Technology “The Interface Between Maturaunga Maori and Mainstream Science” (June 1995) #A15 Document Bank, pp 248-280.

³⁴⁸ Ibid, p 267.

be vested in a Maori management group, ‘firstly for the benefit of all Maori, and secondly for the benefit of all New Zealanders’.

532. Thus, as early as 1995 MORST were well aware of the fundamental differences in the knowledge systems, the way in which they should be approached and funded, and the issues of intellectual property rights.³⁴⁹
533. There were two other key themes raised in the MORST paper in 1995 which remain just as relevant today. Firstly, the paper notes that research into matauranga Maori will require Maori to define the quality criteria and control the development of that research.³⁵⁰ The Crown's obligations are to actively assist Maori to meet the appropriate capability and quality requirements. This theme has been echoed in the context of conservation management,³⁵¹ and kaupapa Maori education.³⁵²
534. And secondly, in the paper there is explicit recognition that the retention and development of matauranga Maori has value beyond that for Maori themselves. The paper notes that this ‘information base’ is peculiar to New Zealand, and may provide a competitive advantage in tourism, art and music: “It underpins significantly the special cultural nation of New Zealand, and will require a research effort to underpin and strengthen it, and preserve it from loss.”³⁵³ Thus, the wellbeing of Maori leads to a wellbeing of society generally.³⁵⁴

³⁴⁹ Refer to Transcript of Evidence of Dr Helen Andersen (Crown Week 1, 17 December 2006) for reference to current MORST acceptance that matauranga is a taonga over which Maori have a right of rangatiratanga.

³⁵⁰ Ministry of Research, Science and Technology “The Interface Between Matauranga Maori and Mainstream Science” (June 1995) #A15 Document Bank, p 266.

³⁵¹ Taiepa et al “Co-Management of New Zealand’s conservation estate by Maori and Pakeha: a review” (1997) 24(3) Environmental Conservation, 236, 241 - discussion of capacity building.

³⁵² Transcript of Evidence of Karen Sewell in context of kohanga reo and kura kaupapa, and Transcript of Evidence of Arawhetu Peretini in context of wananga and NZQA.

³⁵³ Ministry of Research, Science and Technology “The Interface Between Matauranga Maori and Mainstream Science” (June 1995) #A15 Document Bank, p 266.

³⁵⁴ Refer Questioning of Te Taru White and Arapata Hakiwai (Te Papa Tongarewa) for the continued and growing application of the importance of Maori culture and identity to national tourism and identity.

Matauranga Maori and the Education Curriculum

535. The Te Tai Tokerau Second Amended Statement of Claim identifies the education system generally as playing a key role in the subjugation of the Maori world view.

“The claimants claim that in its denial of the rights of manaakitanga, kaitiakitanga and te tino rangatiratanga, the Crown has failed to provide for and protect the existing systems of matauranga Maori exercised by Ngati Kuri, Te Rarawa and Ngatiwai, including but not limited to: ...

The introduction and continued support of an education system which minimised the importance of, failed to actively protect, and denied the exercise and transmission of matauranga Maori.”³⁵⁵

536. Under cross examination the Secretary of Education, Karen Sewell, agreed that it was for Maori to define both the content and the method of delivery of their curriculum.³⁵⁶ Ms Sewell also acknowledged that there are different paths for different children.³⁵⁷ It was also acknowledged that discussion of the current state of Maori education cannot be divorced from an understanding of the past. Where Maori education was conducted by Maori within a Maori paradigm the results of the research into educational achievement were significantly higher compared to Maori being educated within a Western paradigm.
537. In Dr Ranginui Walker’s paper, entitled “Contestation of Power and Knowledge in the Politics Culture”, the importance of the curriculum is highlighted with particular reference to the historical context of colonial education:

“At the centre of the reproductive practice of schooling is the curriculum. Its construction by educational authorities has always been deeply implicated in the politics culture determining what constitutes knowledge, and whose knowledge is validated for inclusion. At the outset, the authorities invalidated Maori language and cultural practices by excluding them from the curriculum. Thus was Maori epistemology

³⁵⁵ Te Tai Tokerau Second Amended Statement of Claim #1(g), para 6.2 and 6.2.2.

³⁵⁶ Transcript of Cross-Examination of Karen Sewell, p 406, line 25

³⁵⁷ Transcript of Cross-Examination of Karen Sewell, p 408, line 15

displaced by the textual authority of the grand narratives emanating from Europe.”³⁵⁸

538. The Crown has issued a draft New Zealand curriculum with no reference to the Treaty of Waitangi. Te Runanga o Te Rarawa issued a clearly worded submission against the proposal which was tabled with Karen Sewell.³⁵⁹ The submission drew her attention to the response in Parliament by the Hon Steve Maharey in September 2006 to a question on how students could “*respect and understand Te Tiriti o Waitangi as a basis of our modern democracy if it is not discussed as a key feature of the school curriculum?*” The Minister of Education admitted “*They cannot*”.³⁶⁰
539. As Walker traces the historical development of the curriculum through its various attempts to assimilate Maori (including banning the use of Maori language in schools, and the emphasis of native schools curriculum on agriculture, handy work and manual instruction) he notes:
- “... by the 1980s it was evident that after more than two decades of cooperating with the education system, Maori underachievement had hardly changed ... Maori intellectuals concluded that problem was structural and inherent in the system. The revelation that the education system was an immorally flawed instrument of domination led to be secessionist kura kaupapa movement modelled after kohanga reo.”³⁶¹
540. Under cross examination, Karen Sewell agreed that Crown support for kaupapa Maori education, be it kohanga, kura kaupapa or wananga, was all too often dependant on those institutions complying with definitions and parameters which were ultimately set by the Ministry of Education themselves. In an exchange with claimant counsel, Dr Sewell agreed that the ultimate aim was to have Maori define their curriculum for themselves, and have authority over quality assurance methodologies, with the Crown’s obligation to be ensuring they have the capability to undertake that role.³⁶²

³⁵⁸ Ranginui Walker “Contestation of power and knowledge and the politics of culture” (1996) 1(2) Te Pukenga Korero, pp 1-7, #A15 (b) Document Bank, pp 486-492.

³⁵⁹ Te Runanga o Te Rarawa, Submission Ministry of Education New Zealand Curriculum (30 November 2006) p 5, doc R29(f).

³⁶⁰ Hansard uncorrected transcript, Question by Metiria Turei to Hon Steve Maharey, Minister of Education (12 September 2006).

³⁶¹ Ranginui Walker “Contestation of power and knowledge and the politics of culture” (1996) 1(2) Te Pukenga Korero, pp 3-4, #A15(b) Document Bank, pp 486-492.

³⁶² Transcript of Cross-Examination of Karen Sewell, pp 406, 407-408, 411.

Dr Sewell agreed that it was not inconsistent with overall national educational objectives for particular iwi to have authority over or control of their curriculum delivery, and indeed research illustrated that educational outcomes were significantly improved.

541. How might such a radical shift occur? Dr Sewell was provided with a copy of Mason Durie’s paper “A Framework for Considering Maori Education Advancement” which he presented at the 2001 Hui Taumata Matauranga: Maori Education Summit.³⁶³ In the paper Mason Durie noted that the broad aim of seeking active Maori participation in the formulation of educational policies and programmes carries with it some expectation that participation might occur within the model of a partnership and from the foundations of a focussed Maori voice.
542. In the paper, Mason Durie sets out three goals which he identifies as being essential for considering Maori educational advancement. These goals have since become the cornerstone of the Ministry of Education’s own development of policy in relation to Maori education.³⁶⁴ The goals are:
- 542.1 *Goal #1 - to live as Maori:* that education should be consistent with the goal of allowing Maori to live as Maori. That meant being able to have access to te ao Maori - the Maori world – access to language, culture, marae, resources such as land, tikanga, whanau, kaimoana: “*If after 12 or so years of formal education a Maori youth were totally unprepared to act within te ao Maori then no matter what else had been learned the education would have been incomplete.*”
- 542.2 *Goal #2- to actively participate as citizens of the world:* this goal recognises that Maori children will live in a variety of different contexts and should be able to move from one to the other with relative ease: “*If years at school do not lead to some readiness to*

³⁶³ Mason Durie “A framework for considering Maori educational advancement” (Paper for Hui Taumata Matauranga) www.minedu.govt.nz, #R29(e).

³⁶⁴ Ibid.

confront the world and participate actively in it, then opportunities for Maori advancement will have been sacrificed.”

542.3 *Goal 3 - to enjoy good health and high standards of living:* education should be able to make a major – if not *the* major – contribution to health and well being and to a decent standard of living. Educational achievement correlates directly with employment, income levels, standards of health, and quality of life.

543. In order to meet those 3 goals, Mason Durie established some key principles, namely:

543.1 The principal of best outcomes, which includes how those outcomes are to be measured. What is the bench mark against which Maori should gauge progress? The principle also expects zero tolerance of educational failure.

543.2 The principle of integrated action means that emphasis must be placed on greater cooperation between institutions such as homes and the school, as well as better coordination across sectors: *“Messages about the value of education will not be well received where de-culturalisation, loss of identity, unemployment and indifference prevail”*.

543.3 The principle of indigeneity, there are a set of rights that indigenous peoples might reasonably expect to exercise in common times that may be different from those valued by the majority. Mason Durie notes that the Treaty of Waitangi is important to indigeneity, but so are international instruments such as the DRIP. He sees the Treaty as being a *“helpful vehicle for the promotion of Maori interests”*, and that its value will be in its potential to *encourage a relationship* between Maori and the Crown, upon which indigenous rights will continue to be realised.

544. Finally, having discussed the goals and principles, Mason Durie turns to the pathways for Maori education and discusses ‘Maori centred pathways’, ‘Maori added pathways’, and ‘collaborative pathways’. He then addresses the ‘glaring gap in Maori capability’ as being a lack of a sustained capacity for long term integrated planning and policy, both amongst Maori and Government:

“While various Government Departments have an eye to the future, their planning fields are limited by sectoral interests and do not usually start from a Maori view. Indeed their mission is to give expression to Government policy, and because of the three year electoral priorities, their political masters are not always easily persuaded to go too far beyond a three year cycle.”

545. Durie acknowledges that there is no national forum where Maori might set policy directions, plan for the future, and enter into agreements with the State and other groups.

546. Dr Williams was asked by Crown counsel why Maori could not simply form such a representative body now and suggested that there was no Crown policy or legislation preventing this from occurring. Dr Williams responded that the obstacle was that “*there was no authority granted to such organisations to exercise tino rangatiratanga in terms of our laws*”³⁶⁵, leading to the problem of enforcement and authority “forum shopping”.

547. Dr Sewell was asked about Professor Durie’s view that a pressing need was for Maori capacity to be broadly representative and the Government to take an integrated approach to planning. She agreed wholeheartedly, as well as agreeing with Mason Durie’s concluding comment that “*until that capacity exists then Maori control of the broad direction for Maori advancement will be more illusionary than real and Maori educational progress will suffer from the absence of a plan that integrates education into the wider arena of Maori ambition*”.

548. The claimants believe that Karen Sewell answered questions with integrity and displayed a willingness to engage with Maori. Yet it was only through questioning that Karen Sewell’s evidence revealed that even the Ministry’s

³⁶⁵ Transcript of Evidence of David Williams (Week 13_ tape 9, p 165.

approach to its revision of the Maori medium curriculum failed to start from these all important first principles. At para 25 of her evidence, she had outlined the Ministry's intention to revise the current Maori medium curriculum, including the over arching principle framed thus: "*matauranga Maori – what is matauranga Maori and how should it be reflected **within** the education system?*"[emphasis added].

549. In her own evidence, it was noted that kaupapa Maori education included the factor that Maori authority and control exists in all aspects of learning and education.³⁶⁶ Yet, if Maori authority and control does not relate to the very issue of definition and to the setting of parameters so as to interact with the education system rather than sitting within it, then the results will be more illusionary than real. With considerable goodwill in her answers, Dr Sewell conceded that the questions had certainly given her a lot to think about in terms of curriculum development and the importance of starting from first principles.³⁶⁷

550. She responded favourably to suggestions of a 'long conversation', agreeing that it was absolutely critical that the engagement commenced from first principles, and was familiar with the Minister of Education's comment that his government had 'inherited an education system which clearly did not meet the needs of Maori', and in that context required 'transformation'.³⁶⁸

Second Component Issues – Existing Law

3A.4.1 Did or do Crown policy, practices or legislation, such as [but not limited to]:

- **Maori Antiquities Acts 1901 and 1975 and amendments**
- **The Antiquities Act 1975 and amendments**
- **Protected objects legislation or policy;**
- **Relevant museum legislation and policies,**

Protect the kaitiaki's' relationship with their tikanga Maori and matauranga Maori and

³⁶⁶ Brief of Evidence of Karen Sewell, #R29, footnote 6.

³⁶⁷ Transcript of Evidence of Karen Sewell (Crown Week 3) p 395. See also pages 396-408 for references.

³⁶⁸ Ibid.

their taonga works or taonga in museums or other institutions.

If not, what amendments should be made to ensure such protection?

551. No. Crown policy and legislation in relation to “Moveable Cultural Taonga” do not protect the relationship of kaitiaki with their taonga or taonga works.
552. The Statement of Issues divides this question into two related categories:
- 552.1 The Antiquities legislation and its amendments; and
- 552.2 Museum legislation and policy.
553. The evidence of Jane Kominik on behalf of the Ministry for Culture and Heritage focuses primarily on the Protected Objects Act 1975, which incorporates amendments to the Antiquities Act 1975.
554. Evidence from Arapata Hakiwai and Te Taru White for Te Papa Tongarewa addressed matters relating to the care of taonga in museum within the context of their own empowering statute, and Margaret Calder (National Library) and Dianne McCaskill (National Archives) gave evidence of the care of taonga in their respective institutions.

Moveable Cultural Property

Protected Objects Act 1975

555. The Crown acknowledges in its evidence that the Antiquities Act 1975 was inadequate to deal appropriately with the relationship of kaitiaki with their taonga.³⁶⁹ Ms Kominik maintains that the legislative amendments meet the Crown obligations set out in the Statement of Issues. From (at least) 1975 then, in terms of the Tribunal’s scrutiny in this claim, and certainly since the 1908 Antiquities Act, the Treaty guarantee to tangata whenua that their taonga would be protected, and the relationship of kaitiaki with those taonga would be protected, has failed to occur.

³⁶⁹ These inadequacies are set out at attachment A of the evidence of Jane Kominik (doc R28(a)).

556. The claimants do not agree with Ms Kominik that the legislative amendments to address those failings have made, or are likely to make, any real difference. The following points list the deficiencies in the legislation with reference to the questioning of Ms Kominik.
557. **Firstly**, the Act maintains the presumption of ‘prima facie Crown ownership’ of any newly found taonga.
558. It was said in justification of this prima facie ownership that any newly found taonga would be protected by preventing finders or landowners gaining ownership through the doctrine of finder’s law. The Ministry written evidence noted that such a phrase ‘may not be viewed positively by Maori’. The submission made by Ngati Hinewaka to the Select Committee had argued that the process would be much more streamlined and more effective for Maori if the approach as outlined in the following paragraph was adopted. It would certainly be more consistent with Maori claims to ownership of their taonga. Miss Kominik, under cross examination, conceded that from a Maori perspective one does not ‘lose’ ownership of taonga.
559. The legislation *could* have stated that there would be prima facie ownership of the taonga in the tangata whenua of the rohe that the taonga was found until claims to that taonga were contested and if so, resolved according to tikanga. The witness agreed that such an approach would have achieved exactly the same aims of this aspect of the legislation.
560. **Secondly**, there is no requirement for kaitiaki to be involved in the registration of an object as a “taonga tuturu”. Where whakapapa or provenance is not able to be established, the default position under the Act is that the object will *not* be deemed to be taonga tuturu, creating the possibility of significant gaps in the regime for want due to lack of input from kaitiaki. Nor is there is any requirement in an application to export taonga, for the kaitiaki to be consulted or involved in the examination of the taonga or the decision to be made.

561. It is essential that expertise in te ao Maori be involved in the recording and registering of objects, both in the context of export applications and in the context of registration generally. The guidelines attached to Ms Kominik's evidence provide the following:

“When recording and registering an object as taonga tuturu the following should be considered in conjunction with a definition:

- The whakapapa, provenance or history of the object is to be known; or
- It is evident in the manufacture, design or style or in a manner the object was found (i.e. recovered from archaeological site) that it is a Maori object.

If the above information is not know or self evident, then the object should not be registered and is not deemed to be taonga tuturu. In coming to the definition of taonga tuturu, the Maori reference committee wanted a term that reflected the importance of objects handed down the generations and found. That is why Whakapapa and manufacture are so important to applying the definition.” (emphasis added).³⁷⁰

562. Under cross examination, Ms Kominik agreed that the determination of an object's whakapapa or provenance should rightly be a matter for the kaitiaki of that taonga, and that where the Act provides for no specific requirement to refer such a question to kaitiaki, there is a significant gap in the process.

563. **Thirdly**, rather than determining claims to taonga within the authority and structures of tikanga, the authority to determine disputes concerning the provenance of taonga lies with the Chief Executive Officer of the Ministry of Culture and Heritage³⁷¹ (and later with the Maori Land Court if the matter is so referred). The CEO of the Ministry must consult with the claimants for the purpose of resolving competing claims and *if satisfied competing claims had been resolved and that the resolution is valid*, apply to the Registrar for an order that confirms the owner of the taonga tuturu.

³⁷⁰ Ministry of Culture and Heritage *Protected Objects Act 1975: Guidelines for Taonga Tuturu* (1 November 2006), Brief of Evidence of Jane Kominik, #R28(b).

³⁷¹ *Ibid*, para 8.3.

564. **Fourthly**, under section 14 of the Act, iwi, hapu or whanau must register as “Registered Collectors” in order to hold their “taonga tuturu”: a scheme involving obligations which are quite inconsistent with the rights and responsibilities of kaitiakitanga (in particular the obligation to make available the taonga collection to the Ministry or its CEO for inspection).³⁷² The very notion that iwi should have to register as a ‘collector’ in order to regain their physical connection with their taonga is contrary to the values and prescriptions which underpin the role of kaitiaki.
565. **Fifthly**, other points of concern in the way in which the legislation deals with taonga are:
- 565.1 The Act provides no ability or jurisdiction to repatriate taonga which has been stolen in the past and are now held by private institutions;
 - 565.2 The age of an object before it can be deemed to be taonga tuturu is arbitrary;
 - 565.3 The significant number of the taonga which are found, compared with the insignificant number which have actually been returned to iwi ownership;
 - 565.4 The decision not to categorise flints as taonga because of a blanket decision made to not include ‘waste and by-products of manufacturing’. Such a definition would capture midden sites.
 - 565.5 The lack of any adequate educational and awareness programme so that iwi can follow the Act’s process (albeit deficient) in order to re-connect with their taonga; and
 - 565.6 The lack of any resourcing for iwi, hapu or whanau capacity building.

³⁷² Ibid, para 43.

Museum Policy and Legislation

566. Museum legislation is inherently non-compliant with the Treaty of Waitangi in that it is based on the assumption that museums are the legal owners of the taonga they hold in their care. This is the case despite often clear examples of the dubious manner in which museums came to be in possession of taonga.
567. It was noteworthy that an institution such as Te Papa Tongarewa has taken initiatives to develop a comprehensive *Mana Taonga* policy, which seeks to ensure that despite the deficiencies of the museum legislation the connection between kaitiaki and their taonga is highly valued. When kaitiaki are more fully involved in taonga management, the results for Te Papa have been highly beneficial in terms of visitor numbers and enjoyment.
568. Te Papa Tongarewa representatives gave evidence of the positives resulting from an application of many of the principles espoused in this claim by the claimant: giving expression to kaitiakitanga; transparency and good faith in dealing with kaitiaki about decisions to do with taonga; respect for the cultural context in which taonga lie, including the *mauri* and the *tapu* of the taonga; and an appreciation of the whakapapa complexities of taonga as they relate to the people themselves, and their environment.

National Library and National Archives

569. It is noted that a considerable amount of Maturanga is contained within the National Library and Archives New Zealand. This includes the Records of Inquiry from the Waitangi Tribunal which contain extensive traditional evidence given in the context of Treaty claims. This evidence often includes extensive information about matauranga, rongoa, and whakapapa.³⁷³
570. The claimants have expressed concerned in these proceedings regarding how their Maturanga might be accessed, by whom and what it might be

³⁷³ For example the evidence of Hema nui a Tawhaki Witana subject to confidentiality orders; the evidence of Raukura Robinson who asks that the material be returned to her or her whanau after this inquiry.

used for in the future. The claimants have given evidence that they would like to see more longer term, if not perpetual, protection instituted.

571. The reconciliation of the claimants concerns with the general principle of promoting access to public information was put to Ms Macaskill who presented evidence on behalf of Archives New Zealand. She commented that Archives New Zealand, in the public system, has yet to give consideration to the concept of group privacy versus personal privacy but she did concede that it is an issue.³⁷⁴
572. It is submitted that Crown policy and legislation governing the National Library and Archives New Zealand do not protect the relationship of kaitiaki with their taonga or taonga works. This is despite the commitment and dedication of staff within those institutions to the importance of the material, and their willingness to engage on how issues of protection might be addressed.
573. The claimants are cognisant of the important role that these institutions can play in the preservation of taonga Maori. However, it is clear that further work is required. It is submitted that any *ex-situ* actions relating to taonga Maori (including matauranga) should only be advanced with the full and effective participation of kaitiaki, in accordance with the Treaty principle of partnership. It is the claimants' view that databases, registers and other repositories of traditional knowledge must be highly confidential so as not to facilitate misappropriation and misuse and more fundamentally, it must preserve and protect the kaitiaki relationship with their traditional knowledge. We refer to *ex-situ* actions in our Remedies section.

Protection from Inconsistent Use

3A.4.1[c] What specific New Zealand legislative or policy instruments contribute to the protection of tikanga Maori and matauranga Maori from use by persons other than the kaitiaki or in a manner inconsistent with the values, and prescriptions underpinning tikanga Maori and matauranga Maori?

3A.4.2 Is the overall effect of these instruments sufficient to meet any obligations identified

³⁷⁴ Transcript of Cross-Examination of Dianna Macaskill, p 280, line 30.

in the first component?

574. The claimants submit that there are no specific legislative or policy instruments which would protect tikanga and matauranga Maori in the manner described. Put another way, any ‘non-kaitiaki’ who uses matauranga Maori, be it te reo, tikanga, or matauranga generally, can do so with complete freedom and lack of restriction, in any commercial or non-commercial context. In fact, current legislation and policy would endorse the use by non kaitiaki of ‘information’ in this way, through the freedom of expression provisions under the Bill of Right Act 1990. This issue overlaps to a large extent with the section on the intellectual property aspects of taonga works.
575. The overall effect of these ‘instruments’ is **insufficient** to meet any obligations identified in the First Component. The Crown simply failed to meet its obligations to protect and promote matauranga Maori from use by persons other than kaitiaki or in a manner inconsistent with the values and prescriptions underpinning tikanga and matauranga.
576. Crown evidence would tend to highlight certain initiatives such as Kohanga Reo, Kura Kaupapa and Wananga as indicating moves which contribute to the development, regulation, control and or use of tikanga and matauranga Maori by their kaitiaki. A critique of this ‘kaupapa Maori curriculum’ has been set out in these submissions. Apart from the fact that these submissions were promoted and driven by kaitiaki themselves as opposed to being a Crown initiative, the fact that the continuation of these kaupapa Maori initiatives has been a struggle for recognition, funding and resources, the fact is that the Crown has failed to make substantive commitment to the promotion and development of matauranga/tikanga.

Development, Regulation and Control of Matauranga/Tikanga

3A.4.3 *Which specific New Zealand legislative or policy instruments contribute to the development, regulation, control and/or use of tikanga Maori and Matauranga Maori by their kaitiaki?*

577. This particular question contains four quite distinct aspects of the application of tikanga and matauranga by their kaitiaki: development, regulation, control and use. All of these are included in the definition of kaitiakitanga at the commencement of the Statement of Issues. But in assessing the legislative or policy instruments which contribute to those matters, it is necessary to deal with them separately. This is even though there are large areas of overlap between each category.
578. From the period 1840 to 1975, it is clear that matauranga Maori was not valued by the Crown and was certainly not a candidate for development. David Williams in particular, with support from other Tribunal-commissioned witnesses dealing with specific aspects of matauranga, gave evidence as to the neglect of matauranga and tikanga Maori through historical legislative and policy instruments. That evidence was amplified by personal testimony from claimant representatives, kuia and kaumatua, who had been educated as children in a system which denied them the right to korero Maori, to enjoy Maori kai at school, or to express themselves according to matauranga and tikanga Maori.
579. Against that historical background, the period 1975 – 2006 which is assessed by this Tribunal with particular reference to breaches of the Treaty can be categorised as a period of slow adjustment from those years of denial to a point where matauranga and tikanga was regarded by the Crown as having some value (where required of it by statute). If this is appropriately classified as a period of “development”, then it can only be in the context of a small reversal in the irreparable damage done to the vitality of matauranga and tikanga over the decades of abuse. Therefore, while commendation should be given to Crown actions where it is due, it should not disguise the fact that “development” initiatives are actually commencing from behind the eight ball, and would not be the type of “development” envisaged by the signatories to the Treaty of Waitangi.
580. Crown evidence came from Te Puni Kokiri as to its Maori Language Plan; from the Ministry of Education on its kaupapa Maori curriculum; from the Ministry of Science, Research and Technology on its incorporation of

matauranga within its research funding programme; and from the New Zealand Qualifications Authority on the inclusion of matauranga within its “Field Maori” courses.

581. These elements of kaitiakitanga are at the heart of the claimants’ case that their tino rangatiratanga has been actively suppressed by the Crown. The Crown, both historically and in terms of contemporary legislation and policy, has categorically failed to provide for the kaitiaki to regulate and control their tikanga and matauranga Maori. The essence of regulation and control is the ability to veto the use of matauranga by non-kaitiaki in order to preserve its integrity. At no time have kaitiaki had such an ability. Matauranga and tikanga have been “free for all” since the commencement of the Treaty relationship. In more recent times, as matauranga has become a powerful branding tool and a valuable commodity in itself, the inability to regulate and control its use has become most apparent. However, time and time again during the course of this claim’s hearings, examples have been given of matauranga and tikanga having entered the public domain in circumstances beyond the control and regulation of the kaitiaki concerned. No Crown evidence sought to dispute that fact. On the contrary, Mr Mark Steel conceded that the lack of regulation (by kaitiaki or the Crown!) of matauranga was of concern, and that the Ministry of Economic Development recognised the need to do something about it. Addressed in other sections of these submissions is the fact that kaitiaki had not been consulted adequately in the MED process and were still not being afforded, even in the development of protection mechanisms, their right to regulate and control such processes. Thus, in a distinction usefully made by the Chief Judge, if Maori can be seen to have both proprietary and participatory rights, then they have been afforded neither in the regulation and control of their matauranga and tikanga.

3A.4.4 *Is the overall effect of these instruments sufficient to meet any obligations identified in the first component?*

582. No. The assessment of the Crown obligations must be the development of matauranga as it was at the time of the Treaty partnership being entered

into, rather than a “spin campaign” being given to the development of a resource which is so heavily depleted. Most importantly, an assessment of the success or otherwise of “development” initiatives for matauranga and tikanga must depend on the level of recognition of tino rangatiratanga of the kaitiaki – in particular the ability to make decisions in relation to the level and objectives of that development.

Preservation and Transmission of Matauranga/Tikanga

3A.4.5 *Which specific New Zealand legislative or policy instruments contribute to the preservation of tikanga Maori and Matauranga Maori in the hands of their kaitiaki and transmission of tikanga Maori and Matauranga Maori from generation to generation among kaitiaki?*

583. This section deals with preservation and transmission of tikanga and matauranga amongst kaitiaki themselves. From the claimants perspective this deals directly with their tikanga associated with wananga. Extensive evidence has been given as to the importance of traditional wananga, including the decision-making structures of wananga and the rules pertaining to the transmission of matauranga from generation to generation.
584. Once again, the historical disintegration of whare wananga systems is vital context in the assessment of current legislative or policy instruments which might seek to contribute to the preservation and transmission of matauranga and tikanga. Whare wananga were ill-supported, disestablished and undermined by Crown policy relating to tribal structures, the legitimacy of the Maori education system, and the devaluing of te reo. Therefore, when the New Zealand Qualifications Authority gives evidence of its efforts over the last decade to incorporate aspects of matauranga in its qualifications regime, the claimants assess those initiatives against what might have been had the Treaty guarantees been fulfilled.
585. Even kaitiaki initiatives to preserve and transmit matauranga and tikanga have met with Crown obfuscation and resistance. Wananga such as Te Wananga o Raukawa in Otaki, were forced to make a claim to the Waitangi Tribunal to address gross disparities in funding between wananga and other tertiary institutions. Under cross examination, Karen Sewell from the

Ministry of Education agreed that disputes still continued between the wananga and the Crown over funding, the autonomy of their audit processes, and the issues of regulation and control.

586. Similarly in the context of kohanga reo and kura kaupapa Maori, the efforts by kaitiaki to reinstate vehicles for the transmission and preservation of matauranga and tikanga in the younger generation have been characterised by a lack of resources, and a requirement to adhere to a western education framework regardless of its incompatibility

<p>3A.4.6. <i>Is the overall effect of these instruments sufficient to meet any obligation identified in the first component?</i></p>
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587. No, for the reasons set out in the answers above.

Third Component Issues – Potential Remedies

588. Remedies in relation to the preservation, protection and promotion of matauranga are set out in detail in Section H – Remedies.

PART E(2): TE REO MAORI

Distinctiveness

Does the Crown have obligations under the Treaty of Waitangi/Te Tiriti o Waitangi to protect and promote Te Reo o Ngati Porou, o Ngati Kahungunu, o Ngati Koata, o Ngati Kuri, o Ngatiwai, o Te Rarawa?

Does the Crown have obligations under the Treaty of Waitangi/Te Tiriti o Waitangi to actively protect Te Reo o Ngati Porou, o Ngati Kahungunu, o Ngati Koata, o Ngati Kuri, o Ngatiwai, o Te Rarawa, as an essential means of cultural identity, cultural expression and knowledge transmission to the particular iwi?

589. Yes to both of these questions.
590. Issues relating to distinctiveness arose primarily from the concerns raised by Ngati Porou claimants that Crown obligations to protect and promote te reo Maori did not adequately accommodate the particular “reo ake o Ngati Porou”. Te Tai Tokerau claimants subsequently supported the Ngati Porou allegations that the Treaty obligations in relation to te reo were more sophisticated than a simple “pan Maori” obligation to the language. For Te Tai Tokerau claimants, hapu and iwi have distinctive dialects, kupu, whakatauaki and pronunciation which give them a unique identity and distinctive place amongst the varying “sovereign” hapu in this country. For Te Tai Tokerau, nga mita o nga reo are essential means of cultural identity, cultural expression and knowledge transmission for the particular hapu or iwi concerned.
591. This position is amply supported by reference to the tikanga principles identified as Nga Pou in these submissions. Te Tai Tokerau claimants gave evidence of the whakapapa of te reo, with particular reference to their own unique rohe, the names of their landmarks, derived from the ancestors or derived from the unique features of their own natural environment. As kaitiaki of those regions, each of Te Rarawa, Ngatiwai and Ngati Kuri have the rights and responsibilities to care for and hand on to their future generations the distinctiveness of their respective reo. Nga reo are the vehicles by which the mythology, oral history and cultural identity is transmitted from generation to generation. If the Crown’s obligation under

the Treaty in relation to this taonga is to be fulfilled, it must apply to the specific reo that is treasured by the respective kaitiaki themselves, rather than a generalised amalgam “te reo Maori”. After all, the Treaty guarantee was to ensure the tino rangatiratanga could be manifested by nga rangatira and hapu who had entered that partnership. One example of the importance of particularising the obligation on the Crown to protect and promote the distinctiveness of each reo a kaitiaki, was the submission by Te Runanga o Te Rarawa on the draft education curriculum, and in particular Te Rarawa’s perspective on how the education system should accommodate a Te Rarawa curriculum for use in schools in the Te Rarawa region. If matauranga and tikanga are to be regarded as a distinctive and relevant to individual rohe, it makes no sense to limit that obligation by transmitting that matauranga via a language that has no recognition of distinctive dialects.

First Component Issues – Crown Obligations

592. The Statement of Issues divides the issues relating to te reo Maori into two sections relating to the distinctiveness of te reo, and the use of te reo.

Second Component Issues – Existing Law

If the answer to those questions is “Yes”, has the Crown met those obligations?

593. The Tai Tokerau claimants say that the Crown has failed to meet these particular obligations under Te Tiriti o Waitangi, and that Crown actions cannot be divorced from the wider context of its activities in relation to Maori language promotion generally. That is, the Crown is failing even at its most basic level to adequately protect te reo Maori, and therefore, it is failing even more so to adequately protect nga reo o Te Tai Tokerau.

Use of Te Reo Maori

3B.3.1(ii) Does the Crown have an obligation under the Treaty of Waitangi/Te Tiriti o Waitangi to protect Te Reo Maori from use in a manner inconsistent with tikanga Maori underpinning Te Reo?

594. For the most part, this section has been traversed in the context of the obligation of the Crown to protect the use of matauranga in a manner inconsistent with the tikanga of the kaitiaki.
595. This is because te reo Maori is an integral (if not *the* integral) aspect of matauranga Maori. One can contemplate the use of a kupu Maori not necessarily conveying aspects of matauranga, but matauranga itself requires te reo to convey it, and to give it its meaning.
596. Del Wihongi in her evidence describes te whakapapa o te reo, and its derivation from the sacred vowels through to each word that is uttered. In that sense, protection and promotion obligations which exist on the Crown in relation to te reo must extend to protection and promotion of the tikanga underpinning te reo. The synergy is often encapsulated in the phrase “te reo me ona tikanga”. That is, the tikanga as “possessed” by the reo itself.
597. Some of the most striking examples in this claim of the misappropriation of matauranga have been the use of Maori words and phrases in a manner inconsistent with the tikanga underpinning those words and phrases. That tikanga includes the fundamental concept of whakapapa but extends to concepts such as tapu, where the association of a Maori word or phrase within a “noa” context is an abuse of the reo.
598. An example given in evidence was the Lego Bionicle games, where the use of tupuna names (for example “Tahu”) or aspects of the natural world (for example “whenua”) were used on a children’s fantasy game, and sold for profit. The issue here was not the association of the reo in the commercial context per se, although that was certainly part of the issue, but derived initially from the lack of consultation and decision-making authority provided to nga kaitiaki of te reo before the Maori words were employed. Claimant witnesses were pressed by Crown counsel to draw black and white distinctions between appropriate and inappropriate use of Maori words and phrases. Few were able to provide such clear cut distinctions, given that so much depended on the way in which the company or commercial stakeholder was willing to engage with Maori and recognise their status and

rights as kaitiaki. In some cases, claimant witnesses did feel able to categorically declare certain words and phrases to be “off limits” for use in a commercial context, but again, that tended to depend on the subject matter of the product being commercialised. Thus the association of alcohol with kupu taonga was regarded, in the main, as unacceptable.

599. At the same time, Ngati Toa Rangatira illustrated their own exercise of tino rangatiratanga by working through, amongst themselves, a proposal by a South Island winery to use the *Ka Mate* haka (including the words and symbols of the haka being performed) on the wine label. The wine label was adduced in evidence by Crown counsel through his own witness, Mr Mark Steel, and it was noted that the label contained explicit recognition of the endorsement by Ngati Toa Rangatira. Such has been the marketing popularity of the *Ka Mate* haka that Ngati Toa Rangatira have been called to deal with issues of the appropriate use of their taonga in a commercial context on many occasions. Their evidence to the Intellectual Property Office of New Zealand (IPONZ) was that the New Zealand Rugby Football Union had been using the haka for nearly one hundred years without ever formally seeking the consent of Ngati Toa Rangatira. That use of the haka had moved from being a ceremonial cultural showpiece at the start of every test match for the national side, to a multimillion dollar marketing brand where even snippets of the haka overlaid by promotional advertising would be enough to satisfy the NZRFU commercial requirements. In that context, Te Ariki Wineera gave evidence that Ngati Toa Rangatira sought to have their kaitiakitanga recognised by NZRFU formally obtaining consent to use the haka, and negotiations with Ngati Toa Rangatira about its appropriate use.

600. The irony for Ngati Toa Rangatira in its application to IPONZ to obtain a trademark to its haka was that the intellectual property rights regime could not accommodate such a claim because the trademark was not distinctive enough in the course of trade. Thus, the inadequacy in a historical sense, of the protection of matauranga by the Crown had allowed a situation to arise whereby this taonga could be used by the NZRFU at will, and yet that very

lack of protection had created such widespread use in the marketplace as to render a trademark claim by the ‘true owner’ vacuous.

601. Mr Brown for the Crown sought to justify the IPONZ refusal to grant the trademark on grounds related to the technical application of the Trademarks Act. At one level, such an approach is logical and quite justifiable: IPONZ can only deal with an application according to the terms of its own statute. However, at another level, such as where the Trademarks Act itself is recognised as being inadequate to deal with the subject matter of a taonga like the haka, such technical questioning fails to address the fundamental issue being raised. That there is an obligation on the Crown to protect te reo Maori from misappropriation is a logical flow on from the fact that te reo is a taonga under Te Tiriti. That the current legislation and policy is simply ill equipped to deliver that protection to such taonga is evidenced by the trademark application and its rejection. The issue for this Tribunal is what can be done to remedy such a deficiency so as to prevent the further exploitation of taonga (matauranga and reo) which is occurring daily.
602. Such a protection mechanism must recognise the decision-making authority of the kaitiaki themselves in determining the parameters of what is ‘appropriate use’. That said, there will be a high level of consensus amongst kaitiaki as to the base line of what is appropriate, and where there is a grey area where opinions between kaitiaki may differ, then tikanga processes of decision-making must be allowed to be exercised and be determinative.

Third Component Issues – Potential Remedies

Refer to **Section H** for Remedies which relate to the preservation of languages of kaitiaki communities, and the protection from misappropriation.

PART F: RELATIONSHIP OF KAITIAKI WITH THE ENVIRONMENT

Chapter Summary

Relationship with the Environment

- The relationship kaitiaki have with their environment is a taonga, sourced in whakapapa and the interconnectedness of indigenous flora and fauna with their habitats, ecosystems and waterways.
- Kaitiaki have their own customary laws and practices, including traditional knowledge relating to biodiversity, rongoa and taonga species, which are taonga and in relation to which kaitiaki were guaranteed their tino rangatiratanga and kaitiakitanga.
- The Crown has assumed regulatory control of the environment and alienated kaitiaki from access to, benefit from, and control and authority over their environment, biodiversity and flora and fauna.
- Recognition of tikanga Maori within the Crown assumption of regulatory control has been limited to just one factor of many competing interests to be taken into account by the decision-maker.
- On the rare occasion when Crown legislation has provided for the potential for effective and strong co-management of the environment, or authority and control in the kaitiaki, the local authorities have had no inclination to enter into effective Treaty relationships and the Crown has not encouraged them to do so.
- The claimants argue for a reasonable and effective Treaty relationship of “strong co-management” in relation to conservation lands within the respective rohe of Ngati Kuri, Ngatiwai and Te Rarawa.
- The claimants seek to reclaim and restore the mauri of the environment, their biodiversity and their traditional knowledge.

Rongoa

- Te Tiriti o Waitangi guaranteed to Ngati Kuri, Ngatiwai and Te Rarawa the exercise of their kaitiakitanga in relation to the traditional healing practices and knowledge of rongoa, including access to the rongoa resources themselves, and the customary laws and practices associated with rongoa.
- Rongoa is a taonga, and must be actively protected within the Crown-Maori relationship.
- The Crown has failed to recognise, actively protect and give effect to those customary systems of knowledge or matauranga and those customary laws and practices by implementing legislation, regulation and policy from 1975-2007, including (but not limited to) the areas of intellectual property rights, health services, education, and science, research and technology.
- The claimants seek to reclaim their tino rangatiratanga in relation to their rongoa for the wellbeing of Maori and the community as a whole.

First Component Issues – Crown Obligations

Essence of Claimants’ Case in Relation to Conservation Estate

603. The claimants regard the Treaty of Waitangi as the foundational document from which the relationship between Maori and the Crown must be based. The two concepts of Rangatiratanga and Kawanatanga need to be interpreted in order to determine that power relationship. In the context of the Conservation estate, kawanatanga has provided a standardised set of laws for all New Zealanders based on a western tradition. From time to time those laws have sought to accommodate aspects of tikanga Maori, but always within the overall model of kawanatanga.
604. For the claimants, the guarantee under Te Tiriti o Waitangi of tino rangatiratanga required the Crown to respect Maori autonomy and control, which would include the continuation of their own set of laws which were already in place before European settlement:

“So it is that the Crown no longer publicly echoes the sentiment that the Treaty is a simple nullity but instead attempts to disguise its ongoing breaches of the promises made in Te Tiriti o Waitangi with a carefully constructed notion of partnership that leaves Māori powerless. So it is that the Te Reo Māori Act declares Māori to be an official language, but fails to guarantee a right to speak it in all but the most narrowly defined of situations. And so it is that Crown law, instead of openly denigrating tikanga Māori as barbarous, now seeks to assimilate approved aspects of our “custom” into itself, thereby giving the impression of a new found liberalism while simultaneously relegating tikanga to a subordinate status. Unarguably, the approach has gained in subtlety, but its core remains intact. It will remain so for so long as we remain bound to the Crown’s power order.”³⁷⁵

605. This Treaty guarantee is based on the fact that the right to legal autonomy, and to control of conservation laws, can be said to be a ‘taonga’.³⁷⁶ Both Article I and Article II concern Maori rights to maintain and support their own tikanga. It follows then, that in a critique of current laws relating to how a kaitiaki relationship with the environment is governed, the imposition

³⁷⁵ Ani Mikaere “How will they judge us? Some thoughts on the relationship between Crown law and tikanga Maori” (Paper presented to the hui on the *Waka Umanga* proposal of the Law Commission, 2006) p 13. Unpublished, but a copy available for the Record of Inquiry.

³⁷⁶ Bruce Biggs “Humpty dumpty and the Treaty of Waitangi” in Hugh Kawharu *Waitangi: Maori and Pakeha perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) p 300-312.

of legislation and policy without providing for Maori autonomy in control of their tikanga is regarded as a breach of the Treaty.

Definition

606. The Statement of Issues uses the following as its working definition:

“Environment means the natural environment and includes eco systems and their constituent parts and all natural resources [and species of flora and fauna].

The Kaitiaki’s relationship with the environment includes the values, knowledge, customary law and practice relating to the use, control, development, maintenance, preservation, regulation and management of the natural environment of an identified rohe and indigenous and/or taonga species of flora and fauna that inhabit that rohe.”

607. For the purposes of the submissions, this definition adequately encompasses the importance of matauranga and all aspects of the natural environment as being interrelated. The Te Tai Tokerau Statement of Claim embraces these concepts: the exercise of tino rangatiratanga, as it relates to indigenous flora and fauna me o ratou taonga katoa, was and is the recognition of the claimants’ interests in the continued existence of flora and fauna and associated cultural taonga as *interconnected threads of te ao Turoa*.³⁷⁷

Has the Crown assumed regulatory control of the environment without making sufficient provision for the protection, preservation, control, use, development, regulation and transmission of the kaitiaki’s relationship with the environment?

608. These submissions treat this question³⁷⁸ as a generalised question which is dealt with more particularity when specific pieces of legislation are dealt with. However, as a general response, the claimants say:

608.1 That the Crown is in breach of the Treaty of Waitangi by “assuming regulatory control of the environment” when Article II of the Treaty guaranteed to Maori the control of their environment;

³⁷⁷ Statement of Claim on Behalf of Ngati Kuri, Te Rarawa and Ngatiwai (28 September 2001) Wai 262, Doc #1.1(g), para 3.5.

³⁷⁸ Statement of Issues, # 2.314, para 4A.4.1.

608.2 In circumstances where the Crown was justified in regulating control of the environment, it has been effected in a manner which has provided insufficient provision for the maintenance of the kaitiaki's own relationship with the environment.

Assumption of Crown Regulation of the Environment

609. Crown assumption of regulatory control of the environment is not a legitimate exercise of kawanatanga unless it also provides for the exercise of tino rangatiratanga over that environment. The list of statutes set out at para 4A.4.2 of the Statement of Issues illustrates a pattern of Crown control over natural resources, ecosystems and species. For such legislation to be Treaty consistent, it is submitted that the onus lies with the Crown to show that the Treaty guarantee of tino rangatiratanga has been adequately provided for. This is accordance with the framework suggested by Dr David Williams, which has been addressed in the context of the “interface” earlier in these submissions.
610. While this Tribunal claim has, in its latter stages, been narrowed in its focus to “contemporary” matters since 1975, the historical assumption of control of the environment by the Crown is an important context in which current legislation and policy. The extent of damage caused by the historical lack of regard for tikanga or matauranga Maori in the regulation of the environment,³⁷⁹ is such that current references in legislation to “the principles of the Treaty of Waitangi” or “tikanga Maori” are hardly remedial of those historical breaches.
611. In fact, by maintaining the position of Maori as “consultees” to the Crown controllers of the environment, the fundamental disparity in the partnership relationship is reinforced. It is crucial that this Tribunal critique Crown action as against what the Treaty required of the partnership relationship as

³⁷⁹ Robert McLean and Trecia Smith *The Crown and Flora and Fauna: Legislation, Policies and Practices, 1983-98*, #K2; David Williams *Crown Policy Affecting Maori Knowledge Systems and Cultural Practices*, #K3; Geoff Park *Effective Exclusion - An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912 – 1983*, #K4; Cathy Marr, Dr Robin Hodge and Ben White *Crown Laws, Policies and Practices in relation to Flora and Fauna, 1840 – 1912*, #K5; Jim Feldman *Treaty Rights & Pigeon Poaching: Alienation of Maori Access to Kereru, 1864-1960*, #K7.

from 1840, rather than simply recent attempts to include the Maori perspective in isolation from the historical context.

Matauranga and the Environment

612. In this section of the submissions the Wai 262 claimants argue for the full expression of the Treaty of Waitangi guarantee of tino rangatiratanga me o ratou taonga katoa to be extended to their relationship with the natural environment. As discussed previously, such a relationship cannot be divorced from the matauranga (including tikanga and reo) of the kaitiaki, nor from the species of flora and fauna themselves.
613. In the context of conservation and resource management, the matauranga - the cultural perspective and the 'world view' of the kaitiaki - underpins the way in which the kaitiaki relates to all aspects of the natural environment. Thus, key principles such as kaitiakitanga and the enhancement of the mauri of their environment, along with respect for its tapu and specific conservation methodologies such as rahui, are all aspects of how this relationship manifests itself. While it is important that this particular discussion remains firmly rooted in the perspectives of the Te Tai Tokerau claimants on behalf of whom these submissions are made, and that the principles involved remain cognisant of the tribal specific and locale specific issues, nevertheless the maintenance of the relationship of kaitiaki and their environment can be generalised to the motu as a whole.
614. Secondly, the way in which flora and fauna species relate to the natural environment must be considered in the context of whakapapa: where the species, its habitat, the wider ecosystems are inter-related. For instance, the claimants will often discuss the maintenance of a particular ecosystem in the context of maintaining their relationship with a particular species. Or they will insist upon access to the whenua in order to maintain the development and transmission of their matauranga about particular species. An example of the former is where Ngati Kuri decry the loss of their silica sands in and around Parengarenga harbour. They see it as a short sighted commercial development (the mining of the sand is used to make glass), with deleterious

effects on both the wider ecosystems, particular species such as the pingao, and the endangerment of their taonga, the Kuaka.

Reclaiming the Mauri of the Environment

615. In addition, a fundamental and relevant objective of kaitiakitanga is the maintenance of the *mauri* or the wellbeing of the environment for future generations.

616. As set out in the previous section on matauranga Maori, the call by the claimants for adequate recognition and expression of their tino rangatiratanga in relation to their environment is not an end in itself – rather, 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:

“The Department has, you know, relationships and partnerships with a whole range of people across the community to achieve conservation outcomes and that’s very much an emphasis that the Department has had and it has been a growing emphasis over the years.”³⁸⁰

617. In the context of the sharing of matauranga, Darryl Posey’s mantra remains as relevant today as it was when he gave evidence to the Waitangi Tribunal in 1998: “*Cultural diversity is inextricably linked to biological diversity.*” The challenge is to work with the differences in approach between the traditional knowledge ethos and the western conversationalist ethos and to accommodate both perspectives for the benefit of the natural environment:

“Co-management arrangements must recognise such differences and find some way to accommodate e.g. sustainable use in some areas preservation in other areas (or they will fail). Both use and preservation approaches demand the protection and enhancement of habitats and the restoration of some populations before they can be harvested sustainably.....co-management could create a formidable coalition of

³⁸⁰ Transcript of Cross-Examination of Doris Johnston (14 December 2006) p 311, line 36.

allies to work for a common purpose if some divergent areas and interests are accommodated.”³⁸¹

618. This, after all, is the essence of kaitiaki: the cultural imperative to hand on all aspects of the Maori world to the next generation in a state that is at least as good as, if not better than, its current state. This long term view of conservation management is entirely consistent with environmentalists of all persuasions, the difference is that the kaitiaki perspective has been embedded in this land for generation upon generation and is not a Twentieth Century phenomenon. Indeed, calls by Tangata Whenua to honour the guarantee of rangatiratanga in conservation management has been at the forefront of many of the resource management issues brought to public attention. As early as the beginning of the 1980s the Waitangi Tribunal was called to deal with resource depletion and pollution. The Tribunal has remained a vital avenue for redress by kaitiaki who are offended by environmental degradation.
619. Thus, in the quest for well-being of the environment through the Maori perspective, the claimants are continuing a longstanding tradition of fighting for the mauri of the environment for us all.
620. As Haami Piripi summarised in the Te Rarawa hearing of refresher evidence in August 2006:

“The significant habitats of our flora and fauna house the mauri and spiritual essence of our ancestors. Therefore, with the destruction of the habitats comes the destruction of the spiritual nature of our existence.

The sapping of our spiritual and physical strength by the destruction of our habitats and the loss of our land and resources inevitably produces an environment that is detrimental to intellectual and scholarly development. In turn, our marginalisation from baseline services like education and health produces an exponential effect leaving Te Rarawa poor, under nourished, ill educated and dysfunctional members of New Zealand society.”³⁸²

³⁸¹ Taiepa et al, ‘Co-management of New Zealand’s Conservation Estate by Maori and Pakeha; a Review’ (1997) 24(3) *Environmental Conservation*, pp 236, 240.

³⁸² Brief of Evidence of Haami Piripi, #P3, paras 36-37.

“Spectrum of Responsibilities” – An Approach to Crown Obligations

621. How might the Treaty guarantee manifest itself in relation to the protection of the relationship of kaitiaki with their environment?
622. These submissions have referred to a ‘spectrum of responsibilities’ which might provide a framework for the range of opportunities available to the two Treaty partners. In the context of the management of the conservation estate (as opposed to other publicly held lands which might be subject to the Resource Management Act or the Reserves Act), the claimants have been willing to endorse a model of ‘co-management’. However their understanding of co-management places both Treaty partners in an equitable arrangement where decision making is shared. It is not an arrangement where mere ‘consultation’ or providing advice is sufficient.
623. In the very valuable contribution to this debate made by Taiepa, Mollerand others³⁸³ on the co-management of New Zealand’s conservation estate by Maori and Pakeha, a ‘continuum of arrangements involving various degrees of power and responsibility sharing between Government and the local Community’ is discussed:

“These arrangements form a partnership that is developed and implemented cooperatively by the mutual agreement of all parties involved. We consider the most effective form of co-management of two or more parties who share decision-making in an equitable arrangement. This is characterised as ‘strong co-management’ in that real decision making power is devolved. It is distinct from ‘mild co-management’ where a minor party gives advice to another party that remains as the decision maker; indeed we would rather dismiss the later as not meaning co-management at all. Mere ‘consultation’ or a ‘meaningful advisory role’ is no longer a sufficient surrogate for true co-management involving Maori and Pakeha because it does not meet the constitutional principle of partnership articulated by the Treaty of Waitangi.”³⁸⁴

624. The assessment of current New Zealand legislation and policy illustrates that where initiatives have been undertaken by the Crown to establish roles for iwi which are said to be in recognition of the Treaty relationship, these

³⁸³ Taiepa et al, ‘Co-management of New Zealand’s Conservation Estate by Maori and Pakeha; a Review’ (1997) 24(3) *Environmental Conservation*, pp 236-250.

³⁸⁴ *Ibid*, p 237.

roles are not of a strong ‘co-management’ type, and key decisions are not made by iwi. This spectrum of co-management will be further elaborated on and fleshed-out below, in order to provide a more comprehensive insight into the various relationships that are being discussed.

625. These submissions have, in various contexts from the education curriculum to health service delivery to conservation management, referred to the need for a ‘transformation’ of the Maori-Crown relationship. Taiepa et al (themselves quoting Mason, 1988) referred to iwi seeking “*an effective and functional role in the conservation management process and that process needs to be reshaped to accommodate them*”.
626. The legislative regime must not be an obstacle to, and must actively facilitate the ability to enter into co-management models. Taken at its fullest, the legislative references in section 4 of the Conservation Act and section 8 of the Resource Management Act do provide a regime whereby the principles of the Treaty of Waitangi can be incorporated and or given effect to. However, the words themselves need to be interpreted according to their spirit and meaning, and the experience of the claimants has been that those sections have been interpreted as requiring only mild co-management and not strong co-management.

Second Component Issues – Existing Law

Crown Evidence from Department of Conservation

627. Evidence filed on behalf of the Department of Conservation in this claim consisted of a Statement of Evidence from Doris Johnston, Acting General Manager Policy, and then a series of rohe specific statements from Regional Conservators and Area Managers. In the case of the Te Tai Tokerau claimants, those rohe specific statements consisted of:

627.1 Jonathan Maxwell (in relation to Ngati Kuri and Te Rarawa issues);

627.2 Michael Gardiner and Rolien Elliot (dealing with Ngatiwai issues).

628. The overall approach of the evidence from the Department was summarised in an exchange with claimant counsel and Doris Johnston during questioning. After putting to Miss Johnston a number of principles which the claimants had raised as being fundamental to their understanding of this claim (principles which have been described in these submissions as the ‘Nga Pou’ of the claim), the following answers were provided to questions:

“LW Now it’s true, isn’t it, that your evidence doesn’t address any possibility that the existing statutory framework might require amendment to address the matters in this claim.

DJ No it doesn’t because I was asked to provide evidence on what the current existing statutory framework was and not to speculate about what any new framework might look like.

LW That was the instructions provided to you was it?

DJ Yeah, that was what I was asked to provide, factual evidence on what the existing statutory framework is and how we operated within it.

LW You’d be aware that the Statement of Issues goes well beyond analysing existing statutory framework doesn’t it, and considers or contemplates the amendment to existing law and policy.

DJ That’s right yes

...

LW Well para 5 of your evidence under the heading Engagement with Maori, you make a strong point there that the involvement of Maori in decision making will be within the existing statutory framework.

DJ That’s right yes. Well we’re a Government Department we have to work within the existing statutory framework yeah.”³⁸⁵

629. Therefore in terms of the ‘pou uara’ of the claim, or the values and principles which from the claimants’ perspective, lie at the heart of their grievance, there has in fact been little (if any) engagement by the Department through its evidence as to how a concept such as tino rangatiratanga can be accommodated within the existing framework. Nor has then been any evidence as to suggested amendments to that framework

³⁸⁵ Transcript of Cross-Examination of Doris Johnston (Crown Evidence Week One, 11-15 December 2006) pp 344-345.

if the existing statutory framework is unable to adequately accommodate tino rangatiratanga.

630. Doris Johnston agreed that the essence of her evidence in the context of the interface between the recognition of the Department's statutory obligations and the recognition of rangatiratanga and kaitiakitanga, is that 'the exercise of tikanga is permitted within the existing legal framework'.³⁸⁶
631. With respect to Department witnesses who were obviously acting under instruction, it is a somewhat disingenuous approach to a Commission of Inquiry to simply factually state the status quo and make little attempt to grapple with the essence of the claimants concerns. The one point of engagement would appear to be around the issue of 'consultation', which is regarded by the Department as being an accommodation of its section 4 obligations to 'give effect to the principles of the Treaty of Waitangi'.
632. All of this is directly contrary to the Department's own 'Partnerships Toolbox' which was appended to the evidence of Doris Johnston. The Partnerships Toolbox itself clearly stated that the Department needs to understand where Maori are coming from in order to build effective relationships. This is particularly so in terms of their understanding of cultural concepts.
633. While the concept itself is laudable, cross-examination elicited that the Department witnesses had made little attempt to understand or respond to the claimants' cultural understanding of the claim.
634. Where there is a will, there is a way. If the Department requires direction from this Tribunal to embark on good faith dialogue with Tangata Whenua about 'strong co-management' of the Conservation estate before it will even consider the possibility, then that would tend to support the claimants' view that the current legislative regime is simply inadequate, and requires a prescriptive requirement on the Government to create a shift in attitude and to consider such possibilities.

³⁸⁶ Ibid, p 352, lines 32-37. Refer also to p353, lns 5-23.

Co-Management

Engagement

635. In order for meaningful engagement to occur between Maori and the Crown, it is integral that there be an increased understanding and recognition of the Maori world view within managing bodies and organisations. The way in which Maori view the environment and their role in the world is inherently one of participation; a participation that involves notions of both use and enjoyment, and guardianship and protection. As Del Wihongi has stated to the Tribunal:

“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.”³⁸⁷

636. The value of the Maori understanding of conservation must be recognised. In some cases this may not be the same as that of the Department of Conservation or other governing bodies, but a variation in views should not mean that the Maori view is discounted as less valuable.

637. In 1988 Dr Helen Hughes commented in her preface to the report on *Environmental Management and the Principles of the Treaty of Waitangi*:

“There is a unique opportunity for Maori and Pakeha principles of environmental management to be considered together for the management of natural and physical resources.”³⁸⁸

638. As this shows, shared management of resources is far from a new or revolutionary concept. Property theory is largely based on the concept of the ‘tragedy of the commons’: the conflict between the individual and the

³⁸⁷ Submission by Del Wihongi, 15 Sep 97 (Te Rarawa), Wai 262, Doc #A27, para 83.

³⁸⁸ Dr Helen Hughes *Environmental Management and the Principles of the Treaty of Waitangi* (November 1998) quoted in Simon Reeves *To Honour the Treaty: the argument for equal seats* (2nd ed., Earth Restoration Limited, Auckland, 1996) 59.

collective interests when resources are shared.³⁸⁹ Three solutions to the tragedy of the common have been posited:³⁹⁰

- 638.1 privatisation of the commons (individual management);
- 638.2 regulation by an external body (state-level management); and
- 638.3 collective agreements amongst local resource users (local-level management).

639. Historically the first and second options have been utilised. New Zealand is currently in a transitional period which involves a significant paradigm shift in environmental planning and theory. This shift has included increased recognition of the viability and potential benefits of local-level management of resources.

640. In the past, approaches to environmental management have been state-based, institutional, and often quite fragmented. The modern era has seen a shift towards environmental policy that is not only more comprehensive and flexible, but also that is more collaborative in origin. It should be understood that this shift is a multifaceted development of the way in which environmental issues and management are thought about. It involves development of:

- 640.1 ecosystem management;
- 640.2 collaborative planning;
- 640.3 collaborative management (with a focus on local and indigenous initiatives);
- 640.4 traditional resource rights,³⁹¹ and
- 640.5 local-level community management.

³⁸⁹ Garrett Hardin "The Tragedy of the Commons" (1968) 162 Science 1243.

³⁹⁰ Mark V Prystupa "Barriers and strategies to the development of co-management regimes in New Zealand: The case of Te Waihora" (1998) 57 Human Organization 134.

³⁹¹ Especially talked about in detail in the writings and evidence of Dr Darrell Posey.

641. The general trend behind each of these individual shifts is the movement towards an understanding of environmental management as necessarily involving and affecting the local community, and is therefore best developed through collaboration with this community.

642. As will be shown, the witnesses for the Crown have not objected to this shift away from the essential requirement of resource management being centralised government control of resources. Witnesses for government agencies such as DOC conceded repeatedly that Crown ownership of land was not essential to conservation activities:

“I’m not sure where my job actually comes into it but if you talk about the conservation work being done by who is going to do it, 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.”³⁹²

643. The current shift in thinking illustrates that now is the ideal time for environmental management to move towards fuller recognition of the rights of Maori as guaranteed in Article II of Te Tiriti o Waitangi. Rather than seeing Maori as simply community stakeholders, it is essential that Maori rights to manage and control environmental resources are recognised within the context of the Crown’s guarantee of tino rangatiratanga. Therefore, Maori have prior rights to these resources which place their interest above that of the general community. Once this foundational partnership between the Crown and Maori has been established, then meaningful engagement with other stakeholders can occur more effectively. It is also essential that formalised stakeholder engagement occurs *after* this partnership has been established, as an attempt to impose this partnership on a pre-existing process of stakeholder engagement is likely to cause tension and be met with opposition.

Kaitiakitanga

644. Kaitiakitanga is discussed in detail above in Part B.

³⁹² Transcript of Cross-Examination of Peter Williamson, p 420, line 20.

645. In summary, the Maori understanding of kaitiakitanga is best set out in the evidence of Del Wihongi:

“Kaitaikitanga is a term that is often used incorrectly. When we speak of “kai” we speak of eating and hence taking into oneself. The act of taking the thing into oneself indicates how these things are viewed ie. As part of you “tiaki” [sic] means to “guard”. When you speak about things such as knowledge, Maori view the responsibilities of kaitiaki as including the ability to treat this knowledge as an integral part of themselves. This included ensuring these things are looked after in accordance with our custom and traditions.”

646. As is clearly expressed in the Tai Tokerau Statement of Claim:

*“[The Maori world view] connects humankind by whakapapa to the creation gods and to the kaitiaki of the natural and spiritual world, creating in each successive generation the obligations of kaitiakitanga.”*³⁹³

647. Kaitiakitanga is an obligation that flows from the holistic nature of the Maori world view, and the responsibilities that flow from it are of utmost importance to our claimants, and Maori as a people³⁹⁴.

Tino Rangatiratanga and Kaitiakitanga in Practice

648. Tino rangatiratanga demands that the absolute minimum standard necessary to ensure the Maori world view is integrated into conservation decision-making is equal participation and equal decision-making. Indigenous flora and fauna over which Maori are the guaranteed rangatira are better managed by properly resourced iwi, allowing for the obligations of kaitiaki to be properly fulfilled by the rightful Maori guardians.
649. In a co-management situation, where divergences in opinion arise, as is inevitable in any cross-cultural communication, equal decision-making power would allow for both opinions to have be voiced and meaningful engagement to occur. Rather than, as has occurred in the past, the Crown’s governing body simply hearing, and then overriding or ignoring the input of Maori.

³⁹³ Second Amended Statement of Claim on Behalf of Ngati Kuri, Te Rarawa and Ngatiwai (20 October 2001) Wai 262, Doc # 1.1(g).

³⁹⁴ Refer to Evidence of Haami Piripi, #P3, paras 18-19, and 23-27.

650. Once equal decision-making is firmly established as the minimum standard, the level of Maori involvement in management of specific resources will depend on the particular factors present. The nature of the partnership established is a matter to be decided by iwi and the Crown on an equal footing, considering both the need for recognition of the Maori kaitiaki obligations and tangata whenua rights, and the need for the protection of the resource.
651. One well known traditional Maori conservation measure is the placing of a rahui on a particular area. This ritual is one that developed within Maori culture in light of the damage that overuse of resources had caused on the environment. There is an intensely important spiritual facet to the use of rahui. While rahui have been acknowledged and utilised by DOC, they have now been absorbed by DOC into their structures and processes. Their attempt to engage has been undermined by the overriding Pakeha nature of DOC thinking. As Del Wihongi stated in her evidence:

“Today the Government structures undermine these rituals and processes of rahui. They say, well, we need to put a rahui on a certain thing, but all the ceremonial karakia and processed of whare meninga and whare waananga which go before the placing of a rahui are ignored. Now we have the white paper of the man to sign.”³⁹⁵

652. Many individual DOC employees have the best of intentions when utilising Maori practises such as rahui, but as Pakeha they often lack the matauranga and understanding to give full regard to the nature of a rahui. The exclusion of Maori from decision making has damaged cultural practise and the relationship with Maori . If Maori were equal partners in the decision they could ensure that proper tikanga was followed.

Co-Management

653. Co-management, like many of the concepts tackled by the Wai 262 claim, is far from a monolithic or easily definable concept. It has many facets and many interpretations. Within co-management, there is a spectrum of potential partnerships between the Crown and Maori. This spectrum has

³⁹⁵ Submission by Del Wihongi, 15 Sep 97 (Te Rarawa), Wai 262, Doc #A27, para 139.

been explicated by a number of academics and the writings of Taiepa et al is one example that has been discussed above. One of the most useful discussions is offered by Peter Horsley who draws out what he calls the “ladder of community participation”, which includes seven rungs, and to which we have added an eighth, as explained below:³⁹⁶

8	Devolution	Full devolution of resource ownership and management to fully resourced iwi.
7	Partnership / Community Control	Partnership of equals, joint decision making institutionalised; power delegated to community where feasible
6	Management Boards	Community is given opportunity to participate in developing and implementing management plans
5	Advisory Committees	Partnership in decision-making starts; joint action of common objectives
4	Communication	Start of two-way information exchange; local concerns begin to enter management plans
3	Co-operation	Community starts to have input into management; e.g. use of local knowledge, research assistants
2	Consultation	Start face to face contact; community input heard but not necessarily heeded.
1	Informing	Community is informed about decisions already made

654. Other specialists in this area, including Taiepa et al, have talked in terms of ‘strong co-management’ where real decision making power is devolved, and

³⁹⁶ Peter Horsley “Collaborative Management – Pre-conditions and Prospects” in M L Howard & H Moller (Eds) *He Minenga Whakatū Hua o Te Ao, Murihiku Marae* 25 – 27 August 2000. Available at: <<http://www.otago.ac.nz/Zoology/hui>> (last accessed 21 March 2007). Taken from: Berkes, F et al “Co Management: The Evolution in Theory and Practice” (1991) 18 Alternatives.

‘mild co-management’ where a minor party gives advice to another party that is the real decision-maker.³⁹⁷

655. In terms of Maori management of resources, tino rangatiratanga requires that an extra rung be added to the ladder above. That rung, would be entitled **Devolution**, and would signify the full devolution of resource ownership and management to iwi (i.e. the eighth rung of the ladder above).
656. Ngatiwai, Te Rarawa and Ngati Kuri are currently in a number of relationships that sit within various rungs on the above ladder. However, these relationships are limited, with an estimated eighty percent of their environmental involvement at rung two, the remaining twenty percent spread between rungs three through to six. The claimants state that the Crown’s guarantee of tino rangatiratanga requires it to recognise their rights and obligations as kaitiakitanga, and as a result engage on an equal level with them. Inherent in this is the requirement that, wherever possible, Crown-Maori relationships in relation to flora and fauna should sit within the seventh and eighth rungs of the ladder.
657. The claimants contend that Maori culture has an inherent and irreplaceable role in the management of the environment. Despite the damage that has resulted from the Crown’s policies of centralised control, including the loss of irreplaceable matauranga Maori, the claimants’ relationship with and knowledge of the environment continues to be strong. Co-management produces “1) better decisions; 2) more equitable decisions; and 3) decision that are more likely to be followed.”³⁹⁸ By involving local and indigenous communities, decisions utilise both Western scientific knowledge and local traditional knowledge. Traditional indigenous knowledge is of particular value as it provides an in-depth understanding of the local environment that often cannot be found through scientific or other methods.

³⁹⁷ Taiepa et al, ‘Co-management of New Zealand’s Conservation Estate by Maori and Pakeha; a Review’ (1997) 24(3) *Environmental Conservation*, pp 236, 237.

³⁹⁸ Mark V Prystupa “Barriers and strategies to the development of co-management regimes in New Zealand: The case of Te Waihora” (1998) 57 *Human Organization* 134.

Partnership

658. In cross-examination, it was conceded by DOC that there does not currently exist any legal mechanism within their policy that provides for true equal partnership between DOC and iwi:

“GP And just to really pick up on the point that the presiding officer was discussing with you, on this table which goes on for about five pages, the different mechanisms that can be utilised in table 1 and table 2, it seems to come down to really two things. Either the Crown retains total decision-making through the manager or the Minister, or the Minister or the particular body, or it delegates it away. It could be to iwi or some other Board. But there doesn’t seem to be any mechanism of the mechanisms that you’ve put down in those various tables running through to p xxv, whereby you can actually end up with a true partnership if you like both in terms of land ownership and management between the Crown, or the Department, and iwi. Would that be a fair comment?”

DJ In terms of both having equal ownership and both having equal management and control?

GP Yes.

DJ No, the mechanisms don’t quite work like that. They can be a practical partnership, though, and I think that the regional briefs of evidence have got some examples where if you put aside that, they are real and effective partnerships to achieve conservation outcomes and they are working really well. But they are not quite the legal mechanisms that you’ve described.”³⁹⁹

659. The lack of provision for equal partnership arrangements between Maori and DOC is somewhat of an anomaly in light of the widely held belief, as discussed above, that “[b]etter environmental outcomes are expected from greater power-sharing between central government and aboriginal communities.”⁴⁰⁰

660. As discussed above, equal partnership in resource management is the absolute minimum required under the Te Tiriti o Waitangi. The omission of such partnership relationships from DOC policy is an insurmountable flaw.

³⁹⁹ Transcript of Cross-Examination of Doris Johnston, p. 329.

⁴⁰⁰ P O’B Lyver “Co-managing environmental research: lessons from two cross-cultural research partnerships in New Zealand” (2005) 32 Environmental Conservation 365, 365.

Not all iwi will have the resources and capacity to receive full devolution of management, therefore it is essential that partnership management arrangements be readily available and well resourced. This is in terms of not only the Department of Conservation, but also resources managed by local authorities under the RMA.

Devolution

661. Devolution of management, and transfer of ownership of resources is not a new concept for the Waitangi Tribunal. In the *Ngai Tahu Ancillary Claims Report* the Tribunal clearly accepted that:

“[T]he Crown does not need to have ownership in order to ensure that land is managed so as to safeguard and conserve its valuable resources in the public interest... within the existing statutory framework, there is adequate provision to enable the return of Crown land to Maori ownership while also providing complete protection of the national interest.”

662. Furthermore, devolution is a powerful tool in countering the imbalances that inevitably undermine co-management relationships. Despite the objectives of a co-management relationship, they often fail to deal with the underlying issues of inherent inequalities.⁴⁰¹ By transferring ownership and control of the resource to Maori, power is placed in the hands of the iwi partners, allowing for a more realistic equal partnership than is often possible under traditional co-management arrangements.

663. Further support for this can be found in the cross-examination of the staff of the Department of Conservation:

“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.”⁴⁰²

664. To recognise tino rangatiratanga means much more than to simply engage on a policy or statement level. Tino rangatiratanga, as chieftainship, refers

⁴⁰¹ Gail Tipa and Richard Welch “Co-management of Natural Resources: Issues of Definition From an Indigenous Community Perspective” (2006) 42 *Journal of Applied Behavioural Science* 373, 382.

⁴⁰² Peter Williamson, Department of Conservation, Wellington, 15 December 2006, p 420.

to Maori control. In a paper presented in 2006, David O’Connell of Ngai Tahu and Poma Palmer of DOC recognised that:

“[Recognising their rights in Te Waihora] without a publicly recognised tangible property right only resulted in hollow policy statements that proved difficult to implement in practise or consultation processes that rarely delivered the specific wishes of the iwi.”⁴⁰³

665. Therefore, in order to substantiate the guarantee provided by the Crown in Article II of Te Tiriti o Waitangi, the Crown must not only provide for, but actively encourage, devolution of resource management to iwi partners.
666. Section 33 of the RMA is a prime example of the Crown’s failure to encourage and facilitate the utilisation of legislation mechanisms that provide for devolution of management. Of the devolution of power to local authorities, the Waitangi Tribunal has already cautioned “*that in devolving power to local authorities the Crown’s responsibility to uphold the principles of the Treaty is in no way lessened.*”⁴⁰⁴ Yet Lindsay Gow of the Ministry for the Environment conceded upon cross-examination that there had been no steps taken by the Ministry to encourage local bodies to use section 33.
667. Mr Gow went on to state that MFE was exploring a range of co-management options for Maori and local authorities. Nonetheless, it was clear that utilisation of section 33 was not encouraged or facilitated by MFE.

Resourcing and Capacity Building

668. The credibility of Maori management of flora and fauna is of fundamental importance to the ongoing public understanding of and support for practical implementation of tino rangatiratanga. It is widely acknowledged that this credibility has substantially increased in the last fifteen years. Positive examples of iwi management of significant resources has provided the public and influential non-government organisations such as the Royal Forest and Bird Protection Society, with evidence of the practical viability

⁴⁰³ David O’Connell and Poma Palmer “Te Waihora Joint Management Plan/Te Mahere Tukutahi O Te Waihora” (Case Study: Effective Partnerships Between Government and Iwi, 18 September 2006).

⁴⁰⁴ Waitangi Tribunal *Ngāi Tahu Ancillary Claims Report: Wai 27* (Brookers, Wellington, 1995) 369.

and value of iwi management of flora and fauna. These examples have shown that conservation outcomes can be successfully met within a partnership that recognises the Maori right of tino rangatiratanga and their right to exercise their rights and obligations as kaitiakitanga. The importance of this increased respect and credibility cannot be underestimated.

669. The influence of increased credibility can be seen in the process undertaken by Ngai Tahu to gain a co-management agreement over Lake Te Waihora. A number of strategies were employed by those involved, however it is believed by many that fundamental to obtaining this concession from the Crown was the earlier success of Ngai Tahu in their management of the less contentious Tutae Patu Lagoon.
670. While it is acknowledged that the burden to maintain this credibility rests largely on Maori themselves, the Crown is far from devolved of responsibility in this area. Experience has shown that despite the many successes, one mistake, when given media attention, can be devastating to the public's perception. Therefore, it is essential that all co-management relationships are fully resourced, and the bodies involved have the necessary capacity, to ensure that this credibility is maintained.
671. Kevin Prime of Ngati Hine has stated that "*Ngati Hine has proven that if given similar levels of funding, iwi can manage government resources as well or even better than government departments.*"⁴⁰⁵
672. Proper resourcing is therefore essential. Iwi bodies entering into co-management or full management of flora and fauna, must have the necessary resources to ensure the taonga under their care is preserved and protected. The Crown is under an obligation to ensure that Maori are properly resourced when exercising their functions as kaitiakitanga. This should not be something that creates hesitancy in co-management relationships, but rather something that ensures that care and dedication is

⁴⁰⁵ Kevin Prime "A perspective from an ex-conservation board member and a case study from Ngātihine" (He Minenga Whakatū Hua o Te Ao, Murihiku Marae, 25-27 August 2000) available at <<http://www.otago.ac.nz/titi/hui/Main/Talks.htm>> (last accessed 28 March 2007).

involved particularly in the initial phases of all developing resource management partnerships.

673. The Crown's obligation to ensure all iwi are properly resourced and have the necessary capacity to manage taonga resources is derived from the historical exclusion of Maori from resource management. Maori have been barred from exercising their rights, and meeting their obligations as kaitiaki by the Crown. Participation has been limited to the bottom rungs of the ladder where Maori have had in reality little or no real involvement in the management of whenua, flora and fauna. As a result, much of the traditional knowledge and skill that was held by Maori has been lost. We are now in a transitional phase, and in order for this transition to occur successfully it is the responsibility of the Crown to ensure Maori have not only the opportunity, but the ability to participate in a meaningful way.

Practical Examples: Titi Islands

674. Under the Ngai Tahu settlement, the Crown returned to Rakiura Maori, ownership of the Crown Titi Islands in explicit recognition of their rangatiratanga and kaitiakitanga. The islands have been managed for some time by Rakiura Maori in some form, however transfer of ownership was seen as essential recognition of their rangatiratanga. The islands are now managed by a formalised body called the Rakiura Titi Island Administering Body, which have forged a strong working relationship with DOC.
675. The islands are important not only for their unique ecosystems, but also as a nesting place for the titi (*Puffinus griseus*, sooty shearwaters, 'muttonbirds'). Rakiura Maori undertake a widespread cultural harvest of titi. This harvest, and the birds themselves, have been the subject of a very successful collaborative study between the University of Otago and Rakiura Maori.⁴⁰⁶ A number of highly successful conservation projects have been undertaken by the iwi, and the ecosystem of the islands is now a first-rate

⁴⁰⁶ See Hendrik Moller "Co-management of a bicultural research project? A research provider's perspective" (He Minenga Whakatū Hua o Te Ao, Murihiku Marae, 25-27 August 2000) available at <<http://www.otago.ac.nz/titi/hui/Main/Talks.htm>> (last accessed 28 March 2007). Also see P O'B Lyver "Co-managing environmental research: lessons from two cross-cultural research partnerships in New Zealand" (2005) 32 Environmental Conservation 365.

example of the positive outcomes that can result from effective conservation management by iwi.

676. The Crown Titi Islands are also an exceptional example of successful devolution of management to Maori that aligns with the claimants' expectations flowing from the Crown's guarantee of tino rangatiratanga.⁴⁰⁷ The Titi Islands are an exemplary example of the outstanding conservation and cultural outcomes that can flow from Maori ownership and control (the eight rung of the ladder) of resources.

Practical Examples: Te Waihora

677. Under section 124 of the Ngai Tahu Claims Settlement Act the bed of Lake Te Waihora was vested in Ngai Tahu.⁴⁰⁸ DOC and Ngai Tahu then formulated a joint management plan to ensure consistent management. It should be noted that this is a joint management policy, rather than co-management.
678. Contrary to the holistic view of the lake inherent in the Maori world view, the plan was constrained to simply cover the bed of the lake and the surrounding public conservation lands.⁴⁰⁹
679. During the negotiation of the Ngai Tahu settlement, the proposed transfer of ownership of the Te Waihora lakebed was extremely controversial. Ngai Tahu faced opposition from a number of non-government organisations, as well as local authorities reluctant to relinquish their power.⁴¹⁰
680. Nonetheless, the management of Te Waihora has been very successful. From the perspective of Ngai Tahu it has provided the ability to exercise

⁴⁰⁷ Also see Lou Sanson, Tane Davis, and Pete McClelland "Co-management of New Zealand's Nature Reserves – the Whenua Hou and ex Crown Titi Islands examples" (He Minenga Whakatū Hua o Te Ao, Murihiku Marae, 25-27 August 2000) available at <<http://www.otago.ac.nz/titi/hui/Main/Talks.htm>> (last accessed 28 March 2007).

⁴⁰⁸ It should be noted that some portions of the bed are not held by Ngāi Tahu as they were not in Crown ownership at the time of settlement, thus remain outside the scope of the joint management agreement.

⁴⁰⁹ Department of Conservation and Te Rūnanga of Ngāi Tahu *Te Waihora Joint Management Plan: Mahere Tukutahi o Te Waihora* (10 December 2005) 7-9.

⁴¹⁰ Mark V Prystupa "Barriers and strategies to the development of co-management regimes in New Zealand: The case of Te Waihora" (1998) 57 *Human Organization* 134.

their rangatiratanga over the lakebed in real and practical ways.⁴¹¹ For DOC the joint management plan provided for a more informed exercise of kawanatanga; DOC now clearly understanding what Ngai Tahu expects from them.⁴¹² Once this understanding and relationship was established, further developments were able to occur and DOC felt more comfortable extending the relationship into other areas of co-management. Ngai Tahu had also developed a better understanding of the Department's role, enabling them to more realistically and practically work with DOC in these relationships.

681. The result has been substantially better conservation outcomes for the lake, meaningful recognition of the kaitiakitanga of Ngai Tahu, including more meaningful rights in the resource consent process and regional planning, and more culturally appropriate management and decision-making.

Conclusion on Co-Management

682. There is no doubt that in New Zealand, on a practical level, co-management is occurring. Relationships are being forged and information is passing between Crown officials and individual Maori. Much respect is due to individual staff at Crown departments such as DOC, and at some local authorities.
683. The significant gap, however, is the lack of a coherent legal regime whereby partnerships and co-management relationships are systematically encouraged, implemented, and protected. The current system of co-management is fragmented and inconsistent, and as a result offers little protection to tino rangatiratanga and the rights and obligations of Maori as kaitiakitanga.
684. New Zealand has now proven that co-management can, and does, work. The next step is for the Crown recognise and accept its obligation to actively

⁴¹¹ David O'Connell and Poma Palmer "Te Waihora Joint Management Plan/Te Mahere Tukutahi o Te Waihora" (Case Study: Effective Partnerships Between Government and Iwi, 18 September 2006).

⁴¹² David O'Connell and Poma Palmer "Te Waihora Joint Management Plan/Te Mahere Tukutahi o Te Waihora" (Case Study: Effective Partnerships Between Government and Iwi, 18 September 2006).

protect tino rangatiratanga, and take concrete steps towards implementing this.

Resource Management Act 1991

4A.4.3	<i>Does the Resource Management Act 1991 provide effective protection of the kaitiaki's relationship with the environment? Specifically:</i>
(a)	<i>Does the recognition of the relationship of Maori with their ancestral lands as a matter of national importance in section 6(e):</i>
(i)	<i>ensure the preservation, regulation and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki; and/or</i>
(ii)	<i>protect the transmission of that relationship from generation to generation among kaitiaki?</i>

685. No.

686. The Resource Management Act 1991 was developed in the late 1980's and heralded a fundamental shift in the way in which Maori and the Crown would collectively deal with the natural environment. Early Resource Management Law Reform ("RMLR") papers relied heavily on contributions from the Reverend Maori Marsden to establish the importance and validity of matauranga Maori in relation to the environment.

687. In essence, the RMA failed to deliver on this opportunity to fully involve kaitiaki in the management of the environment. Despite a number of references in the legislation to iwi interests, the decision-making authority continues to rest with local authorities, and the kaitiaki interest is satisfied by way of 'consultation'. Even where opportunities exist under section 33 for the transfer of power to iwi authorities, no local authority has chosen to use that provision, despite applications from a number of tribes to do so.

688. The RMA places no obligation on applicants under the Act to consult tangata whenua. Rather, the obligation is to report on the consultation if it is undertaken; in the context of the assessment of environmental effects (see Fourth Schedule, clause 1(h)) it has become good practice for applicants to consult, and some local authorities encourage this to occur. But this is not sufficient to meet the Treaty guarantee of partnership, when the opportunity

for tangata whenua engagement depends on the will of the applicant or the decision-maker.

689. There is no obligation on a consent authority to consult with tangata whenua (section 36A), but councils may develop good practice to consult in collating relevant information for an authority. And section 94 requires consideration to be given to whether kaitiaki are to be notified of an application. This is because iwi are regarded as one of the groups of the community who may be adversely affected by an application.
690. Put simply, there is no requirement on local authorities to act in a way which is acceptable to the views of kaitiaki.
691. The RMA has a series of principles in Part II which provide a hierarchy of matters to be taken in account in achieving the purpose of the Act: The sustainable management of natural and physical resources of those hierarchical considerations, section 5(2) has the overriding balancing provision of sustainable management (which is defined) against the “ecological considerations” of sustaining the potential of resources to meet the needs of future generations; safeguarding the life supporting capacity of air, water, soil and ecosystems; and avoiding remedying or mitigating adverse effects.
692. In the course of that balancing requirement under section 6, certain matters of national importance are to be recognised and provided for. Of these, the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu and other taonga is but one of a range of varying factors within the same level of the hierarchy. Therefore, the categorisation of the Maori relationship in section 6(e) as a matter of ‘national importance’ places it in the category of other ‘public good’ considerations. 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.⁴¹³ This is not what the Treaty guaranteed, nor what those Maori who participated in the RMA Law Reform process intended.

693. In terms of the Treaty guarantee, any management of the environment must guarantee the effective exercise of tino rangatiratanga, before it could be constitutionally valid. At a practical level, whanau, hapu and iwi have experienced regular setbacks when they seek to challenge consent applications and find that their relationship with the environment is often swamped in the need to balance so many other competing factors..
694. Worse still, section 6(e) has increasingly been interpreted as a requirement on decision-makers under the Act to merely ‘consult’ with Maori. Therefore, quite apart from failing to provide for any proprietary right to the natural environment, even the participatory right carries with it no semblance of decision-making authority, regulation or control, but rather places Maori in a framework where their involvement is as mere “consultees”. In this way Maori are again relegated to the lowest ‘rung’ on the environmental decision-making ladder.
695. The High Court decision in *Takamore Trustees v Kapiti Coast District Council*,⁴¹⁴ dealt directly with a point of law concerning the alleged misapplication of section 6(e) of the RMA with regard to oral testimony concerning the presence of koiwi (human remains) in swamplands which were in the path of a proposed four lane arterial road through Waikanae. Mackenzie J summarised the current law as follows:

“Section 6 requires that all persons exercising functions under the Act must recognise and provide for the matters of national importance listed. The requirement to “provide for“ the matters referred to in para (e) does not mean that the strong views of the Takamore Trustees, and those they represent, must be given effect by refusing to confirm the designation. That would amount to treating s 6(e) as creating a right of veto where matters of wahi tapu arise. That is clearly not the effect of s 6(e). That is clear from such decisions as *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294, at 307, and *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360, at 370. The Takamore Trustees do not contend for a right of veto. The obligation to “provide for” the s

⁴¹³ Refer to discussion of *Takamore Trustees v Kapiti Coast District Council* and cases therein.

⁴¹⁴ *Takamore Trustees v Kapiti Coast District Council* (27 October 2004) CIV – 2003-485-1805 per Mackenzie J

6 matters is to be read in the light of the Part II hierarchy: that is, in the context of achieving the purpose in s 5.”⁴¹⁵

696. The result of such an interpretation was that it was enough for the Court to “clearly articulate” the views of the Takamore Trustees in order to correctly apply the legal obligations in the balancing exercise which it was required to undertake. This is not tino rangatiratanga at work – this is the reduction of a Treaty guarantee to a point where the kaitiaki relationship is one of just many varying factors to be taken into account.
697. Tino rangatiratanga does require the right of “veto” in circumstances where the incompatibility of a proposal is such that the kaitiaki can see no way of avoiding a deleterious impact on their relationship with the environment. If this should raise concerns of “exclusivity” it must be emphasised again that the right of a kaitiaki has an inbuilt balance because of the responsibilities of manaakitanga. Properly applied, it would be contrary to the valid exercise of kaitiakitanga for the kaitiaki to exercise a veto in circumstances where other options could reasonably be taken. The fundamental point however, is that the kaitiaki have the decision-making authority and control over their resources, and are not simply another interest group representing a matter of national importance.
698. As the Waitangi Tribunal has affirmed most recently in the *Te Tau Ihu Report on Customary Rights*, the Treaty did envisage that tino rangatiratanga would involve a right, under certain circumstances, to ‘say no’. In the context of the land sales in Te Tau Ihu, the Crown would ‘brook no alternative’, but the right to say no was clear.⁴¹⁶
699. Given the above analysis, the claimants assert that the kaitiaki relationship with the environment is not preserved, regulated or developed in the hands of kaitiaki by virtue of section 6(e). Nor is the kaitiaki relationship and its transmission from generation to generation protected by that section.

Does the requirement (section 7) for those people exercising functions under the act to take

⁴¹⁵ Ibid, p 26.

⁴¹⁶ Waitangi Tribunal *Te Tau Ihu Report on Customary Rights* (Legislation Direct, Wellington 2007).

account of kaitiakitanga protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

700. The claimants state that Section 7 does not protect the kaitiaki's relationship with the environment in a way which is consistent with the kaitiaki's customs and tikanga.
701. Section 7 is further down the hierarchy of matters to be taken into account in the balancing exercise of a proposal which impacts on the environment. "Taking account of" kaitiakitanga does not protect the kaitiaki relationship with the environment. At most, it provides a flag to decision-makers (who are not the kaitiaki) that an interest group must be consulted and their views understood prior to a proposal preceding. If a proposal is inconsistent with the customs and values of kaitiaki, and yet decision-makers conclude that on balance, the proposal meets the purpose of sustainable management, then regardless of the inconsistency with the kaitiaki relationship the proposal can legally proceed. The analysis in the section above on section 6(e) is directly applicable to an analysis of the place of section 7. Even more so under section 7 as the words "to take account of" have been interpreted by functionaries as requiring mere consultation with kaitiaki.
702. Such was the devaluing of the status of kaitiakitanga that the section 7 wording began to be interpreted by councils themselves as including a council who had a kaitiaki relationship with its land. The trend became so pronounced that legislative amendment was required to clarify the interpretation of kaitiaki as deriving from whakapapa.

Does the requirement in section 8 for those people exercising functions under the Act to take into account the principles of the Treaty of Waitangi:

- (i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;***
- (ii) provide for control and regulation by kaitiaki of their relationship with the environment?;***
- (iii) ensure the preservation and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki; and/or***
- (iv) protect the transmission of that relationship from generation to generation among***

kaitiaki?

703. No. Section 8 has already been found by the Waitangi Tribunal to be “fatally flawed” because it lacks teeth:

“It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed.”⁴¹⁷

704. Merely “taking into account” principles of the Treaty, which are then relegated in against other considerations, provides a serious lack of protection for kaitiaki. The phrase “take into account” is much weaker than the equivalent provision in the Conservation Act 1987 (section 4 “give effect too”).

705. Yet even in the face of the Waitangi Tribunal’s criticisms, the Crown has taken no steps to strengthen the reference to the Treaty of Waitangi in the RMA hierarchy of interests. Moreover, the Courts have interpreted the section 8 reference as simply ‘confirmatory’ of the section 6(e) and section 7 requirements already discussed. This seriously erodes the significance of the Treaty provision.

706. A typical case in point is the Takamore Trustees litigation. Mackenzie J concludes:

“Because I have held that, on its reconsideration, the Environment Court has not erred in its assessment of ss6e and 7(a) matters, I am accordingly of the view that that error of law in the application of s8 is no longer apparent. That is sufficient to deal with this point of appeal.”⁴¹⁸

Does the recognition of customary activities in sections 17A and 17B:

(i) ensure the preservation, regulation and development of the kaitiaki’s relationship with the environment (including wāhi tapu) in the hands of the kaitiaki; and/or

⁴¹⁷ Waitangi Tribunal *Nga Wha Geothermal Report* (Legislation Direct, Wellington, 1993) p 146.

⁴¹⁸ *Takamore Trustees v Kapiti Coast District Council* (27 October 2004) CIV – 2003-485-1805, para 100 per Mackenzie J.

(ii) protect the transmission of that relationship from generation to generation among kaitiaki?

707. No. Sections 17A and 17B are simply operational amendments to the RMA which give effect to the Foreshore and Seabed Act 2004 and its legislative regime relating to Customary Rights orders. That regime has been the subject of detailed criticism by this Waitangi Tribunal, which is not traversed here. For the claimants, the Foreshore and Seabed Act was a confiscation of their entitlement to obtain recognition of their property rights to the coastal environment. The inclusion in the confiscating legislation of a new range of limited “customary rights orders” was entirely inadequate in fulfilling the Crown obligation to guarantee the exercise by kaitiaki of their tino rangatiratanga to the foreshore and seabed.

708. Therefore, the RMA operational provisions of this customary rights regime are similarly flawed.

Does the ability of local authorities to transfer powers to other public authorities, specifically including iwi authorities, (section 33) provide for control, preservation, regulation, use and development by kaitiaki of their relationship with the environment?

709. Yes, potentially section 33 is a provision which might, if fully implemented, provide for practical exercise of kaitiakitanga. Section 33 was regarded during the RMLR process as signalling a new devolution to iwi of environmental decision-making.

710. The irony for the claimants is that 15 years after the promulgation of the RMA, not one local authority has taken the step of transferring its powers to iwi authorities under this section. Under questioning, Lindsay Gow for the Ministry for the Environment appeared to dismiss the relevance of this lack of practical application as being a matter for local authorities rather than the Crown. However, he conceded that the Ministry had taken no active steps to encourage local authorities to implement section 33, nor provided local authorities with incentives to actively engage in power sharing with iwi.⁴¹⁹

⁴¹⁹ Transcript of Cross-Examination of Lindsay Gow, p 81.

711. From the point of view of iwi authorities, the Ministry has undertaken no specific work to increase their capacity to receive devolved responsibilities, or the resources to undertake local authority activities.

712. The ability of an iwi authority to undertake devolved responsibilities rests entirely with the local authority itself – this is not what the Treaty partnership envisaged. Therefore, while claimants view section 33 transfers as providing opportunities for the expression of kaitiakitanga, the provision is still less than the full provision of tino rangatiratanga.

Does the ability of local authorities to make joint management agreements (section 36B) provide for control, preservation, regulation, use and development by kaitiaki of their relationship with the environment?

713. Joint management agreements are a step down from the transfer of decision-making authority as contemplated in section 33. Joint management agreements are not exclusive agreements with iwi or hapu, but are able to be entered into by local authorities with other groups representing community interests. Therefore, while an iwi authority may be provided the opportunity to enter into a section 36B agreement with the local authority (and this can only occur at the behest of the local authority), the provision cannot be said to be a fulfilment of the Treaty guarantee when it can equally apply to other public authorities. It should be noted that the section 36B joint arrangements revert back to the local authority having sole decision-making as the default position where the joint agreement does not explicitly provide for a particular circumstance.

Does the definition of ‘heritage protection authority’ in section 187:

- (i) protect the kaitiaki’s relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?; and/or***
- (ii) provide for control, regulation and development by kaitiaki of their relationship with the environment?***

714. The “heritage protection” regime under the RMA is not specific to the interests of kaitiaki at all, but rather applies to any ‘body corporate’ who wishes to become a heritage protection authority.

715. Heritage orders have the potential to protect places of special significance to the tangata whenua, but there are serious limitations. A heritage order can impose restrictions which might apply to a particular place, but such an order can only be imposed by a heritage protection authority. The process for becoming a heritage protection authority is costly and time-consuming, but more importantly, application is made to the Minister for the Environment who has the final say. The Minister must consider whether approval of the application is appropriate for the place, and whether the applicant can satisfactorily carry out its responsibilities under the Act. There is no right of appeal from the Minister's decision.
716. An application for the status of heritage protection authority costs \$250.00 at present, with a range of other costs also incurred for the heritage order itself. These include council administrative charges for the 'notice of requirement', and potential costs in the Environment Court and beyond if the heritage order is challenged.
717. The process for iwi to become a heritage protection authority must be compared with the automatic status of heritage protection authority granted to local authorities, Ministers, or the Historic Places Trust. The default position is that the iwi authority is *not* a heritage protection authority, and must have the resources and capacity to apply to be one.

Does the effect of heritage protection orders (section 193) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

718. The effect of a heritage protection order is that regardless of any resource consent or plan provision, no person can act in a manner which will impact on the heritage order, including sub-division, or changing the character, intensity or scale of use of the land. As noted above, such restrictions render the heritage protection orders open to challenge in the Environment Court by landowners or those proposing to use the land. Indeed, such is the potential for impact on the landowner, that the heritage protection authority can be made by the Environment Court to compulsorily acquire the land under the Public Works Act or have the order removed. This would apply

where the land would be incapable of reasonable use because of the presence of the heritage protection order.

719. That said, it is within reasonable contemplation that properly resourced, an iwi authority could make use of the heritage protection regime under the Act to protect its wahi tapu or areas of cultural significance. But the limitations of the process are such that the regime is not actively protecting the kaitiaki relationship as the Treaty might have envisaged.

Do the consultation requirements relating to policy statements and plans that are set out in Schedule 1 (specifically as they relate to iwi authorities and tangata whenua):

- (i) ***protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;***
- (ii) ***provide for preservation, regulation and development by kaitiaki of their relationship with the environment?***

720. No, the provisions do not protect the kaitiaki's relationship with the environment. Such provisions are part of the way in which iwi can actively participate in the setting of goals for resource management, but the goal of active participation is no more than what is hoped for all sectors of the community. The fact that local authorities *must* consult at this stage of the planning process is recognition of the importance of the iwi or hapu view, but it could equally have been inserted so as to ensure the local authorities do not avoid their duties to tangata whenua, given their reluctance to involve iwi in any substantive decision-making authority (for example under section 33).

721. It is also relevant that councils are under no obligation to consult if consultation on the relevant issues has occurred under separate legislation within 12 months of the notification of the proposed planning instrument.⁴²⁰ This is a serious limitation on the Schedule 1 scheme, which fails to acknowledge that the iwi might reach different conclusions on particular issues over a 12 month period, due to (among other reasons), the change of personnel within the iwi authority; increases in capacity in dealing with the

⁴²⁰ Environmental Defence Society – *Tangata Whenua Participation*
<http://www.rmaguide.org.nz/rma/introduction/tangata.cfm> Last accessed 6 April 2007.

complexities of resource management proposals, or changes in the iwi's own strategic objectives for their rohe.

Conservation Act 1987

Does the relative size of the conservation estate and the conservation values protected in it mean that particular provision should be made in the legislative framework regulating this estate for:

- (i) protection of the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;**
- (ii) provision for control, regulation and development by kaitiaki of their relationship with the environment?;**
- (iii) preservation of the kaitiaki's relationship with the environment in the hands of the kaitiaki; and/or**
- (iv) transmission of that relationship from generation to generation among kaitiaki?**

Size of the Conservation Estate

722. The claimants say that the relative size of the conservation estate is one relevant factor, and the conservation values applicable to the conservation estate is another relevant factor, requiring the relationship of kaitiaki with their environment to be protected. But those factors are of less importance than the fact that within the conservation estate is ancestral whenua, taonga species, ngahere, wahi tapu, sources of rongoa and kai. The Treaty guaranteed that such taonga would remain in the control of whanau, hapu and iwi for as long as they wished to possess them. Thus, quite apart from the size of the conservation estate or the conservation values being protected, the Treaty requires that the kaitiaki relationship with their environment be protected.

723. The size of the conservation estate is relevant to the nature and extent of the Crown obligation. In the case of the Tai Tokerau claimants, the conservation estate makes up a significant percentage of the land in each claimant rohe. Department of Conservation witnesses were provided with maps outlining the extent of DOC managed land as opposed to land still held in Maori ownership. The evidence of claimant witnesses illustrated

that the most pervasive relationship the claimants had with a Crown agency tended to be the relationship with DOC.

724. The size of the conservation estate is important in a historical context as well. The alienation of tangata whenua from their lands through the historical breaches of the Treaty of Waitangi has disenfranchised hapu and iwi from the lands which provided sustenance, identity and turangawaewae upon which to practice and exercise their tikanga and Mātauranga. Tribunal commissioned witnesses provided detailed overviews of the way in which much of this alienated land found its way into the conservation estate.⁴²¹
725. Importantly too, the size of the conservation estate tends to support its significance as providing refuge to whole ecosystems, when in other urbanised or industrialised parts of the country it is rare to find ecosystems intact. For that reason, the conservation estate is one of the few places left in New Zealand where the original pre-Treaty sense of ‘te ao turoa’ can be experienced: where the interconnectedness and intrinsic values of the natural environment can be appreciated. It is these values which are of such importance to tikanga Māori, and (while at times synonymous with conservation values) are the essence of the kaitiaki relationship with the environment.

Conservation Values

726. The conservation values protected in the conservation estate do tend to intersect with tikanga and mātauranga as those concepts relate to the environment. However, there are important differences as well. The analysis by Taiepa, as well as the ladder model advocated by Horsley, are helpful in discerning where those links and differences lie. The opportunities for collaboration are obvious: to achieve better conservation outcomes, active participation in conservation management is needed from Māori. Conversely, the need to pass on to the next generation the resources bestowed upon the current generation, is a task which is helped

⁴²¹ See, for example, Geoff Park *Effective Exclusion? An Exploratory Overview of Crown Actions and Māori Responses Concerning the Indigenous Flora and Fauna, 1912-1983* (Waitangi Tribunal Report, Wellington, 2001) 337-338.

immeasurably by the support of conservationists. However, the Treaty provides that kaitiaki are not just an ‘interest group’ but are guaranteed to have a fundamental relationship with their environment.

Does the Conservation Act 1987 provide effective protection of the kaitiaki’s relationship with the environment? Specifically:

- (a) ***Does the requirement in section 4 that the Act be interpreted and administered to give effect to the principles of the Treaty of Waitangi:***
- (i) ***protect the kaitiaki’s relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;***
 - (ii) ***provide for regulation, control and development by kaitiaki of their relationship with the environment?;***
 - (iii) ***ensure the preservation, regulation and development of the kaitiaki’s relationship with the environment in the hands of the kaitiaki?; and/or***
 - (iv) ***protect the transmission of that relationship from generation to generation among kaitiaki?***

727. Section 4 of the Conservation Act contains language which is demonstrative of a Treaty partnership, in that functionaries under the Act are required to “give effect to” the principles of the Treaty of Waitangi. There is therefore no statutory impediment to the Act being administered in a manner which provides for the exercise of tino rangatiratanga. The restrictions on that happening however lie in three other areas:

727.1 The goodwill and attitude of those administering the Act in their interpretation and application of that section;

727.2 The fact that decision-making as to how the section is to be interpreted or enforced lies with the Crown, and not the kaitiaki; and

727.3 Where a conflict arises between the ‘preservationist ethic’ and the indigenous knowledge ethic of sustainable use, the policies being implemented tend to support the former. Ngatiwai’s perspective on the kiore is a very good example of such a conflict arising. There was nothing in the statute which required the kiore

to be deemed a ‘pest’ which would require its eradication. This was a matter of policy.

728. Doris Johnston in cross-examination explained the situation that would result for a conflict between the Treaty of Waitangi and the conservation principles they were expected to apply:

“In very general terms the way, the normal issue where there is with the Department is that we have to achieve certain conservation outcome and or for the legislation has got a certain framework that we have to work with and that there may be instances when I don’t know whether it’s the principles of the Treaty but where the view of Māori may be that we should do something different or we should wait for longer for consultation but we still have to make a decision or to take some action to achieve a conservation goal which may mean that even though we have taken their views into account and understood them we may still decide to take an action which they don’t totally agree with in a particular circumstance.”⁴²²

Does the requirement that membership of Conservation Boards be determined with regard to the interests of tangata whenua (section 6P) provide for control by kaitiaki of their relationship with the environment?

729. No, because the Conservation Board regime is not a vehicle for providing for kaitiaki control of their relationship with the environment. The Conservation Boards are not decision-makers in terms of conservation management, but provide community stakeholder advice to the Department.⁴²³ This is particularly true in the case of the Conservation Management Strategies (CMS). Once the CMS is approved by the Conservation Authority, the Boards simply then advise on its implementation.

730. Section 6P provides that the Minister shall appoint the members to the Board, after consultation with the Conservation Authority. A range of factors must be taken into account in the appointments process. Section 6P(2)(b) provides that the Minister shall consider the interests of:

730.1 Nature conservation;

⁴²² Transcript of Cross-Examination of Doris Johnston, p 347, line 10.

⁴²³ Conservation Act 1987, s 6M.

- 730.2 natural earth and marine sciences;
- 730.3 recreation;
- 730.4 tourism;
- 730.5 and the local community *including the interests of tangata whenua of the area.*

731. The list above illustrates the placement of the kaitiaki perspective in the hierarchy of interests. It is but one of a range of competing interests and is regarded as but one part of the local community. This is hardly recognition of a Treaty guarantee.

Does the ability of the Minister of Conservation to confer additional specific protection requirements to a described area or interest in land for a specified purpose (section 18) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

732. No. This section simply provides a mechanism for land to be declared a special status which confers on the land certain management requirements. The mechanism does not devolve responsibilities to hapu or iwi for management of the area, and indeed the section does not even mention cultural values as being one of the explicit purposes for which a protected area might be gazetted. The Minister of Conservation has all of the decision-making authority and this includes the right to revoke the area's protected status.

(d) Does the declaration in section 26ZH that Māori fishing rights are unaffected by Part 5B of the act:

- (i) ensure the preservation, protection, regulation and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or***
- (ii) protect the transmission of that relationship from generation to generation among kaitiaki?***

733. To a limited extent. Section 26ZH reserves to Maori their fishing rights in relation to indigenous fresh water species of fish such as whitebait and freshwater koura (but not eels), provided the taking is carried out in

accordance with appropriate tikanga. However, the application of this provision has been interpreted restrictively so that the Maori fishing rights are species specific and do not protect the rights of kaitiaki in relation to the waterways themselves. Thus, the kaitiaki has no control over the species of fish that have been introduced into their river systems, which in the case of trout, have displaced indigenous species of inanga.⁴²⁴

Does the ability to create Ngā Whenua Rahui Kawenata under section 27A protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

734. No, the provision does not protect the kaitiaki relationship with their environment. The covenants apply to those areas where Maori still own their land, and so by their very nature, are limited in their application, given the paucity of land still in Maori ownership. The covenants do not provide for any exercise of the kaitiakitanga relationship with the conservation estate, local authority owned land, other public land, or with private land not owned by Maori. Even then, some 230,000 hectares of Maori owned land is under covenant protection. This is a staggering testimony to the practical (and voluntary) commitment of tangata whenua to conservation management.

735. Nga Whenua Rahui covenants are promoted in the DOC evidence of Doris Johnston as being a success of the New Zealand Biodiversity Strategy, and that:

“Nga Whenua Rahui enables Maori to exercise their kaitiaki responsibilities and use their Maturanga to retain core cultural values ...”⁴²⁵

736. However, it is the *ownership* of Maori land which enables Maori to exercise their kaitiaki responsibilities. The covenant regime might provide some financial incentive to preserve the sites, but the covenants are not the enablers of kaitiakitanga. The covenants cannot be said to contribute to the protection of the kaitiaki relationship with their environment in a manner

⁴²⁴ *McRitchie v Taranaki Fish and Game Council* (22 November 1998) CP 184/98.

⁴²⁵ Brief of Evidence of Doris Johnston, #R8, paras 90-91.

that is consistent with the customs and values of the kaitiaki, because the land ownership provides that protection. Of much more interest in the assessment of Crown protection mechanisms would be schemes which ensured that where land ownership did not rest with Maori, the use of the environment was nevertheless consistent with their customs and values.

- (f) Do the sections in Part 3B relating to concessions for activities in conservation areas:**
- (i) ensure the preservation, protection, regulation and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki? and/or**
 - (ii) protect the transmission of that relationship from generation to generation among kaitiaki?**

737. No. Evidence given by claimants illustrates the fact 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. In the case of Ngatiwai, concessions have been charged by DOC for access to the offshore islands. Ngatiwai struggled for years to obtain recognition of their tangata whenua status in terms of receiving a share of those profits. In the case of Ngati Kuri, a major tourism attraction at Te Rerenga Wairua and Te Paki continues to generate funds from the concessions charged by DOC, but Ngati Kuri do not share in those benefits.

738. In addition, the decision-making authority for the concessions does not provide for the effective exercise of tino rangatiratanga. Ngati Kuri do not have equitable access to information on the impact of tourist numbers at their wahi tapu, nor do they have a say in the numbers of concessions granted. In Te Rarawa, only after working hard to establish a relationship with DOC has Te Runanga o Te Rarawa now negotiated a process whereby applications for concessions in their rohe are referred to them for comment.

Reserves Act 1977

Does the Reserves Act 1977 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

(a) Does the ability of the Minister to grant hunting or burial rights to Maori in relation to specific reserves (section 46):

(i) ensure the preservation, protection, regulation and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or

739. No. This only provides for a very narrow aspect of the kaitiaki's relationship with the environment.

(ii) protect the transmission of that relationship from generation to generation among kaitiaki?

740. No. It does not protect the transmission of the relationship, only a very limited aspect of that relationship.

(b) Does the requirement that any authorisation of afforestation must provide adequate safeguards for natural, historic and cultural features and indigenous flora and fauna (section 75(2)) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

741. There is a major distinction between simply safeguarding interests on the one hand and providing the means for tangata whenua to exercise kaitiakitanga. The present regime relegates tangata whenua interests to something that is to be safeguarded. It is the claimants' view that this type of approach will always be inadequate in terms of protecting the kaitiaki's relationship with the environment.

742. As a general point, we note that tangata whenua concerns and/or preferences may not, as of right, be given any greater weight than those of, for example, the Royal Forest and Bird Protection Society.

(c) Does the ability to create Nga Whenua Rahui Kawenata (section 77A) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

743. To a limited extent only. While it is acknowledged that the agreement is sensitive to Maori values in terms of spirituality and tikanga, the application of this covenant is limited to privately-owned Maori indigenous areas. A large portion of the claimants concerns relate to the management of land that is not in Maori ownership, particularly the DOC estate.

Local Government Act 2002

744. As a preface to responding to the issues concerning the Local Government Act 2002 (“LGA”), it is necessary to consider the place of local authorities in the Crown-Maori Treaty relationship. The Crown maintains that local authorities are not ‘the Crown’ and therefore not subject to Treaty of Waitangi obligations. Nevertheless the Local Government Act does confer on local authorities certain obligations which might be regarded as akin to Treaty obligations in certain circumstances (see also the Resource Management Act). This is particularly so in the requirement of section 77 concerning decisions in relation to land or bodies of water, where the section echoes section 6(e) of the RMA.
745. From the claimants’ perspective, local government plays a critical role in the day-to-day management of their environment, and the Crown cannot side-step its Treaty obligations by delegating authority to local government. Therefore, either the legislation which grants these powers over the environment to local government is robust in ensuring that Treaty obligations are to apply, or the Crown should maintain an active protection role in relation to the way in which iwi and hapu can interact with their local authority.
746. The critique of the RMA and the conclusions concerning the lack of good will or political will at the local authority level to grant meaningful power sharing arrangements to iwi are just as applicable to the Local Government Act regime. The difference is that there is no explicit ‘section 33’ type provision to enable hapu and iwi to regulate and control decision-making over the natural environment. Rather, the LGA simply requires local authorities to provide opportunities for Maori to *contribute* to the decision-making processes of the local authority, or for local authorities to take the Maori interest “into account”.
747. As a broad conclusion, the LGA scheme as it relates to Maori is simply the ‘end point’ of how local government would wish to see all other sectors in the community participate in their decision-making processes. If the

community is engaged, then this is a worthwhile aspiration for local government management. Therefore the Maori proprietary interest under the Treaty is rendered vacuous and the Maori right of engagement is simply the same as that of the rest of the community.

4A.4.7 Does the Local Government Act 2002 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

(a) Does the statement in section 4 that Parts 2 and 6 of the Act that are intended to facilitate participation by Maori in local authority decision-making processes in order to take appropriate account of the Treaty of Waitangi provide for control, preservation, protection, regulation and development by kaitiaki of their relationship with the environment?

(b) Does the statement in section 14(1)(d) that local authorities should provide opportunities for Maori to contribute in their decision-making processes provide for control, preservation, protection, regulation and development by kaitiaki of their relationship with the environment?

748. No. As discussed above, Maori are encouraged to participate in the decision-making processes in a similar way to other sectors of the community. Those other sectors may not have explicit statutory provisions to ensure the opportunity for participation, but nevertheless the ultimate goal for good local government decision-making processes is for the whole community to be actively engaged. The Maori Treaty right and its guarantee of tino rangatiratanga requires more than just a contribution to a decision-making process over which they have no ultimate control.

(c) Does the requirement in section 77 that, when making significant decisions in relation to land or a body of water, a local authority must take into account the relationship of Maori with ancestral land, water, wahi tapu, flora and fauna, and other taonga protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

749. No, the provision does not protect the kaitiaki relationship with their environment. The claimants refer to their position on section 6(e) of the RMA. A similar balancing act is made by local authorities who have the ultimate decision-making power to determine a course of action as between competing interests, of which the Maori relationship with their ancestral land, water, wahi tapu, flora and fauna, and other taonga, is but one. Therefore, it is not the statutory provision which provides protection,

preservation, control, regulation or development by kaitiaki of their relationship with the environment. Rather, if such a relationship is to survive, the scheme of the Act places that burden on the local authorities own decision-making and the weight they give to the Maori perspective.

(d) Does the requirement in section 81 that local authorities establish and maintain processes to develop Maori capacity to contribute to decision-making processes provide for control, preservation, protection, use, regulation and development by kaitiaki of their relationship with the environment?

750. No. The requirement on local authorities to establish and maintain processes to develop Maori capacity is aimed at furthering the decision-making regime in parts 2 and 6 of the Act. In that sense, section 81 does no more than enhance the local authorities ability to satisfy its own decision-making processes, and does not enhance the authority of iwi or hapu themselves to make decisions in relation to their environment.

751. That said, any increase in the capacity of kaitiaki to actively participate in local government management is appropriate and welcomed by the claimants. However, it should not be a substitute for a meaningful sharing of power.

(e) Does the requirement for each local authority to have a long-term community plan that complies with section 93 provide for control, use, preservation, regulation and development by kaitiaki of their relationship with the environment?

752. No. Section 93 is part of a suite of provisions which establish a process to encourage active engagement of the community in local government decisions. In that sense, tangata whenua are but one of a range of sector interests.

Biosecurity Act 1993

4A.4.8 Does the Biosecurity Act 1993 provide effective protection of the kaitiaki's relationship with the environment?

753. It is submitted that the Biosecurity Act 1993 must be assessed for its compliance under the Treaty of Waitangi against the background of the

inadequacy of biosecurity management prior to the 1993 Act. The history of biosecurity illustrates a lack of attention to the protection of indigenous flora and fauna, and some crucial decisions made in the name of “biological controls” which caused irreparable environmental damage. Evidence for the Crown was given by Mr Larry Fergusson of the Ministry of Agriculture and Fisheries:

“LW The facts of New Zealand’s biosecurity history illustrate that we have been badly let down really, haven’t we?

LF We’ve made some dumb decisions as a country, yes.”⁴²⁶

754. Thus, when considering the regime from 1993 on, the relationship of kaitiaki with their environment had already been so significantly diminished (both in terms of species destruction and lack of decision-making authority) that any gains since 1993 are really only “catch up”.

History of Biosecurity

755. The history of biosecurity in New Zealand is set out in a useful summary in the Foreword to the Biosecurity Strategy.⁴²⁷
756. From 1835 (the time of Charles Darwin’s visit) over the next 60 years, Council chair John Hellstrom characterised the “*transformation of indigenous biodiversity*” as “*already unstoppable, where the primeval environment of Aotearoa was changed forever.*”⁴²⁸ One of the imports which badly affected indigenous biota was the rabbit. To control the rabbit, ferrets, stoats and weasels were imported in 1884. This was referred to in the Biosecurity Strategy as “*New Zealand’s worse ever state sponsored attempt at biological control*”. Furthermore:

“A century later, [that is, by 1984] the proliferation of ferrets, stoats and weasels throughout the country imperils all our native birds, and threatens all our land dwelling birds (kiwi and yellow eyed penguin) with extinction.”

⁴²⁶ Transcript of Cross-Examination of Larry Fergusson (Week 2) p 190, lns 7-9.

⁴²⁷ Biosecurity Management Strategy, pp 5-6, , #R2(a).

⁴²⁸ Ibid.

757. During the same period, from the mid 1880's through to the 1970's "*and possibly longer*",⁴²⁹ much of New Zealand's native forests and shrub lands was cleared for farming and use of timber for infrastructure, which also had a major impact on the indigenous birdlife.
758. Biosecurity management did not focus on the importance or protection of indigenous flora and fauna. The history of biosecurity was motivated by the desire to protect newly introduced farm species from pests and diseases that might cause economic loss.⁴³⁰ The Biosecurity Strategy notes that some 120 years later, by the 1960's, it was still the case that "*very little thought had been given to protecting our native flora and fauna on the land, and in lakes, rivers and wetlands from pests; none had been given to protecting our marine eco-systems*".
759. Therefore, according to the Strategy it was only with the introduction of the Biosecurity Act 1993 that the importance of biosecurity to the protection and preservation of indigenous flora and fauna came under scrutiny.
760. Mr Fergusson agreed that at least until the passing of the 1993 Act, Crown obligations to protect indigenous flora and fauna from pests and diseases had not been fulfilled:
- "... by the '80s it was pretty apparent that we had a regime for managing the introduction of organisms into the country, whether it was deliberate introductions or whether it was pests that wasn't fit for the purpose. And the result of that was the development of those two pieces of legislation. So if you like, missed out a whole bunch of stuff because I kind of took it as given. What we had was inadequate, wasn't working, and wasn't achieving what we needed to achieve, so we needed something different."⁴³¹
761. Mr Fergusson noted that societies "needs and expectations" had changed and so the law had changed too (referring to both the Biosecurity Act and the HSNO Act). He also pointed to the benefit of hindsight in answering a question from Crown counsel in re-examination. Yet he conceded that throughout the period of Crown biosecurity management, the needs and

⁴²⁹ Transcript of Cross-Examination of Larry Fergusson (Week 2) pp 190-191.

⁴³⁰ Ibid, p 191, lns 14-15: "*Our biosecurity system was built around protecting our primary industries, which were basically based on exotic species.*"

⁴³¹ Ibid, pp 190-191.

expectations of Maori about the active protection of their flora and fauna arising from the Treaty of Waitangi had not changed.⁴³² And that must be the critical barometer in this claim.

762. This Tribunal has restricted its focus for the purpose of findings and recommendations to Crown policy and legislation since 1975. It is clear from the Crown evidence that from 1975 to the passing of the 1993 legislation, Crown Treaty responsibilities to protect indigenous flora and fauna and the relationship of kaitiaki with that environment had been breached. That situation did not significantly alter after the legislation was passed. As Mr Fergusson acknowledged, in the context of adequate resources being applied to biosecurity, simply passing an Act does not automatically achieve what it is that the Act is designed to achieve.⁴³³

Protection of Indigenous Flora and Fauna

763. For the ten years following the passing of the Act there was little practical improvement in the protection of indigenous flora and fauna from biosecurity threats. The Biosecurity Strategy itself declares that the Crown applied “*scant resources too slowly*” to biosecurity which made it impossible to achieve the changes in systems and attitudes needed to actually match the concept of the Act.⁴³⁴ At the time of release of the Biosecurity Strategy in 2003, the biosecurity system was struggling to cope.

764. It follows then that the active protection of indigenous flora and fauna and the matauranga associated with those species was still not happening in terms of biosecurity management by 2003:

“LW Well thanks for that, but the consequence has been that, 10 years after the passing of the Act, the biosecurity system was still struggling to cope with the protection of indigenous flora and fauna, that’s the case isn’t it?”

LF We’re not achieving, were not achieving what, desirably, we should be achieving.

⁴³² Ibid , p 189, lns 28-31.

⁴³³ Ibid, p 198, lns 14-15.

⁴³⁴ Biosecurity Management Strategy, p 6, , #R2(a).

LW And it would follow that with the lack of active protection of the flora and fauna in that period, the decline in Matauranga Māori was continuing as well. That hasn't.

LF That's the discussion we were having before morning tea, yes."⁴³⁵

765. Mr Fergusson agreed that matauranga Maori would be considered a "taonga". He added that whether or not it fitted within Article II of the Treaty would be "*something for lawyers to argue about*".⁴³⁶

Maori Involvement in Biosecurity Management

766. The Biosecurity Act makes no reference to the Treaty of Waitangi. This is a fundamental omission given the acknowledged importance of tangata whenua to biosecurity management. It is inconsistent with the Resource Management Act and the Conservation Act, which are inter-related pieces of legislation in the context of environmental management.

767. Prior to the Biosecurity Act, there is no evidence whatsoever of Maori involvement in biosecurity management. It is reasonable for the Tribunal to infer that had kaitiaki been involved in the setting of priorities for biosecurity, then their attitudes towards indigenous flora and fauna as taonga would have meant a greater focus on the protection of indigenous flora and fauna from pests and diseases.

768. As it was, at least until 1993 at law, and until 2003 in practice, biosecurity priorities were economically driven and consideration of the wellbeing of indigenous biota came a distant second.

769. The introduction of the Biosecurity Act failed to improve participation of kaitiaki in decision-making. Ten years later, there was no attempt made within the development of the Biosecurity Strategy to involve a Maori perspective. The 2003 Strategy was published by the Biosecurity Council, which comprised the CEOs of government departments, representatives from regional councils, primary producers and environmental groups.⁴³⁷

⁴³⁵ Transcript of Cross-Examination of Larry Fergusson (Week 2) p 194.

⁴³⁶ Ibid, p 194.

⁴³⁷ Brief of Evidence of Larry Fergusson, #R2, para 73.

Mr Fergusson agreed that the Biosecurity Council had no representative of iwi interests. Even the Minister of Biosecurity in his endorsement of the Strategy did not mention Maori or iwi interests at all.⁴³⁸

770. Nevertheless, despite the lack of Maori input into its development, the Strategy itself does recognise the importance of better integrating Maori into biosecurity management, and including matauranga Maori in those processes. The Biosecurity Science Research and Technology Strategy has an indicator of its future success when “*Matauranga Maori is making a significant contribution to biosecurity science and the achievement of biosecurity outcomes.*”⁴³⁹
771. Mr Fergusson concurred under questioning that with the decline in flora and fauna, there has been a parallel decline in matauranga Maori associated with that flora and fauna,⁴⁴⁰ and this conclusion was supported by the Biodiversity Strategy.⁴⁴¹
772. Therefore, the government had clearly identified that Maori involvement in biosecurity (and biodiversity) management was desirable, even though there had been no involvement from iwi interests in the development of the Biosecurity Strategy. However, recognised involvement of Maori is based on the principle that the active participation and cooperation of the community leads to better and more effective biosecurity management. The greater the interest in the species under threat, the greater the interest in protecting it.
773. The issue the claimants have in this context is that active engagement of Maori in biosecurity management is based on the same principle that applies to all sectors of the community. It is not recognition of a proprietary or participatory right derived from the Treaty relationship. In this way, the conclusions in the context of biosecurity are identical to those reached in the context of conservation management. Is the Maori perspective any different

⁴³⁸ Transcript of Cross-Examination of Larry Fergusson (Week 2), pages 186-187.

⁴³⁹ *A Biosecurity Science, Research and Technology Strategy for New Zealand* (draft) (8 November 2006) p 15, #R2(g).

⁴⁴⁰ Transcript of Cross-Examination of Larry Fergusson (Week 2), pages 194, lns 28-34.

⁴⁴¹ New Zealand Biodiversity Strategy, (February 2000), #R8(c).

from anyone else in the community? If their involvement in these processes is regarded as equally as valid as the rest of the community, because participation leads to better outcomes, then what of the guarantee of Article II?

774. Furthermore, it was acknowledged by Mr Fergusson that effective and active participation in biosecurity will depend on the internal capacity of kaitiaki to understand the issues, consult amongst themselves and provide a considered response to those issues. It is therefore incumbent on the Crown to resource and assist hapu and iwi to increase their capacity to actively engage. To this point, the evidence indicates that instead of increasing Maori capacity to respond to biosecurity, the priority of the Ministry for Agriculture and Fisheries has been to increase its own capacity to deal with Maori through the Maori Responsiveness Strategy.

Decision-Making Authority of Kaitiaki

775. A critical issue for the claimants remains the lack of decision-making authority which resides in hapu and whanau. Mr Fergusson conceded that the expectation of kaitiaki working with central and regional government on biosecurity is an expectation which is regularly conveyed to the Maori Strategy Unit at hui and in other fora. These sentiments would appear to be entirely consistent with the Treaty principle of partnership.
776. The Biosecurity Strategy appears to support this principle of partnership in decision-making. Refer for example:

“Maori are concerned at the lack of understanding by non-Maori of their customs and the value of traditional knowledge in managing indigenous species. **Direct involvement by Maori in biosecurity decision-making processes** would inform both biosecurity agencies and the wider community of Maori specific outcomes. Local iwi need to be involved in the protection of taonga.”⁴⁴² (emphasis added)

⁴⁴² New Zealand Biosecurity Strategy (February 2000) p 19, #R8(c).

777. This aspiration tied in with the specific expectation “*that kaitiaki are invited to work **with** central government and regional councils on biosecurity matters.*”⁴⁴³
778. These expectations were not accurately transferred into the brief of evidence of Mr Fergusson however. It was put to him that he had deliberately read down that expectation when he summarised the Strategy,⁴⁴⁴ referring to Maori being invited “*to the table to participate in working groups and focus groups, and bring with them kaitiaki principles.*”⁴⁴⁵
779. The Strategy expectation appears to be directed at an outcome for the participation of Maori in decision-making, where as Mr Fergusson’s rendering of that expectation appears to be focussed on a methodology of participation. The Ministry’s own Maori Responsiveness Strategy clearly distinguishes between the outcomes wanted for Maori, and the way those outcomes are delivered: “*Consultation, cultural awareness and related processes and capabilities are means to an end not the end itself.*”⁴⁴⁶
780. Both Mr Fergusson, and the Director of the Maori Strategy Unit for MAF, Mr George Ria, were unable to point to any particular documentation which indicated the success of the Ministry or the Unit in relation to this key expectation of the Biosecurity Strategy that kaitiaki would be working with central government and regional councils. The only steps the Ministry appeared to have taken to implement active involvement of Maori were matters associated with the Maori Responsiveness Strategy, which sought to increase the Ministry’s own capacity, rather than Maori decision-making authority.
781. Indeed, the situation was most disturbingly circular: the Biosecurity Strategy’s expectations are to be dealt with in the Maori Responsiveness Strategy, and yet the Responsiveness Strategy simply refers back to the Biosecurity Strategy as being the MAF strategic approach for the protection

⁴⁴³ Ibid, p 19, para 6.

⁴⁴⁴ Brief of Evidence of Larry Fergusson, #R2, para 74.

⁴⁴⁵ Transcript of Cross-Examination of Larry Fergusson, p 176, line 15-35.

⁴⁴⁶ Ministry for Agriculture and Forestry *Maori Responsiveness Strategy* (2002), #R2(b), p 3.

of cultural resources. Rather, the Responsiveness Strategy is aimed at the protection of ‘biologically based economic resources’ which is said to be its priority.⁴⁴⁷

782. It seemed that the only action point in the protection of Maori cultural resources being undertaken by MAF was the convening of a Maori Reference Group as recently as 28 June 2006, with the purpose of providing input into the selection of a number of case studies of native plants.⁴⁴⁸ Yet this is hardly an implementation of the Biosecurity Strategy’s expectation of “*direct involvement by Maori in biosecurity decision-making processes*” and the statement that “*local iwi need to be involved in the protection of taonga.*”

783. The Tribunal can reasonably infer from the lack of documentation provided by the Ministry, that the direct involvement of Maori in biosecurity management is not a priority for the Ministry.

4A.4.8 Does the Biosecurity Act 1993 provide effective protection of the kaitiaki’s relationship with the environment? Specifically:

(a) Does the ability to establish a pest management strategy for organisms that may have an adverse effect on the relationship of Maori with ancestral lands, waters, sites, wahi tapu, and taonga (section 57(c)(5))⁴⁴⁹:

(i) ensure the preservation, regulation protection, and development of the kaitiaki’s relationship with the environment in the hands of the kaitiaki? and/or

(ii) protect the transmission of that relationship from generation to generation among kaitiaki?

784. No, this provision does not protect the kaitiaki relationship with their environment. The only reference to Maori interests in the Biosecurity legislation is in the context of setting regional and national pest strategies under sections 57 and 72 of the Act. The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu and taonga is one factor (out of eight) which must be taken into account. In this

⁴⁴⁷ Ministry for Agriculture and Forestry *Maori Responsiveness Strategy* (2002), #R2(b), p 8.

⁴⁴⁸ Brief of Evidence of Larry Fergusson, #R2, para 76.

⁴⁴⁹ Note, this should be section 57(c)(iv) which provides for the *notification* of a pest management strategy.

regard, earlier critiques of the RMA and the LGA in terms of the balancing of competing interests are relevant:

784.1 Firstly, the Maori interest is but one of a range of competing interests with no particular priority; and

784.2 Secondly Maori are not the decision-makers in the assessment of those competing interests.

785. Of interest is the exchange between counsel and Mr Fergusson about the definition of pest in the context of the Ngatiwai taonga, the kiore. The definition of pest under the Act is whatever is declared to be a pest in the Pest Management Strategies. The Biosecurity Strategy only refers to “introduced” pests as being those deliberately introduced during European settlement.⁴⁵⁰ The Ministry’s own 2005 Annual Report defined “indigenous” as species “*occurring naturally in New Zealand including self introduced species but not human introduced ones.*” After taking Mr Fergusson to these definitions, it was established that as the kiore was a pre-European biota, therefore on that basis at least the kiore is not a “pest” as understood by the Biosecurity Strategy.⁴⁵¹

786. Despite the fact that Ngatiwai regards the kiore as a taonga, the Auckland Regional Pest Strategy 2002-2007 treated that perspective as being of lesser importance than the determination that the kiore was a pest to be eradicated.⁴⁵² While Ngatiwai regarded the kiore as being able to be controlled by sustainable harvest, their tikanga and values were simply one factor to be taken into account, and were ultimately overridden because of the power imbalance in the decision-making structure.

(b) Does the requirement that proposals for pest management strategies set out actual or potential effects on the relationship of Maori with their ancestral lands, waters, sites, wahi tapu, and taonga (section 60(j)) protect the kaitiaki’s relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

⁴⁵⁰ New Zealand Biosecurity Strategy (February 2000) #R8(c), p 34.

⁴⁵¹ Transcript of Cross-Examination of Larry Fergusson, p 217-219.

⁴⁵² Brief of evidence of Michael J Gardiner & Rolien S Elliot, Department of Conservation (21 November 2006) # R12, para 52.

787. No, for the reasons set out above, this provision does not protect the kaitiaki relationship with their environment.

Does the consultation requirements with regard to a national pest management strategy that are set out in section 73 (which specifically include consultation with tangata whenua):

- (a) ***protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki? And/or***
- (b) ***provide for control, preservation, regulation and development by kaitiaki of their relationship with the environment?***

788. No, this provision does not protect the kaitiaki relationship with their environment. Consultation with tangata whenua in biosecurity management is an aspiration which is as applicable to the other sectors of the community as it is to Maori. Better community participation leads to better biosecurity outcomes. There is nothing in the section 73 consultation requirements which provide for the Treaty guarantee.

789. However, the Ministry has provided an example of a Memorandum of Understanding with iwi (Te Kawerau a Maki) in its further attachments dated February 2007, as an example of improvements in the relationship between iwi and the Ministry.⁴⁵³

790. The claimants say that the Ministry should be actively promoting these initiatives, even though a close reading of the MOU illustrates that the kaitiaki party is not a decision-maker in any substantive sense. Rather, clause 6 of the MOU which sets out what each party will do for the other, relates to the sharing of information on biosecurity measures. The MOU explicitly acknowledges that “MAF operates subject to statutory and policy frameworks and that these frameworks may impact on the matters in this MOU.” In that regard, until the legislation can provide for substantive sharing of decision-making authority, MAF’s Memoranda will have limited effect.

⁴⁵³ Memorandum of Understanding Between Ministry of Agriculture and Forestry and Te Kawerau a Maki (16 February 2007) # R2(c)-1.

4A.4.9 Does the Hazardous Substances and New Organisms Act 1996 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

(a) Does the requirement in section 8 that all persons exercising powers and functions under the Act must take into account the principles of the Treaty of Waitangi:

(i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;

(ii) provide for control, regulation and development by kaitiaki of their relationship with the environment?;

(iii) ensure the preservation of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or

(iv) protect the transmission of that relationship from generation to generation among kaitiaki?

791. No. The claimants gave evidence (Mana Cracknell, Peter Wills, Del Wihongi), of the cultural impacts of genetically modified organisms and genetic engineering generally on their taonga. In particular, concern was expressed over tampering with whakapapa and particularly the mixing of human genes with animals.. The claimants have also raised these concerns with the Royal Commission on Genetic Modification and submissions to the Waitangi Tribunal considering a claim for urgency seeking an extension of the GE moratorium.

792. For the reasons stated previously, the requirement to take account of the principles of the Treaty lacks any real 'teeth'. Invariably, this section is interpreted by the Environmental Risk Management Authority (ERMA) as a requirement to consult.⁴⁵⁴

793. Whilst section 6(d) requires decision makers to take into account the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, valued flora and fauna, and other taonga, these consideration are invariably outweighed by competing considerations in section 6 (for example economic benefits of (s6(e)).

⁴⁵⁴ See Decision of ERMA in GMF98009 Part 1, 18 November 1999 (an application to genetically modify cattle by implanting them with human genes to produce milk that was claimed to have cancer healing propertues)

Does the establishment of Ngā Kaihautu Tikanga Taiao under Part 4A of the Act:

- (i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;***
- (ii) provide for control, by kaitiaki of their relationship with the environment?;***
- (iii) ensure the preservation of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or***
- (iv) protect the transmission of that relationship from generation to generation among kaitiaki?***

794. The establishment of Nga Kaihautu Tikanga Taiao has assisted kaitiaki (such as Ngatiwairere in the application to insert human genes into cattle) in the articulation of their cultural and spiritual concerns to the ERMA. Unfortunately, the advice of Nga Kaihautu is often outweighed by other considerations taken into account by the ERMA. For example, in the Ngatiwairere example, a majority of ERMA decision-makers preferred the scientific and economic evidence before them, over the cultural and spiritual concerns of the kaitiaki that their whenua and health would be adversely impacted by the experiments. The application was consequently approved. In doing so, the ERMA, by majority, had dismissed the advice of Nga Kaihautu that the application should not proceed. Both Nga Kaihautu and the only Maori member on the decision-making authority of ERMA, shared the view that the application should be withdrawn. Their views are summarised in the following statement from the decision:

“The Minority believe that the six month adjournment resulted in an outcome which clearly showed that there were very significant risks to Ngāti Wairere’s cultural, physical and spiritual values and to their health and well-being which were of such a degree, that these risks could not be ameliorated, nor was Ngāti Wairere prepared to consider a compromise. It is not surprising that the applicant and Ngāti Wairere were unable to reach agreement on measures which might be taken by the applicant to ameliorate the cultural concerns expressed by Ngāti Wairere, or that in hindsight the endeavour was bound to fail. **The affront to Ngāti Wairere’s cultural values and spiritual beliefs which the proposed research represents can only be avoided by not proceeding with the research, a view which has been strongly supported by Ngā Kaihautū Tikanga Taiao, the Māori advisory committee to the Authority.”⁴⁵⁵**

⁴⁵⁵ See Decision of ERMA in GMF98009, Part II, section 67A, 2006.

795. Thus, even where a mechanism is established, such as Nga Kaihautu Tikanga Taio that enables the Maori voice to be heard, the institutional power imbalance in these Crown authorities is so great as to continually deny Maori a just outcome. It is difficult to imagine a stronger case where Maori concerns over their role as environmental kaitiaki had been put forward during consultations; several extra months taken to re-consider them, these concerns were fully supported by the Maori member of the ERMA and Nga Kaihautu Tikanga Taio, but still these concerns were dismissed by the Authority as inferior to other more important statutory considerations, namely science and economics.

Crown Minerals Act 1991

796. The Crown Minerals Act is a gross breach of the Treaty of Waitangi in that the whole regime is based on the assumption of Crown ownership and management of minerals. Any inclusion in the Act of tikanga or custom is subsumed within that overall Crown framework. Kaitiaki have no substantive decision-making authority in relation to minerals, except where they have the same rights as other citizens in relation to land that they own. Since the claim's inception, the claimants for Ngati Kuri have raised with this Tribunal their concerns about the misappropriation and abuse of the silica sands at Parengarenga. Likewise, Ngatiwai have decried the loss of their tino rangatiratanga to the sands at Pakiri. In neither case have the kaitiaki had control or decision-making authority over how these resources were used, or the impacts of commercial use on other ecosystems.

797. To the extent that the phrase *me o ratou taonga katoa* as defined in the Tai Tokerau claimants' Statement of Claim,⁴⁵⁶ it includes natural resources (silica sands, rivers, foreshore and seabed, dry land, moana, minerals, metals), yet the Crown contends that these issues are more appropriately dealt with as part of the settlement of land-based claims.⁴⁵⁷

⁴⁵⁶ Second Amended Statement of Claim for Ngati Kuri, Te Rarawa and Ngatiwai (28 September 2001) # 1.1(g), para 3.8.

⁴⁵⁷ Crown Statement of Response, # 2.256, para 143-144.

798. The claimants assert that this Tribunal is not prevented from making recommendations for return of natural resources including land, metal, minerals or flora and fauna as a means of redressing established contemporary breaches under this claim.

799. To the extent that the Tai Tokerau claimants are seeking rights and interests in relation to natural resources, refer to the individual Remedies section.

4.4.10 Does the Crown Minerals Act 1991 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

(a) Does the requirement under section 4 that all persons exercising powers and functions under the Act must have regard to the principles of the Treaty of Waitangi:

- (i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;**
- (ii) provide for control, regulation and development by kaitiaki of their relationship with the environment?;**
- (iii) ensure the preservation of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or**
- (iv) protect the transmission of that relationship from generation to generation among kaitiaki?**

800. No. This Treaty reference is of limited value to kaitiaki in the context of such a Treaty inconsistent regime. Moreover, the terminology of section 4 is at the weaker end of the spectrum, compared with, for example, the Conservation Act's section 4 (even though that section is given a minimalist interpretation by DOC). The general critique of these Treaty principle sections in comparable legislation can be applied in this context.

(b) Do the requirements relating to entry on to Māori Land for minimum impact activity as set out in section 51 protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

801. No. The section 51 restraint on entry applies to Maori land ownership as much as non-Maori land ownership, and is not derived from the Treaty relationship, but rather an adherence to private property rights. While it is conceivable that in the case of mineral extraction proposals on land owned by Maori, these provisions may provide some precaution, in reality the

dominance of the Crown over minerals as established by the Act renders the kaitiaki relationship with those minerals and the wider environment when extraction is proposed, to be only one factor to be taken into account.

Marine Mammals Protection Act 1978

4.4.11 Does the Marine Mammals Protection Act 1978 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

(a) Do the requirements in section 5 relating to applications for permits to take/import/export marine mammals or marine mammal products protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

802. No.

803. The section 4 Conservation Act Treaty Principles clause applies now with equal force to the Marine Mammals Protection Act ("MMP Act").⁴⁵⁸ This is despite the fact that the Department of Conservation, charged with administering the MMP Act, challenged the application of the Treaty of Waitangi to marine mammals in the Whale Watching litigation. Up until the 1995 decision, the Department had been reading its obligations with a literal interpretation and failing to incorporate Treaty principles in its decision-making. In practice therefore, kaitiaki were disenfranchised from their relationship with such taonga species as whales, dolphins and seals. In the case of Ngatiwai, it was through sheer determination from the iwi in establishing a working relationship with the Department that they were able to negotiate a whale protocol which recognised their interests as kaitiaki in those taonga.

804. Ngatiwai has acknowledged the efforts of DOC staff in achieving this protocol. Nonetheless, the evidence of Ngatiwai highlight a pattern of resourcing difficulties, compliance and health concerns, and resistance to their effective exercise of their tino rangatiratanga over whales. For example, Ngatiwai are not able to use whales freshly beached as a source of kai which was a traditional harvesting practice and whalebone, an ancient taonga of Ngatiwai, is still deemed to be owned by the Crown.

⁴⁵⁸ *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

805. With the Court of Appeal’s clarification of the application of Treaty principles, it is now possible (given the right attitude) for the Department to interpret its current management responsibilities as requiring true power sharing with their kaitiaki partners. In most cases, apart from the protection of the wellbeing of live whales, the kaitiaki interest is mainly directed at access and control over the allocation of bone from flensed whales. To that end, the kaitiaki interests do not overtly conflict with competing interests from other sectors of the community. One might cynically observe that it is this lack of conflict which has allowed the kaitiaki interests to be given effect. In the case of iwi expressions of interest to sustainable harvest of live whales, as recently expressed by Te Ohu Kai Moana representatives as being a traditional right of indigenous peoples, the potential for conflict with competing conversationalists meant that the kaitiaki interest was not so acceptable. Even in the case of dead whales, Ngatiwai’s evidence has shown continued resistance from authorities to providing decision-making authority to Ngatiwai for health and safety issues.
806. The Crown maintains its assumption of control over marine mammals “for the public good”. While gains have been made by iwi in the recognition of their interests, there is still a long way to go before tino rangatiratanga could be said to have been reclaimed.

Marine Reserves Act 1971

4.4.12 *Does the Marine Reserves Act 1971 provide effective protection of the kaitiaki’s relationship with the environment? Specifically:*

(a) *Does the ability of iwi or hapū to apply for an Order in Council declaring an area to be a marine reserve (section 5) protect the kaitiaki’s relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?*

807. No. It is inconsistent with the customs and values of the kaitiaki for the reasons set out below.
808. Similar principles to the Conservation Act apply in the context of areas of the coastal marine area which are being “carved out” for the protection of ecosystems. Whereas a preservationist ethic might support restrictions on

the harvest of species, the kaitiaki perspective requires continued access to those “protected areas” in order to sustain their relationship with the environment and maintain their matauranga and tikanga.

809. In broad terms, the following remain fundamental difficulties with the Marine Reserves Act in terms of its protection of the kaitiaki relationship with their environment:

809.1 The authority to make decisions to establish a marine reserve lies with the Crown partner, not the kaitiaki;

809.2 The kaitiaki values and customs are but one of a range of factors to be taken into account in the establishment of the maintenance of, or the revocation of marine reserves

809.3 The need for marine protected areas is clearly derived from the historical wastage and misuse of our fisheries resource. To that end, remedial action such as a marine reserve, while laudable, tends to restrict customary take as much as commercial or recreational take. Iwi, and their relationship with their environment, suffer twice over as they see their taonga being depleted beyond their control to make decisions to prevent it, and their customary access for kai (and the matauranga associated therein) restricted because of that depletion when a reserve is imposed;⁴⁵⁹

809.4 Traditional methods of ensuring the protection of the resource have been overlooked. Rahui and similar resource management methods, were and continue to be, an active part of the kaitiaki’s relationship with their environment.

810. The Marine Reserves Amendment Act is said to part of the Government’s response to implementing its obligations under the Convention on

⁴⁵⁹ Brief of Evidence of Haami Piripi, #P3, para 34; Transcript of Evidence of Haami Piripi. Brief of Evidence of Saana Murray, #D5 (in relation to toheroa and traditional kai). Brief of Evidence of Rapata Romana, #D2, p 6-12, 18-22.

Biological Diversity for the protection of marine ecosystems⁴⁶⁰. In that sense, article 8(j) of the CBD requires measures to ensure the inclusion of traditional knowledge and access and benefit sharing. It is against those principles that the Marine Reserves Amendment Act falls to be assessed.

Environment Act 1986

4.4.13 Does the Environment Act 1986 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

(a) Does the requirement for the Commissioner for the Environment (section 17) and the Ministry for the Environment (section 32) to have regard to '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' protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

811. No. It is inconsistent with the customs and values of the kaitiaki for the reasons above.

812. The inclusion of references to the interest of kaitiaki with their land, water, sites, fishing grounds or physical or cultural resources is of a similar nature to that contained in the RMA and the LGA, wherein the relationship of kaitiaki is but one of a range of factors to be taken into account by the decision-maker. In this case, decisions under the Environment Act 1986 rest with the Commissioner and Ministry functionaries. Regardless of Ministry initiatives to increase their own capacity to deal with and respond to Maori interests, the power imbalance remains and the Treaty relationship is flawed.

Overall Effect of Statutory Protections

4.4.14 If the answer to any of the above questions (4.2.1-10) is "yes", is the overall effect of these protections sufficient to meet the Crown's obligations as determined in the first component?

813. No. The answers above illustrate the claimants' view that there needs to be a *fundamental transformation* in the way the Crown and kaitiaki interact and

⁴⁶⁰ New Zealand Biosecurity Strategy (February 2000) #R8(c), p 67.. Refer also to commentary on the Marine Reserves Amendment Bill.

share responsibilities for the management of the environment. Such a transformation is consistent with the Crown's own objectives to encourage active participation in resource, biosecurity and conservation management. A new relationship based on good will, trust, effective partnership, good faith and the Treaty guarantee of tino rangatiratanga would not therefore disturb current management objectives for the environment, but would enhance those objectives.

814. One can point to several (albeit rare) instances of such relationships in New Zealand. A prime example is that of Rakiura Maori and Titi Islands, as discussed above. This restoration has had benefits for all parties concerned, including Maori, DOC, University Research projects, NIWA and even extending to international climate research based on the sharing of matauranga by Rakiura Maori on the migratory habits of muttonbirds.
815. Given the interconnectedness between the environment and matauranga/tikanga, decision-making authority resting with kaitiaki would ensure the development and protection of customs and values which can play a crucial role in meeting the challenges to the environment that we all face today.

Third Component Issues – Potential Remedies

816. Refer to Section H.

PART F(2): TAONGA SPECIES

First Component Issues – Crown Obligations

4B.3.1(a) *Must the Crown protect taonga species from use in a manner that is inconsistent with the customs and values of the kaitiaki?*

817. Yes. The interrelationship between the natural environment and the cultural, social, economic and physical well-being of tangata whenua, is reflected and managed through the customs and values of kaitiaki, that is, kaitiakitanga. Any uses that are inconsistent with these customs and values have damaging consequences for the well-being of tangata whenua and also the environment. This often includes irreparable spiritual damage.

818. It is submitted that the Crown has an overriding responsibility to protect taonga species from damage of both a spiritual and physical nature. In the *Te Arawa Representatives Geothermal Resources Report* (1993), the Tribunal referred to the Crown duty of active protection and noted that this applies to all interests guaranteed to Maori under Article II and among these, natural and cultural resources are of primary importance.⁴⁶¹ The Tribunal referred to the need to ensure that:

“Maori are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms.”⁴⁶²

819. The Tribunal also noted that:

“... the degree of protection to be given to Maori resources will depend upon the nature and value of the resource. In the case of a very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori, the Crown is under an obligation to ensure its protection (save in very exception circumstances) for so long as Maori wish it to be protected.”

820. It is our submission that ‘taonga species’ fall within this category. Extensive claimant evidence has been presented that illustrates the value attached to

⁴⁶¹ Waitangi Tribunal *Te Arawa Representatives Geothermal Resources Report* (Legislation Direct, Wellington, 1993) p 31.

⁴⁶² *Ibid*, p 31.

such taonga by tangata whenua. In addition, expert reports have noted this relationship. For example, James Feldman acknowledged in his report produced for the Tribunal the special relationship Maori cultivated with the kereru (also called the kuku or kukupa).⁴⁶³

821. It is submitted that the Crown has a duty to provide a high degree of protection for taonga species for so long as Maori wish it to be protected.
822. That said, while it is the claimants' view that the Crown must actively protect taonga species from use in a manner that is inconsistent with the customs and values of the kaitiaki, the claimants do not consider that the Crown should assume and execute that role itself. It is submitted that the Crown must ensure that kaitiaki themselves are able to protect taonga species from use in this manner and furthermore, the Crown must establish, in cooperation with its Treaty partners, the policies and procedures to enhance their ability to do so.
823. This is consistent with the Crown's Treaty obligation to actively protect taonga Maori and more fundamentally, the guarantee of tino rangatiratanga. Any action which would undermine or interfere with the Maori right to fulfil their obligations, and utilise their rights, as kaitiakitanga, is a direct breach of the Treaty of Waitangi.

(b) *If so, has New Zealand law and policy provided such protection?*

824. No. While there are some laws and policies that might be considered to protect taonga species generally (such as the prevention of the introduction of alien species which threaten ecosystems, habitats and species), these have not been designed with the objective of preventing use that is inconsistent with kaitiakitanga. Any protection of kaitiakitanga that might be argued as being provided by New Zealand law and policy has been, in the claimants' view, an inadvertent consequence. It cannot be considered to be an adequate discharge by the Crown of its Treaty obligations.

⁴⁶³ James W Feldman *Treaty Rights and Pigeon Poaching: Alienation of Maori Access to Kereru, 1864-1960* (Waitangi Tribunal Publication, Wellington, 2001) p vii.

825. As a general comment, Crown policies have had little regard for the traditional resource management practises exercised by tangata whenua.
826. In the context of the conservation estate, Crown policies have promoted the values of conservation and public access over recognition of kaitiakitanga. While these principles are far from inconsistent with kaitiakitanga, it is submitted that the Crown has refused to integrate the Maori world view and kaitiaki responsibilities into a culturally appropriate resource and conservation management framework;
827. At the local government level, there has been a largely inconsistent approach in which many local authorities have been unwilling to meaningfully engage with local iwi. Maori have been excluded from decisions, particularly the granting of resource consents that have resulted in irreparable harm to taonga species, and fundamentally undermined the spiritual value of specific flora and fauna or significant sites. It is submitted that the failure by the Crown to ensure iwi are able to exercise kaitiakitanga in local authority decision-making that affects taonga species is a breach of the Treaty principle of active protection. It is also noted that the Tribunal considered that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies.⁴⁶⁴

4B.3.2(a) Must the Crown provide for the control, use, development and regulation by kaitiaki of taonga species?

(b) If so, has New Zealand law and policy ensured such control?

828. Yes, the Crown must provide for the control, use, development and regulation by kaitiaki of taonga species. This is consistent with the Crown's obligation to protect tino rangatiratanga.
829. In the *Te Arawa Representatives Geothermal Resources Report*, the Waitangi Tribunal referred to the tribal right of self-regulation or self-management as "*an inherent element of tino rangatiratanga*", and this included a guarantee of "*tribal control of Maori matters, including the right*

⁴⁶⁴ Waitangi Tribunal *Te Arawa Representatives Geothermal Resources Report* (Legislation Direct, Wellington, 1993), p 32.

to regulate access of tribal members and others to tribal resources.”⁴⁶⁵

Further, the Tribunal noted that:

“... the cession of sovereignty or kawanatanga enabled the Crown to make laws for conservation control and resource protection, being in everyone’s interests... But this right is to be exercised in the light of article 2 and should not diminish the principles of article 2 or the authority of the tribes to exercise control. In short, sovereignty is said to be limited by the right reserved in article 2.”⁴⁶⁶

830. In the *Ngai Tahu Sea Fisheries Report*, the Tribunal also discussed the balancing of tino rangatiratanga and kawanatanga. The Tribunal considered this discussion further in the *Turangi Township Report* where it stated that:

“... if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent guarantees to Maori in Article 2, it should be only in exceptional circumstances and as with and overrides the fundamental rights a last resort in the national interest.”⁴⁶⁷

831. It is submitted that there were no circumstances presented in Crown evidence that met this threshold. Moreover, given the highly valued nature of taonga species to Maori, it is difficult to see how any type of national interest argument would override the Maori interest here.

832. In addition, the Crown has international obligations that are of relevance to this question. Article 10(c) of the Convention on Biological Diversity relates to the sustainable use of components of biological diversity and provides 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 practises that are compatible with conservation or sustainable use requirements.”

833. While the application of Article 10(c) is limited to customary use and therefore does not, arguably, extend to all possible uses of taonga species such as commercial use, it does lend support to the claimants view.

⁴⁶⁵ Ibid, p 32.

⁴⁶⁶ Ibid.

⁴⁶⁷ Waitangi Tribunal *Turangi Township Report* (Legislation Direct, Wellington, 1995) p 285.

4B.3.2(b) If so, has New Zealand law and policy ensured such control?

834. No. Historically, the Crown's policies and laws have not protected or facilitated kaitiakitanga, and have in many circumstances been an active bar to the practical expression of kaitiakitanga over taonga species. This includes many conservation policies implemented by DOC.
835. By way of example, the special relationship between tangata whenua and the kereru has already been referred to, including in the context of the report produced for the Tribunal by James Feldman. Yet Crown policies have prevented tangata whenua from exercising kaitiakitanga in relation to the kereru as it became a protected species in 1922. As a consequence, if tangata whenua wished to maintain their matauranga and customary practices, they had to contravene the law. Rapine Murray for Ngati Kuri gave evidence and admitted that he continued to harvest kereru despite the laws against it; he also admitted to the anguish that was caused by the fact that this potentially made him a criminal.⁴⁶⁸
836. In addition to DOC policies, another policy initiative may have significant implications in this area. New Zealand's draft bioprospecting⁴⁶⁹ policy, as set out in the public discussion document *Bioprospecting in New Zealand: Discussing the Options*,⁴⁷⁰ does not make provision for any control, use, development and regulation by kaitiaki of taonga species. While it is acknowledged that this work is still in the developmental phase, it is noted that the work completed thus far has narrowly defined tangata whenua interests and concerns to matters relating to the use of matauranga associated with taonga species. Mr Steel's evidence on behalf of MED refers to the issues to be resolved in the development of a New Zealand Bioprospecting Policy and makes no mention of tangata whenua interests in the regulation of taonga species.⁴⁷¹ This is of considerable concern to the claimants given the relationship between this policy initiative and the

⁴⁶⁸ Brief of Evidence of Rapine Simon William Nicholas Robert Murray, # D4, para 22-24.

⁴⁶⁹ Bioprospecting is also referred to as 'access to genetic resources and the fair and equitable sharing of the benefits arising out of their utilisation' or in short, 'ABS'.

⁴⁷⁰ Brief of Evidence of Mark Steel, # R16 (ff).

⁴⁷¹ *Ibid*, para 346-8.

matters covered in the claim. While the claimants are cognisant that matauranga can be highly valuable in identifying sources of new products derived from genetic resources, we must be emphatic in highlighting that tangata whenua interests extend beyond this.

4B.3.3(a) Must the Crown ensure the preservation of knowledge and practices related to taonga species in the hands of kaitiaki and the transmission of that knowledge and those practices from generation to generation among kaitiaki?

(b) If so, does New Zealand law and policy provide for such preservation and transmission?

837. Yes. However, the Crown's duty extends further than preservation and transmission to include protection of the holistic values that underpin the knowledge and practices related to taonga species. It is this protection which is vital for the preservation of cultural identity. There are considerable parallels between this issue and matters covered in the *Te Reo Maori Report*.

838. In addition, the claimants wish to emphasise that a broad range of factors beyond tangata whenua control have had an impact on the preservation and transmission of matauranga. The loss of a species has a direct relationship with the loss of matauranga and vice versa. Restrictions on access has also have a direct relationship with the loss of matauranga.

839. The loss of matauranga through Crown policies that prevent access and use of taonga species has been a central motivation of all claimants in Wai 262 and is a very real concern that must be dealt with immediately before more knowledge is lost.

840. It is also noted that New Zealand has obligations under international instruments in this regard. Article 8(j) of the CBD provides 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 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.”

4B.3.3(b) If so, does New Zealand law and policy provide for such preservation and transmission?

841. To a very limited extent. In her evidence, Ms Johnston referred to DOC’s Matauranga Kura Taiao Fund which is a contestable fund aimed at:

...supporting tangata whenua and Maori initiatives to increase Maori capability to retain and promote traditional Maori knowledge and its use in biodiversity management. It also helps increase tangata whenua participation managing biodiversity in their rohe and recognises that the use and protection of traditional knowledge is central to Maori participation in biodiversity management and to achieving good conservation outcomes.⁴⁷²

842. It is the claimants’ view that a contestable fund cannot be considered an adequate discharge of the Crown’s obligations to protect matauranga. Also, the scale and scope of this initiative does not reflect the significance of matauranga as a taonga.

Second Component Issues – Existing Law

4B.4.1 Has the Crown assumed regulatory control of the environment without making sufficient provision for protection of (severally) Te Rarawa, Ngāti Kuri and Ngāti Wai’s relationship with and kaitiakitanga over species such as those identified by Te Rarawa, Ngāti Kuri, Ngāti Wai as taonga species in Schedule 1?

843. Yes.

844. This was recognised by Geoff Park in his report for the Waitangi Tribunal which discussed the Crown’s policy over wetlands in particular:

“The way the Crown used its legislative and policy prerogative in New Zealand to confer rights explicitly on those who drained wetlands and eliminated their indigenous flora and fauna, and deny Maori their customary interests in the same wetlands, is a classic example of [the traditional Western world view of wetlands as wastelands] in effect.”⁴⁷³

⁴⁷² Brief of Evidence of Doris Hazel Johnston, # R8, para 92.

⁴⁷³ Geoff Park *Effective Exclusion? An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912-1983* (Waitangi Tribunal Publication, Wellington, 2001) # K4, p 28.

845. As Dr Park illustrates in detail in his report, the destruction of precious wetlands is simply one example of Crown assumption of control dominated by a Pakeha world view that has little understanding, and as a result no place for, the important Maori understanding of the environment and their responsibilities as kaitiaki. This was in the face of explicit expressions of concern and objection by Maori.

846. In the context of National Parks, Dr Park explains the Pakeha-dominated nature of the concept of national parks:

“National parks in New Zealand are fundamentally about viewing of otherwise experiencing nature’s ecosystem as a visitor. They actively exclude human habitation or use in any other form. Thus, the relationship between the national park idea and the indigenous flora and fauna is very different from that which is implicit in the rangatiratanga principle of article 2 of the Treaty of Waitangi and its guarantee to Maori in respect of natural resources: the right to continue a relationship with those resources that was as much about their right to use as about their conservation.”⁴⁷⁴

847. As a result of this dominate conservation ethos, national parks are founded on a concept which inherently excludes effective exercise of kaitiaki. No provision was made for the integration of kaitiakitanga within the national parks regulatory scheme.

Ngati Kuri

848. In their management of pupuharakeke Nellie Norman explained to the Tribunal the importance to Ngati Kuri of gaining a meaningful role in management and decision-making in regards to taonga species:

“... it is NOT appropriate that DOC control the decision-making on access without the full involvement of Ngati Kuri. Ngati Kuri are the rightful decision-makers on issues concerning our taonga tuku iho. This is because Ngati Kuri loses the opportunity to gain our own knowledge about the taonga, and they lose the ability to access our important ancestral lands (now in the conservation estate) for our own food, medicine and other purposes.”⁴⁷⁵

849. Nellie further elaborated when presenting to the Tribunal:

⁴⁷⁴ Ibid, p 330.

⁴⁷⁵ Brief of Evidence of Nellie Norman (11 August 2006) Wai 262, Doc # P6, p 2-3.

“The first issue is the fact that while the protection of pūpū harakeke by restricting access to the public in certain areas, it is sometimes necessary to protect the survival of the pūpū harakeke, it is not appropriate that DoC control the decision-making on access without the involvement of Ngāti Kuri. Ngāti Kuri are the rightful decision-makers on issues concerning out taonga tuku iho.”⁴⁷⁶

850. For Ngati Kuri the exclusion they are facing, particularly where DOC has barred them from access to traditional lands which has prevented access to important taonga species, has directly lead to the loss of irreplaceable traditional knowledge.

851. In relation to the gathering of flax for weaving, Mereraina Uruamo gave evidence:

“There have been fences put up by the Department of Conservation who now assert ownership of the areas where we traditionally gathered these fibres. They are fenced in places like Spirits Bay. We need keys from DOC to get in there.

Many of our women could not drive and therefore couldn't go anywhere else to gather their flax. This left many of the many [sic] of the Maori women feeling let down and isolated. These areas were the traditional gathering grounds of fibres. These fibres needed to be gathered seasonally. In the gathering of these fibres we exercised conservation principles. Although things are taken from the plant it is for the purpose of ensuring it is nurtured and not being neglected. It is important to cut the outer leaves of the Harakeke especially, otherwise it will strangle and kill the roots in the middle.

852. Because our Maori women had difficulties in gathering enough fibres they couldn't get enough to establish an economic base from their weaving. This put a lot of our Maori women off pursuing weaving.”⁴⁷⁷ Further, for those who refuse to desist in the exercise of their traditional rights and customs, they are forced to breach the law, as Rapine Murray explained to the Tribunal:

“My family continue to harvest the kuaka today, even though it is prohibited by the Wildlife Act. It is said in one sense that we could end up being criminals when what we are doing is preserving the traditions that our tupuna have undertaken since they arrived here in Aotearoa.”⁴⁷⁸

⁴⁷⁶ Nellie Norman evidence to the Tribunal (22 August 2006) Wai 262, Transcript p 25.

⁴⁷⁷ Brief of Evidence of Mereraina Uruamo, Wai 262, Doc # D7, p 4.

⁴⁷⁸ Brief of Evidence of Rapine Simon William Nicholas Robert Murray, # D4, p 5.

853. The hurt and suffering that was caused by the barring of Maori from collecting kuaka has been expressed to the Tribunal by Ropata Romana:

“But the hardest one of the lot though was when the Crown stopped us from taking our Kuaka. There were Rangers who tried to stop us. When the Crown tried to stop us from eating the Kuaka I thought that was beyond the limit. The Crown made a law to stop us from shooting or taking the kuaka home for our families

All of these foods were part of our livelihood. Our old people depended on the kuaka. My Aunty would say “te reka te kai o te wai o te kuaka, o Sonny hoa” to her husband who was the greatest hunter of kuaka I knew.”⁴⁷⁹

854. Ngati Kuri object to the requirement that they get a permit to access their traditional kai and fulfil their kaitiaki obligations. This is a direct contravention of section 4 of the Conservation Act, and a breach of the Treaty of Waitangi.

Te Rarawa

Kumara

855. As mentioned above, the kumara is symbolically important to the Wai 262 claim.
856. The reasons for Mrs Wihongi and her colleagues travelling to Japan to bring back the kumara was their concern for the “mauri and whakapapa” of those kumara. She, and the other Maori elders who accompanied her, were concerned that these native varieties of kumara were being held in a foreign country and should be brought home. The collection returned to New Zealand included the rekamauroa, hutihuti and taputini, all known to be pre-European varieties. The remaining four cultivars are varieties of the waina variety, which is thought to have been imported to New Zealand from America around 1819. Dr Douglas Yen, who had embarked on collecting all early varieties of kumara in New Zealand (and the Pacific) in the 1950s, considered kumara to be one the greatest agricultural achievements of the

⁴⁷⁹ Brief of Evidence of Ropata Romana, # D2, p 4.

early Maori because they had successfully adapted the growing of kumara from a sub-tropical to a temperate climate.⁴⁸⁰

857. Dr Gould was critical of Maori for having failed to exercise their kaitiaki responsibilities by preserving the native varieties of kumara. However, under questioning Dr Gould agreed that the only reason Dr Yen was able to collect native varieties of kumara in the 1950s was because they were still being grown by Maori gardeners. In fact, Dr Yen's reports provide clear evidence that practically all his collections were sourced from Maori growers.

Dr Gould's Evidence (#R35)

858. Although Dr Gould's evidence is substantial, serious doubt was cast on his main conclusions, including the claim by him that Mair introduced the rekamauroa variety to New Zealand after 1840. The rekamauroa and hutihuti varieties are genetically identical. Essentially, Dr Gould's argument is that of the three native varieties of kumara brought from Japan in 1988, only the taputini is a pre-European variety. He relies on a private letter from Mair to his nephew and statements in articles written by the amateur ethnographer, Mr Ben Keys, to support his conclusion that the "legitimate historical doubt" exists about the provenance of rekamauroa. However, Keys himself cast serious doubt on the veracity of Mair's claim, as Mair had a well-known habit of making false claims to having introduced trout, frogs, and carp into Lake Rotorua. However, under cross-examination Gould conceded that Mair's claims were to be "*considered cautiously*"⁴⁸¹.
859. Dr Gould also conceded in the cross-examination that the views of Maori at the time of Mair's claims were not recorded. Keys, on the other hand, had written that Mair's claims were "*not substantiated*" by Maori.
860. Under cross-examination Dr Gould further conceded that in writing his report (which had taken place over a ten year period), he had not consulted

⁴⁸⁰ Dr Ashley Gould *Kumara in New Zealand: Some Issues and Observations*, #R35: in particular, the development of storage techniques that enabled the kumara to survive through the cold winter months.

⁴⁸¹ Transcript of Cross-Examination of Dr Gould (31 January-1 February 2007).

with any of the known Maori experts on kumara, such as Dr Mere Roberts, and nor had he spoken with the key claimant, Mrs Wihongi. When queried on this, Dr Gould responded that these were witnesses for the claimants and that it was not his role as an expert for the Crown to be speaking with them. On the other hand, Dr Gould had gone to considerable lengths to consult with a range of other experts, scientists and academics about the kumara, including contacting Dr Yen (who now lives in Hawai'i) on several occasions. The admission from Dr Gould that he avoided talking to Maori experts cast doubt on the balance and overall accuracy of his report.

861. The three Document Banks of source material relied on by Dr Gould and filed with the Tribunal at the request of counsels provide much illuminating background information on the events leading up to, during, and after the return of the kumara from Japan. Among other things, this material highlights the cultural, spiritual and scientific significance that all parties have associated with the project to return the kumara. These parties included scientists from the Department of Science and Industrial Research, Dr Yen himself and the Japanese Ministry of Agriculture.
862. The bundle of documents also shows that Dr Yen and other DSIR scientists in the mid 1980s and early 1990s believed that these early varieties were either extinct or close to it. In questioning, Dr Gould also conceded that Mrs Wihongi and other Maori attending the hui at Rehua marae in 1988 had reason to believe that these early native varieties of kumara had become extinct in New Zealand, which was why they travelled to Japan to bring them back.⁴⁸²
863. During an exchange with the Chief Judge, Dr Gould agreed that the kumara is a taonga and that the appropriate test is not whether it is indigenous but is in the strength of the cultural affiliations to that taonga:

“CJ Taonga is as a taonga does, I suppose.

⁴⁸² See Dr Yen letter 8 November 1988 where he states that his work in gathering the native varieties was to ensure “*the preservation of the remaining Maori kumara in the 1950s*” and that “*I perceived it was my scientific duty to ensure the preservation of the sweet potato.*”

AG Yes taonga does not have to be old. You could point to a new-born child and say that child is a taonga. I don't think age is necessarily definitive of taonga. But it's the associations, what it means to the people who provide the definition, I guess that's the ultimate thing.

CJ Yes. I guess that's the real test. The strength of cultural, spiritual or other associations of the thing being claimed. Is the claim contrived, or is it real? That's the real question for us.⁴⁸³

864. Correspondence in Volumes 1-3 also illustrates the positive working relationships developed between Mrs Wihongi's Pu Hao Rangi Trust and DSIR, and more recently Crop and Food Research Ltd. The Memorandum of Understanding between Crop and Food and Pu Hao Rangi Trust provides recognition of the rangatiratanga and kaitiakitanga (control and guardianship) over the 'Japan collection' and the terms on which collaboration on research and the distribution of the kumara are to occur.

865. Dr Gould also agreed during cross-examination that the post-European waina varieties of kumara had been grown almost "exclusively" by Maori immediately after their introduction to the country. He also agreed that Maori knowledge of the kumara and in particular the storage techniques, would have been vital to the survival and development of the new varieties of kumara after their introduction. Although he suggested other techniques for cultivating kumara developed in America and Europe may have been known about, there is no evidence to show that they were in use in New Zealand in the early part of the 19th century.

Conclusions

866. The following conclusions can be drawn:

866.1 Kumara are a taonga of the Tai Tokerau claimants in particular and Maori generally;

866.2 Mrs Wihongi and the other claimants had good reason to believe in 1988 that they were travelling to Japan to bring home native

⁴⁸³ Transcript of Cross-Examination of Dr Gould (31 January-1 February 2007), pp 133-134.

varieties of kumara that were no longer being grown in New Zealand;

866.3 Considerable doubt has been cast on the probity of the ‘evidence’ relied on by Dr Gould to support his claim that rekamauroa and therefore hutihuti varieties of kumara were introduced by Gilbert Mair to New Zealand;

866.4 the post-European varieties of kumara, more especially the waina variety introduced about 1819, were grown almost exclusively by Maori who thus contributed significantly to the early development and growth of the commercial kumara-growing industry in New Zealand;⁴⁸⁴

866.5 Since 1988, Mrs Wihongi on behalf of the Tai Tokerau claimants and the Pu Hao Rangi Trust have exercised her rangatiratanga rights and kaitiaki responsibilities in relation to the returned collection in accordance with tikanga Maori and in a spirit of Treaty-based partnership with various Crown agencies and private sector interests.

867. The Findings and Recommendations that are sought in relation to kumara are set out in Part H of these submissions.

868. The research currently being carried out by scientists at Massey University to determine the genetic inheritance of the rekamauroa and other kumara may or may not determine its provenance. Whatever the outcome of this research, the claimants assert that all varieties of kumara, including rekamauroa and waina, are taonga protected by the Treaty of Waitangi.

Number	Description/Name	Provenance
Yen 500	Owairaka Red	European pre-1900

⁴⁸⁴ For example, in the Waitangi Tribunal’s Wellington District inquiry the claim was made that they had cultivated 800 acres of land in the Hutt Valley before and after 1840, and sold their crops to the “thriving markets in Wellington”: Waitangi Tribunal *Te Whanaganui a Tara me ona Takiwa: Report on the Wellington District* (Legislation Direct, Wellington, 2003) p 220.

Yen 500 1-1	Tauranga Red	European pre-1900
Yen 502	Gisborne Red	European pre-1900
Yen 503	Waina-European	European pre-1900
Yen 504	Owairaka Pink	European pre-1900
Yen 508	Reka maurua	Maori pre-European
Yen 512	Hutihuti	Maori pre-European
Yen 513-1	Taputini	Maori pre-European
Yen 513-2	Taputini	Maori pre-European

Wetlands

869. As discussed above in relation to the research of Geoff Park, the Crown's support for the destruction of wetlands has caused irreparable harm to important ecosystems throughout New Zealand. The rohe of Te Rarawa in particular has suffered from this Crown policy. Haami Piripi for Te Rarawa explained to the Tribunal:

“The Hokianga harbour as an estuarine ecosystem provides a strong temptation to turn wetlands into grass paddocks. There are numerous sites of reclamation along the northern shores of the Hokianga Harbour from Motukaraka to Motuti, which have been very destructive of flora and fauna, with reclamation continuing through the 1970's. On the western seaboard, square miles of pristine native forest were stripped bare exposing even more land to the prevailing westerly wind bringing with it a massive problem of sand erosion and environmental destruction. Tauroa Peninsula is sandswept and desolate, where once it was rich with species. Land has been laid bare further up the west coast between Ahipara and Muriwhenua, and this has extended right across the rohe of Te Rārawa into the areas of Takahue.

Associated with the habitat destruction has been the exterminating of scores of native species on land and in water. The consequent impact upon Te Rārawa communities was devastating because having already had land taken for Europeans, their capacity for survival was further exacerbated by a huge loss of staple food resources. Those effects today are a reality for those of us in Te Rarawa in terms of our ability (or consequent lack of) to exercise our kaitiakitanga.

Nowhere is this more apparent than in the destruction of the Tangonge wetlands which spread across miles of lowland. Local authorities have had a primary role in this destruction and have continued to impose their land and water utilisation regime using the weight of a raft of national

legislation and policies to bully their way past the objections of Te Rārawa people and communities. As late as 2005, draining of these wetlands – the largest natural lake in the region – was continuing, with enormous kauri logs being discovered and commercialised in the process. The land comprises a Landcorp farm, an SOE of the Crown.”⁴⁸⁵

Ngatiwai

870. For Ngatiwai the kiore is a taonga species of particular importance, brought to New Zealand by the original ancestors to arrive in New Zealand. As a result of the whakapapa associated with the kiore, it has a fundamental place in the culture of the Ngatiwai people. Nonetheless, this is something that DOC has been unable to understand or appreciate. The kiore eradication programmes have gone ahead despite repeated objection by the Ngatiwai Trust Board. Hori Parata explained to the Tribunal:

‘DOC has continued with its eradication programme of the kiore from the offshore islands despite objections and court action by Ngatiwai in 2002 regarding eradication of kiore from Hauturu. Ngatiwai acknowledge that there are issues with the kiore affecting other native biota and want to find a fair and balanced solution. One such solution for Ngatiwai would be to relocate the kiore to another offshore island. This option had been discussed and initially agreed to be DOC back in 2002 when it was proposed to relocate the kiore from Hauturu to the smallest of the Marotere Islands (Hen and Chickens) but then DOC changed its mind saying that the kiore was a registered pest and could not be put onto any Crown reserve. Kiore is a taonga of Ngatiwai of which we are kaitiaki. We would like to retain the kiore so that we could sustain, control and harvest the kiore which was traditionally an important kai for our people - *Te kai o te Rangatira*. More importantly the kiore was brought here by our ancestors so has been on these islands for over a thousand years. It deserves a place it can call home too.’⁴⁸⁶

871. Himione Peter Munroe, in his original evidence to the Tribunal stated that:

“DOC’s role is to assist us to maintain our kaitiaki role for our taniwha. They are not there to take over that role – merely to assist us in fulfilling our traditional roles. We’re not here to teach DOC how to become experts in our ways.”⁴⁸⁷

872. Mr Munroe’s statement clearly sum up the claimants perspective on the Crown’s role regarding taonga species: the Crown is there to assist Maori in

⁴⁸⁵ Brief of Evidence of Haami Piripi (11 August 2006) # P3, p 6-7.

⁴⁸⁶ Brief of Evidence of Hori Te Moanaroa Parata (14 August 2006) # P31, p 2-3.

⁴⁸⁷ Brief of Evidence of Himiona Peter Munroe, #B11, p 13.

fulfilling their obligations as kaitiaki. It is not the role of the Crown to manage and control resources with token inclusion or consultation of Maori. Maori must control all things Maori. In the past this has not occurred, but as will be shown in the remedies section, meaningful engagement is both necessary and possible.

Third Component Issues – Potential Remedies

873. The potential remedies relating to this section are dealt with in detail in Part H of these submissions.

PART F(3): RONGOA

Definition

874. The definition of rongoa for the Statement of Issues is:

“Rongoa includes the medicinal properties of the flora and fauna used as rongoa or as components of rongoa, including the products therefrom (resulting from human and/or natural processes), where they are used by kaitiaki as rongoa; and further includes the tikanga, matauranga, and practices utilised to create, transmit or protect rongoa, or that are otherwise associated with rongoa.”⁴⁸⁸

875. The definition draws on the following key components of rongoa Maori:

875.1 The rongoa resource itself, derived from the medicinal properties of the flora and fauna;

875.2 The products of rongoa (whether produced by human or natural processes);

875.3 The fact that rongoa Maori is as used by kaitiaki as rongoa;

875.4 The fact that the plant material and the rongoa products are interconnected with the tikanga, matauranga and practices associated with rongoa.

876. Because rongoa relates to both matauranga and to the natural resources, much of what is covered by the Statement of Issues in this Part has been traversed in the context of the obligation of the Crown to protect the use of matauranga in a manner inconsistent with the tikanga of the kaitiaki, or the relationship of kaitiaki with their environment. The same principles are said by the claimants to apply to rongoa.

877. The protection of rongoa has been a central part of the claimants’ case for Te Tai Tokerau, and a central reason why both Mrs Saana Murray for Ngati Kuri and Mrs Del Wihongi for Te Rarawa were focused on the protection of

⁴⁸⁸ Statement of Issues, page 83, para 4C.1.1

their natural resources and their matauranga. Other claimant evidence supplemented that aspiration, aspects of which are drawn on in this section.

First Component Issues – Crown Obligations

4C.3.1(a) *Must the Crown protect rongoa from use in a manner that is inconsistent with the customs and values of the kaitiaki?*

878. Yes. The Crown must protect rongoa from use by non-kaitiaki in a manner which is inconsistent with the tikanga and values associated with that rongoa. Matauranga Maori is a taonga of the claimants. Rongoa is a part of that matauranga, but also encompasses the indigenous flora and fauna as well. The Treaty obligations on the Crown of active protection of taonga and the guarantee of tino rangatiratanga extends to ensuring that the taonga can be controlled, used, regulated or developed in a manner which is consistent with the tikanga and customs associated with those taonga.

879. The Waitangi Tribunal in the *Napier Hospital and Health Services Report* (2003) accepted that various components of customary health knowledge and healing practice constituted taonga, or cultural assets:

“They connect with fundamental values, in particular, the concepts of mauri (life essence) and wairua (spirituality). The taonga include three general types of resource:

- Associations of place, such as wai tapu (protected sources of water);
- Access to materials used for healing, such as rongoa (medicinal flora); and
- Specialist knowledge of healing, in particular the technical and spiritual knowledge possessed by tohunga or traditional healers.”⁴⁸⁹

880. The Napier Hospital Tribunal also found that whether such taonga were held by particular hapu or groups of hapu, or had evolved into a more generalised

⁴⁸⁹ Waitangi Tribunal *Napier Hospital and Health Services Report* (Legislation Direct, Wellington, 2003) p 49.

practice, their status is no less valid as a taonga: “*Whether of local or wider currency, such taonga are subject to a duty of protection by the Crown.*”⁴⁹⁰

881. There is an important rationale to this requirement, beyond the simple application of Treaty principles. When matauranga related to rongoa is taken out of its cultural context there are significant risks in terms of health and wellbeing to the user of that knowledge, to the recipient of the rongoa and to the integrity of the knowledge itself.

882. Robert McGowan summarised the issue in these terms:

“The differences in approach by Western science (Bio-Prospectors etc) to a medicinal plant from the approach of a traditional healer. The former focus on the active components of a plant, without a sense of responsibility to the resource itself or its environment. The healer sees the plant as having a *mauri*, and connections and inter-relationships with other species and other mauri.

To be acceptable to traditional peoples, scientific research must begin with an acknowledgement of *mauri*. This provides a broader framework within which scientific research may take place.”⁴⁹¹

883. Claimant evidence has been consistent in its portrayal of rongoa as encompassing the following elements:

883.1 The tapu nature of the matauranga, creating obligations on both the practitioner and patient;

883.2 The primary purpose of rongoa being the enhancement of wellbeing of the patient, and the patient’s wider whanau;

883.3 The availability of rongoa to all based on the key principle of manaakitanga;

883.4 The inconsistency between rongoa Maori and the commercialisation of rongoa, given that practitioners adhere to a

⁴⁹⁰ Ibid.

⁴⁹¹ Brief of Evidence of Robert McGowan, #L6, paras 5-6.

strict understanding that their gift and resource is not for their own monetary gain.⁴⁹²

884. Mr Wi Keelan, Chief Maori Advisor to the Ministry of Health, was asked under cross examination about a number of these principles and whether they were relevant to the activities of the Ministry of Health. He agreed that similar issues had been raised in the Ministry's consultation on the Rongoa Development Plan.⁴⁹³
885. However, and consistent with those principles, an application of the principle of tino rangatiratanga (and the Treaty principles of development and options) would lead to the conclusion that practitioners have the right to consider the development of their rongoa in the commercial context, as long as the cultural imperatives associated with rongoa are maintained and that control of the rongoa is kept with the kaitiaki of that knowledge.

Mauri – Wellbeing

886. These submissions have sought to highlight the connection between wellbeing (mauri) on the one hand, and effective control and access to the resources of the Maori world, and effective participation in society, on the other hand.
887. Professor Mason Durie has drawn together in one text his range of writings on aspects of Maori health in the book *Mauri Ora – The dynamics of Maori health*.⁴⁹⁴ Useful for the purposes of these submissions are the 'Foundations of Maori Health' which he identifies in chapter 2, along with the Indicators and Risks of Health for each Foundation.⁴⁹⁵
- Te Ao Hurihuri – society and the economy;
 - Te Ao Hou – lifestyles;

⁴⁹² Brief of Evidence of Raukura Robinson, #A32; Evidence of Hema nui a Tawhaki Witana, #A27; Evidence of Robert McGowan, #L6.

⁴⁹³ Transcript of Cross-Examination of Wi Keelan (Crown Week 4) pp 187-188.

⁴⁹⁴ Mason Durie *Mauri Ora – The dynamics of Maori health* (Oxford University Press, Auckland, 2001).

⁴⁹⁵ *Ibid*, p 35ff.

- Hikoi tangata – Journeys;
- Te Ao Maori – identity;
- Mana Ake – uniqueness.

Foundations for Health	
Foundation	Indicators and Risks
Te Ao Hurihuri Society and the Economy	Housing Education Employment and Income Justice
Te Ao Hou Lifestyles	Smoking Gambling Injuries Recreation and Leisure Nutrition Alcohol and Drug use
Hikoi tangata Journeys	Collective histories Forces of colonisation Terms of participation in society
Te Ao Maori Identity	Access to the Maori world Culture Heritage Whanau
Mana Ake Uniqueness	Genetic endowment Personality and temperament Personal Journeys

888. Durie draws attention to the connection between the health of indigenous peoples and the history of their colonisation experience which has led to a loss of resource and a lack of participation in society:

“Health is determined by the past as well as the present. While socio-economic circumstances and modern lifestyles have more obvious and immediate effects, the health status of indigenous peoples has been strongly influenced by the experience of colonisation and the subsequent efforts to participate as minorities in a contemporary society while retaining their own ethnic and cultural identities. Colonial journeys may have lead to innovation and adaptation but they also created pain and suffering from which full recovery has yet to be felt.
When there is a loss of the resources necessary to sustain well being

and a loss of standing in terms of full participation in society and the economy, health too is threatened.”⁴⁹⁶ (emphasis added)

889. The legacy of this colonial history continues to affect Maori health today and is reflected in the low incomes and other markers of poor socio-economic status. Durie’s conclusions are supported by the respected research of Te Ropu Rangahau Hauora a Eru Pomare:

“Any discussion of health of Maori today must take into account New Zealand’s colonial history. The arrival of the Pakeha not only brought disease, conflict and dispossession, but also caused the destruction of belief and value systems.”⁴⁹⁷

890. The Tribunal has found an obligation on the Crown in terms of its fiduciary duty to ensure that where Maori have been adversely affected by the process of colonisation, it must correct that imbalance by affirmative action.⁴⁹⁸

(b) *If so, has New Zealand law and policy provided such protection?*

891. The cross-examination of Mr Keelan revealed explicitly that despite recognition by the Ministry of the importance of ensuring that rongoa is practiced in a manner consistent with its tikanga, customs and matauranga, there remains no Ministry of Health legislation or policy which provides such protection. Rongoa can be practised by anyone who derives Matauranga from books and the public domain, with no onus on the practitioner to adhere to the tikanga associated with that Matauranga. Nor is there any current policy, or even any proposed Ministry policy, to ensure that such practice does adhere to tikanga and customs.

4C.3.2(a) *Must the Crown provide for the regulation and control by kaitiaki of rongoa, including control over who may access rongoa?*

(b) *If so, has New Zealand law and policy ensured such control?*

⁴⁹⁶ Ibid, p 48.

⁴⁹⁷ Eru Pomare, Vera Keefe-Ormsby, Clint Ormsby, Neil Pearce, Paparanga Reid, Bridget Robson, Naina Watene-Haydon, *Hau Ora – Maori standards of health IV [A study of the years 1970-1991]*, [Te Ropu Rangahau Hau Ora Eru Pomare, 1995].

⁴⁹⁸ Waitangi Tribunal *Radio Spectrum Management and Development Final Report* (Legislation Direct, Wellington, 1999) pp 51-52.

892. Yes, the Crown must provide for kaitiaki control and regulation over their rongoa. The claimants have provided clear evidence that rongoa is a taonga to them. The Treaty guarantees to them their continued tino rangatiratanga over their rongoa. Rongoa includes the practice of rongoa and the matauranga associated with rongoa.
893. At present Maori have no control over their rongoa practice to the extent that it is not regulated by the Medicines Act 1981, and can be practiced by anyone without recourse back to the tohunga or kaitiaki of that knowledge. Any practice of rongoa that goes beyond the ‘practitioner-patient’ relationship, including any practice of rongoa for commercial benefit, is beyond the control of kaitiaki.
894. In addition, the kaitiaki have lost their traditional control mechanisms over those who can practice rongoa and the manner in which they practice the rongoa. Whereas, within custom only tohunga who had the requisite training and knowledge could undertake rongoa, it is now beyond the control and regulation of kaitiaki to prevent any member of the community (including the global community) from using that knowledge. Even traditional systems of the transmission of that knowledge through wananga have been disestablished or undervalued, and are certainly no longer the controlling or regulating mechanisms that they once were within tikanga.⁴⁹⁹
895. The question also raises the issue of access to rongoa. The claimants submit that a fundamental aspect of rongoa practice is the ability to source indigenous flora from the ngahere in circumstances, timing and from places which are appropriate to the practitioner, and with full ability to exercise the appropriate tikanga associated with the extraction of the species. Robert McGowan concludes in his thesis on Traditional Maori Medicine:

“One of the obstacles highlighted in this thesis is the separation of the vast majority of Maori from the natural world, *Te Wao nui a Tane*, which is source of the knowledge and identity which is the foundation of *Maoritanga*. If the bush has disappeared or is greatly modified and degraded how is something like *rongoa Maori*, which depends not just

⁴⁹⁹ For example, Brief of Evidence of Raukura Robinson, #A32, para 3.1. Brief of Evidence of Hema nui a Tawhaki Witana (Del Wihongi), #A27, paras 5-8.

on knowledge of the bush, but having a living connection with it, going to survive?”⁵⁰⁰

896. The Crown does not appear to dispute the connection between the access to the rongoa species, and the practice and matauranga of rongoa.
897. This is why the access to the conservation estate is such an important issue for the claimants who have witnessed significant parts of their rohe becoming inaccessible to practitioners because of Crown conservation management policies which prefer the ‘preservationist’ ethic rather than the ethic of sustainable use. The claimants say that practitioners must have access to their rongoa resources, and be able to control access in the sense of being able to determine themselves when certain resources can be harvested, and for what purpose. That is what tino rangatiratanga requires. In the words of Mrs Del Wihongi:

“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.”⁵⁰¹

898. The claimants recognise that there needs to be a balance struck with other users of the conservation estate, and with other principles of conservation management applied by the Department. However these issues are not irreconcilable. This can be achieved by way of appropriate consultation mechanisms with DOC, and protocols establishing a balance between practitioners and the Department. The essence of this claim however, is in the way in which that balance is negotiated and implemented. They seek a nation where kaitiaki have decision-making authority, rather than having to come to the Department ‘cap in hand’ when access to the conservation estate for rongoa is required. That is the nature of the ‘transformation in relationship’ between tangata whenua and the Crown as sought by this claim. It concerns the redefinition of the terms of engagement between the Treaty partners.

⁵⁰⁰ Robert McGowan *The Contemporary Use of Rongoa Maori – Traditional Maori Medicine* (A thesis submitted in partial fulfilment of the requirements for the Degree of Master of Social Science in Anthropology, University of Waikato February 2000) #K11, p 125.

⁵⁰¹ Brief of Evidence of Del Wihongi, #A27, para 84.

4C.3.3(a) Must the Crown ensure the preservation, development, use, control and regulation of the practice of rongoa in the hands of kaitiaki, the kaitiaki's access to rongoa, and the transmission of Mātauranga in respect of rongoa from generation to generation among customary kaitiaki?

(b) If so, does New Zealand law and policy provide for such preservation, access, development and transmission?

899. Yes, part of the Crown obligation to protect the taonga that is rongoa, and the mātauranga and resources associated with its practice, is the obligation to ensure that the transmission of mātauranga from generation to generation continues. That transmission must be based in the customary methods of wānanga, where the obligations of tapu, manaaki, and whanaungatanga are able to be transmitted, learnt and respected.

900. Traditional healer Robert McGowan was called by the Tai Tokerau claimants to provide expert evidence and he submitted his Masters thesis for the Record of Inquiry: *The Contemporary Use of Rongoa Māori: Traditional Māori Medicine*. The thesis discusses the range of publications on rongoa which have all, in their own way, made a contribution to the retention of traditional Māori medicine:

“However, it is interesting to note that many Māori view them with some misgiving. There is more to the medicinal properties of a plant than the combined effect of the chemicals it contains. Lists of recorded uses of plants, compiled by people who have little or no personal experience of the use of those plants, even complemented by a register of the bioactive compounds identified by chemical analysis does little justice to traditional knowledge and to the culture and traditions out of which that knowledge developed. One of the most consistent themes that came through in my working with *kaumatua* and traditional healers, is that the foundation of *rongoa Māori* is *taha wairua* ‘spirituality’; not *wai rakau* ‘herbal medicine’. The place of *karakia* and *tikanga* – the appropriate rituals and traditions – is essential. Yet one would not gain that impression from the publications just described.”⁵⁰²

901. Earlier submissions are relevant in this context of the lack of Crown legislation or policy which protects publications on matters of mātauranga Māori such as rongoa entering the public domain without ensuring that they

⁵⁰² Robert McGowan *The Contemporary Use of Rongoa Māori – Traditional Māori Medicine* (A thesis submitted in partial fulfilment of the requirements for the Degree of Master of Social Science in Anthropology, University of Waikato February 2000) #K11, p 18.

do so with the consent of the kaitiaki, or in a manner which is consistent with those underlying ‘he uara’ – values and principles.

902. It is not enough for the Crown to say that ‘but for’ the publication of some of those texts on rongoa, much of the traditional knowledge may have been lost. That may be a historical happenstance, and may have had a positive consequence. (It should be noted that the Crown adduced no evidence to support the proposition however). But the same consequence could have been achieved by the recording of the traditional knowledge in a manner more deferential to the kaitiaki, and which respected and reflected those underlying values, and the mauri and tapu of the knowledge.

903. Dr David Williams used the example of Elsdon Best’s publications to illustrate how the process should, and might, have worked:

Dr Williams: “Yes, so that if we were sitting in this Tribunal just before the Dominion Museum is deciding to appoint Elsdon Best to write some books we would have put in place some protocols and procedures so that they were written in a very different way from the way in fact they were written. He would have acknowledged his sources, he would have said who his informants were, if told not to publish things he would have not published them whereas he wrote things down and published them regardless and so on so that’s the sort of thing we’re talking about isn’t it?”⁵⁰³

904. Mr Keelan acknowledged that issues concerning the protection of matauranga Maori associated with rongoa, and the impact of intellectual property rights on that matauranga, were particular concerns of the claimants, raised by submitters to the MOH on the Rongoa Development Plan, and an issue considered by the Ministry itself.⁵⁰⁴ He was shown a copy of the publication by P.M.E Williams, which had drawn extensively from information told to him by kuia from Te Tai Tokerau: “*The kuia and kaumatua to whom I listened are now long gone but their knowledge survives.*”

⁵⁰³ Transcript of Cross-Examination of David Williams(Claimant Week 13 22 May 2002) tape 8, p 153.

⁵⁰⁴ Transcript of Cross-Examination of Wi Keelan (Crown Week 4) p 187.

“LW It’s of concern to you, no doubt, that copyright exists in the book, copyright exists in the illustrations, but the knowledge contained about rongoa is not similarly protected.

WK It’s of concern to a lot of traditional healers, yes.

LW Is it of concern to you in your role as Chief Advisor Maori to the Ministry of Health?

WK Being that it’s the concern of traditional healers, yes, and they have relayed those to me, yes.

LW Is it not urgent in your view that similar protections be put in place for this type of matauranga?

WK Given that that’s a great concern of traditional healers, yes, and they’ve relayed that to me. Yes, I would agree.”⁵⁰⁵

905. Despite that concession Mr Keelan acknowledged that the Ministry had no formal strategy to deal with these issues.

“LW Let’s be clear. The Maori action plan contains no strategy, does it, for dealing with the call by Maori that intellectual property rights issues needs to be dealt with in this context?

WK No. No specific plan.

LW No. And the reference by your colleague to the Taonga Tuku Iho, the rongoa development plan, similarly makes no reference whatsoever to intellectual property rights, does it?

WK My reading of it would say no.”⁵⁰⁶

906. His sole recourse was to refer to the fact that that sort of work was being undertaken “by another Ministry.”⁵⁰⁷

907. Mr Keelan was provided with the Health Research Council’s strategy and agreed that Matauranga was viewed with enormous potential in the market place:

“Much new health knowledge is generated by Maori researchers which is of relevance and benefit to all New Zealanders and communities around the world. Although the HRC encourages researchers and their

⁵⁰⁵ P M E Williams *Te Rongoa Maori – Maori Medicine* (Reed, 1996) #R5(e), p 13.

⁵⁰⁶ Transcript of Cross-Examination of Wi Keelan (Crown Week 4) p 187, lns 27-34.

⁵⁰⁷ Ibid, p189 lns 9, p190 lns 13-14.

host institutions to protect and develop intellectual property, much ground work needs to be undertaken before developments in this area become a reality for Maori.

Strategies

Guidelines, policies and processes need to be developed to advise Maori communities on the protection and development of intellectual property which may result from research in which they have an interest.

There are commercial opportunities for Maori health research; however, development in this area need to proceed with caution. The main areas for development are knowing what can be commercialised, providing opportunities for knowledge innovation, generating interest in the product, protection of tangata whenua commercial intellectual property, and ensuring tangata whenua have mechanisms in place to handle and distribute commercial benefits.”⁵⁰⁸

908. Mr Keelan was asked what implementation measures the MOH had undertaken in relation to those strategies. His answers were completely unsatisfactory, indicating the lack of attention given by the Ministry to issues of protection of matauranga, despite explicit Ministry endorsement of the use of matauranga in the commercial market place. He could point to no documentation within the Ministry dealing with these matters, and simply reiterated that this was the responsibility of “another Ministry”. He did not even name that Ministry, and was unable to indicate what engagement he or his staff had had with the ‘other Ministry’ other than to say that there had been ‘some meetings’ and that concerns raised by submitters had been passed on.⁵⁰⁹

Second Component Issues – Existing Law

Knowledge Systems

5.4.1	<i>Has or did the Tohunga Suppression Act 1907 adversely affected the ability of kaitiaki to:</i>
(a)	<i>control, regulate, use or develop the knowledge systems of Māori healing?;</i>
(b)	<i>preserve and protect the knowledge systems of customary Māori healing?; or</i>

⁵⁰⁸ Heath Research Council *The Health Research Strategy to improve Maori Health and Well-Being 2004-2008* (March 2004) p 19.

⁵⁰⁹ Transcript of Cross-Examination of Wi Keelan (Crown Week 4) p 190, lns 13-25.

(c) ***transmit the knowledge systems of customary Māori healing from generation to generation among kaitiaki?***

909. Relevant to the issue of transmission is the fact that the Tohunga Suppression Act continued to have a long-lasting impact in terms of how kaitiaki regarded the State's disrespect for traditional knowledge related to healing. The stigma associated with traditional healing which has its origins in that legislation and subsequent policy, was far-reaching. In terms of the transmission of knowledge, the effect was most prejudicial because tohunga lost respect, were unfairly associated with unsafe and unhealthy practices, and their teaching methods called into question.

910. The impact of the Tohunga Suppression Act on matauranga Maori has been extensively addressed in the work of Dr David Williams who drew the connection between that legislation (a very 'visible element' of the assimilationist policies of the time), with the choice made by tohunga to not pass their knowledge on.⁵¹⁰ These effects are also addressed by claimant witnesses who provide oral testimony of the effects of the legislation on their own whanau and the transmission of knowledge down to their subsequent generations.

911. Williams draws on general academic discourse in the field of the sociology of law to discuss the impacts of legislation on behaviour, even where prosecutions for offences under the legislation are not necessarily pursued by authorities, or successful:

“I think the importance of that is more that later political and religious leaders, like Ratana and others, recognised the dangers of being identified as Tohunga because you'd bring the anger of the State upon you if you so identified yourself.”⁵¹¹

912. Crown counsel spent some time in questioning of Dr Williams, trying to establish that Maori Members of Parliament at the time supported the passage of the legislation. Even if this were the case (and Dr Williams was

⁵¹⁰ David William *Matauranga Maori and Taonga* (Waitangi Tribunal Publication) #K6; Transcript of Cross-Examination of David Williams (Claimant Week 13, 23 May 2002) tape 12, p 199, lns 1-8.

⁵¹¹ *Ibid*, p 225.

equivocal on the historical evidence on this point), this could not support an argument that therefore the obligations under the Treaty of Waitangi to protect and support matauranga Maori were fulfilled. The Maori Members of Parliament were of the highest calibre at the time in terms of their appreciation of the multitude of issues facing the survival of Maoridom. Yet they did not speak for the Maori Treaty partner in terms of ‘acceding’ to Crown policy, and their views on the Tohunga Suppression Act cannot be regarded as a justification for the discriminatory legislation which was passed.⁵¹² Of importance in this context was the fact that Dr Williams pointed out that there were other ways of achieving the abolition of ‘quackery’ for health and safety reasons, and it did not require the abolition of a practice of matauranga Maori.⁵¹³ Nor did he think that the Young Maori Party members could have foreseen those indirect effects on the loss of matauranga.⁵¹⁴

913. As Chief Judge Williams noted to Mr Wi Keelan during the Crown evidence, the country has come a long way since the Tohunga Suppression Act, and for that we can be pleased. But the issue for the claimants is what prejudice was caused to whanau, hapu and iwi from the legislation, and what impact that has had now on the practice of rongoa. For the Crown’s current policy in relation to rongoa cannot be divorced from those historical factors where the practice of rongoa was illegal, and then gained a reputation and stigma which was unfounded and prejudicial.
914. The Crown has chosen not to call any evidence to counter the historical research undertaken by Dr Williams, despite the fact that the impact of the Tohunga Suppression Act was an explicit issue in the Statement of Issues. The extent of the Crown challenge to claimant assertions of prejudice was the questioning from Crown counsel. It is submitted that a reading of the transcript illustrates that the Crown has not rebutted the conclusions in Dr Williams’ report that the legislation caused long lasting prejudicial impact

⁵¹² Ibid, p 247 and p 248.

⁵¹³ Ibid, p 232-233 and p 234.

⁵¹⁴ Ibid, p 234.

on whanau, hapu and iwi, well after the actual Act was removed from the statute books: “*It drove genuine Maori healers underground.*”⁵¹⁵

- 5.4.2** *Has Crown policy relating to funding of health services adversely affected the ability of the kaitiaki to:*
- (a)** *preserve, protect, regulate, control, develop or use the knowledge systems of customary Māori healing?; or*
- (b)** *transmit the knowledge systems of customary Māori healing from generation to generation among kaitiaki?*

915. Yes, the Crown’s funding of health services explicitly excludes funding for rongoa that is ingested, which is a significant part of rongoa practice. The exchange in questioning between the Chief Judge and Wi Keelan established that this was a ‘rather strange’ situation, when both the Ministry of Health and Maori acknowledge the integral nature of ingestion to rongoa practice. It is submitted that the situation is more than ‘strange’ (to use the words of Mr Keelan) but is in fact symptomatic of the Crown approach to health delivery of rongoa services. The Crown retains the control and decision-making authority as to what aspects of rongoa practice are to be supported. Anomalies arise when the kaitiaki is not in control of the definition of services, or the authority over the way in which they are to be funded.

916. The current policy regime of Primary Health Organisations being funded from the District Health Boards is in itself prejudicial to the successful practice of rongoa. Questioning of Mr Keelan illustrated the risk that devolved power from the Minister to DHB’s will mean that Crown obligations in relation to the protection of matauranga Maori will not be able to be fulfilled adequately:

“Chief Judge: Whatever one might see are positive attributes of the devolution of the health spend to DHBs, one of the potential risks is that the Crown’s obligation of active protection in respect of Maori health and Maori culture, both of which are affected, the survival of both of which are affected by rongoa Maori, is lost in the process. Do you see the point? That in this process of

⁵¹⁵ Ibid, p 252.

devolving to local community boards the central obligation of active protection which the Crown owes in respect of rongoa Maori both for the purpose of advancing Maori health and for the purpose of advancing the survival of Maori culture, is dissipated and ultimately lost, because there is no ability for a minister of the Crown or for the central executive to operationalise its duty of active protection with money and policy. Do you see the point I'm making?"⁵¹⁶

917. Mr Keelan did not agree but his answer related to the increase in the uptake of rongoa services as being indicative of the 'opposite being true'. In fact, the uptake of services might be due to a range of varying factors (which may include an increased desire from patients to access services outside of mainstream health delivery), but this does not address the continued existence and relevance of the Crown obligations to protect rongoa, and the risk to implementation of that obligation from devolution. It seems trite that the more removed the Crown is from the delivery of the taonga that it is charged with protecting, the more difficult it will be for the Crown to ensure that its obligations are met. Mr Keelan's answers did not address that risk or illustrate how the Ministry was ensuring that it would be overcome.

Practices Associated With Plants and Other Material

- 5.4.3** *Has the Crown's assumption of regulatory control of the environment adversely affected the ability of the kaitiaki to:*
- (a)** *control, use, regulate, or develop the practices associated with plant and other material used systems of customary Māori healing?;*
 - (b)** *preserve or protect the practices associated with plant and other material used systems of customary Māori healing?; or*
 - (c)** *transmit the practices associated with plant and other material used systems of customary Māori healing?*

918. It is noteworthy that this question is prefaced on the Crown assumption of regulatory control of the environment. For the avoidance of doubt, the claimants say that this assumption of control is itself a breach of the Treaty. They say further, in answer to sub paragraphs (a) – (c) that this Crown control of the environment from which rongoa resources are extracted does

⁵¹⁶ Transcript of Cross-Examination of Wi Keelan (Crown Evidence Week 4) p 211.

adversely affect the ability of the kaitiaki to control, use, regulate and develop their practices of customary Maori healing. This is particularly so because of the size of the conservation estate as a habitat for extensive rongoa resources, and the difficulty of access to that estate to extract those resources. It follows that where control and access to resources is inhibited, the custom, tikanga and matauranga associated with customary Maori healing is less able to be preserved and protected, and the practices less able to be successfully transmitted from generation to generation.

919. In terms of transmission of knowledge, claimant evidence criticised the New Zealand Qualifications Authority for assuming control over the way in which rongoa has been taught in its “field Maori” curriculum. Claimants compare this to the delivery mechanism of the wananga which allows the transmission of rongoa knowledge to be retained within the structures and decision-making authority of the kaitiaki.

5.4.4 *Has the Medicines Act 1981 adversely affected the ability of the Crown to protect the practices associated with plant and other material used systems of customary Māori healing from use in a manner that is inconsistent with the values of the kaitiaki?*

920. The claimants generally support the conclusions of Ngati Kahugunu in relation to this issue.

5.4.5 *Has the Medicines Act 1981 adversely affected the ability of kaitiaki to:*

- (a) control, use, regulate or develop the practices associated with plant and other material used systems of customary Māori healing?;*
- (b) preserve or protect the practices associated with plant and other material used systems of customary Māori healing?; or*
- (c) transmit the practices associated with plant and other material used systems of customary Māori healing?*

921. The claimants generally support the conclusions of Ngati Kahugunu in relation to this issue.

5.4.6 *Has Crown policy relating to funding of health services adversely affected the ability of the kaitiaki to:*

- (a) control, use, regulate or develop the practices associated with plant and other*

material used systems of customary Māori healing?; or

(b) protect, preserve or transmit the practices associated with plant and other material used systems of customary Māori healing?

922. This question is a duplicate of 4C.4.2 and has already been answered.

Delivery of Health Services

5.4.7 Has Crown policy relating to funding of health services adversely affected the ability of the kaitiaki to control, use, regulate, preserve, protect, transmit or develop the delivery of health services in accordance with the system of customary Māori healing?

5.4.8 Has the Medicines Act 1981 adversely affected the ability of the kaitiaki to control, use, regulate, preserve, protect, transmit or develop the delivery of health services in accordance with the system of customary Māori healing?

923. Yes, the Crown has assumed, both historically and in contemporary legislation and policy, regulatory control for the delivery of health services. In so doing, it has an obligation to ensure the effective exercise of tino rangatiratanga by kaitiaki in relation to their own health delivery.

924. Instead, as evidenced by the ANZTPA proposal, the Crown failed to adequately incorporate the Maori perspective within their policy development or decision-making structures. Mr Wi Keelan acknowledged that Professor Mason Durie's writings influence the Ministry's work in everything it does:

“LW The final couple of questions just related to a text by Mason Durie, *Maoriora, The Dynamics Of Maori Health*. Are you familiar with that book?

WK Yes, I have read it.

LW He makes the point at page 257, and I just wanted to get your view as to whether this was still relevant for the Ministry of Health, that **three broad strategies contribute to positive health gains for Maori. The first was the recognition of Maori perspectives on health, the recognition of the Maori world view within health. Secondly Maori leadership in the health sector. And thirdly dedicated Maori health services usually delivered by Maori for Maori.**

WK Yes.

- LW Were you aware that he had presented evidence to the Waitangi Tribunal in support of this claim?
- WK I was not aware but I wouldn't be surprised.
- LW Yes. Part of that evidence discussed a longitudinal study undertaken by Massey University.
- WK Oh, yes, I read the study.
- LW You are aware of that study?
- WK Yes, I am.
- LW And that study talks about a secure identity for Maori, leading to positive health gains. And the secure identity is assisted by access to resources, to marae, to whanau and to teo Maori. Are you familiar with that study?
- WK I agree.
- LW Two things arise. If that connection has been accepted by the Ministry of Health, are you following that longitudinal study and letting it influence how you undertake your work?
- WK Most of Mason's work influences how we undertake our work. In fact all of it.
- CJ Sorry. Say that again?
- WK A lot of what we produce from the Maori Health Directorate is influenced by Mason's work."⁵¹⁷

925. Yet there was nothing in the Crown evidence to illustrate a commitment to sharing of authority with tangata whenua within the structures of health delivery. Maori have become "providers", but the funding stream, the definition of their services, the determination of their tenure, the assessment and audit methodologies, and the ultimate strategic direction and policy, lies with the Crown.

⁵¹⁷ Ibid, p 192, lns 3-31.

Third Component Issues – Potential Remedies

926. Remedies are dealt with generally in a separate section of these submissions, but in the context of rongoa Maori, it is appropriate to record that there will be specific issues which require urgent redress to avoid continued prejudice to Maori from the current lack of protection to their rongoa resources and knowledge. Those measure may include:

926.1 Adequate access for rongoa practitioners to their traditional gathering areas for flora and fauna. In some cases, this may include remedial work on the environment in those areas to counter degradation and improve the quality of the resource to be ingested.

926.2 Adequate protection for traditional knowledge which is currently in the public domain against the wishes of the kaitiaki, and is being used, or proposed to be used, in a manner inconsistent with the customs and values of the kaitiaki.

926.3 Adequate protection against the publication of traditional knowledge without the prior informed consent of the kaitiaki, and/or in a manner inconsistent with the kaitiaki customs and values.

926.4 Active development of Codes of Ethics for the research community to ensure that the use of traditional knowledge follows clear guidelines as to appropriate use, involvement of the kaitiaki, prior informed consent, and access and benefit sharing.

927. Robert McGowan, in his evidence in support of the claimants, concluded with this endorsement of a process of engagement with the Crown to find appropriate solutions to these issues:

“There is a middle ground between western ‘science’ and its commercial imperatives and recognising and respecting rongoa Maori. The Wai 262 claim seeks acknowledgement, respect and appropriate protection for the claimants’ values and beliefs.

I support and endorse the remedy sought by the claimants to embark on nationwide consultation amongst Maori to enable recommendations to go forward to achieve these goals.”

PART G: MISCELLANEOUS

Historical v. Contemporary Issues

928. On 2 May 2006 the Presiding Officer issued directions in respect of historical claims.⁵¹⁸ The Direction noted:

“In the end we are not convinced that the benefits of a full-scale historical inquiry at this point in time are sufficient to delay the Tribunal in bringing to a conclusion the core issues of contemporary law and policy. Instead we prefer, at this point in the inquiry, to utilize the historical evidence as important context on which to base findings and recommendations relevant to contemporary law and policy. While we were very mindful of the concerns expressed by some claimants, we cannot agree the approach to historical claims reflected in the draft SOI will impoverish the claims of those groups. In our view the opposite is true. By adopting the approach we have suggested the claimants maximize their chances of materially influencing the law and policy debate. A full historical inquiry will see the tail wag the dog. It will substantially reduce the likelihood of influence.”⁵¹⁹

929. In a Memorandum of Counsel dated 12 June 2006,⁵²⁰ counsel recorded some concerns with this approach, namely that the lack of a substantive inquiry into historical aspects of the inquiry would potentially prejudice the claimants in terms of the findings and recommendations they are seeking from the tribunal. Counsel has proceeded on the basis that no such prejudice will result.

930. Counsel also recorded that the Crown, having argued for and agreed with the Tribunals approach to the Wai 262 claim, could not later claim it was prejudiced by any subsequent findings and recommendations in favour of the claimants because a “forensic examination” of historical evidence had not been undertaken. That position is maintained.

⁵¹⁸ Memorandum-Direction of the Presiding Officer in respect of Historical Claims,#2.279

⁵¹⁹ Ibid, p 6.

⁵²⁰ #2.303

PART H: REMEDIES TO RESTORE THE TREATY RELATIONSHIP AND TE AO MAURI

Chapter Summary	
<ul style="list-style-type: none"> ▪ General Findings <ul style="list-style-type: none"> ○ Indigenous Flora and Fauna ○ Matauranga ○ International 	
<ul style="list-style-type: none"> ▪ General Recommendations <ul style="list-style-type: none"> <u>Ethical Framework for Resolution</u> <ul style="list-style-type: none"> ○ Wai 262 claimants to coordinate a Kanohi Ora Strategy <ul style="list-style-type: none"> ▪ To raise awareness amongst whanau, hapu iwi ▪ To coordinate views of whanau, hapu, iwi ○ Crown prepares its strategy ○ Process of Engagement between Maori and Crown ○ Into an ‘Ethical Space’ <ul style="list-style-type: none"> ▪ Appointment of Treaty Facilitator ▪ Coordinating Body (Wai 262 and Crown) ▪ Principles, Objectives and Policies ▪ Options ▪ Eight Working Groups ▪ Constitutional Relationship Working Group ○ Equal Decision Making on Resolutions ○ Leave to return to the Tribunal <u>Rationale for Recommendation</u> <ul style="list-style-type: none"> ➤ Claimants and Crown agree on Key Issues in the evidence ➤ Co-ordinated Approach ➤ The need for an “Ethical Space” ➤ Involvement of all whanau, hapu and iwi ➤ Holistic and Principled Review ➤ An Ethical Framework for Durable Resolution 	
<ul style="list-style-type: none"> ▪ Rohe Specific Recommendations <ul style="list-style-type: none"> ○ Ngati Kuri ○ Te Rarawa ○ Ngatiwai 	

General Findings

931. The following are the general findings that are sought from the Tribunal by the Tai Tokerau Claimants.

Indigenous Flora and Fauna and the Environment

932. That all indigenous flora and fauna (referred to as including associated biological and genetic resources of indigenous flora and fauna, and the habitats, ecosystems and environment of indigenous flora and fauna) within the respective rohe of Ngati Kuri, Te Rarawa and Ngatiwai were and remain 'taonga' which are guaranteed protection under Article II of the Treaty of Waitangi.

Biological and Genetic Resources

933. That the claimants are guaranteed tino rangatiratanga over indigenous flora and fauna in their respective rohe, including the taonga of associated biological and genetic resources of indigenous flora and fauna, on the basis that:

933.1 Biological and genetic resources are not new resources but are derivatives of the indigenous flora and fauna connected by whakapapa;

933.2 Biological and genetic resources are highly valued components of indigenous flora and fauna to Ngati Kuri, Te Rarawa and Ngatiwai and in relation to which Ngati Kuri, Te Rarawa and Ngatiwai had traditional knowledge; and/or

933.3 Ngati Kuri, Te Rarawa and Ngatiwai have a right of development to their taonga including indigenous flora and fauna, which attaches to biological and genetic resources when technology develops which enables those resources to be identified and applied.

Kiore and Kumara

934. That the guarantee of tino rangatiratanga over indigenous flora and fauna in their respective rohe included and includes the taonga of the kiore and the kumara, on the basis that the kiore and the kumara:

- 934.1 Are particular examples of flora and fauna which were highly valued as taonga by Ngati Kuri, Te Rarawa and Ngatiwai prior to 1840;
- 934.2 Are species in relation to which Ngati Kuri, Te Rarawa and Ngatiwai have traditional knowledge, including their whakapapa connections to kiore and kumara, and knowledge and customs of sustainable use, and in relation to which Ngati Kuri, Te Rarawa and Ngatiwai exercised their tino rangatiratanga and kaitiakitanga.
935. That Ngati Kuri, Te Rarawa and Ngatiwai were and remain today the kaitiaki of indigenous flora and fauna within their respective rohe, and have never consented to the relinquishment, or restriction of their kaitiakitanga, or the exercise of tino rangatiratanga with those taonga.⁵²¹
936. That the exercise of kaitiakitanga and tino rangatiratanga of Ngati Kuri, Te Rarawa and Ngatiwai with their taonga and the relationship with their environment includes the obligation and the corresponding right to protect, preserve, control, regulate, use, develop and/or transmit those taonga and tino rangatiratanga includes the right of kaitiaki to make and enforce laws and customs in relation to their taonga.
937. That, in breach of the Treaty of Waitangi, the Crown has failed to recognise, protect and give effect to those rights and interests by implementing a legislative, regulatory and policy ‘blitzkrieg’ in the period 1975-2007,⁵²² in relation to environmental, conservation and resource management which has had the effect of:

⁵²¹ Brief of Evidence of Saana Murray, #D6(a), para 21. See also Brief of Evidence of Haami Piripi, #P3, para 22.

⁵²² In order to appreciate the full extent of the historical and contemporary legislative and policy exclusion of Maori from their role as kaitiaki of the natural environment, it is important to consider in this context the reports of Geoff Park *Effective Exclusion – An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912-1983*: (#K4), David Williams *Crown Policy Affecting Maori Knowledge Systems and Cultural Practices*: (#K3), Robert McLean and Trecia Smith *The Crown and Flora and Fauna: Legislation, Policies and Practices, 1983-98* (#K2); Cathy Marr, Robin Hodge and Ben White, *Crown Laws, Policies and Practices in Relation to Flora and Fauna, 1840-1912* (#K5) and Jim Feldman, *Treaty Rights & Pigeon Poaching: Alienation of Maori Access to Kereru, 1864-1960* (#K7).

- 937.1 Alienating Ngati Kuri, Te Rarawa and Ngatiwai from their traditional role as kaitiaki over the indigenous flora and fauna within their respective rohe, and their relationship as kaitiaki with their environment;
- 937.2 Restricting access to indigenous flora and fauna and the environment to the virtual exclusion of the kaitiaki rights and responsibilities of Ngati Kuri, Te Rarawa and Ngatiwai to protect, preserve, control, regulate, use, develop and/or transmit their taonga;
- 937.3 Failing to protect the customary knowledge and tikanga of Ngati Kuri, Te Rarawa and Ngatiwai to their indigenous flora and fauna and their environment.

Matauranga / Customary Laws and Practices / Taonga Works / Rongoa

938. That the customary systems of knowledge or matauranga (including tikanga and reo) of each of the respective iwi of Ngatiwai, Te Rarawa and Ngati Kuri are taonga guaranteed protection under Article II of the Treaty of Waitangi, and include rongoa and the taonga works derived from matauranga.
939. That Te Tiriti o Waitangi/Treaty of Waitangi including the promises and undertakings made by the Crown at the time of the signing of Te Tiriti o Waitangi (including the so-called “Fourth Article”), reserved and guaranteed to Ngati Kuri, Te Rarawa and Ngatiwai the continued exercise of their customary laws and practices in relation to their taonga (including indigenous flora and fauna, rongoa, and taonga works);
940. That the Crown has failed to recognise, actively protect and give effect to those customary systems of knowledge or matauranga and those customary laws and practices, by implementing legislation, regulation and policy from 1975-2007, including (but not limited to) the areas of intellectual property rights, health services, education, science research and technology, and moveable cultural property, which has had the effect of:

- 940.1 Contributing to the ongoing erosion of customary systems of knowledge of the claimants;
- 940.2 Contributing to the ongoing loss and alienation of matauranga of the claimants into the public domain;
- 940.3 Contributing to the ongoing loss of traditional and political institutional structures and knowledge;

International

- 941. That the Treaty guarantee of tino rangatiratanga extends to the Crown protecting at an international level, the rights and interests of Ngati Kuri, Te Rarawa and Ngatiwai in relation to their indigenous flora and fauna and their environment, matauranga and customary laws and practices, and the Crown has failed to recognise, actively protect and give effect to those rights and interests, and in particular (but not limited to):
 - 941.1 Entering into and ratifying the GATT:TRIPs agreement with no mechanism to protect matauranga Maori;
 - 941.2 Failing to engage with Ngati Kuri, Te Rarawa and Ngatiwai to identify and protect their rights and interests as they relate to international agreements or instruments;
 - 941.3 Failing to ensure that Ngati Kuri, Te Rarawa and Ngatiwai specifically, and Maori generally, have been adequately represented in international fora dealing with those rights and interests.

Taonga Specific Recommendations

- 942. The following are the taonga specific recommendations that are sought from the Tribunal by the Tai Tokerau claimants. These are *in addition* to the general recommendations which would apply to all indigenous flora and fauna.

943. Counsel notes that there may be some amendments to the Rohe Specific remedies after further consultation with the claimant iwi and after time to consider and respond to the Closing Submissions of the Crown.

Ngati Kuri

	Taonga	Recommendations
1.	Pupuharakeke	<p>The Crown formally recognise Ngati Kuri as a kaitiaki of the pupuharakeke within their rohe;</p> <p>The Crown develop in partnership with Ngati Kuri a management plan for pupuharake that recognises and gives effect to the kaitiaki status and decision-making authority of Ngati Kuri;</p> <p>The Crown provides all research it has undertaken on the pupuharakeke to Ngati Kuri.</p>
2.	Kuaka	<p>The Crown formally recognise Ngati Kuri as a kaitiaki of the kuaka within their rohe;</p> <p>The Crown develop in partnership with Ngati Kuri a management plan for kuaka that recognises and gives effect to the kaitiaki status and decision-making authority of Ngati Kuri, including the sustainable harvest of kuaka for their customary and traditional purposes.</p>
3.	Kukupapa	<p>The Crown formally recognise Ngati Kuri as a kaitiaki of the kukupa within their rohe;</p> <p>The Crown develop in partnership with Ngati Kuri a management plan for kukupa that recognises and gives effect to the kaitiaki status and decision-making authority of Ngati Kuri, including the sustainable harvest of kukupa for their customary and traditional purposes.</p>
4.	Toheroa	<p>The Crown formally recognise Ngati Kuri as a kaitiaki of the Toheroa within their rohe;</p> <p>The Crown develop in partnership with Ngati Kuri a management plan for Toheroa that recognises and gives effect to the kaitiaki status and decision-making authority of Ngati Kuri, including the sustainable harvest of Toheroa for their customary and traditional purposes.</p>
	Geographical Name changes	The restoration of the tapu names of important landscapes within the rohe of Ngati Kuri (to be considered and agreed as part of the Ethical Framework of Resolution).
	Parengarenga	<p>The Crown formally recognise Ngati Kuri as a kaitiaki of the Parengarenga sands;</p> <p>The Crown develop in partnership with Ngati Kuri, and after further inter-Maori dialogue, a management plan for</p>

	Taonga	Recommendations
		Parengarenga that recognises and gives effect to the kaitiaki status and decision-making authority of Ngati Kuri.
	All other indigenous flora and fauna within the claimant rohe and kaitiaki relationship with their environment	Refer to general recommendations
	Matauranga and tikanga o Ngati Kuri	Refer to general recommendations

Te Rarawa

	Taonga	Recommendations
1.	Kumara	The Crown provide funding to re-establish the ethnobotanical garden at Mangere “Te Wao nui a Tane”; The claimants be acknowledged as interim kaitiaki or trustees on behalf of all of Maori, of the surviving varieties of kumara returned from Japan in 1988, as listed in the table of kumara species.
2.	Kukupu	The Crown formally recognise Te Rarawa as a kaitiaki of the kukupu within their rohe; The Crown develop in partnership with Te Rarawa a management plan for kukupu that recognises and gives effect to the kaitiaki status and decision-making authority of Te Rarawa, including the sustainable harvest of kukupu for their customary and traditional purposes;
3.	All other indigenous flora and fauna within the claimant rohe and kaitiaki relationship with their environment	Refer to general recommendations
4.	Matauranga and tikanga o Te Rarawa	Refer to general recommendations

Ngatiwai

	Taonga	Recommendations
1.	Hauturu (Little	Restoration of ownership and management of Hauturu to

	Taonga	Recommendations
	Barrier Island)	Ngatiwai in recognition of their rangatiratanga and kaitiaki status; Statutory recognition of Ngatiwai's status as kaitiaki of Hauturu and its indigenous flora and fauna; Change of name from Little Barrier Island back to Hauturu-a-Toi.
2.	Tawhitirahi/Aorangi (Port Knights Islands)	Return to Ngatiwai ownership of Tawhitirahi and Aorangi; The Crown develop in partnership with Ngatiwai a management plan for Tawhiti and Aorangi that recognises and gives effect to the kaitiaki status and decision-making authority of Ngatiwai; Change of name back to Tawhitirahi and Aorangi.
3.	Kaikoura	Return of ownership to Ngatiwai; The Crown develop in partnership with Ngatiwai a management plan for Kaikoura that recognises and gives effect to the kaitiaki status and decision-making authority of Ngatiwai.
4.	Other Offshore Islands	Refer to general recommendations.
7.	Kiore	The Crown formally recognise Ngatiwai as a kaitiaki of the kiore within their rohe; The Crown apologise to Ngatiwai for the loss of kiore suffered as a result of the eradication programmes; The Crown provide resources and assistance to work with Ngatiwai to assist in the re-establishment of a population of kiore on one of the off-shore islands.
8.	Tuatara	The Crown formally recognise Ngatiwai as a kaitiaki of the Tuatara within their rohe; The Crown develop in partnership with Ngatiwai a management plan for Tuatara that recognises and gives effect to the kaitiaki status and decision-making authority of Ngatiwai.
	Tohora	The Crown recognise the rangatiratanga of Ngatiwai over the tohora and in particular that Ngatiwai have joint and equal authority and decision making over the tohora.
9.	Tipori	The Crown formally recognise Ngatiwai as a kaitiaki of the

	Taonga	Recommendations
		Tipori within their rohe.
10.	Pakiri Sands	<p>The Crown formally recognise Ngatiwai and in particular, the Hapu of Ngati Manuhiri as a kaitiaki of the Pakiri sands;</p> <p>The Crown develop in partnership with Ngati Manuhiri a management plan for Pakiri that recognises and gives effect to the kaitiaki status and decision-making authority of Ngatiwai and Ngati Manuhiri.</p>

General Recommendations – Towards An Ethical Framework for Resolution

944. The following are the general recommendations that are sought from the Tribunal by the Tai Tokerau Claimants.

Indigenous Flora and Fauna

945. That the kaitiaki rights and interests of Ngati Kuri, Te Rarawa and Ngatiwai in indigenous flora and fauna (including biological and genetic resources, and the habitats, ecosystems and the environment of indigenous flora and fauna) be recognised, actively protected, and given effect to, by recommend as set out below.

946. The Crown co-operate and engage with the Wai 262 claimants in the development and implementation of an agreed **‘Ethical Framework for Resolution’** as outlined in these submissions, for the purposes of agreeing to and implementing the following:

946.1 Effective and ‘strong’ partnership and co-management arrangements with Ngati Kuri, Te Rarawa and Ngatiwai in relation to all lands administered by the Department of Conservation within each of their respective rohe. Those co-management arrangements would provide for:

946.1.1 Statutory acknowledgement of the kaitiaki status of the claimants and their relationship with their environment

including statutory acknowledgement of the co-management arrangements themselves;

946.1.2 Equal decision-making authority in relation to the management of indigenous flora and fauna within each of their respective rohe, including the habitats, ecosystems and environment;

946.1.3 The incorporation of the customary knowledge, and customary laws and practices of Ngati Kuri, Te Rarawa and Ngatiwai into the decision-making processes regarding the control, use, development and management of indigenous flora and fauna within the respective rohe of the claimants;

946.1.4 Allocation of adequate funding on an annual basis to assist the claimants to fulfil their kaitiaki obligations under the proposed co-management arrangements;

946.1.5 Specific arrangements with the respective claimant iwi in relation to their taonga species as more particularised in the “Rohe Specific” section of these submissions.

947. A recommendation that relevant government departments and Crown agencies, with responsibilities for management of flora and fauna:

947.1 Accord priority to traditional knowledge and customary practice issues of kaitiaki in their relevant policy and planning documents and identify work in the output plans agreed with their Ministers;

947.2 Reaffirm their commitment to the Cabinet Minute of November 2001 to be proactive in the international fora in pursuing and protecting cultural and intellectual heritage rights and responsibilities of Maori;

- 947.3 Ensure that Maori are consulted and adequately resourced to attend international meetings independently and as part of government delegations;
- 947.4 Ensure that relevant officials working on international files concerning flora and fauna and traditional knowledge related issues have sufficient understanding and comprehension of the issues to avoid the “fear factor” mentality that has influenced the work of some government departments as revealed in the evidence;
- 947.5 Report annually to a Select Committee of Parliament on progress towards achieving the above objectives.

Matauranga

948. That the kaitiaki rights and interests of Ngati Kuri, Te Rarawa and Ngatiwai in their customary knowledge and matauranga (including tikanga and reo) and customary laws and practices be recognised, actively protected, and given effect to, by recommending that:
949. The Crown co-operate and engage with the Wai 262 claimants in the development and implementation of an agreed **‘Ethical Framework for Resolution’** as outlined in these submissions for the purposes of agreeing to and implementing a co-ordinated and comprehensive framework of legislation and policy, including (but not limited to):
- 949.1 The **preservation** of matauranga and customary laws and practices by way of:
- 949.1.1 *in situ* initiatives within the kaitiaki communities to maintain and strengthen matauranga, (e.g. cultural heritage, nga reo programmes, capacity building within kaitiaki communities) and to maintain and strengthen the inter-generational transmission of matauranga (e.g. wananga, tohunga, education curricula); and

- 949.1.2 *ex situ* initiatives (with the prior informed consent and effective participation of kaitiaki) to safeguard matauranga from erosion and loss, in circumstances where matauranga is held by agencies independent of the kaitiaki communities (e.g. archives, libraries, museums, educational institutions);
- 949.2 The **protection** of matauranga and customary laws and practices by which kaitiaki can control access to, disclosure and use of matauranga, prevent the misappropriation of matauranga, and derive equitable benefits from the application of matauranga by way of:
- 949.2.1 Application of customary laws and protocols as determined by the appropriate kaitiaki ;
- 949.2.2 Sui-generis models of protection based on intellectual property principles, which include, inter alia, applying the principles of prior informed consent of the kaitiaki and equitable benefit sharing;
- 949.2.3 Development of non-legal forms of protection including codes of ethics, codes of conduct and research guidelines;
- 949.2.4 The development and use of educative programmes and other awareness-raising mechanisms;
- 949.3 The **promotion** of matauranga and customary laws and practices by which kaitiaki can harness matauranga for sustainable development, including:
- 949.3.1 Encouragement and facilitation of partnerships between kaitiaki communities and research institutions/foreign investors for research programmes on matauranga and/or biodiversity-related knowledge applying principles of prior informed consent and benefit sharing;

- 949.3.2 Incentives to stimulate tradition-based innovations and creativity under those principles;
 - 949.3.3 Support for local, national and export production of matauranga derived products; technical assistance on new product development, and facilitation to meet international product standards.
950. A recommendation that relevant government departments, and Crown agencies with responsibilities in relation to preservation, protection and promotion of matauranga Maori (including tikanga, taonga works, reo and biological and genetic resources):
- 950.1 Accord priority to traditional knowledge and customary practice issues of kaitiaki in their relevant policy and planning documents and identify work in the output plans agreed with their Ministers;
 - 950.2 Reaffirm their commitment to the Cabinet Minute of November 2001 to be proactive in the international fora in pursuing and protecting cultural and intellectual heritage rights and responsibilities of Maori;
 - 950.3 Ensure that Maori are consulted and adequately resourced to attend international meetings independently and as part of government delegations;
 - 950.4 Ensure that relevant officials working on international files relating to preservation, protection or promotion of matauranga related issues have sufficient understanding and comprehension of the issues to avoid the “fear factor” mentality that has influenced the work of some government departments as revealed in the evidence;
 - 950.5 Report annually to a Select Committee of Parliament on progress towards achieving the above objectives.

International

951. That the rights and interests at the international level of Ngati Kuri, Te Rarawa and Ngatiwai in relation to their indigenous flora and fauna and their environment, matauranga and customary laws and practices be immediately recognised, actively protected and given effect to, by recommending that:
952. The Crown co-operate and engage with the Wai 262 claimants in the development and implementation of an agreed **‘Ethical Framework for Resolution’** as outlined in these submissions for the purposes of agreeing to and implementing the following:
- 952.1 Ensuring the full and effective participation of Maori in all international fora dealing with issues relating to traditional knowledge and/or biological and genetic resources including, but not limited to, the CBD, dDRIP, WIPO, UNESCO and WTO. Such measures for participation to involve:
- 952.1.1 Independent representation of Maori in these fora;
- 952.1.2 Provision of adequate funding and resources to enable independent Maori representation;
- 952.1.3 Ensuring appropriate skilled Maori are included in New Zealand Government Delegations to these fora.
953. That the Crown undertake full and effective consultation with Maori prior to attending international meetings in order to arrive at agreed statements relating to New Zealand’s interventions in these fora;
954. That the Crown take a proactive stance in these international fora to advocate for protection of the rights and interests of Maori to their matauranga and associated cultural and intellectual heritage rights;

955. That the Crown, in collaboration and agreement with Maori, support the adoption of the Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly.
956. A requirement that relevant government departments and Crown agencies with responsibilities for international issues affecting or relating to matauranga Maori and flora and fauna:
- 956.1 Accord priority to traditional knowledge and customary practice issues of kaitiaki in their relevant policy and planning documents and identify work in the output plans agreed with their Ministers;
 - 956.2 Reaffirm their commitment to the Cabinet Minute of November 2001 to be proactive in the international fora in pursuing and protecting cultural and intellectual heritage rights and responsibilities of Maori;
 - 956.3 Ensure that Maori are consulted and adequately resourced to attend international meetings independently and as part of government delegations;
 - 956.4 Ensure that relevant officials working on international files concerning flora and fauna and traditional knowledge related issues have sufficient understanding and comprehension of the issues to avoid the “fear factor” mentality that has influenced the work of some government departments as revealed in the evidence;
 - 956.5 Report annually to a Select Committee of Parliament on progress towards achieving the above objectives.

Appointment of a Treaty Facilitator

957. That the Crown in agreement with Maori appoint a suitably qualified person or persons to act as a facilitator/mediator between the Crown and Maori, to (inter alia):

957.1 Facilitate the Process of Engagement as outlined in the Ethical Framework for Resolution; and

957.2 Otherwise assist as required from time to time by the Crown and Maori.

958. That the Crown provides adequate resources for the Treaty Facilitator.

Urgent and Interim Findings

959. It is submitted that based on the concessions made by the Crown witnesses during the Crown evidence weeks on particular issues raised by the claimants, that there is sufficient commonality between the claimants and the Crown evidence, to enable the Tribunal to make certain urgent and interim findings which will aid the development of a **‘Ethical Framework for Resolution’** between the parties to resolve the issues at hand.

960. Those areas of commonality between the witnesses related to (inter alia):

960.1 The recognition that matauranga Maori is a taonga, to which Maori have certain rights and responsibilities as guaranteed by the Treaty of Waitangi. The nature and parameters of those rights and responsibilities is not a matter to which the parties are in accord, and this is largely because the rights and responsibilities will depend on the circumstances of each category of matauranga, and the circumstances of its use. The parties will benefit greatly from the Tribunal’s own final conclusions on the parameters of those rights and responsibilities; nevertheless, the status of matauranga as a taonga is accepted.

960.2 The recognition that current intellectual property rights were not intended to, and do not, adequately protect matauranga Maori. This includes the explicit concession by the Ministry of Economic Development that new models of protection for traditional knowledge are necessary and should be developed.

- 960.3 The acknowledgement that misappropriation of Mātauranga and reo is occurring regularly, and is likely to increase with the development of new technologies, (in particular internet based information sharing technology) and that remedial action to protect mātauranga is urgently required.
- 960.4 The acknowledgement that the development of new models of protection of Mātauranga must involve the kaitiaki of the mātauranga from the outset, rather than as consultees in a Crown-run process.
- 960.5 The necessity for issues such as the protection of mātauranga to be widely canvassed amongst whānau, hapu and iwi throughout the motu, so as to firstly raise awareness amongst kaitiaki of the current risk to mātauranga and the opportunities for the development of new protection mechanisms; and secondly to ensure that protection mechanisms adequately accommodate the variances of kaitiaki from rohe to rohe, and that their particular expressions of kaitiakitanga are accommodated.
- 960.6 The importance to Māori of the ongoing work and development of international law and policy relating to issues of self-determination, traditional knowledge, and biological and genetic resources:
961. Therefore, the Tai Tokerau claimants submit the following **findings** can be made on the evidence by this Tribunal on an **urgent** basis:
- 961.1 Mātauranga Māori was a taonga of whānau, hapu and iwi prior to, and as at 1840, and continues to be a taonga of kaitiaki today;
- 961.2 Current legislation and policy designed to protect and promote intellectual property is inadequate to deal with the protection of Mātauranga;
- 961.3 Mātauranga continues to be at risk of misappropriation because of this lack of protection.

962. Based on these urgent findings, the claimants ask that the Tribunal **recommend an Ethical Framework for Resolution**, involving a two-stage process:

962.1 A claimant lead “Kanohi Ora” for whanau, hapu and iwi; and, following that strategy

962.2 A “Process of Engagement” between Maori and the Crown to develop matauranga protection mechanisms.

963. The reason for recommending a two stage process is because the claimants recognise that issues of the protection of matauranga extend beyond their own rohe, and that durable and effective solutions will necessarily require the inclusion of other kaitiaki as well. However, in order for the wider Maori community to “catch up” to the level of understanding of the claimants, and be able to fully engage in expressing how their own kaitiaki responsibilities might be accommodated within new protection mechanisms, a concerted strategy of consultation and communication is required.

Ethical Framework for Resolution

Stage One – Kanohi Ora Strategy (Communication and Consultation amongst Maori)

964. The claimants propose that the Tribunal recommend the immediate commencement of a Communication and Consultation Strategy amongst whanau, hapu and iwi on issues raised by the Wai 262 claim.

965. Recommend that the Wai 262 claimants form the nucleus of a group responsible for the Consultation and Communication strategy; generally responsible for:

965.1 The raising of awareness among Maori of the key issues;

965.2 The canvassing of kaitiaki to determine foundational principles;

965.3 The appointment of a “Taumata” representative of kaitiaki who can engage with the Crown.

966. The claimants seek a recommendation from the Tribunal that the Crown meet the actual and reasonable costs of the Consultation and Communication Strategy. This is on the basis that the need for protection of Matauranga arises directly from the Crown's Treaty obligation to guarantee to kaitiaki their tino rangatiratanga over their taonga.
967. The claimants would be open to general discussion with the Tribunal about details of the strategy, such as budget parameters, about how whanau, hapu and iwi are to be grouped for the purposes of consultation hui, and whether an independent facilitator or facilitators are required to assist in the process. Additionally, the claimants would be amenable to continued Tribunal oversight of the Strategy, if that was considered necessary.
968. The claimants believe that such a strategy, if supported by an urgent Tribunal recommendation and subsequent Crown funding, could be commenced in the later part of 2007 and be completed by the time the Tribunal has finalised its substantive report. Based on the findings and recommendations in that report, and the proceedings of the Consultation Strategy (including decisions made as to foundational principles and mandate of representatives), the Crown and Maori (by way of their Taumata) would be ready to commence the Process of Engagement.
969. At times, Crown counsel (via witness questioning) expressed doubts about the need for a process of engagement and put forward the proposition that the Waitangi Tribunal claim process was in effect the "process" for engagement.⁵²³ Claimant witnesses, Interested Persons and several Crown witnesses⁵²⁴ all expressed support for a process of engagement between the Crown and Maori for the purpose of finding solutions. Most, if not all, supported the notion of a "longer conversation". All these witnesses also, acknowledged the key role the Tribunal will play in making findings and recommendations on the issues.

⁵²³ See for example Questioning of Moana Maniapoto by Crown Counsel, Transcript of Evidence, Week 1, 11-15 December 2006.

⁵²⁴ See for example evidence of Keelan, Steel, Sewell, Parker, Smythe, Richardson, and Maniapoto.

970. If the above premise that Maori are to engage substantively with the Crown in a ‘longer conversation’ is accepted by the Tribunal and the Crown, then the following elements will be required:
- 970.1 *Raising Awareness:* The capacity of whanau, hapu and iwi must be increased to understand the complex issues of intellectual property and the interface with traditional knowledge, and the search for potential solutions. Adequate time must be allowed for that to occur.
- 970.2 *Policy Objectives and Considerations:* Kaitiaki must be provided time to discuss some of the policy consideration concerning the Process of Engagement and the potential remedies and options for resolving the issues.
- 970.3 *Mandate to Engage with Crown:* The whanau, hapu and iwi who are kaitiaki of the Maturanga must have an opportunity within their own tikanga to come together and determine appropriate representatives, who have the mandate to speak and negotiate solutions. These representatives are referred to for the purposes of these submissions as a “Taumata”.
971. Therefore, prior to commencing this “longer conversation” the claimants regard the Kanohi Ora Strategy as being paramount to the future success of that engagement with the Crown.
972. Before turning to the specifics of that communication and consultation strategy, it must be noted that the stage two “Process of Engagement” with the Crown (referred to by some witness as the ‘longer conversation’) will be addressed in some detail, so that it is not merely advocating for a “talkfest”, but a structured and timed process to achieve substantive and long lasting results.
973. It is also recommended that while Maori conduct the communication and awareness-raising strategy, the Crown might also take the opportunity to

consolidate their institutional knowledge on these aspects and prepare for the Process of Engagement.

Stage Two – Process of Engagement between Taumata and the Crown

“We suggest it is not enough to only seek solutions from within dominant western institutions and frameworks as these will continue to perpetuate historical power inequities, no matter how well-intentioned. What is needed is both the *will* and the *way* for all parties, Indigenous and non-Indigenous, academic and non-academic, to actively engage in a process of transforming relations that leads to mutually-agreed standards to guide behaviour in a post-colonial era.”⁵²⁵

974. The claimants maintain that the issues in the Wai 262 claim are so complex and significant that they cannot be addressed in a piecemeal fashion, nor in a manner which simply seeks to “tinker” with existing Crown legislation and policy. Rather, finding the way forward must involve good faith and measured negotiation between the Treaty partners, starting from first principles and according the perspective of kaitiaki an equitable voice, as required by the Treaty partnership. It is for these reasons that the claimants support the notion of an ‘Ethical Framework for Resolution’ which can provide the space, expertise and willingness to move beyond and “transform” the way in which such issues have been addressed in the past.
975. This suggested process is analogous to the concept of ‘ethical space’⁵²⁶ which has been developed in Canada between western research institutions

⁵²⁵ Kelly Bannister, *Appropriation of Knowledge Part 1: Ethnobiology as a Casestudy I*, April 2006 (a paper submitted for publication).

⁵²⁶ Roger Poole (1972) coined the term ‘ethical space’ in his book *Towards Deep Subjectivity* to identify an abstract space that frames an area of encounter and interaction of two entities with different intentions. According to Poole (1972), “there are two sorts of space because there are two sorts of intentions. The intentions structure the space in two different ways. When the two sets of intentions...confront each other...then ethical space is set up instantaneously” (p.5). More recently, Ermine (2000) further developed that analogy of a space between two entities, as a space between the Indigenous and Western spheres of culture and knowledge relative to research issues. The positioning of these two entities, divided by the void and flux of their cultural distance, their histories, values, traditions and national imperatives, produces a significant and interesting notion that has relevance in research thought. The affirmation for the existence of two objectivities, each claiming their own distinct and autonomous view of the world, and each holding a different account of what they are seeing across the cultural border, creates the urgent necessity for a common space of retreat, reflection and dialogue.

The entrenched differences of the two entities can fragment and interfere with real communication between individuals, nations and even different parts of the same organization because the hidden values and intentions can control behaviors, and these unnoticed cultural differences can clash without our realizing what is occurring. These distinct, unseen, unspoken differences create disparity between the West and Indigenous worlds and without an appropriate exploration of the social constructs and

and indigenous communities. A leading thinker in this field, Willie Ermine, has this to say about ethical space:

“... the ethical space, is the realignment and shifting of the perspective, particularly from the Western knowledge perspective that dominates the current research order, to a new center defined by symmetrical relations in cross-cultural engagement. The new partnership model of the ethical space, in a cooperative spirit between Indigenous Peoples and Western institutions, will create new currents of thought that flow in different directions and overrun the old ways of thinking.”⁵²⁷

976. The concept of ‘ethical space’ has been adopted by the Canadian Institute of Health and Research in the development of Guidelines for Health Research Involving Aboriginal Peoples.⁵²⁸

977. The claimants also recognise the risk that the “longer conversation” might be regarded as a protracted “talkfest”, when more immediate solutions might be recommended by the Tribunal that appear more attractive. There are two rejoinders to this:

977.1 Firstly, the Process of Engagement need not be so protracted as to add to the current prejudice caused by the misappropriation of matauranga, if interim recommendations concerning immediate protection mechanisms are made by the Tribunal and accepted by

inhibitions that affect communications, there will no understanding of how thought functions in governing our behaviors. The act of dialogue is the act of resolving the confrontation and is itself an ethical act.

This neutral zone is the ethical space where a precarious and fragile window of opportunity exists for “critical conversations about democracy, race, gender, class, nation, freedom, and community.” (Denzin & Lincoln, 2000, p. 1048). As Foucault (1988) states, “the things which seem most evident to us are always formed in the confluence and chances, during the course of a precarious and fragile human history.” (p. 37). The ethical space provides a paradigm for how, at the ‘confluence and chance’, cultures/worldviews/knowledge systems can engage in an ethical/moral manner. (Taken from the paper by Willie Ermine in following footnote)

⁵²⁷ Willie Ermine *Ethical Space: Transforming Relations* (Discussion Paper, Gathering Timeline, May 3-June 24 2005).

⁵²⁸ *Canadian Institute Of Health And Research Project – Ethical Guideline (Draft for Consultation)*, Prepared by CIHR Ethics Office, April 2006. The Guidelines state that the “Purpose is not to restrict research but facilitate partnerships for mutual benefit.” The Purpose section provides that: “This document is designed to facilitate the ethical conduct of research involving Aboriginal peoples.⁵²⁸ The intent is to promote health through research that is in keeping with Indigenous values and traditions. Health is understood in a broader sense than the notion of bio-psycho-social well-being (Romanow, UNESCO). In keeping with Indigenous understandings of health, the concept as used in this document also includes spiritual, cultural, community and environmental well-being. Fostering health in this sense includes enabling growth, balance, self-determination, reciprocity, relationships and peace. This is a living document, as a part of an ongoing process it is intended to be reviewed and revised in four-year cycles.”

the Crown. This would provide a window of interim protection while the substantive engagement on long term solutions took place.

977.2 Secondly, these submissions outline suggestions on how the ‘Process of Engagement’ would take place, including avenues of recourse to this Tribunal for guidance and facilitation where necessary. These suggestions include:

977.2.1 the frequency of meetings between the Taumata and Crown representatives:

977.2.2 funding parameters;

977.2.3 possible engagement of a tribunal appointed facilitator/mediator to assist in the process;

977.2.4 issues which are to have primacy in negotiations, and others to which solutions are not so pressing;

977.2.5 consideration of a “suite of options” for protection such as existing customary law mechanisms, IP mechanisms, legislative amendments, certificates of origin, protecting matauranga in public domain (against misappropriation), and other *sui generis* mechanisms;

977.2.6 structural/administrative requirements at local, national and international levels; and

977.2.7 processes for the involvement of stakeholders other than the Treaty partners and particularly Crown Research Institutes, commercial users of Matauranga and involvement where appropriate of international expertise.

978. It is submitted that if appropriate parameters and guidelines are in place to ensure the Process of Engagement is focused, timely and solutions-based, then the benefit of such an engagement will greatly outweigh any perceived disadvantage from not prescribing immediate long term solutions now.

Policy Considerations

979. The following policy considerations, although expressed in relation to matauranga, will have more general application to other aspects of the Wai 262 claim. For example, in designing models for co-management and management of certain taonga species as identified under the claimant specific recommendations.

Policy Objectives

980. Although there are many possible objectives relating to protection of matauranga we suggest that the key policy objective for any legal framework should be the preservation, protection and promotion of customary systems of knowledge or matauranga.
981. Possible objectives of preservation, protection and promotion might include:
- 981.1 to support and respect the integrity and underlying values of existing customary knowledge systems and provide incentives to the kaitiaki to maintain and safeguard their knowledge systems (for example by the re-establishment of marae based whare wanaanga);
 - 981.2 to provide the means by which kaitiaki can control access to, disclosure and use of Matauranga, including through exercising the right to require prior informed consent;
 - 981.3 to ensure they derive fair and equitable benefits from the application of any commercial application of their Matauranga;
 - 981.4 to prevent the misappropriation and illicit uses of Matauranga;

- 981.5 to support the harnessing of Mātauranga for sustainable development including rewarding and protecting tradition-based creativity and innovation where appropriate.

Policy Principles

982. In order to promote the policy objective, it is important that there are clear policy principles to guide the development of the substance of the policy.
983. Possible guiding policy principles might include:
- 983.1 to recognise and act in accordance with the cultural values and customary laws of the kaitiaki including the recognition of whakapapa, kaitiakitanga, tino rangatiratanga, manaakitanga, tapu and mauri;
 - 983.2 to recognise that whanau, hapu and/or iwi are the kaitiaki of mātauranga (including the owners of rights associated with mātauranga) and the primary decision-makers regarding its use;
 - 983.3 to respect and give effect to the right of kaitiaki to control access to their mātauranga by the exercise of their rangatiratanga;
 - 983.4 to ensure measures and procedures for the protection of mātauranga are not burdensome for kaitiaki;
 - 983.5 to recognise that the benefits of protection from the framework should generally accrue to the kaitiaki;
 - 983.6 to recognise that the continued uses, exchange, transmission and development of Mātauranga within the customary context, should not be restricted or interfered with;
 - 983.7 to recognise that the state has a role in the protection of Mātauranga, including providing assistance to Māori communities in the management and enforcement of their rights in Mātauranga;

983.8 to recognise that new forms of protection for Mātauranga and conventional IPR protection should be complementary as much as possible;

983.9 to ensure access to effective enforcement and dispute-resolution mechanisms where breaches or conflicts occur.

Process Principles

984. During questioning of various Crown witnesses, numerous examples were highlighted of what the claimants consider to be poor process by government officials, despite various Cabinet decisions recognising the importance of being “proactive” in pursuing and protecting Māori cultural and intellectual heritage rights.

985. Moreover, documents put to Mr Van Bohemen during questioning by counsel as supported by subsequent documents obtained from Te Puni Kōkiri, demonstrate the resistance by the New Zealand government to support full and effective participation of Māori at the international level, despite the key role developing international measures is playing in the articulation of policies and processes for protecting mātauranga.

986. The claimants ask that the Tribunal also issue process-oriented recommendations, as it is at the policy development phase where the framework will take shape. The use of process principles could assist in at least two ways:

986.1 Establishing the standard by which engagement with Māori should occur in elaborating a domestic legal and policy framework to, amongst other things, ensure Māori, rather than officials, shape the framework; and

986.2 Affirming the importance of Māori participation within international fora (recalling that a national regime has many limitations and effective protection will only come through national, regional and international measures).

987. Process principles should:

987.1 Recognise that the effective participation of Maori throughout the policy development process is critical in order to ensure that their rights as kaitiaki and rights-holders are fully and effectively protected;

987.2 Acknowledge that policy development should be guided by aspirations of the kaitiaki as well as by the nature and characteristics of customary systems of knowledge, expression of culture, creativity and innovation.

Policy Options

988. There is an extensive menu of options from which a comprehensive framework can be built. In terms of which policy options are selected, this will be generally determined by how best to make the policy objective actionable. The claimants submit that such decisions must be made in partnership with Maori.

989. Ideally, the set of policy and process principles discussed above would guide and hold together the elaboration of any detailed menu of options, creating a consistent and complementary framework for Mataranga.

990. Assuming the policy objectives cover the areas of preservation, protection and promotion, it follows that a package of measures would be needed, and collectively these would form the legal and policy framework for Mataranga. While it is difficult to compartmentalise policy options into these three groups given, the significant degree of overlap, the following list includes possible national actions/tools that the Crown (and other stakeholders) could consider using to achieve the policy objectives.

Preservation Measures

991. Preservation measures can include both *in-situ* and *ex-situ* actions.
992. ***In-situ*** actions can focus on maintaining the knowledge base and preserving and strengthening the communities themselves. Examples include:
- 992.1 cultural heritage preservation laws and programmes;
 - 992.2 recognition and preservation of te reo Maori and nga mita o ia iwi, ia hapu;
 - 992.3 recognition and strengthening of customary law and practices;
 - 992.4 recognition of specialists (such as professional accreditation).
993. *In-situ* measures can also be used to strengthen inter-generational transmission such as raising awareness of the value of matauranga to encourage renewed interest by community youth, including incorporation into formal school curriculums, training youth, and use of modern technologies to improve transmission among regionally dispersed communities.
994. ***Ex-situ*** measures can also be used to safeguard existing knowledge from erosion and loss, independent of the communities in which it is held. Examples include documentation, museums, databases and registers (including using non-written media such as video). However, the claimants stress that any *ex-situ* measures should only be advanced with the full and effective participation of kaitiaki, including recognition of their right to prior informed consent, in accordance with the Treaty principle of partnership.

Protection Measures

995. A range of protection measures are needed in order to achieve the full spectrum of protection objectives. In addition the protection framework will need to contain both binding and non-binding measures ranging from detailed prescriptions through legislation through to ‘soft law’ approaches

such as codes of ethics. This is necessary to address the full range of the claimants concerns and in particular, to capture those matters not appropriately addressed through legislative intervention.

996. The protection framework could include, inter alia:

996.1 the application or amendment of intellectual property laws;

996.2 non-intellectual property-based *sui generis* systems;

996.3 databases/registers;

996.4 codes of ethics;

996.5 the use of contracts and licenses.

997. It is noted that over and above these measures, customary practices and principles govern kaitiaki dealings with their Mātauranga.

998. While the claimants recognise that each of these components can make a valuable contribution within a protection framework, the claimants are also cognisant of the advantages and disadvantages within each, and that some components are best utilised at different stages of development. In some areas, the claimants acknowledge that the Crown has made positive advances. These aspects of the various protection components are now addressed.

999. Firstly, the claimants acknowledge that existing IPRs. The claimants acknowledge that existing IPR's can be used to a *limited* degree but only in respect of new works derived from the mātauranga base; they do not protect the base itself. There are also some factors hampering Māori use of the existing IP regime which need to be addressed by the Crown. The claimants note that MED's Traditional Knowledge work programme includes various measures to try and improve the accessibility of the IP regime to Māori and consider this to be a useful initial step. As well, the claimants acknowledge the valuable work undertaken by Creative New Zealand in developing Toi Iho (the Māori Made Mark).

1000. Secondly, modified or adapted IPRs can be used such as preventing inappropriate IPRs being granted to third parties. The claimants also acknowledge the work carried out by MED to develop defensive protection measures to prevent inappropriate IPRs being granted to third parties (for example, the Trade Marks Act 2002 and the Patents Bill).⁵²⁹ However, additional measures that could occur such as perpetual collective cultural and moral rights under copyright law and mandatory disclosure of origin in patent applications.
1001. Thirdly, stand-alone IP-based *sui generis* systems can be utilised. This is not untested or without precedent internationally. Examples include:
- 1001.1 the Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002;⁵³⁰ (# R16 (cc))
 - 1001.2 the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identify and their Traditional Knowledge of Panama 2000 and the related Executive Decree of 2001;⁵³¹ and
 - 1001.3 the Tunis Model Law on Copyright for Developing Countries 1976.⁵³²
1002. The claimants acknowledge the positive and constructive manner in which the New Zealand government, led by MED, has participated in the WIPO

⁵²⁹ The term “defensive protection” refers to measures aimed at preventing the acquisition of intellectual property rights over traditional knowledge by parties other than the traditional knowledge holders. In contrast, positive protection refers to the use of intellectual property rights or the development of new types of rights providing for the affirmative protection of traditional knowledge.

⁵³⁰ The objective of this law is to protect the rights of traditional owners in their TK and expressions of culture and permit tradition-based creativity and innovation, including commercialisation thereof, subject to prior informed consent and benefit-sharing. The law also reflects the policy that it should complement and not undermine IP laws.

⁵³¹ The objective of this law is to protect the collective IP rights and TK of indigenous communities through the registration, promotion, commercialisation an marketing of their rights in such a way as to give prominence to indigenous socio-cultural values and cultural identities and for social justice (Preamble and Article 1). Another key objective is the protection of the authenticity of crafts and other traditional artistic expressions.

⁵³² The objective of this law is to provide specific protection for works of national folklore. Protection is provided to prevent any improper exploitation and to permit adequate protection of the cultural heritage known as folklore which constitutes not only a potential for economic expansion, but also a cultural legacy intimately bound up with the individual character of the community. Works need not be fixed in material form in order to receive protection, and their protection is without limitation in time.

IGC in developing new forms of IP protection for what it refers to as traditional knowledge and traditional cultural expressions. However, while an IP-based *sui generis* system may contribute a degree of protection within a broader framework, it will be inherently limited in its application and acceptability to kaitiaki given that it is founded on IP principles which are in many fundamental ways conceptually and philosophically at odds with customary systems and practices.

1003. This is not to say that the claimants reject the use of an IP-based *sui generis* system altogether; it simply highlights that additional *sui generis* measures/systems will also be needed which enable matauranga to be treated in a more holistic manner. This is not possible within an IP paradigm as it compartmentalises matauranga into categories of value and such isolated treatment does not, amongst other things, reflect the broader role of matauranga in sustaining culture and fostering self-identity.

1004. In respect of non-IP based *sui generis* systems, there is broad recognition at the international level that *sui generis* systems for the protection of traditional knowledge, innovations and practices need to be developed taking into consideration customary law and practices. For example, the Conference of the Parties to the Convention on Biological Diversity (of which New Zealand is a Party) has:

1004.1 Recognised that indigenous and local communities have their own systems, as part of their customary laws, for preserving and maintaining traditional knowledge, innovations and practices as well as for the protection and transmissions of traditional knowledge;

1004.2 Recognised the need to halt the misuse and misappropriation of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and related genetic resources through effective mechanisms that will protect the rights of indigenous and local communities;

- 1004.3 Recognised that a *sui generis* system for the protection of traditional knowledge at the international level may enable indigenous and local communities to effectively protect their knowledge against misuse and misappropriation and that such a system should be flexible and respect the interests and rights of indigenous and local communities;
- 1004.4 Emphasised that any *sui generis* system for the protection of traditional knowledge, innovations and practices needs to be developed taking into consideration customary law and practices with the full and effective involvement and participation of concerned indigenous and local communities.⁵³³
1005. Such acknowledgements support the claimants' view that, in order to be effective, *sui generis* systems of protection must be responsive to the particular needs and circumstances of Maori communities to enable them to carry out their roles and obligations as kaitiaki and effectively protect Maturanga.
1006. The New Zealand Government has participated in all meetings of the Convention on Biological Diversity Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions (Working Group on Article 8(j)). The mandate of this working group includes consideration of non-intellectual property based *sui generis* forms of protection and the development of elements for *sui generis* systems. This work is fundamentally important to the protection of Maturanga
1007. Consistent with its obligations to actively protect taonga Maori, it is submitted that the Crown must establish *sui generis* systems that will enable Maori to, inter alia:
- 1007.1 control access to, disclosure and use of traditional knowledge in accordance with tikanga;

⁵³³ For example, see CBD Decision VII/16H.

- 1007.2 exercise the right to require prior informed consent for any access to or disclosure and use of traditional knowledge;
- 1007.3 ensure that they derive fair and equitable benefits from the wider application of their traditional knowledge, innovations and practices.
1008. As well, it is noted that *sui generis* systems will only be effective if there are complementary measures at the regional and international level. The Crown's obligations are, therefore, not limited to the establishment of national systems; the Crown must also take steps to actively protect taonga Maori at the regional and international levels.
1009. The establishment of databases and registers has been identified as a tool for the defensive protection of traditional knowledge in the context of defeating applications to patent traditional knowledge by parties other than the kaitiaki themselves. While there appears to be considerable support for this option internationally, there is also considerable concern regarding costs, access and use of the database, and the protection of the contents. While the advantages and disadvantages of using such databases require further discussion and debate by Maori generally, it is the claimants' view that unless these databases are confidential repositories of Maturanga, they will do little to prevent the piracy of that knowledge and may, in fact, facilitate misappropriation and misuse.
1010. Codes of ethics can also make a positive contribution to a protection framework. As a 'soft-law' approach, it can help to bring about change in areas where legislative intervention may be considered too excessive. Codes of ethics can include principles and methodologies and can be useful where external parties wish to research, access, use, exchange and/or manage information concerning Maturanga. Article 1.3 of the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples 1993, refers to the development of a code of ethics by indigenous peoples, which external users must observe when recording (visual, audio or written) their traditional and customary knowledge. The International

Society of Ethnobiology (ISE) Code of Ethics, is an example of international best practice regarding research involving traditional knowledge of biological and genetic resources, a point that was acknowledged by several Crown witnesses.

1011. The use of contracts and licenses is commonly identified as a key protection mechanism. However, in the absence of legally recognised rights, there is no incentive for external users to enter into agreements with kaitiaki. The value of contracts in the context of the objectives of protection, is contingent upon the recognition of kaitiaki rights in relation to their matauranga. Also, there are practical impediments that limit the extent to which contracts and licenses can be an effective protection tool for Maori. These include capacity and capability constraints, as well as imbalances in bargaining power. Policy initiatives are needed to help address these impediments.

Promotion Measures

1012. In some circumstances, kaitiaki may wish to use their Matauranga in sustainable development initiatives. This might include production and export of Matauranga-derived products. The claimants consider that the Crown should provide assistance in this regard through measures such as technical assistance in new product development, scientific validation of products and meeting international product standards. The Crown could also facilitate partnerships among community-based businesses (thereby enhancing economies of scale, joint marketing and sales) as well as with foreign investors.
1013. It is acknowledged that the government already has in place a number of Maori economic development initiatives, some of which are focused on matauranga Maori. Helen Anderson on behalf of MORST presented evidence on their Matauranga Maori policy initiative, which could be considered to provide incentives to stimulate traditional knowledge-based innovations. However, in the absence of a clear and comprehensive legal and policy framework that sets out rights and obligations, it is submitted that these types of initiatives can actually foster a ‘first in-first served’ culture,

and therefore result in discontent between hapu and iwi. Moreover, the encouragement of research on traditional knowledge-related matter must be agreed to by Maori in the first instance and this has not occurred.

1014. The accreditation of traditional practitioners can also be of significant assistance in sustainable economic development activities.

Legislative Amendments

1015. It is submitted that specific legislative amendments should only be considered following completion of Stages One and Two of the Process of Engagement to ensure that

Codes of Ethics⁵³⁴

“While a legal rights-based framework clearly has dominated discussions and negotiations in national and international fora to date, support for complementary policies and moral mechanisms is on the rise, particularly the role of voluntary codes of conduct and codes of ethics.”⁵³⁵

1016. Codes of ethics, codes of conduct and research guidelines are becoming more common as educative tools and non-legal voluntary forms of protection mechanisms. Four current examples at the international level include the Bonn Guidelines (for access and benefit sharing related to biological and genetic resources) the *Akwe: Kon* Guidelines (for conduct of cultural and environmental assessments); the International Society of Ethnobiologists Code of Ethics (concerning research relating to traditional knowledge and biological resources), and the CBD development of a code of conduct regarding the implementation of Article 8(j).⁵³⁶
1017. Development of codes of ethical conduct using the above models as guidelines, are practical mechanisms that work could commence on almost immediately as a part of the Ethical Framework for Resolution.

⁵³⁴ Transcript of Evidence of Mason Durie(6 May 2002) tape 2, pp 41 and 44.

⁵³⁵ Kelly Bannister *Appropriation of Knowledge, Part 1: Ethnobiology As a Casestudy* (A paper submitted for publication, April 2007)

⁵³⁶ COP-8 Decision VIII/5/F - Article 8(j) and related provisions. UNEP/CBD/WG8J/4/8 14 November 2005.

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APPENDICES

Volume of Documents